THE ULTRAHAZARDOUS ACTIVITY OF EXCLUDING FAMILY MEMBERS IN CANADA'S IMMIGRATION SYSTEM

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Who is family? Some of us take for granted that we, as Canadians, can not only choose who our family is but whether we can live with them in Canada. One little-known regulation in our immigration system is wreaking havoc on our family reunification system. We are told that section 117(9)(d) of the Immigration and Refugee Protection Regulations aims to protect the integrity of our immigration system by preventing and deterring fraud in family reunification. Practically, the regulation applies to persons who, when applying to immigrate to Canada did not disclose and therefore have a family member examined by immigration officials. The regulation, when triggered, imposes a lifetime ban on the sponsor to sponsor the non-disclosed family member. The rule denies Canadian citizens and permanent residents from ever being with their family in Canada, even if they are genuine family members. This paper looks closely at this regulation and points out that the construction of the rule is one that is akin to an absolute liability regime, reserved for deterring and preventing ultrahazardous activity in criminal and tort law. When considered against evidence that indicates that the main reason why persons do not disclose their family has nothing to do with fraud, the paper argues that the regulatory regime is a prejudicial and sticky generalization that allows non-discretionary exclusion of persons from Canada. Further, while the government may feel that this regulation makes it easier to determine who is in the family class, it ignores tried and tested mechanisms already in existence to deal with fraud. Finally, the paper argues, the provision is not merely suboptimal, but inhumane and unconstitutional.

Qu'est-ce que la famille ? Certains d'entre nous tiennent pour acquis qu'en tant que Canadiennes et Canadiens, nous pouvons non seulement choisir

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notre famille, mais également décider si nous pouvons vivre avec elle au Canada. Un des règlements peu connus de notre système d'immigration cause des ravages dans notre régime de réunification familiale. On nous dit que l'alinéa 117(9)d) du Règlement sur l'immigration et la protection des réfugiés a pour objet de protéger l'intégrité de notre système d'immigration en prévenant et en empêchant la fraude lors de demande de réunification familiale. Dans les faits, le règlement s'applique aux personnes qui, lorsqu'elles ont présenté une demande d'immigration au Canada, n'ont pas divulgué l'existence d'un membre de leur famille qui, par conséquent, n'a pas été pris en compte par les agents d'immigration. Le règlement, lorsque son application est déclenchée, impose une interdiction à vie au membre non déclaré de sa famille d'être parrainé. La règle refuse aux citoyens canadiens et aux résidents permanents la possibilité de se retrouver en famille au Canada, même s'il s'agit réellement de membres de la même famille. L'auteure de cet article examine minutieusement ce règlement et fait remarquer que la structure de la règle est comparable à un régime de responsabilité absolue réservé à la dissuasion et à la prévention d'activités présentant des risques extrêmement élevés en droit pénal et en droit de la responsabilité civile. Examinant ce régime de réglementation à la lumière d'éléments de preuve qui indiquent que la principale raison pour laquelle les personnes ne divulguent pas l'existence de leur famille n'a rien à voir avec la fraude, l'auteure soutient que ledit régime constitue une généralisation préjudiciable et difficile à réfuter qui autorise une exclusion de personnes du Canada qui n'est pas de nature discrétionnaire. En outre, alors que le gouvernement peut penser que ce règlement facilite l'identification des personnes tombant dans la catégorie du regroupement familial, il fait fi de mécanismes avérés existants qui permettent de s'attaquer à la fraude. Enfin, l'auteure de l'article soutient que la disposition laisse-t-elle non seulement grandement à désirer, mais est également inhumaine et inconstitutionnelle.

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1. Introduction

A family does not disclose a newborn while waiting to be resettled as refugees for fear of delaying the processing of their application. A woman is afraid to disclose her baby born out of rape due to social stigma and the shame of being unwed. A father is afraid to speak to a local interpreter at a Canadian embassy about the existence of a child born out of an affair. A Chinese couple, afraid the Chinese government would find out they contravened the one-child policy, does not disclose their second child. A father believed his son was killed in genocide; but after he arrived in Canada, the International Committee of the Red Cross located his son. A mother, believing she would

never see her children again because her husband took the children away, does not disclose her children.[2]

These are tragic stories that start with the non-disclosure of a family member in an immigration application and end with permanent family separation due to one Canadian regulation that imposes a lifetime ban on family sponsorship.

Canadian immigration law has long feared the liar, cheater, fraudster, criminal and terrorist. While these labels have been prominently applied to asylum seekers, Parliamentary debates, jurisprudence and public discourse have also applied them to family members of immigrants.[3]

Subsection 117(9)(d) of the *Immigration and Refugee Protection Regulations* ("*Regulations*")[4] aims to combat those who seek entrance into Canada using false information or seek to sponsor persons that are not their *bona fide* family members. In doing so, it deems persons not disclosed and examined as a family member at the time of application for immigration status in Canada as persons that are not in the family class and therefore not eligible to be sponsored via family sponsorship. This may seem like an appropriate measure to deter misrepresentation and fraud but, as this paper will reveal, *Regulations* subsection 117(9)(d) does much more. It is an extreme and harsh example of how the law can be overbroad, arbitrary and violent.

Between 2010 and 2014, approximately 1,200 family class applications were refused due to the application of *Regulations* subsection 117(9)(d).[5] Roughly 55 percent of the sponsorship applications were refused due to *Regulations* subsection 117(9)(d).[6] Of the reported cases from the Federal Court and Federal Court of Appeal dealing with *Regulations* subsection 117(9)(d), 20 percent displayed refugee-like facts or clearly noted that

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2 These are true stories collected by the Canadian Council for Refugees (March 2016).

3 See e.g. *House of Commons Debates*, 37th Parl, 1st Sess, No 150 (27 February 2002) at 1735 (Chuck Cadman): MP Chuck Cadman discusses the "problem" of immigrants coming through the "back door" and discusses fraudulent immigrants as "undesirables".

4 *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 117(9)(d) [*Regulations*].

5 House of Commons, *Order Paper Questions*, 41st Leg, 2nd Sess, No 163 (27 January 2015), Q-832, December 1, 2014 (Mr. Dewar (Ottawa Centre)) (impact of Family Class sponsorships and Immigration and Refugee Protection Act (IRPA) Regulation 117(9)(d)), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=2&DocId=6841702&File=0>.

