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# The Concept of Family in Canadian Immigration Policies

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## I. Introduction

Canada's history of immigration is unsettling due to its colonial beginnings and, later, racially exclusionary policies. While this chapter is not an exhaustive examination of the history of immigrants to Canada or the inequities they experienced due to racist policies, this brief introduction will consider the development of post-Confederation immigration policies through the lens of the family unit.<sup>1</sup> It will provide an overview of the types of families that first arrived in Canada and the policy basis for their recruitment. It will show that the selection of immigrants to Canada based on their family ties was influenced by racism and by Canada's perceived economic needs. More recently, immigration to Canada based on family relationships has been significantly shaped by the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

## II. First Immigrant Families to Canada

It is undeniable that immigration was used as a tool of imperial conquest prior to Confederation and as a strategy for continued colonization after Confederation. This caused massive displacement of Indigenous communities from their land, devastating fatalities, and systematic erasure of traditional lifestyles and languages.<sup>3</sup> It is arguably the case that the first immigrant families to Canada were the Indigenous peoples who inhabited North American lands for thousands of years prior to their first contact with European explorers. Their diversity and history often go unacknowledged precisely because the colonial powers that formed this country did not perceive the Indigenous communities, Tribes, and Nations they engaged with as co-settlers. Instead, these colonial powers looked to their European homelands for people to populate Canada. Active recruitment of immigrants came as a result of Canada's preoccupation with settling the West. Prior to Confederation, the rival British and French empires had both attempted to build colonies in Canada. These efforts did have an impact, which is evident, for example, in francophone communities in Quebec and the Maritimes. Overall, however, these efforts were largely unable to attract and retain subjects in sufficient numbers to create permanent and flourishing settlements.

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1 For a comprehensive review of historical immigration patterns and policies, refer to Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd ed (Toronto: University of Toronto Press, 2000).

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

3 Kelley & Trebilcock, *supra* note 1 at 25-26, 59. For further reading on the effects of immigration on Indigenous communities in Canada, see also Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times*, 4th ed (Toronto: Oxford University Press, 2009); Paulette Yvonne Lynette Regan, *Unsettling the Settler Within: Canada's Peace-maker Myth, Reconciliation, and Transformative Pathways to Decolonization* (PhD Thesis, Indigenous Governance, University of Victoria, 2006) [unpublished].

Instead, there were many external factors that pushed emigrants toward Canada before and after Confederation. These included:

- the influx of loyalists fleeing from the civil war in the south (modern-day United States), including former slaves who settled in Nova Scotia;
- the industrial revolution and technological innovations in Europe that led to a surplus of labourers and farmers;
- the growing economic depression and famine in Ireland; and
- the shipping companies that stood to gain from encouraging passage to the Canadian colonies.

Moreover, Canadian officials continued to fear American expansionism, which had loomed over Canada ever since the American War of Independence in the late 1700s.<sup>4</sup>

With respect to family immigration policies at the time, regulations were few because promotional activity focused heavily on attracting unskilled labourers and farmers. Families were not the target immigrants. While settling the West would inevitably require families to build homes and create communities, Canada did not have an official policy on family recruitment until the first provision on relatives as a category of immigrant was introduced in 1908.

Single men were perceived as desirable by employers in the emerging railway, mining, and timber industries. The demand for male foreign workers that had begun prior to Confederation continued to increase as the Canadian colonies experienced significant industrialization and economic expansion. While Clifford Sifton, Canada's first Minister of the Interior, sought to attract agriculturalists from Eastern and Central Europe, industry employers advocated for a less restrictive approach to immigration to fill growing labour needs.<sup>5</sup> In fact, the Canadian Pacific Railway (CPR) created its own department of colonization and immigration,<sup>6</sup> and by 1925 it had secured an agreement with the Canadian government to recruit agriculturalists and issue occupational work certificates to Estonian, Polish, Russian, Yugoslavian, and German citizens, among others. These ethnic groups had been previously deemed as undesirable.<sup>7</sup>

To a lesser extent, single women were also sought out for domestic service work, as were orphaned children and youth for farmhand jobs. The women were often assisted by organizations on the ground, such as the National Council of Women of Canada and the Young Women's Christian Association. The emigration of child workers from

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4 Kelley & Trebilcock, *supra* note 1 at 24, 59-61.

5 Kelley & Trebilcock, *supra* note 1 at 119-20.

6 Reg Whitaker, *Immigration and Ethnicity in Canada Series: Canadian Immigration Policy Since Confederation*, vol 15 (Ottawa: Canadian Historical Association, 1991) at 6.

