
"For Better or For Worse": Immigration and Intimate Relationships

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The *Immigration Act* states that one of its major objectives is to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives abroad. While most family relationships, apart from adoption, are based on biological relationships, Canada's immigration law recognizes that Canadians bond in intimate relationships with non-Canadians and that these non-Canadians should be granted permanent resident status so that they can live as a couple in Canada.

Historically, the only intimate relationships Immigration recognized were with persons whom a Canadian citizen or permanent resident was or intended to get married to. Many intimate relationships other than marriage express commitment and can be long term in duration. While there is still no statutory recognition of other forms of intimate relationships not based on marriage in immigration legislation, there are options for immigration through policy guidelines. There are four distinct types of intimate relationships:

1. spouses (married heterosexual)
2. fiancé(e)s (heterosexuals intending to marry)
3. common law (heterosexual) partners
4. same sex (gay or lesbian) relationships

Each of these relationships is treated quite differently by Immigration.

Relationships with spouses and fiancé(e)s have statutory recognition and are included in the family class as persons who can be sponsored for immigration. Common law and same sex relationships are not included in the family class and are dealt with on a case by case basis through policy guidelines. Priority in processing and certain rights of appeal are given to spousal and fiancé(e) relationships that are not given to common law or same sex relationships.

Immigration law is presently under a review process that may result in legislation that includes common law and same sex relationships in the definition of spouse and eliminate many of the present inequalities in how applications are treated by Immigration.

FREQUENTLY ASKED QUESTIONS

Can I sponsor my common law or same sex partner for immigration?

Section 2 of the *Immigration Regulations* states that:

"spouse", with respect to any person, means the party of the opposite sex to whom that person is joined in marriage.

This definition explicitly excludes common law heterosexual and same sex relationships. They are not in the family class and cannot be sponsored.

While a Canadian citizen or permanent resident cannot sponsor their common law or same sex partner for immigration there are other available options. If the non-Canadian partner

does not qualify for immigration on their own merits they can still be considered on humanitarian and compassionate grounds based on the relationship.

There is nothing in the *Immigration Act* or *Regulations* that refers to common law or same sex relationships. While policies give some guidance, they allow considerable discretion to the assessing officer. There are differences how offices and even officers in the same office exercise discretion.

While Immigration approves most spousal sponsorships with minimal scrutiny, there is a great deal of scrutiny of common law and same sex relationships. Immigration generally requires interviews for these applications. Immigration assumes spousal sponsorships are bona fide unless they have evidence to the contrary. Immigration places the onus of proving that a common law or same sex relationship is bona fides on the applicant.

If an applicant in a common law or same sex relationship files their application in a visa office and cannot qualify for points, the visa officer refers the case to the Program Manager for humanitarian and compassionate consideration. In practice, Program Managers will rarely over rule a positive recommendation of a visa officer who has interviewed an applicant.

What does Canadian Immigration consider as a bona fide [i.e., genuine] common law or same sex relationship?

In June 1994 National Headquarters for Immigration sent guidelines for processing common law and same sex relationships in a telex to all visa offices. They advised visa officers to determine that relationships are bona fide - in terms of duration, stability and not primarily for admission to Canada of one of the parties. More recent guidelines in the Immigration Manual advises visa officers to note if the relationship was entered into primarily to gain admission to Canada when they are reviewing humanitarian and compassionate factors.

Does Immigration scrutinize other kinds of intimate relationships more than spousal sponsorships?

Immigration is more likely to question the bona fides of a relationship with a fiancé(e), common law partner or same sex partner than a spouse. They consider that a married sponsor and spouse display greater commitment because they are married. Applications based on intimate relationships that are not spousal will more likely require an interview to assess the bona fides of the relationship. It is important to provide full supporting documentation and written submissions with your application to address any concerns that Immigration might have. Immigration often suggests that it will be easier to process an application based on a common law relationship if the applicant marries their Canadian partner and have them submit an undertaking.

How should I address concerns about bona fides?

Address potential questions about the bona fides of the relationship with written submissions and supporting documentation when you file your application. If Immigration is satisfied with all of the filed documents and submissions they may waive the interview. This will considerably reduce the processing time for the application and reduce your stress level. Most applications do require interviews, so do not be alarmed just because you are requested to attend an interview.