6 Access to Information request made by the Canadian Council for Refugees.

the sponsor came as a refugee.[7] Considering the fact that, for example, in 2014, refugees constituted only nine percent of all immigrants coming to Canada, the figure of 20 percent of *Regulation* 117(9)(d) cases that dealt with refugees is alarming.[8] A survey of Federal Court and Federal Court of Appeal case law also revealed that in 90 percent of the cases, the reasons for non-disclosure of family members displayed no fraudulent intent.[9] This means that a significant number of immigrants, a large portion of which are refugees, are being denied the ability to live in Canada with their family.

With the recent resettlement of at least 25,000 Syrian refugees in Canada, there will undoubtedly be increased efforts to reunify family left behind with family newly arrived in Canada. We will see some efforts thwarted by the application of *Regulations* subsection 117(9)(d). In the mayhem of fleeing a country and finding a new home, information and documents may have been lost, omitted or mistakenly conveyed, leading to heartbreaking and life-long separation.

This paper argues for the abolishment of *Regulations* subsection 117(9)(d). The first part will provide an overview of the family reunification scheme in Canada, while the second part will explain how subsection 117(9)(d) imposes an absolute ban from sponsoring family members. The third part of the paper will show that there is very little recourse to *Regulations* subsection 117(9)(d), and that effective remedies are scarce. The fourth section will discuss how the *Regulations* thwarts Canada's family reunification objective and efforts by using the most extreme form of the law—the absolute liability regime. The absolute liability regime has been used in tort law for ultrahazardous activity and in criminal law to prevent dangerous behaviour, thus the misinformation of family by immigrants has been, by association, characterized as an extreme danger. This paper will illustrate that in doing so, the provision is a radical measure to combat fraud, a problem that is unconfirmed as being uncontrolled. As well, it will be argued that the measure duplicates built-in tools in the immigration system that target misrepresentation. Finally, this paper will conclude by asserting that the provision is overbroad, arbitrary and disproportionate in respect to its purpose of combating fraud, rendering *Regulations* subsection 117(9)(d) unconstitutional.

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7 Jamie Liew, Prasanna Balasundaram & Jennifer Stone, "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers" (2016), online: <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2839415> [Liew et al].

8 Citizenship and Immigration Canada, *Facts and figures 2014—Immigration overview: Permanent residents,* online: <www.cic.gc.ca/english/resources/statistics/facts2014/permanent/02.asp>.

9 Liew et al, *supra* note 7.

2. Family Reunification in Canada's Immigration System

A) General Objective of Family Reunification

Family reunification in Canada's immigration policy has been described as the "humanitarian" aspect of immigration policy.[10] Following World War II, family reunification was seen as a means to increase levels of adjustment and stability among immigrant communities.[11] Despite these views, some advocated to abolish the practice in favour of a more economic or labour-oriented approach.[12] Today, however, family reunification is firmly embedded in our immigration system.[13] One of the *Immigration and Refugee Protection Act*'s ("*IRPA*") primary objectives regarding Canada's immigration system is "to see that families are reunited in Canada."[14]

B) The Family Reunification Scheme

The *IRPA* provides that a Canadian citizen or permanent resident can sponsor foreign nationals[15] "as a member of the family class on the basis of their relationship."[16] The *Regulations* facilitate reunification by allowing concurrent processing for permanent residence of the refugees and their family members.[17] Further, refugees and their families are exempt from some admissibility requirements, including financial and medical.[18]

C) Who Are Members of the Family Class?

Canadian citizens or permanent residents can sponsor persons who are "family members" or are members of the "family class". Those who are family members are not necessarily one and the same as members of the family class.[19] There are three reasons. First, the *family class* includes more

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10 Dominique Daniel, "The Debate on Family Reunification and Canada's Immigration Act of 1976" (2005) 35:4 Am Rev Can Studies 683 at 684.

11 *Ibid* at 685.

12 Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 1st ed (Toronto: University of Toronto Press, 1998) at 353–58.

13 See Chandan Reddy, "Asian Diasporas, Neoliberalism, and Family: Reviewing the Case for Homosexual Asylum in the Context of Family Rights" (2005) 23:3–4 Social Text 101 at 107–108.

14 *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 3(1)(d), 3(2)(f) [*IRPA*]; Canada, Canada Gazette Part II, *Regulatory Impact Analysis Statement*, vol 136, no 9 (Ottawa: 2002) at 254–55.

15 *IRPA*, *supra* note 12, s 13(1).

16 *Ibid*, s 12(1).

17 *Regulations*, *supra* note 4, s 176.

18 *IRPA*, *supra* note 14, ss 21, 42.

19 See *Regulations*, *supra* note 4, ss 70, 116–22.

relationships than *family members*.[20] Second, a person who is sponsored as a member of the *family class* may themselves include *family members* in their application. Third, as later discussed, immigration applicants must identify all *family members* who are not accompanying them. Failure to do so renders such persons not members of the *family class*.

While it is difficult to fully draw a distinction between *family member* and *family class*,[21] subsection 117(1) of the *Regulations* provides a list of those who belong in the family class. The list includes a spouse, common-law partner, conjugal partner, children, mother, father and other relations of the sponsor. Subsection 119(9)(d) of the *Regulations* however, qualifies the list:

> [117] (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if … (d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.[22]

Subsection 117(10) provides an exception to subsection 117(9)(d) to those who are not required to be examined under *IRPA*, such as family members of refugees who cannot locate family members.[23] Subsection 117(10) however, is rendered inoperable if an officer, for example, finds that a family member could have been examined at the time an application was considered.[24]

3. Subection 117(9)(d): Excluding Family Members

A) The Consequences of Being Subject to Subsection 117(9)(d)

Subsection 117(9)(d) imposes a lifetime ban from sponsoring a family member. Once it is determined that a person was not disclosed and examined during an application process, this exclusion clause is triggered and the finding cannot be rebutted or defended. No factors nor explanations—no matter how germane—will be considered.

B) The Rationale for Subsection 117(9)(d)

Subsection 117(9)(d) of the *Regulations* was part of the many changes that were introduced by *IRPA* and its *Regulations* when it replaced the

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20 *Ibid*, s 117(1).

21 *IRPA*, *supra* note 14, s 12(1).