7 Library and Archives Canada, "Railway Agreement, 1925" (last accessed 30 April 2021), online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/railway-agreement-1925>>.

Britain to Canada was supported by the Canadian government, despite the confirmation of child abuse and neglect upon arrival.<sup>8</sup>

Despite the lack of formal family immigration policies, the more liberal recruitment of workers, encouraged by employers, created chain migration<sup>9</sup> networks that diversified the population and served as anchor communities for the generations of relatives that would follow. For example, the recruitment of Italian labourers was effectively coordinated through steamship travel agents and *padroni*—agents in Canada who served as recruitment intermediaries who managed the Italian labour pool in Toronto and Montreal.<sup>10</sup> Prior to the First World War, the steady influx of Italian immigrants came largely as a result of this private sector recruitment practice. By 1914, as many as 119,000 Italian migrants had entered Canada.<sup>11</sup> Although many Italians came as seasonal workers and returned home, their presence and work in Canada established solid links between villages in southern Italy—like Calabria, Abruzzi, Basilicata, and Friuli—and Canadian cities like Toronto and Montreal.<sup>12</sup> Italians who had settled in Canada would become anchor relatives who would assist their families through sponsorship schemes following the Second World War. As Bruno Ramirez describes in *The Italians in Canada*, “more than 90 percent of all Italians who entered Canada between 1947 and 1967 were sponsored by their Canadian relatives.”<sup>13</sup>

Similarly, chain migration networks and private sector recruitment helped to establish the ethnically Chinese community in British Columbia. Initially, many Chinese migrants came up from California in response to the 1858 Fraser River gold rush.<sup>14</sup> However, as the CPR began engaging and recruiting labourers from Hong Kong, the Chinese community in Victoria grew steadily. In Vancouver, Chinese migrants relied

8 Kelley & Trebilcock, *supra* note 1 at 126.

9 Chain migration refers to migration patterns that are created when migrants follow their fellow community members who have emigrated abroad to a particular destination. As defined by MacDonald & MacDonald, these chains result from “a movement in which prospective migrants learn of opportunities, are provided with transportation, and have initial accommodation and employment arranged by means of primary social relationships with previous migrants”: John S MacDonald & Leatrice D MacDonald, “Chain Migration, Ethnic Neighborhood Formation, and Social Networks” (1964) 42:1 *Milbank Memorial Fund Q* 82 at 82.

10 Kelley & Trebilcock, *supra* note 1 at 142. See also Robert F Harney, “Montreal’s King of Italian Labour: A Case Study of Padronism” (1979) 4 *Labour* 57 at 61.

11 *Ibid.*

12 Bruno Ramirez, *Immigration and Ethnicity in Canada Series: The Italians in Canada*, vol 14 (Ottawa: Canadian Historical Association, 1989) at 9.

13 *Ibid.*

14 Anthony B Chan, “Bachelor Workers” in Franca Iacovetta, Paula Draper & Robert Ventresca, eds, *A Nation of Immigrants: Women, Workers, and Communities in Canadian History, 1840s-1960s* (Toronto: University of Toronto Press, 1998) at 232.

on systems of kinship and village contacts for work opportunities in Canada.<sup>15</sup> In the 1870s, following the Taiping Rebellion in South China, clan ties became strong determinants of an emigrant's destination.<sup>16</sup>

While Chinese communities in British Columbia were largely composed of single men, 1860 saw the arrival of the first woman, Mrs Lee. She was the wife of a wealthy San Francisco merchant who had established an import business in Victoria, and she immigrated with her five children. This marked "the beginning of the Chinese family in Canada."<sup>17</sup> Unfortunately, the stability that families could bring to a community of bachelor workers was short-lived due to rising anti-Asian sentiment. British Columbia became a hostile environment for Chinese workers and their families, and they were valued only as labour. In an 1882 speech to Parliament, Prime Minister John A MacDonalD attempted to appease the underlying racist sentiments by stressing the need for labour:

I believe they [the Chinese] would not be a wholesome element for this country. I believe that it is an alien race in every sense, that would not and could not be expected to assimilate with our Arian population; and therefore, if the temporary necessity had been overcome, and the railway constructed across the continent, with the means of sending European settlers and laborers into British Columbia, then it would be quite right to join to a reasonable extent in preventing the permanent settlement in this country of Mongolian, Chinese or Japanese immigrants. At present it is simply a question of alternatives—either you must have this labor or you cannot have the railway.<sup>18</sup>