The kinds of questions that should be answered in written submissions include:

1. How, when, and where did you meet?
2. How long have you known each other?
3. How did the relationship progress? Are families, friends, coworkers, etc. aware of the relationship? If not, why?
4. Have you ever cohabited? If not, why?

Differences in age, education, race, ethnicity, religion, etc. should be addressed and commonalities listed.

Provide documentary evidence in support of the bona fides of the relationship. Examples are correspondence, telephone bills, photographs, letters of support from people who know the couple, airline tickets. If you have cohabited, send a copy of a residential tenancy agreement in both of your names or a letter from their landlord. Wills, powers of attorney, nominations of committee, health care directives or living will and other documents naming each other can also be evidence of your relationship.

What happens if Immigration refuses a spousal/fiancé(e) application?

The Canadian sponsor has the right to appeal to the Immigration Appeal Division. Only Canadian sponsors of members of the family class can appeal to the IAD. The IAD can grant the appeal on either of two grounds:

- the refusal was not legally valid; or,
- there are humanitarian or compassionate considerations that warrant granting special relief.

The IAD can hear new evidence that was not presented in an application. Because they have the power to grant the appeal on humanitarian and compassionate considerations, appeals to the IAD are an effective remedy, particularly if someone has been refused because of criminal or medical inadmissibility.

What happens if Immigration refuses a common law/same sex relationship application?

Because common law and same sex relationships are not part of the family class they do not have Canadian sponsors, there is no right to a hearing before the IAD when Immigration refuses their applications. The only possible remedy is judicial review in Federal Court. A Canadian sponsor could file a challenge based on the equality rights provisions in section 15(1) of the *Canadian Charter of Rights and Freedoms* since immigration legislation denies the right to sponsor common law or same sex partners.

In practice, when applicants have filed for judicial review or Charter challenges, Immigration has either found a way to process the immigration application or given up without a hearing in court. While this has resulted in individuals getting immigration status in Canada it has prevented the courts from establishing precedents on the rights of common law or same sex Canadian citizens or permanent residents to sponsor their partners for immigration.

What happens if my relationship is over before I have my immigration status?

If it is an inland application and there are compelling humanitarian or compassionate reasons, Immigration may still approve your application. This has occurred in cases where there would be an excessive hardship to the applicant to return to their own country, they were abused by their Canadian spouse, they have a Canadian child or are pregnant, or they were the primary care giver for their partner before the partner died. Immigration will deny the application if the application is filed in a visa office outside Canada.

Should I file an application for a same sex relationship in a visa office outside Canada or can I file within Canada?

Even applicants in Canada may consider filing their application in a

visa office in the United States if they can obtain a U.S. visa to attend an interview. Applications are processed faster in many visa offices than inland cases, although estimating processing times is difficult at the best of times. There are specific guidelines concerning processing common law or same sex relationship cases at visa offices outside Canada in the Immigration Manual which are not included in section on processing in Canada. Applicants that score well on the point selection system are better off first having their application first considered on point selection. If they qualify on their own merits there is then no need to consider the relationship.

Some applicants may be in Canada and not able to go to a visa office in the U.S.A. or want to go to a visa office in their own country. Each case must be examined individually.

I think that I will qualify for immigration on my own merits. Would it be better not make any reference to Immigration about my same sex or common law relationship?

No. Make a reference to the relationship. Request that if for any reason you do not qualify on your own merits you be given an opportunity to provide further submissions and documentation concerning the relationship.

Do I need to have cohabited with my Canadian partner to file an application based on a common law or same sex relationship?

There is no cohabitation requirement in any of the policy guidelines. Immigration expects cohabitation for couples residing in Canada. Often cohabitation is impossible for many couples because of immigration difficulties. While cohabitation can strengthen an application, there are many other factors you could stress in its absence. Evidence of regular communication and visits should satisfy Immigration the relationship is bona fide.

Is there a minimum period that the relationship should have existed before I file an application?

The policy guidelines do not set out any period. What would be an acceptable period to convince Immigration that the relationship is bona fide, stable, and of likely duration will vary according to the couple's circumstances.

If I qualify for immigration to Canada on my own merits and have a common law/same sex partner who is not a Canadian citizen or permanent resident, can my partner accompany me as my dependent?

The definition of dependent in the *Immigration Regulations* excludes common law or same sex partners. However, two common law or same sex partners can each file an application simultaneously in the same visa office and refer to their relationship in written submissions and supporting documents. As long as one applicant qualifies for immigration on his or her own merits, the other applicant can still be considered for immigration based on the relationship.

