

Sponsorship of Same-Sex Partners or “Do you believe in love at first sight?”

This article examines how the law has changed for sponsorship of same-sex partners and the practical aspects of preparing an application for persons in a same-sex relationship who are immigrating to Canada.

Prior to the introduction of the *Immigration and Refugee Protections Act (IRPA)* and the *Regulations* in June 28, 2002, there was no provision for recognition of same-sex relationships. There was only one option for a Canadian or permanent resident who wanted to obtain permanent residence for a foreign national same-sex partner. That was for the partner to file an economic class application. If the foreign national partner failed to make the required points to meet the pass mark they had to request consideration on humanitarian and compassionate grounds based on the same-sex relationship. The new legislation introduced two new categories of family members that same-sex partners were able to qualify under for sponsorship: common-law partners and conjugal partners. Since then, court decisions and federal government legislation has opened up marriage to same-sex couples so that spousal sponsorship of same-sex partners may also be an option for couples who are able to come to Canada to get married.

In June 2004, after the same-sex marriage decisions in the Ontario, BC and Quebec Courts of Appeal, CIC issued its “Interim Policy on Civil Marriages between Same-Sex Persons”. This policy set out the limited situations where CIC would recognize a same-sex marriage. It was understandable that NHQ needed to give some direction how to process same-sex marriages at a time when they were not legally recognized throughout the country. Although the *Civil Marriage Act* was proclaimed on July 20, 2005, therefore removing the need for the Interim Policy, CIC still retained it until early 2007 when it was quietly removed.

Section 5.31 of OP 2 of the Immigration Manual states:

Persons who change their sex legally, retain the sex they had at birth for the purposes of marriage. A marriage to someone who has had a sex change is recognized for immigration purposes only where the parties are of the opposite birth sex.

If the parties are of the same birth sex and have lived together in a conjugal relationship for at least one year, they may be considered as common-law partners for the purposes of immigration.

This section is completely at odds with the *Civil Marriage Act* and should not be followed. The gender of each of the spouses in a marriage is now irrelevant. Whether the visa office considers that a couple is a same-sex or opposite-sex couple should make no difference in the processing of the application. As long as the marriage is valid in the jurisdiction where it took place and is conforms to Canadian law the couple must be considered as legally married and should be processed for immigration as spouses.

In my experience, visa offices generally have little difficulty in determining whether an applicant is in a common-law partner relationship. This is a question of fact as to whether there is evidence to show that the couple has cohabited for at least one year in a conjugal relationship. I provide my clients with a checklist that lists the types of documents that could be obtained as evidence. This list is not exhaustive. When all else fails, it should be possible to obtain letters of support from persons who know the couple and can give evidence about the relationship. It is not required that these be statutory declarations unless it is a common-law partner or conjugal partner relationship. In those cases, most visa offices request a minimum of two statutory declarations. I have resisted requests by clients to provide them with a precedent letter and tell them to follow the guidelines on the checklist. This is because I found when I gave them a precedent letter that all of the letters of support they gave me slavishly adhered to the wording of the precedent and ended up looking like fill in the blank forms.

One type of common-law partner sponsorships that could cause difficulty is if the couple is in a conjugal relationship for at least one year but has been unable to cohabit due to persecution of any form or penal control. *Regulation 1.(2)* allows these kinds of relationship to still be considered as common-law partners. You could also refer to any relevant refugee case law, although the provision is more broadly worded than the Convention refugee definition, and give examples of where gay men or lesbians have been accepted as Convention refugees from the country in question. This provision would only apply to the situation where the Canadian partner and the sponsored partner are both living in the same country. It would not be applicable in situations where the Canadian partner is living in Canada or another country. It could also be applicable in economic class applications where both the principal applicant and the dependent partner are living in the same country.

Conjugal partner relationships are the likeliest to encounter difficulties in processing. The statutory definition of conjugal partner is set out in *Regulation 2* as:

"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.

The Immigration Manual states that "Without continuous cohabitation and the merging of households that takes place when a couple is in a common-law relationship, conjugal-partner relationships are more challenging to assess than common-law relationships." In my experience, there were fewer problems processing same-sex partner applications where there was a lack of one full year of cohabitation in most visa offices before we had the new legislation than after. Although there are the advantages of processing in the Family Class with creation of the conjugal partner category, the assessment of these applications is difficult.