Racial desirability therefore remained a key determinant of early immigration policies, and not all families were welcomed. Desirable immigrants were ranked according to their ethnic background, with primacy placed on immigrants from the British Isles. Although British migrants remained the preferred class, Sifton advocated strongly for expansive recruitment of Eastern and Central European families because they were "born to the soil" and were people "whose forefathers have been farmers for ten generations, with a stout wife and half-dozen children."<sup>19</sup>

Unsurprisingly, the first non-Indigenous families to populate Canada were largely European. By 1911, the German population in Canada had reached about 400,000, which represented the largest ethnic group apart from the British and French.<sup>20</sup> Ukrainian settlements also flourished in Dauphin, Manitoba, expanding westward to

15 Laura Madokoro, "Chinatown and Monster Homes: The Splintered Chinese Diaspora in Vancouver" (2011) 39:2 *Urban History Rev* 17 at 18. See also Paul Yee, *Saltwater City: An Illustrated History of the Chinese in Vancouver* (Toronto: Douglas & McIntyre, 1988) at 47.

16 Chan, *supra* note 14 at 235.

17 *Ibid* at 232.

18 *Ibid* at 238, quoting Canada, *House of Commons Debates*, 4-4 (11 May 1882) at 1476 (Hon John A MacDonalD).

19 Sir Clifford Sifton, "The Immigrants Canada Wants," *Maclean's* (1 April 1922).

20 Kelley & Trebilcock, *supra* note 1 at 130.

Saskatchewan and Alberta.<sup>21</sup> Similarly, between the late 1880s and early 1900s, Polish farmers settled in the Canadian prairies, while Polish workers were drawn to urban centres like Montreal, Hamilton, and Winnipeg, where they established permanent communities.<sup>22</sup> A relatively stable community of Finnish workers settled in northern Ontario, drawn to the logging industry;<sup>23</sup> they later settled in southern Alberta, where land units were reserved for Finnish immigrants from the United States and overseas.<sup>24</sup>

For many of Canada's first families, racial discrimination erected barriers against family reunification. The treatment of Asian immigrants in the early 1900s is a clear example of the severe hostility that produced and maintained racist immigration policies after Confederation.<sup>25</sup> Sifton was a strong supporter of the Chinese head tax that had been implemented by the *Chinese Immigration Act*<sup>26</sup> of 1885, and the *Alien Labour Act*<sup>27</sup> of 1897 that restricted the hiring of Chinese workers.<sup>28</sup> His successor, Frank Oliver, was an equally strong advocate of exclusionary measures that staunched the immigration of Chinese families to Canada. In 1908, Oliver oversaw the implementation of the "Continuous Journey" provision, which required immigrants to purchase a direct ticket from their home country to Canada and predominately affected Japanese and Indian immigrants.<sup>29</sup> In 1923, Prime Minister William Lyon Mackenzie King passed the *Chinese Immigration Act*,<sup>30</sup> which permitted Chinese merchants to sponsor only their wives and children under the age of 18. By contrast, European residents in Canada could sponsor their wives, unmarried children, unmarried siblings, and parents.<sup>31</sup>

21 *Ibid* at 131. Also see James W Darlington, "The Ukrainian Impress on the Canadian West" in Iacovetta, Draper & Ventresca, *supra* note 14.

22 Kelley & Trebilcock, *supra* note 1 at 132.

23 Ian Radforth, "Finnish Radicalism in Northern Ontario" in Iacovetta, Draper & Ventresca, *supra* note 14.

24 Kelley & Trebilcock, *supra* note 1 at 128.

25 Exclusionary measures directed against Chinese immigrants were repealed only in 1947. The Canadian government finally rendered a formal apology in 2006: Government of Canada, News Release, "Prime Minister Harper Offers Full Apology for the Chinese Head Tax" (22 June 2006), online: <<https://www.canada.ca/en/news/archive/2006/06/prime-minister-harper-offers-full-apology-chinese-head-tax.html>>.

26 SC 1885, c 67.

27 SC 1897, c 11.

28 Under Sifton's management, the head tax rose from \$50 to \$500: Kelley & Trebilcock, *supra* note 1 at 123, 145.

29 *An Act to amend the Immigration Act*, SC 1908, c 33, online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/image-gallery/continuous-journey-regulation-1908>>.

30 *An Act Respecting Chinese Immigration*, SC 1923, c 38, online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/chinese-immigration-act-1923>>.

31 Kelley & Trebilcock, *supra* note 1 at 206.

### III. The Changing Definition of “Family”

As the family unit assumed a more prominent role in Canada’s immigration policy, it was affected by changing attitudes based on racial preference and on perceptions of Canada’s economic needs.