22 *Regulations*, *supra* note 4, s 117(9)(d).

23 *Ibid*, s 117(10).

24 *Ibid*.

Immigration Act, 1976 in June 2002. The then Minister of Citizenship and Immigration, Elinor Caplan, reasoned:

> Bill C-11 will also strengthen the integrity of our immigration system. It will tighten up sponsorship provisions to see that those who sponsor new immigrants are both able and willing … to keep their promises…Bill C-11 also recognizes that family reunification has always been a cornerstone of Canada's immigration policy. Canadians know that new arrivals establish themselves more quickly and much better when they have the support of their extended families. Bill C-11 and its supporting regulations would allow spouses, partners and dependent children to apply for landing from within Canada provided that they are already here legally and that they made appropriate admissibility provisions.[25]

In providing the rationale for the exemptions, the Regulatory Impact Analysis Statement states:

> Under IRPA all family members of an applicant must be examined, whether they are accompanying or not. Paragraph 117(9)(d) is a necessary component of this requirement in order to *prevent fraudulent abuse*. While paragraph 117(9)(d) was very broad in the original regulations, these amendments provide for some exceptions to its application.[26]

The operational manual that guides immigration officials on how to process applications regarding members of the family class states:

> The exclusion found in R117(9)(d) exists to encourage honesty and prevent applicants from circumventing immigration rules. Specifically, it exists to prevent applicants from later being able to sponsor otherwise inadmissible family members under the generous family class sponsorship rules when these family members would have prevented the applicant's initial immigration to Canada for admissibility reasons (i.e., excessive demand).[27]

While one of *IRPA*'s main aims is to reunite families in Canada, subsection 117(9)(d) contrarily appears to ensure that those who are inadmissible or abuse the family reunification scheme do not enter Canada.

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25 *House of Commons Debates*, 37th Parl, 1st Sess, No 21 (26 February 2001) at 1525 (Hon Elinor Caplan).

26 *Regulatory Impact Analysis Statement*, (2002) C Gaz II, 1100 [emphasis added].

27 Immigration, Refugees and Citizenship Canada, *OP2 Processing Members of the Family Class*, Overseas Processing (OP) operational manual at 14, online: <www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf> [*OP2*].

C) Why Applicants Do Not Disclose Family Members

The case law reveals a number of reasons why applicants may not disclose family members in their applications. In a survey of 123 cases from the Federal Court and Federal Court of Appeal that discussed subsection 117(9)(d), approximately 90 percent of cases involved situations where the non-disclosure of family members could be described as *not* fraudulent.[28] In six percent of cases, the sponsor himself or herself was sponsored by a parent and disclosing his or her spouse would have rendered them inadmissible.[29] In one percent of cases, it was unclear that the applicants would be rendered inadmissible because it was questionable whether the family member was inadmissible.[30] The other one percent of cases involved persons in a refugee scholarship program that required the person to be single.[31]

The case law, however, provides an imperfect picture of how persons are impacted by *Regulations* subsection 117(9)(d). A survey of lawyers discussing 56 cases dealing with subsection 117(9)(d) confirmed the above case law findings.[32] The reasons for non-disclosure vary, but they fall into common themes or categories. The following is a sample of the jurisprudence.

1. Misunderstanding:

    a. The applicant did not know about the requirement to list all family members and the serious consequences associated with this;[33]

    b. The applicant misunderstood the meaning of the word "dependent";[34]

    c. The applicant did not speak English fluently and was unable to communicate with the visa officer;[35]

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28 Liew et al, *supra* note 7.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 Liew et al, *supra* note 7.

33 *Krauchanka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 209, 2010 CarswellNat 1672.

34 *Tauseef v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 303, 354 NR 192.

35 *Phyang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 81, 23 Imm LR (4th) 32; *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 437, 408 FTR 84; *Fang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 733, 460 FTR 153.

d. The applicant's ex-husband took the child away and forbade contact with the child. She did not declare her child at the time of her application.[36]

2. Failure to update application:

a. The applicant got married while the application was pending and failed to update the application;[37]

b. The applicant's child was born while an immigration application was pending and the applicant failed to inform immigration officials of the child's birth.[38]

3. Fear of exposure:

a. The couple had children outside of marriage;[39]

b. The applicant had an extramarital affair that resulted in a child but was afraid to disclose the existence of the child;[40]

c. The applicant fled her abusive husband and children, married a man she met while in a refugee camp and had children with her second husband. She did not disclose her children from her first marriage because she was afraid to tell her second husband;[41]

d. The applicant feared the cultural stigma that would arise if a common-law partner was declared;[42]

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[36] *Rarama v Canada (Minister of Citizenship and Immigration)*, 2014 FC 60, 446 FTR 111.

[37] *Hamedi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1166, 300 FTR 200; *Benjelloun v Canada (Minister of Citizenship and Immigration)*, 2005 FC 844, 2005 FCJ No 1069 (QL).

[38] *Gill v Canada (Minister of Citizenship and Immigration)*, 2008 FC 613, 334 FTR 229.

[39] *Mei v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1044, 85 Imm LR (3d) 99; *Lin v Canada (Minister of Citizenship and Immigration)*, 2007 FC 314, [2007] FCJ No 435 (QL); *David v Canada (Minister of Citizenship and Immigration)*, 2007 FC 546, [2007] FCJ No 740 (QL).

[40] *Tse v Canada (Minister of Citizenship and Immigration)*, 2007 FC 393, 61 Imm LR (3d) 68.

[41] *Yen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1236, 279 FTR 231.

[42] *Charles v Canada (Minister of Citizenship and Immigration)*, 2015 CanLII 27207, [2015] IADD No 51 (QL); *Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 353, 371 FTR 27.

e. The applicant feared he or she would be ineligible;[43]

f. The applicant was afraid the birth of the child would be discovered by the Chinese government as she was in violation of China's one-child policy.[44]

4. Lack of knowledge or bad advice:

a. The applicant did not disclose on the advice of an immigration consultant;[45]

b. The applicant simply did not fill out the application properly;[46]

c. The applicant was separated from his spouse and children and did not think he needed to include them because of a probable breakdown in marriage that subsequently did not happen;[47]

d. The applicant did not know he or she had to declare a common-law partner;[48]

e. The applicant did not have custody of her children and did not think they would accompany her;[49]

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43 *Azizi v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406, 344 NR 174 [*Azizi*]; *David v Canada (Minister of Citizenship and Immigration)*, 2007 FC 546, [2007] FCJ No 740 (QL).