The Immigration Manual states in section 5.45 of OP2:

The conjugal partner category is mainly intended for partners where **neither common-law partner status nor marriage is possible**, usually because of marital status or sexual orientation (both analogous grounds of discrimination under the Charter), combined with an immigration barrier.

Further on, section 5.47 states:

The conjugal-partner applicant should explain why they have not been able to live continuously with their sponsor for at least one year. In most cases, there will be an immigration impediment to continuous cohabitation (e.g., inability to obtain long-stay visas for one another's country). Non-cohabitation for purely personal or economic reasons (i.e., did not want to give up a job or studies) does not normally qualify as a sufficient impediment, but should be assessed on a case-by-case basis. Applicants should be able to provide evidence that they have seriously considered living together as common-law partners. For example, they might have explored options for living together in one another's country, such as work or study permits, how their occupational skills and qualifications would be recognized in their partner's country, visitor visas, long-term visitor status, etc.

...The key to determining whether an individual is a conjugal partner is whether they are in a conjugal relationship with their sponsor and whether there is a compelling barrier to continuous cohabitation.

The first element, that it be a conjugal relationship, is a statutory requirement. However, the legislation does not define what a conjugal relationship is. Visa offices are demanding about the degree of evidence they need to be satisfied that the relationship is conjugal. Unfortunately, many of the characteristics that visa officers expect should be present in a conjugal relationship do not always readily apply in the immigration context, particularly with regard to same-sex partners. Same-sex conjugal partners will not always be involved in caring for children. It is difficult for two people who are not living in the same country to open joint bank accounts or have any significant degree of financial interdependence.

While Immigration Appeal Division (IAD) panels are flexible in the weight that they will give to the various factors in assessing a conjugal relationship, they must be satisfied on the balance of probabilities that the relationship was a "marriage-like" relationship at least one year prior to the filing of the sponsorship application

The second element, that there is a compelling barrier to continuous cohabitation, is not a statutory requirement and it is questionable whether it should apply at all if the couple is able to satisfactorily establish that their relationship is conjugal. I would argue that it may be a factor in determining whether a relationship is conjugal, although it is not a prerequisite. The Immigration Manual also does allow that a compelling barrier to

continuous cohabitation may not always be necessary by including a note at the end of section 5.45 of OP 2 where it states:

A Canadian citizen residing abroad may sponsor a conjugal partner provided that the sponsor and the applicant will be residing together in Canada when the applicant becomes a permanent resident [R130(2)]. The situation in which this could occur would be rare.

A major issue in conjugal relationships is establishing the date when the relationship became conjugal in nature. This is crucial because the application cannot be filed until at least one year after the application has become conjugal. A spousal relationship commences with a marriage ceremony and a common-law relationship commences with one year of continuous cohabitation, but since there is no single characteristic that constitutes a conjugal relationship, this is very difficult to determine.

It is the lawyer's responsibility to be an agent of reality for the client and alert them to any potential weaknesses in their application. Clients may often want to date the beginning of a conjugal relationship from the time that they first met in person. I have encountered some clients who have initially met each other in an Internet chat room and have thought they could say the conjugal relationship began even before they physically met. Although there are a number of factors that are considered in deciding whether a conjugal relationship exists, for the purposes of determining its beginning the mutual commitment to have an exclusive, i.e. monogamous, relationship is probably the most significant. This rarely happens on a first date. A visa officer will naturally be skeptical if the couple has not spent significant periods of time physically in each other's company before they make such a commitment. Usually it is difficult for the clients to provide evidence of having made a commitment, beyond their own statements. While certain elements of the gay and lesbian communities in North America and Europe have wholeheartedly embraced the institution of marriage, gay and lesbian culture has never developed such pre-nuptial rituals as the "engagement". Sometime, a couple may exchange rings or one partner gives the other a ring to symbolize their commitment, but this is far from a universal practice.

In most countries of the world, even where there is not persecution that would give rise to a refugee claim, there is widespread homophobia that causes same-sex couples to be closeted and hide their relationships. It may be difficult to find people who would write letters of support saying they have seen the couple together and are aware of the relationship.

In my experience, same-sex couples have a wide variety of expectations and configurations in their relationships and do not necessarily conform to the "Leave it to Beaver" stereotype. I had a one heterosexual male client who was the biological father through artificial insemination of a child with a Canadian lesbian. He had lived with her continuously for over a year in a mutually interdependent family unit and shared responsibility for caring for the child they were raising. However, they did not have a sexual relationship with each other. The birth mother had a sexual relationship with

another woman. I did not think that a visa officer, if fully aware of the situation, would accept the relationship between the client and the birth mother as conjugal so that he would qualify as her common-law partner for immigration. It would be pushing the envelope to try to have this relationship considered as conjugal partners. I advised him to apply as a skilled worker since he had sufficient points to qualify.