#### A. Introduction of Enumerated Relatives

The first immigration statute enacted in Canada, the 1869 *Immigration Act*,<sup>32</sup> focused on regulating safe passage to Canada. To combat overcrowding and unsanitary conditions on ships, the spread of disease, and monetary exploitation by shipmasters and innkeepers, its provisions set out requirements for immigration offices in Canada and abroad, quarantine stations at ports, passenger lists, vessel sizes, and medical inspections. The Act also contained prohibitions against the landing of destitute immigrants, as well as penalties against shipmasters for bringing “Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm Person[s]” without “Immigrant Family” to look after them.

The *Immigration Act* of 1906 expanded the list of prohibited immigrants to include “Diseased Persons,” “Paupers and Beggars,” and “Criminals and Prostitutes” and formalized Cabinet’s absolute power to expand the list, as necessary.<sup>33</sup> Family was only relevant insofar as family members could guarantee “permanent support” to immigrants caught under the prohibited class dealing with disabilities.<sup>34</sup>

Reflecting the growing importance of family units in Canada’s immigration policy, the *Immigration Act* of 1910<sup>35</sup> provided the first definition of family and enumerated specific relatives who could serve as “Head of the Family.” “Family” was defined as “mother, father, and children under eighteen years of age” and “Head of the Family” included “father, mother, son, daughter, brother or sister upon whom the other members of the family are mainly dependent for support.”<sup>36</sup>

The concept of familial support obligations also emerged at this time. Section 42(5) of the 1910 Act further clarified that when the head of the family is deported or when a dependant becomes a “public charge” due to “wilful neglect or non-support” by the family, this may warrant the deportation of the entire family.<sup>37</sup>

32 *An Act Respecting Immigration and Immigrants*, SC 1869, c 10, online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/immigration-act-1869>>.

33 *An Act Respecting Immigration and Immigrants*, SC 1906, c 19, ss 26-30, online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/immigration-act-1906>>.

34 *Ibid*, s 26.

35 *An Act Respecting Immigration*, SC 1910, c 27, online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/immigration-act-1910>>.

36 *Ibid*, s 2(h).

37 *Ibid*, s 42(5).

Economic fluctuations also played a key role in expanding and contracting family sponsorship criteria. In times of economic decline, the definition of family was restricted. For example, during the Great Depression, the concept of family was limited to children under 18 years old and wives.<sup>38</sup> By contrast, during the post-war years of economic prosperity, the definition of family expanded to include grandparents among the list of eligible relatives.<sup>39</sup>

Discriminatory policies continued against certain minority groups despite the expanding list of relatives allowed under immigration legislation. For example, through the use of the Preferred Class list in 1956, Canada divided source countries into four groups and ranked admissibility according to priority countries.<sup>40</sup> At the top of the list were white, English-speaking countries. The last category consisted of mostly non-white developing countries subject to stricter family sponsorship criteria.<sup>41</sup>

In the 1960s, for the first time, Canada's economic immigration policy eliminated discrimination based on race and nationality in favour of a focus on skills, education, and training. The trend of attaching less emphasis to race and nationality also positively affected family sponsorship criteria. Regulations introduced in 1962 by Ellen Fairclough, Minister of Citizenship and Immigration, expanded the list of eligible relatives, such that all Canadians could sponsor their parents regardless of their age.<sup>42</sup> However this was only a half-step: only families from preferred nations could sponsor extended family members including siblings, some nieces and nephews, and married children.<sup>43</sup>

Revisions in 1967 included the introduction of a point system designed to remove "all explicit traces of racial discrimination from Canada's immigration laws."<sup>44</sup> These regulations also introduced two categories of relatives: dependent relatives (immediate family members such as spouses and young children) and nominated relatives. Recognizing extended family ties, nominated relatives included children over the age of 21, non-orphaned siblings of any age (and their accompanying immediate family), parents, grandparents under 60 years of age, nieces, nephews, uncles, aunts,

38 Rell DeShaw, "The History of Family Reunification in Canada and Current Policy" (Spring 2006) *Canadian Issues* 9 at 10.

39 *Ibid.*

40 Kelley & Trebilcock, *supra* note 1 at 333.

41 *Ibid* at 334.

42 *Ibid* at 338. Prior to these revisions, age restrictions were placed on the sponsorship of parents from Asia and Africa. For further analysis, see Paul Andrew Evans, "*The Least Possible Fuss*": *The Politics of Immigration Postwar Canada, 1945-1963* (PhD Thesis, University of Waterloo, 2018), online (pdf): <[https://uwspace.uwaterloo.ca/bitstream/handle/10012/13700/Evans\\_Paul.pdf..pdf](https://uwspace.uwaterloo.ca/bitstream/handle/10012/13700/Evans_Paul.pdf..pdf)>.