The practice in most visa offices is to open separate files for each partner and to cross reference them. If an interview is required it is usually scheduled as a joint interview so that the relationship can be assessed as well as other factors. If the couple do not reside together in the same country you will have to choose which visa office to file in. Some visa offices have policies of putting applications from outside of their region in a different queue for processing than applications from within their region. An application from outside a visa office's region will usually require an interview.

What if my common law/same sex partner is still married or has dependent children?

Immigration will not consider an application based on a relationship where either of the parties is still in a subsisting marriage, regardless of the length of time of the separation. It would be possible to file an application

while you are waiting for a divorce, but the divorce must be finalized before Immigration will approve the application. If a common law or same sex partner has children who qualify as dependents they would be able to be landed along with the partner when the partner's application is approved.

Do I need a lawyer for my immigration application?

While Immigration stresses that it is not necessary to be represented by a lawyer, there are a number of reasons to consider hiring a lawyer for your immigration application.

Immigration to Canada is more than just properly filling out the forms and adding up points. There is a considerable amount of discretion given to immigration decision makers in assessing any immigration application. This is especially true for applications based on a same sex relationship. A competent, trained lawyer will be able to determine what are the proper limits of discretion.

A lawyer can advise you about the available options for immigration that will apply in your case. This could include advising you on the most appropriate type of immigration application to file, where you should file it, and if there is something you could do to improve your chances of success before filing your application or attending an interview.

A lawyer can provide you with important information that not available from Immigration. For example, Immigration publishes the General Occupations List which lists occupations that receive points in the Occupational Demand Factor. Reading just the name of an occupation on the list gives you no idea as to whether Immigration would consider you qualified for that occupation. A lawyer would be able to tell you what the employment qualifications are and the job description used to assess your qualifications. There may be alternate occupations that you are qualified for that you were not aware of that should be included in your application. It is not up to a visa officer to consider

occupations not included in your application.

A lawyer will be alert to any criminal or medical inadmissibility issues that would affect your application and advise you what, if anything, can be done to address them.

A lawyer will tell you which additional documents should be included with your application over and above those that Immigration lists as required. The lawyer will also make written submissions to ensure that the basis of your application is clearly understood by the decision maker. This may include appropriate references to statutes, case law, immigration policies and guidelines which will be cross referenced with your documents. Immigration law is a constantly changing field. This is especially true concerning same sex relationships. Sometimes it could be significant to know that a particular program manager in a visa office has been replaced by someone else. Retaining a competent lawyer will enable you to keep abreast of changes that could affect your application.

Immigrating to another country is a serious commitment that is not entered into lightly. Before you conclude that you will save money by not hiring a lawyer, consider the investment of time and money that you will be making when you apply for immigration to Canada and the consequences a refusal of your application would have for your future.

What is the difference between hiring a lawyer and an immigration consultant?

Each province has legislation governing the legal profession. Lawyers must have graduated with a Bachelor of Law degree at a recognized university and have successfully completed bar examinations and a period of practical training under the supervision of a practicing lawyer. Lawyers' conduct is strictly regulated by professional codes and rules. Lawyers must keep account of money that they have received in trust from clients. Complaints against a lawyer can be filed with the

governing body in the province in which the lawyer is practicing. A lawyer can be disciplined and monetary compensation paid to a client with a well founded complaint.

Anyone may call themselves an immigration consultant. There are no minimum qualifications for working as an immigration consultant. There are no laws regulating immigration consultants. There is no disciplinary body to lodge a complaint against an immigration consultant. There have been cases where immigration consultants have been found by Canadian courts to have engaged in the unauthorized practice of law.

If I hire a lawyer, must the lawyer be practicing in the same province that I intend to settle in?

No. Immigration to Canada is under federal jurisdiction. Although there are some provincial and federal agreements about immigration, it is not necessary that the lawyer reside in the same province as you are planning to settle in.

Rob Hughes is a partner at *Smith and Hughes* and practices immigration law. He is Chair of the Immigration Committee of the Lesbian and Gay Rights Section of the B.C. Branch of the Canadian Bar Association.

Smith and Hughes
Barristers & Solicitors
1525 Robson Street, Suite 321
Vancouver, B.C. V6G 1C3
CANADA
Phone: 604-683-4176
FAX: 604-683-2621
rhughes@smith-hughes.com