44 *Weng v Canada (Minister of Citizenship and Immigration)*, 2014 FC 778, 29 Imm LR (4th) 152 [*Weng*]; *Gan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 824, 462 FTR 152.

45 *Preclaro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1063, 277 FTR 231 [*Preclaro*]; *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, [2010] 1 FCR 175.

46 *Dung v Canada (Minister of Citizenship and Immigration)*, 2005 FC 600, 278 FTR 279; *Aranguren v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1315, [2008] FCJ No 1702 (QL); *Dumornay v Canada (Minister of Citizenship and Immigration)*, 2006 FC 541, [2006] FCJ No 708 (QL); *Nazaire v Canada (Minister of Citizenship and Immigration)*, 2014 CanLII 90574, [2014] IADD No 333.

47 *Akhter v Canada (Minister of Citizenship and Immigration)*, 2006 FC 481, 290 FTR 149.

48 *Seshaw v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 181, 462 NR 99 [*Seshaw*].

49 *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292, [2006] FCJ No 1613 (QL).

5. Unaware child existed at time of application:

    a. The applicant believed her children were dead or did not know their whereabouts;[50]

    b. The applicant had an extramarital affair that resulted in a child unbeknownst to the applicant at the time of his application;[51]

    c. The applicant engaged in a relationship with someone in his home country and later discovered the existence of a child from that relationship;[52]

    d. The applicant was simply unaware he had a child at the time of his application.[53]

In the minority of cases, the failure to disclose the family member was material, in the sense that the sponsor may not have been able to obtain permanent resident status themselves had they disclosed their family member.[54] However, in the majority of cases, the nondisclosure was a result of mistake, misunderstanding, cultural confusion or a special circumstance.

Many of the reasons provided, with regards to non-disclosure and non-examination of family members, do not reflect an intention to avoid a finding of inadmissibility by concealing a family member, but rather indicate that the complexity of applicants' lives may render a different answer to the question subsection 117(9)(d) asks. Numerous reasons explain why non-disclosure may have occurred—reasons that do not point to misrepresentation or fraud.

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50 *Thirunavukarasu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 339, 364 FTR 259; *Munganza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1250, [2008] ACF no 1559 (QL) (in French).

51 *Woldeselassie v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1540, 305 FTR 276 [*Woldeselassie*]; *Jean-Jaques v Canada (Minister of Citizenship and Immigration)*, 2005 FC 104, 265 FTR 261 [*Jean-Jaques*].

52 *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 133, 362 FTR 105; *Adjani v Canada (Minister of Citizenship and Immigration)*, 2008 FC 32, 322 FTR 1 [*Adjani*].

53 *Woldeselassie, supra* note 51; *Jean-Jaques, supra* note 51; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 331, [2012] FCJ No 373 (QL); *Adjani, supra* note 52.

54 Liew et al, *supra* note 7.

There may be language, translation and cultural reasons for non-disclosure of a family member. Often, Canadian embassies and consultants abroad hire local staff and, while work is presumed confidential, because a staff member may live in a particular community, applicants themselves may not feel their information will remain confidential. Most importantly, nothing in the immigration forms themselves give any indication of the consequences of non-disclosure. Staff at embassies, consulates and refugee camps, and even immigration officials, are not obligated to provide a disclaimer and often none is given. Applicants are thus often unaware of the permanent consequences that flow from an omission until it is too late.[55]

4. Lack of Relief to the Harsh Application of Subsection 117(9)(D)

Once subsection 117(9)(d) of the *Regulations* is found to apply, there are few remedies. While the courts have been eager to point to alternative remedies,[56] including persons leaving Canada to be with their family members,[57] these options provide little practical relief for families seeking to be united within Canada.

A) The One-Year Window

Regulations section 141 allows for non-accompanying family members to be issued a permanent resident visa within one year of the applicant arriving in Canada, but there is one caveat.[58] *Regulations* subsection 141(a) specifically states that the family member must have been included in the application at the time the application was made or was added to the application before the applicant departed for Canada.[59] The One-Year Window Rule, purposed to provide flexibility for difficult family departures and separations, reinforces the message that *bona fide* family members are always disclosed and examined.

B) Appeals at the Immigration Appeal Division

The Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) normally reviews decisions regarding sponsorship applications

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55 See United Nations High Commissioner for Refugees, "Passages: An awareness game confronting the plight of refugees", online: <www.unhcr.org/473dc1772.pdf>.

56 See e.g. *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 [*Kisana*].

57 See e.g. *Leobrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 587, [2011] 4 FCR 290.

58 *Supra* note 4.

59 *Ibid*, s 141(a).

or applications regarding persons within the family class.[60] The problem, however, is the Federal Court's holding that a person who is excluded from the family class pursuant to subsection 117(9) of the *Regulations* cannot get the benefit of the IAD's discretion to grant relief on the basis of humanitarian and compassionate grounds.[61] Thus, the IAD has no jurisdiction to hear cases involving *Regulations* subsection 117(9)(d) because its application means the individual being sponsored is not within the family class.

C) Judicial Review

While the Federal Court itself has recognized that subsection 117(9)(d) produces severe results,[62] the rule has withstood scrutiny by the courts. The Federal Court has clearly stated that the scope of subsection 117(9)(d) is not limited to fraudulent non-disclosure.[63] Judicial reviews at the Federal Court are mainly successful for subsection 117(9)(d) where there can be findings that procedural fairness requirements were not met.[64] Obtaining relief is difficult, as not all subsection 117(9)(d) cases may have issues with regards to procedural fairness.

D) Humanitarian and Compassionate Grounds Applications

The Federal Court and Federal Court of Appeal frequently point out that submitting a permanent residence application on humanitarian and compassionate ("H&C") grounds[65] or requesting a visa officer to consider H&C grounds is a viable option.[66] In fact, the courts have stated that H&C assessments can mitigate the severe effect of the *Regulations*, preserving the "integrity of the [immigration] system."[67]

The H&C mechanism, however, also proves to be a limited remedy for six reasons. First, many applicants are unaware of this option because

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60 *IRPA*, *supra* note 14, s 63(1).