43 Kelly & Trebilcock, *supra* note 1.

44 *Ibid* at 357.



and grandchildren.<sup>45</sup> Nominated relatives were subject to labour market requirements and had to score between 20 and 25 points on the point system, depending on their sponsor's status in Canada.<sup>46</sup> This class would later be renamed the "assisted relative" category; it was finally abolished in 1993.<sup>47</sup>

## B. "Reunification of Families" as a Policy Objective

Family reunification was formally established as an independent fundamental policy objective in the *Immigration Act* of 1976.<sup>48</sup> This Act stated that Canadian immigration policies, rules, and regulations were "designed and administered" to "facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives abroad."<sup>49</sup>

The 1976 Act formalized private support obligations for sponsored relatives. Prior acts and regulations required assurances from the sponsor to provide adequate support and care. However, in cases where sponsors failed, the federal, provincial, and municipal governments would step in to provide support.<sup>50</sup> To discourage further cases of default, this Act imposed a lengthy and formal commitment on the sponsor to provide sponsored relatives with lodging, care, and maintenance for up to ten years. Although the government lacked enforcement mechanisms to ensure these commitments were kept, the formalization of support obligations signalled a marked focus on self-sufficiency, in contrast to the assisted homesteads and land grants of the 1800s.

In the late 1970s and 1980s, the family class continued to expand. By 1978, the family class included parents of any age.<sup>51</sup> In addition, in 1988, the government implemented a program called "J-88," which allowed unmarried sons and daughters of any age to immigrate to Canada as dependants of sponsored parents.<sup>52</sup> This program led to a backlog of cases as "the intake in the family class almost doubled in four years following this policy change."<sup>53</sup> The program was eventually eliminated through

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45 *Immigration Act, Immigration Regulations, Part 1, Amended*, RG2-A-1-a, vol 2380, PC 1967-1616 (16 August 1967), s 33(1), online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/immigration-regulations-order-in-council-pc-1967-1616-1967>>.

46 DeShaw, *supra* note 38 at 10. Kelley & Trebilcock, *supra* note 1 at 362.

47 DeShaw, *supra* note 38 at 10.

48 *Immigration Act*, 1976-77, c 52, s 1, online: *UNHCR refworld* <<https://www.refworld.org/docid/3ae6b5c60.html>>.

49 *Ibid.*

50 Kelley & Trebilcock, *supra* note 1 at 389.

51 *Ibid* at 390. Previously, only parents who were aged 60 years and over or disabled could be sponsored, unless they applied as nominated relatives.

52 DeShaw, *supra* note 38 at 10.

53 *Ibid.*

revisions introduced in 1993, which would limit the age of accompanying dependants of sponsored parents to 19 years old or younger.<sup>54</sup>

As Canada entered a recession in the 1980s, the government launched a consultation to review the immigration framework. The resulting report highlighted rising concerns with the reliance of immigrant families on the Canadian social welfare system.<sup>55</sup> Whether immigrant families were in fact creating a strain on social assistance programs or not, the response from the public and other stakeholders shaped the policy revisions of the early 1990s.

As a result of the government's consultations, the ability to contribute to Canada's economy became a central trait of Canada's 21st century "desirable" immigrant. Economic immigration therefore became the favoured immigration stream in the eyes of the public, while family immigration remained an open question: sometimes there was expansion of the family class, and at other times there were greater restrictions. As Immigration, Refugees and Citizenship Canada policy advisor Rell DeShaw explains, "The immigration plan of 1995-2000 made explicit that the balance between economic, family and other immigration components would put greater emphasis on attracting those with an ability to settle quickly in Canada."<sup>56</sup>

### C. The Introduction of the Charter and Its Impact on LGBTQ+ Families

The "rising tension between family class versus economic immigration"<sup>57</sup> was a phenomenon fuelled by the growing recognition of the importance of families in building Canada. The arrival of the Charter in 1982 provided countervailing principles that would highlight the inherent value of individuals and, by extension, their families. No longer was the definition of "family" the absolute prerogative of the government: those choices were now subject to Charter scrutiny.

A clear illustration of the Charter's transformative impact on Canadian family immigration is its use to address the historical discrimination against lesbian, gay, bisexual, transgender, and queer (LGBTQ+) families.<sup>58</sup> Canadian immigration policies had explicitly banned LGBTQ+ individuals from entry to Canada when it expanded its class of prohibited immigrants to include "homosexuals" in the 1952

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54 Kelley & Trebilcock, *supra* note 1 at 390.