From a practical point of view, I find that appealing a refusal decision to the IAD may not always be the best strategy for the client. It may be easier and quicker, if the reason for refusal is something that has since been corrected, to simply file a new sponsorship application and wait for it to be processed. For example, if a sponsorship application for a conjugal partner was refused because the visa officer decided that the relationship was not conjugal in nature a year prior to when it was filed but the couple now have evidence that they have completed a full year of continuous cohabitation, it would make more sense to file a new sponsorship application as common-law partners.

If you appeal a refusal of a conjugal partner sponsorship to the IAD, you must satisfy the panel not only that it is a conjugal relationship at the time of the hearing but that it was a conjugal relationship for at least one year prior to filing the sponsorship application. You cannot rely on the equitable jurisdiction of the IAD if you fail to do this, since if the panel determines that a conjugal partner relationship did not exist one year prior to the date of the application, then the conjugal partner is not part of the family class. It is still helpful to submit updated evidence to the IAD about the relationship from the date of refusal to the date of the hearing as well as from the beginning of the relationship to the date of filing the application as this can establish intentions and patterns in the relationship that the panel can infer existed a year prior to filing the sponsorship application.

One other potential landmine to avoid in a conjugal partner sponsorship is to avoid being considered as fiancés. This is where immigration policies begin to look like Alice in Wonderland. The Immigration Manual states at section 5.47 of OP2 that:

Officers should also inquire whether the couple is planning to marry. If they are planning to marry, then they are fiancés and may not have established a conjugal relationship. Officers should explain that there is no fiancé(e) category in Canada's immigration legislation, and that the foreign national fiancé(e) must be married to their Canadian sponsor and apply to immigrate as a married spouse.

This may sound logical to a heterosexually-minded immigration officer, but makes no sense to the same-sex couple who, because the foreign national partner is unable to obtain a temporary residence visa to visit Canada, is unable to get married to their Canadian sponsor before they become a permanent resident. Since marriage is not going to be available in their country, it is not an option for them to "be married to their Canadian sponsor and apply to immigrate as a married spouse." Clients should be advised to not disclose their intention to marry in Canada once the foreign national partner is landed so as to avoid the perception that their relationship is simply a precursor to a marriage and that they are in fact conjugal partners.

In summary, although there have been tremendous gains made the last few years with the implementation of the *IRPA* and the *Civil Marriage Act*, there remain a number of areas where same-sex couples are still not on an equal footing with opposite-sex couples in the immigration context.

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Appendix A

<http://www.cic.gc.ca/english/sponsor/index.html#samesex>

Interim Policy on Civil Marriages between Same-Sex Persons

Same-sex couples' access to civil marriage was extended throughout Canada on July 20, 2005, under the *Civil Marriage Act*. While CIC examines the impact of the Act on its immigration programs, its [interim policy](#), which recognizes the validity of civil marriages between a foreign national and his or her Canadian citizen or permanent resident same-sex partner, will continue. At this time, the policy applies only to the Family Class (which includes the Spouse or Common-Law Partner in-Canada Class).

<http://www.cic.gc.ca/english/sponsor/familymembers.html#sponsoring>

Sponsoring your same-sex partner as a spouse under the family class (CIC's Interim Policy)

You can apply to sponsor your same-sex partner as a spouse if

- you are a Canadian citizen or a permanent resident; and
- you were issued a marriage certificate by a Canadian province or territory on or after the following dates:
 - Quebec (on or after March 19, 2004)
 - Ontario (on or after June 10, 2003)
 - British Columbia (on or after July 8, 2003)
 - Yukon (on or after July 14, 2004)
 - Manitoba (on or after September 16, 2004)
 - Nova Scotia (on or after September 24, 2004)
 - Saskatchewan (on or after November 5, 2004)
 - Newfoundland (on or after December 21, 2004)
 - New Brunswick (on or after July 4, 2005)
 - **All other provinces or territories (on or after July 20, 2005).**

If you were married outside Canada, you **cannot** apply to sponsor your same-sex partner as a spouse. However, if you are a Canadian citizen or a permanent resident, you may qualify to sponsor your partner as a common-law or a conjugal partner.