61 See *Seshaw*, *supra* note 48.

62 *David v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 740 at para 10, 2007 FC 546; see also *Desalegn v Canada (Minister of Citizenship and Immigration)*, 2011 FC 268 at para 4, [2011] FCJ No 316 (QL) [*Desalegn*].

63 *Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 678 at para 11, 47 Imm LR (3d) 222; see also *Adjani*, *supra* note 52.

64 *Canada (Minister of Citizenship and Immigration) v Yanknga*, 2008 FC 1008, 341 FTR 7.

65 *IRPA*, *supra* note 12, s 25(1).

66 See *Kisana*, *supra* note 56; *Preclaro*, *supra* note 45; *Azizi*, *supra* note 43; *de Guzman v Canada (Citizenship and Immigration)*, 2005 FCA 436, 262 DLR (4th) 13.

67 *Preclaro*, *ibid* at para 27.

many are told by Citizenship and Immigration Canada that there are no other avenues for recourse.

Second, the impetus for submitting an H&C application is the recognition that the applicant is asking to be exempt from *IRPA*'s requirements. Thus, applicants who seek relief from subsection 117(9)(d) in an H&C application do so with full disclosure of why they cannot sponsor the family member under the normal course provided. From the outset, an immigration officer may construe this act as fraudulent behaviour. As the Federal Court has noted, it is not improper to consider the non-compliance, whether inadvertent or not, as a factor in considering whether relief should be granted.[68] For example, in balancing between a parent breaking the rules and the best interests of a child, the courts have recognized that "children are 'left behind' due to a parent's misrepresentation" and that it is "self-evident that the child was not complicit in the misrepresentation" but that "it is well established that such misrepresentation is a relevant public policy consideration."[69] H&C applications, therefore, do not give an applicant a *de novo* chance to first prove they are a *bona fide* family member, and second that the family member would not have impacted the sponsor's admissibility to Canada.

Third, an H&C application requires more than just a familial relationship to tip the balance in favour of an applicant. As stated in subsection 25(1), "undue or disproportionate hardship" is required in order to merit exemption from *IRPA*'s requirements. As the Federal Court has stated, an H&C application is an "exceptional" remedy that is not granted lightly or often because it requires an exemption from the rules.[70] This is evidenced by how often H&C applications are granted in general. For example in 2011, only 36 percent of H&C applications were accepted.[71] The Federal Court has stated, where such "relief is discretionary", it is "by definition, uncertain."[72] Officers reviewing H&C cases vary in their approach to reviewing H&C applications, leading to uncertainty about the outcome. While persons may seek judicial review of denied applications, this option may not provide another opportunity to have an H&C application reviewed in a favourable manner. Accessing these avenues, which may not provide relief, draw extensive costs and prolong family separation.[73]

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68 *Kisana*, *supra* note 56.

69 *Ibid* at para 27.

70 *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 40, 372 DLR (4th) 539.

71 Citizenship and Immigration Canada, DWS (FOSS) Finalized H&C Applications and Removals as of 29 June 2012 (requested by Andrea Asbil, 3 August 2012).

72 *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 293, 458 FTR 1 [*Canadian Doctors*].

73 *Weng*, *supra* note 44.

Fourth, even where there are compelling reasons to show that there was no misrepresentation and that hardship exists, lawyers report there is a systemic failure to allow family reunification through H&C mechanisms.[74] A summary document of the Downtown Legal Services' survey states:

> Many lawyers identify the failure of visa and embassy officials to properly exercise their discretion in considering H&C factors and Best Interests of Children (BIOC) as a constant problem in achieving family reunification. Visa officers consistently fail to analyse H&C and Best Interest factors or give sufficient explanation for H&C refusals […] Notably, for most of these cases, when another application was subsequently submitted once again asking visa officers to exercise H&C discretion, the application was granted […]. Other practitioners note, however, that they have never had any success with sponsorships seeking H&C exemption from R117(9)(d) since visa officers have, in their cases, consistently failed to exercise discretion positively. Another lawyer surveyed expresses what seems to be the consensus among practitioners that "H&C is not an adequate recourse for families affected by 117(9)(d)".[75]

Fifth, the courts have shown "significant deference" to H&C findings,[76] cautioning "it is not for the courts to reweigh the factors considered by an H&C officer."[77] While the courts eagerly point to the H&C assessment as a source of relief, even characterizing H&C in particular cases as "compelling" or viable alternatives, the applications are still often refused.[78] Of the 105 reported IAD, Federal Court and Federal Court of Appeal cases surveyed, only 29 percent of cases were successful.[79]

Finally, seeking H&C relief is simply inefficient. If preventing fraud is the purpose of the regulation, then there are less arbitrary, overbroad and cruel ways to combat this perceived problem. Thus, while the Supreme Court of Canada has recently reinvigorated a broad interpretation of "humanitarian and compassionate" and outlined a flexible and contextual approach, the reality is that the sponsors and their family members must still explain why they did not adhere to the rules and what hardship results from the application.[80]

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74 Liew et al, *supra* note 7.

75 *Ibid*.

76 *Chinenye v Canada (Minister of Citizenship and Immigration)*, 2015 FC 378 at para 16, [2015] FCJ No 346 (QL).

77 *Kisana*, *supra* note 56 at para 24.

78 See e.g. *Dan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 103, [2009] FCJ No 107 (QL); see also *Desalegn*, *supra* note 62 at para 5.

79 Liew et al, *supra* note 7.

80 *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909.

E) Other Immigration Processes

Some decision makers have pointed to other avenues of immigration such as skilled worker applications and temporary resident permits. Such avenues are unrealistic for children and family members who do not meet *IPRA* requirements. As noted above, some cases dealing with *Regulations* subsection 117(9)(d) involved refugees or refugee-like facts.[81] Such applicants or their family members may not meet the *IPRA* requirements for skilled worker programs, and temporary permits are not an answer to sustained family reunification. These options do not fill in the cavernous gap created by the impugned provision.

5. The Non-Examination of Family Equating to Ultrahazardous Activity

A) Subsection 117(9)(d) Is an Absolute Liability Offence

Subsection 117(9)(d) of the *Regulations* is an absolute liability offence. Absolute liability, in criminal law, is known as an offence where *mens rea* does not need to be proven. One is found guilty simply by the commission of the *actus reus*. It is also known in tort law as a theory of liability, where one can be held liable for injuries without determining either fault or whether reasonable care was taken in the omission or commission of an act. Those enforcing absolute liability provisions have no discretion to deviate from the legislated scheme.