55 DeShaw, *supra* note 38 at 10.

56 *Ibid.*

57 *Ibid.*

58 For a comprehensive review of the impact of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on LGBTQ+ couples, see Nicole LaViolette, "Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act" (2004) 49:4 McGill LJ 969.

*Immigration Act*.<sup>59</sup> While the ban was formally eliminated 14 years later with the 1976 *Immigration Act*, it would take years of Charter litigation before the equal ability of LGBTQ+ families to reunify in Canada was recognized in Canadian law.

Charter litigation, which continuously advanced equality rights for LGBTQ+ individuals and same-sex couples in Canadian law throughout the late 1990s, effectively set the stage for changes under various federal statutes.<sup>60</sup> This included Canada's immigration legislation and regulations.

In an attempt to prevent a Charter challenge to Canada's immigration law, the 2002 *Immigration and Refugee Protection Act* incorporated changes that eliminated a heterosexual definition of marriage and allowed for sponsorships of same-sex partners. The family class was also expanded to include common law partners, reflecting the evolving concept of family in Canadian society.

Prior to these changes, same-sex partners of Canadians could seek entry to Canada as independent immigrants through the point system or, failing that, on humanitarian and compassionate grounds. However, humanitarian relief relied heavily on discretionary powers that lacked transparency and could too easily become arbitrary.<sup>61</sup> The recognition of same-sex families within the family class was therefore a necessary and welcome change.

However, the common law partner definition required couples to demonstrate cohabitation of at least one year before being entitled to sponsorship rights or to immigrate as a family unit. For many same-sex couples, this was not possible for a variety of reasons, such as separation due to visa requirements or the risk of persecution in their home countries.<sup>62</sup> Moreover, whereas heterosexual couples could more easily avoid the one-year cohabitation requirement by getting married, this path was not open to same-sex couples who lived in jurisdictions where same-sex marriage was not an option.

In response to these criticisms of the cohabitation requirement, the government amended the regulations in June 2002 to add "conjugal partner" as another category of sponsored immigrant.<sup>63</sup> While neither the marriage nor cohabitation requirements applied to conjugal partners, this new class required the sponsored foreign national to be in a conjugal relationship with the sponsor for a period of at least one year.<sup>64</sup>

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59 *An Act Respecting Immigration*, SC 1952, c 42, s 5(e), online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/immigration-act-1952>>.

60 See e.g. *Egan v Canada*, [1995] 2 SCR 513, 1995 CanLII 98, which challenged the opposite-sex definition of marriage in the *Old Age Security Act*, RSC 1985, c O-9 and in which the Supreme Court of Canada acknowledged sexual orientation as an analogous ground of discrimination. See also *M v H*, [1999] 2 SCR 3, 1999 CanLII 686, which challenged the heterosexual definition of common law spouse under the Ontario *Family Law Act*, RSO 1990, c F.3.

61 LaViolette, *supra* note 58 at 977.

62 *Ibid* at 981-82.

63 *Ibid* at 984.

64 *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

A further amendment allowed for the recognition of a common law relationship in circumstances in which cohabitation is not possible for reasons of persecution or penal control.<sup>65</sup>

#### D. The Immigration and Refugee Protection Act

In addition to the recognition of common law and conjugal partners and the mitigation of discrimination toward LGBTQ+ families, the IRPA introduced a number of other changes to the family sponsorship process, which will be examined in depth in subsequent chapters.

Briefly, of note is the introduction of two types of family class sponsorship streams: the “family class” for sponsorships processed outside Canada, and the “spouse or common law partner in Canada class.”<sup>66</sup> According to DeShaw, the in-Canada class was created partly to address cases of foreign national spouses and partners residing in Canada whose only option was to undertake humanitarian and compassionate applications, and to “put them into a more regularized and transparent stream.”<sup>67</sup>

Support obligations remained a central feature of the sponsorship process under the IRPA. Sponsors were required to sign a sponsorship agreement promising to provide support to their sponsored relative. Under the 1976 *Immigration Act*, the duration of the undertaking was ten years regardless of the dependant’s relationship to the sponsor. The IRPA and its accompanying regulations revised the undertaking period to vary in length from three to ten years, depending on the sponsored relative’s relationship to the sponsor. For example, the undertaking period for a spouse is three years, whereas the undertaking period for a child under 22 is ten years or until the child turns 25.<sup>68</sup>

The IRPA also imposed new financial requirements that were set in accordance with Statistics Canada’s low income cut-off. To prove that sponsors were able to financially support their sponsored relative(s), they became subject to a minimum necessary income (MNI) requirement that varied according to the size of the family. However, if the sponsored relative was a spouse or dependent child, the sponsor was exempt from the MNI requirement.<sup>69</sup>

In addition to meeting pre-IRPA eligibility criteria, such as not being subject to removal or not being in default of a previous undertaking, sponsors had to meet new criteria. A Canadian citizen or permanent resident was not eligible to sponsor family if they had been convicted of a crime of family violence or if they were in arrears of

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65 IRPR, r 1(2).

66 DeShaw, *supra* note 38 at 11.

67 *Ibid.*

68 IRPR, r 132.

69 IRPR, r 133(4).

court-ordered support.<sup>70</sup> If a sponsor was in receipt of social assistance for reasons other than disability, they were not eligible to sponsor immediate relatives.<sup>71</sup>

The IRPA also raised the maximum age of a dependent child to 22 and included adopted children in this category.<sup>72</sup>

Finally, the IRPA maintained the sponsorship of other prescribed family members, such as siblings and nieces and nephews, but this class contained several age and marital status restrictions that are explored in Chapter 6, Other Relatives.

The reduction of the undertaking period for spouses and the disqualification of sponsors with domestic violence convictions are notable changes that came out of an intentional policy shift to address the growing concerns over gender equity in Canadian immigration policies. Throughout the public consultation period prior to the IRPA's implementation, the Canadian government specifically stated that it would be applying an ongoing gender-based analysis to examine gender and diversity considerations. Indeed, the government's Regulatory Impact Analysis Statement highlighted that the changes to the undertaking period were specifically designed to reduce the risk of gender-based violence: "The duration of sponsorship was decreased from 10 to 3 years given concerns that domestic violence is aggravated by the implied dependency imposed on the sponsor by the undertaking of support."<sup>73</sup>

Moreover, in line with this rights-based approach to immigration policy-building, the government also sought to increase civic participation. In her gender analysis of Canadian immigration policy, Margaret Walton-Roberts examines how consultations with community stakeholders, and specifically female advocacy groups, contributed greatly to addressing gender power imbalances during the development of the IRPA.<sup>74</sup> Walton-Roberts highlights the vigorous lobbying efforts by women's organizations (such as Sahara Indo-Canadian Women's Group) to ensure that the new law addressed discriminatory effects on immigrant women. For example, in response to the Legislative Review Advisory Group's 1998 report on the future framework of Canadian immigration, Sahara supported recommendation 43, which disqualified sponsors convicted of family violence crimes who did not have evidence of rehabilitation, because it would mitigate against arranged marriages with "known abusers."<sup>75</sup> This recommendation would eventually become a new requirement for sponsors under the IRPA.

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70 DeShaw, *supra* note 38 at 12.

71 Kelley & Trebilcock, *supra* note 1 at 438.

72 IRPR, r 2, definition of "dependent child."

73 Regulatory Impact Analysis Statement, *Immigration and Refugee Protection Regulations* (15 December 2001) C Gaz I, Vol 135, No 50, online (pdf): <<https://canadagazette.gc.ca/rp-pr/p1/2001/2001-12-15/pdf/g1-13550.pdf>>.

74 Margaret Walton-Roberts, "Rescaling Citizenship: Gendering Canadian Immigration Policy" (2004) 23:3 *Political Geography* 265.

75 *Ibid* at 272.

Thus, in addition to the equitable changes that addressed the previous law’s discriminatory impact on LGBTQ+ spouses, the rise in human rights discourse and the continued influence of Charter litigation also pushed the Canadian government to implement analytical frameworks that were sensitive to and actively promoted gender equity. This represented a dramatic shift from the often explicitly discriminatory policies of previous Canadian immigration laws and regulations.

#### IV. Demographics and Changes to the Family Unit

Canada’s population has changed considerably over the last century and a half. According to a 2016 Statistics Canada report on immigration, more than 17 million immigrants have made Canada their home since Confederation.<sup>76</sup>

Immigrants continue to have an influential role in Canada’s population growth. In an 1871 census, foreign-born people represented about 16 percent of the population.<sup>77</sup> Despite the fluctuations in Canadian immigration and emigration trends, by 2016 that figure had increased to about 21.9 percent, meaning that about one in five Canadians were foreign-born.<sup>78</sup>

Moreover, despite Canada’s long history of exclusionary immigration practices, the diversity of Canada’s immigrants has expanded. According to the 2011 National Household Survey, Asian and Middle Eastern countries had become the predominant sources of Canada’s immigrant population.<sup>79</sup> In 2016, Africa was the second-largest source continent, with Nigeria, Algeria, Egypt, Morocco, and Cameroon as the “top five countries of birth of recent African-born immigrants.”<sup>80</sup>

Similarly, the 2018 issue of *Canadian Megatrends* reported an increasing linguistic diversity within Canada’s population. Although between 1901 and 1941, the German-language population was the largest “immigrant language population,” other Europeans languages such as Italian, Greek, and Dutch grew more rapidly following the Second World War.<sup>81</sup> Immigrant languages in Canada underwent further

76 Statistics Canada, “150 Years of Immigration in Canada” (last modified 17 May 2018), online: <<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016006-eng.htm>> [150 Years].