B) Absolute Liability in Canadian law

1) Absolute Liability in Regulatory and Criminal Law

The jurisprudence in Canada related to absolute liability offences in the regulatory or criminal context reveals two important considerations relevant to understanding subsection 117(9)(d). First, there is a distinction and delineation between absolute and strict liability.[82] Second, the courts have struck down and held that an absolute liability regime violates the *Canadian Charter of Rights and Freedoms* where the provision has the potential of depriving a person of their life, liberty and/or security of the

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81 Liew et al, *supra* note 7.

82 *R v Sault Ste Marie (City of)*, [1978] 2 SCR 1299, 85 DLR (3d) 161; see also Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed (Scarborough: Thomson Carswell, 2007) at 183 [Stuart]; Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3rd ed (Toronto: Thomson Carswell, 2007) at 250 [Colvin & Anand].

person.[83] For example, the Supreme Court of Canada held that the offence of sexual intercourse with a person less than 14 years of age (statutory rape) constituted an absolute liability offence because Parliament had specifically provided for the accused's guilt upon proof of *actus reus* "whether or not he believes that she is fourteen years of age or more."[84] The Court held that the offence was an unjustified violation of section 7 of the *Charter* when compared to a less restrictive alternative that would allow the accused a limited defence that he took all reasonable steps to ascertain the age of the complainant.[85]

There is a "small minority of reported decisions" where the courts found that an accused could be held absolutely liable.[86] These cases include possessing an uncased rifle at night,[87] operating an overloaded truck,[88] selling and advertising a new drug before submitting it for testing,[89] permitting a minor to enter licensed premises,[90] providing and collecting funds for a listed person under the Terrorism Regulations,[91] and depositing hazardous substances in an area frequented by migratory birds.[92]

The regulatory and criminal law jurisprudence raises three points concerning absolute liability. First, there is reluctance to allow absolute liability writ large. The general consensus is that there is a relationship between penalty levels and the requirement for *mens rea*. The greater the penalty to be inflicted, the greater the culpability needed to justify the penalty, and the greater the care that must be taken.[93] Secondly, as gleaned from the few instances where absolute liability exists, it is acts that legislators or the

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83 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536; *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

84 *R v Hess*, [1990] 2 SCR 906, 79 CR (3d) 332;

85 *Ibid*; *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 84 DLR (4th) 161 [*Wholesale Travel Group*].

86 Stuart, *supra* note 82 at 193.

87 *Lands and Forests Act*, RSNS 1967, c 163, s 123(2); *R v Morrison* (1979), 52 APR 195 at 203, 31 NSR (2d) 195 (CA) (adopted in *R v Maidment* (1984), 7 DLR (4th) 171, 10 CCC (3d) 512 (NSCA)).

88 *Highway Traffic Act*, *supra* note 88, s 125 (previously RSO 1970, c 202, s 72(1)(c)); *R v Allen* (1979), 59 CCC (2d) 563, 3 MVR 203 (Ont Dist Ct).

89 *Food and Drugs Act*, RSC 1985, c F-27, s 26; *R v Trophic Canada Ltd*, 57 CCC (2d) 1, [1981] 3 WWR 158 (BCCA).

90 *Liquor License Act*, RSO 1990, c L.19, s 30; *R v Capozzi Enterprises Ltd* (1981), 22 CR (3d) 249, 60 CCC (2d) 385 (BCCA).

91 *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360.

92 *Migratory Birds Convention Act*, SC 1994, c 22, s 5.1.

93 Colvin & Anand, *supra* note 82 at 250.

courts can define as ultrahazardous and thus are prohibited absolutely.[94] Finally, the courts have little hesitation in infusing more flexibility into a rule, making it less absolute and therefore less harsh in its application.

2) Absolute Liability in Tort Law

Absolute liability in the area of tort law has been characterized as "relatively insignificant" partly because it "is clearly at odds with the values and objectives of fault-based compensation to hold a person liable for faultless behaviour."[95] While some scholars describe absolute liability as the exception and not the rule, some argue that it is more prevalent than we think.[96] In absolute liability, the principle is clear: no fault is required in finding someone liable.

The application of absolute liability in Canadian tort law traces back to the House of Lords case, *Rylands v Fletcher*, where a property owner constructed a reservoir on his land.[97] The reservoir burst, leading the escaping water to fill mineshafts located on neighbouring property. The court held the defendant liable. In doing so, the court acknowledged that building the reservoir was an activity that was on the one hand lawful and beneficial, and on the other hand, highly dangerous. In characterizing the situation this way, the court found that those who engage, for their own benefit, in highly dangerous, although lawful, activities ought to bear the costs of the activities.[98]

Following *Rylands v Fletcher*, the courts expanded absolute liability to only a few areas. Courts have found a defendant liable for engaging in socially productive and valuable, but also ultrahazardous and risky activity. Scholars posit that this regime is also justified because the activities themselves lead to accidents where evidence would be difficult to obtain because it would be destroyed in the accident, and because it creates incentives to either stop the activity or find alternative, less risky ways to achieve a goal.[99] In this sense, scholars challenge the notion that any safety

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94 See *Wholesale Travel Group*, *supra* note 85; see also Colvin & Anand, *supra* note 82 at 252–53.

95 Lewis Klar, *Tort Law*, 4th ed (Toronto: Thomson Carswell, 2008) at 619; see also GHL Fridman, *The Law of Torts in Canada*, 2nd ed (Toronto: Thomson Carswell, 2002) at 218.

96 See *ibid*; Gregory C Keating, "The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54:3 Vand L Rev 1285.

97 *Rylands v Fletcher*, [1868] UKHL 1, (1869) LR 3 HL 330, affirming (1866) LR 1 Ex 265.

98 *Ibid.*

99 Kenneth S Abraham, *The Forms and Functions of Tort Law*, 3rd ed (New York: Foundation Press, 2007) at 169–73.

mechanisms or processes could not temper the risks or harm associated with the activity, and therefore the activity must be done sparingly, or if done, with the assumption of risk and liability. Some examples include the creation or use of: natural gas explosions,[100] aerial spraying of herbicides,[101] fires for non-natural use,[102] keeping or owning dangerous animals,[103] the release of toxic substances into the environment,[104] and explosions.[105] Still, courts have found a reluctance to expand the doctrine of absolute liability to equally productive and valuable, but dangerous activity. This includes the creation or use of: domestic and industrial fires[106] and domestic gas appliances.[107]

When absolute liability is associated with an activity, legislators or the courts are sending a message: if people engage in the activity, they are doing so knowing the risks and they will be responsible for damages associated with the activity, no matter how severe.

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100 See e.g. *Raffan v Canadian Western Natural Gas, Light, Heat and Power Co* (1915), 8 WWR 676, 1915 CarswellAlta 290 (WL Can) (SCC); *Mortimer v British American Oil Co*, [1949] 2 WWR 107, 1949 CarswellAlta 35 (WL Can) (SC); *Federic v Perpetual Investments Ltd et al* (1968), [1969] 1 OR 186, 2 DLR (3d) 50 (SC); *Beutler v Beutler* (1983), 26 CCLT 229, 1983 CarswellOnt 713 (WL Can) (SC (H Ct J)).

101 See e.g. *Cruise v Niessen* (1977), 76 DLR (3d) 343, [1977] 2 WWR 481 (Man QB); *Bartel v Ector*, 90 DLR (3d) 89, 1978 CarswellSask 154 (WL Can) (QB); *Mihalchuk v Ratke* (1966), 57 DLR (2d) 269, 55 WWR 555 (Sask QB); *Schunicht v Tiede* (1979), 20 AR 606, 9 CELR 134 (QB).

102 See e.g. *Canada (AG) v Diamond Waterproofing Ltd* (1974), 4 OR (2d) 489, 48 DLR (3d) 353 (CA); *Creaser v Creaser*, 41 NSR 480, 1907 CarswellNS 134 (WL Can) (SC). Note that several jurisdictions in Canada have created statutes to mitigate the strict liability position of the common law. Still the role of the statutes has been limited.

103 See e.g. *Rands v McNeil*, [1955] 1 QB 253, [1954] 3 All ER 593 (CA) (involved a bull on a farm); *Cowles v Balac* (2005), 29 CCLT (3d) 284, 19 CCLI (4th) 242 (Ont Sup Ct J); *Behrens v Bertram Mills Circus Ltd* (1956), [1957] 2 QB 1, [1957] 1 All ER 583.

104 See e.g. *Heard v Woodward* (1954), 12 WWR (NS) 312, [1954] BCJ No 23 (QL) (SC); *Cairns v Canadian Refining Co* (1914), 26 OWR 490 [1914] OJ No 426 (SC).

105 See e.g. *JP Porter Co v Bell*, [1955] 1 DLR 62, 35 MPR 13 (NSSC); *MacDonald v Desourdy Construction Ltee* (1972), 27 DLR (3d) 144, 7 NSR (2d) 434 (SC); *Tremblay Signs Ltd v Robert McAlpine Ltd* (1982), 102 APR 590, 51 NSR (2d) 590 (SC (TD)).

106 See e.g. *Dudek v Brown* (1980), 33 OR (2d) 460, 124 DLR (3d) 629 (H Ct J); *Maron v RAE Trucking & Distributing Ltd* (1981), 31 AR 216, 126 DLR (3d) 9 (QB). Note that the general opinion is the difference between these cases and those where strict liability is held is whether a fire is natural or non-natural use.

107 See *O'Neill v Esquire Hotels Ltd* (1972), 5 NBR (2d) 371, 30 DLR (3d) 589 (SC (App Div)).

C) The Absolute Liability Provision of Subsection 117(9)(d)

The regulatory and criminal law context elucidates that absolute liability is reserved to strictly prohibit acts society views as dangerous to the public. However, criminal law is reluctant to apply the regime to all dangerous activities, especially where penalties associated with the offence are severe. Absolute liability in the tort law context reveals that while society may view an activity as productive or valuable, but also ultrahazardous, a person may be held strictly responsible for any harm that arises out of the choice to engage in the activity.

Subsection 117(9)(d) operates as an absolute liability offence because first, decision makers have no discretion to inquire into the individual circumstances of the non-disclosure and non-examination of family members. Second, it imposes a lifetime ban from sponsoring a person with no opportunity to explain why the omission was made. Any reasons for the non-disclosure are not *and cannot* be considered, including whether there is a genuine relationship, whether there is a genetic or blood link, and the best interests of the child.

The application of absolute liability in other areas of our law illuminates what the exclusion clause of subsection 117(9)(d) really means. In one sense, we view the problem the exclusion clause is aimed at (letting in otherwise inadmissible persons or "fake" family members) as so hazardous and egregious that it merits the strict application of the law and also a severe punishment. In another sense, while we can view the activity of reuniting families as socially productive and valuable, there are risks associated in allowing landed immigrants to bring their families into Canada (allowing fraudsters and those that are not *bona fide* family members in). The state has signalled that the risk posed by fraudulent applicants is ultrahazardous. To protect against this hazard, the state has chosen the strongest measure—the use of absolute liability that automatically triggers a lifetime ban.

The operation of subsection 117(9)(d) also allows a decision maker to characterize the sponsor as a liar, cheater and/or fraudster. The Operational Manual that guides immigration officials on decisions related to family reunification states that applicants cannot "benefit" from the non-disclosure and treats sponsors as sophisticated litigants that should "preserve" their right to sponsor family members at a later date.[108] This regulatory regime creates a normative stake in how immigration applicants fill out forms, where the act of filling out the form turns into a substantive inquiry of whether persons are in the "family class" under immigration law and therefore whether they are worthy of membership in Canada.

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108 *OP2*, *supra* note 27 at 13.