77 *Ibid.*

78 *Ibid.* According to a 2016 census released by Statistics Canada, 21.9 percent of the population reported that they were or had been landed immigrants or permanent residents. Also note that Statistics Canada defines “foreign-born” as a person who is or has been a landed immigrant or permanent resident. This definition therefore excludes work and study permit holders as well as refugee claimants: Statistics Canada, “Immigration and Ethnocultural Diversity: Key Results from the 2016 Census,” *The Daily* (25 October 2017), online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025b-info-eng.htm>> [2016 Census].

79 150 Years, *supra* note 76.

80 2016 Census, *supra* note 78.

81 Statistics Canada, “The Evolution of Language Populations in Canada, by Mother Tongue, from 1901 to 2016,” *Canadian Megatrends* (21 February 2018), online: <<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2018001-eng.htm>>.

diversification in the 1970s and 1980s, with an increasing presence of non-European languages largely due to “a rapid rise in immigration from Asia, the Middle East, Latin America, the West Indies and Africa.”<sup>82</sup> According to census data, fewer than 100,000 immigrants declared a Chinese language as their mother tongue in 1971, but by 2016 this figure had increased to more than 1.3 million.<sup>83</sup>

How much of the above-mentioned diversification in ethnic and linguistic composition of Canada’s population is due to the contribution of family immigration? While it is impossible to pinpoint an exact number, census data estimates that in 2016 approximately 60.3 percent of newcomers were admitted under the economic category, 26.8 percent were admitted under the family class, and about 11.6 percent were admitted as refugees.<sup>84</sup> In other words, about six in ten newcomers were economic immigrants, while about three in ten were admitted under the family class.<sup>85</sup> In its 2012 *Annual Report to Parliament on Immigration*, Citizenship and Immigration Canada reported that in 2011 Canada had admitted 156,118 economic immigrants and 56,451 family class immigrants.<sup>86</sup> These figures suggest that the majority of Canada’s recent immigrants continue to enter Canada through the economic stream. However, family relationships remain a strong driver of diversification in the Canadian immigrant population. This is particularly the case given the fact that a significant percentage of economic immigration consists of accompanying family members of economic immigrants.

With respect to the composition of the family unit, recent census data reveal a notable increase in common law couples in Canada. A 2017 Statistics Canada report on households and marital status reveals that although married couples represented the majority of couples in 2016, “over one-fifth of all couples (21.3%) were living common law, more than three times the share in 1981 (6.3%).”<sup>87</sup> Moreover, from 2006 to 2016, cohabiting same-sex couples increased by approximately 60 percent, while cohabiting opposite-sex couples increased by 9.6 percent in the same period.<sup>88</sup> In 2016, “married spouses represented one-third (33.4%) of all same-sex couples in Canada.”<sup>89</sup> Common law relationships thus continue to be an increasingly popular family unit composition for both opposite-sex and same-sex couples in Canada.

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82 *Ibid.*

83 *Ibid.*

84 2016 Census, *supra* note 78.

85 *Ibid.*

86 Canada, Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration, 2012* (Ottawa: CIC, 2012).

87 2016 Census, *supra* note 78.

88 Statistics Canada, *Census in Brief: Same-Sex Couples in 2016*, Catalogue No 98-200-X2016007 (Ottawa: Statistics Canada, 2 August 2017), online: <<https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.cfm>>.

89 *Ibid.*

Additionally, multigenerational households, containing at least three generations of the same family living together, are “the fastest growing type of household.”<sup>90</sup> Statistics Canada suggests that this “may be partly attributed to Canada’s changing ethnocultural composition,” since this is more commonly observed in immigrant households.<sup>91</sup>

The changing demographics observed in the recent census data and the increasing presence of differently composed family units demonstrate a marked departure from the predominantly European heterosexual nuclear family unit that was desirable and actively recruited in the decades following Confederation.

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90 2016 Census, *supra* note 78.

91 *Ibid.*