6. Other Measures To Detect Misrepresentation

IRPA provides other ways to deter, prevent and punish misrepresentation. The main way in which *IRPA* deals with misrepresentation is via subsection 40(1), which deems a person inadmissible due to misrepresentation if the person misrepresents or withholds material facts.[109] Courts in the past have held that even if a person had no intention to misrepresent, or was not aware of the misrepresentation, the person would still be deemed inadmissible.[110] However, the prevailing view in the courts more recently has been that if a person could show he or she honestly and reasonably believed they were not withholding material information, they could not be held to have contravened subsection 40(1), favouring a less strict, non-absolute approach to reading the provision.[111] As well, persons alleged to have made a misrepresentation can challenge whether or not the misrepresentation would be "material" or information that forecloses a line of investigation.[112] The penalty for committing the offence of misrepresentation under subsection 40(1) is inadmissibility for a period of five years.[113] As well, the Federal Court has held that a person does not become inadmissible solely because they violated the rules regarding misrepresentation and that other penalties such as fines or fees are applicable.[114]

Practically speaking, immigration applicants who omit or falsely provide information about their finances, education, travel and even their identity have the opportunity to provide an explanation for their misrepresentation. They can also argue that the misrepresentation was not material to the application—that it could "induce a particular decision or an error in the administration of IRPA."[115] Finally, these applicants are subject to a variety of penalties that do not lead to permanent repercussions.

Given these existing mechanisms to investigate, deter, prevent and punish misrepresentation, why is the non-disclosure and non-examination of family members rendered a more serious offence under *IRPA* than

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109 *Supra* note 12.

110 *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, 277 FTR 216; *Mohammed v Canada (Minister of Citizenship and Immigration)*, [1997] 3 FC 299, 130 FTR 294.

111 *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 378, 89 Imm LR (3d) 36.

112 See e.g. *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 166, 2008 CarswellNat 279 (WL Can).

113 *IRPA*, *supra* note 12, s 40(2)(a).

114 *Zhong v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1636 at para 24, 265 FTR 155.

115 *IRPA*, *supra* note 12, s 40(1)(a).

the non-disclosure of other information and why is there a need for the exclusionary clause of subsection 117(9)(d)?

7. Subsection 117(9)(d) Violates the Charter

Canadian courts have little tolerance for the use of absolute liability in either criminal or torts contexts. The activity that is subject to absolute liability has to be one that is abhorrent or ultrahazardous. As a function of subsection 117(9)(d), the non-disclosure and non-examination of family members is rendered as an activity that is so repugnant and dangerous that it is subject to the harshest of legal rule design, and as a consequence, penalty. Given that many criminal and regulatory regimes have not passed *Charter* scrutiny, it is difficult to imagine that subsection 117(9)(d) would survive such a constitutional challenge.

A) Lifetime Ban from Sponsoring Family Is Unusual Treatment or Punishment

Section 12 of the *Charter* states, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."[116] Both the sponsor and the family member are subject to cruel and unusual treatment or punishment imposed by the state when they are subject to the punishment of a lifetime ban under subsection 117(9)(d). While much of the jurisprudence discussing punishment under section 12 of the *Charter* deals with punishment by imprisonment, the Supreme Court of Canada, in *Rodriguez*, stated that treatment or punishment might include "that imposed by the state in contexts other than that of a penal or quasi-penal nature."[117] In *Chiarelli v Canada*, the Supreme Court of Canada held that deportation fell within the scope of treatment under section 12.[118] Further, the Supreme Court of Canada, in *R v Smith*, stated punishment will be cruel and unusual if it "is of such character or duration as to outrage the public conscience or be degrading to human dignity"; "goes beyond what is necessary for the achievement of a valid social aim"; or it is "arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards."[119] The Court in *Smith* also held, "in its modern application, the meaning of 'cruel and unusual treatment or punishment'

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116 *Charter*, *supra* note 83, s 12.

117 *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 40, [1993] 7 WWR 641; see also *Canadian Doctors*, *supra* note 72 at para 585.

118 *(Minister of Employment & Immigration)*, [1992] 1 SCR 711 at 22–23, 135 NR 161.

119 *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at para 94, [1987] 5 WWR 1; *Canadian Doctors*, *supra* note 72 at para 614.

must be drawn 'from the evolving standards of decency that mark the progress of a maturing society.'"[120]

The consequence flowing from the application of subsection 117(9)(d) carries the characteristics as identified by Justice McIntyre in *Smith*: a lifetime ban from sponsoring a family member goes beyond what is necessary to deter and punish fraud and misrepresentation, given the existence of alternative approaches. The punishment is also arbitrary in that it is applied upon one factual predicate rather than a contextualized, rational basis and investigation.

Subsection 117(9)(d) forces immigration officers to treat Canadian citizens, permanent residents, and their family members in an unacceptable way. Officers have no choice but to deny the reunification of families, where otherwise permissible, simply because a family member was not examined. While the aim of preventing and deterring fraud and misrepresentation may be met, the costs associated with this particular regulatory measure are extremely high. Families are separated for life with virtually no recourse. This cost is exacerbated by the fact that there are other adequate alternatives to the legitimate aim of the government.[121]

It is difficult to understand that such a harsh measure must be taken, given that one of the primary aims of the immigration system is to reunite families. Subsection 117(9)(d) does not accord with public standards of decency and should shock the general conscience given the tools and technology available to immigration decision makers today to determine *bona fide* family members. Further, it is degrading to the human dignity and worth of the sponsor and sponsored person that they should be denied reuniting in Canada on a technicality without being given the opportunity to explain or prove their relationship.

B) The Life, Liberty and Security of Sponsors and Family Members Are at Stake

Section 7 of the *Charter* is engaged by subsection 117(9)(d) of the *Regulations* in two ways: first, where the sponsor's security is at stake; and second, where the family member's life, liberty and security are at stake. The Supreme Court of Canada, in *Blencoe v British Columbia*, held that the security of the person could be jeopardized by measures that impose serious, state-imposed, psychological stress on the individual, including interference with the integrity of the parent-child relationship as a cause

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120 *Ibid* at para 84.

121 See *IRPA*, *supra* note 14, s 40(1).

of serious psychological stress and therefore deprivation of security of the person.[122]

A child, dependent sibling or a spouse may be subject to various conditions in their home country rendering the separation of family members an issue affecting the life, liberty and security of that family member. As discussed above, various forms of hardship may accompany the application of subsection 117(9)(d): such as separation from family, physical danger, inaccessibility of medical or psychological care, and inadequate access to education.

While there is some case law suggesting that the *Charter* does not have an extraterritorial application, there is other case law recognizing implied qualifications to this general rule, and thus, the question surrounding the ambit of the *Charter* should be sensitive to context.[123] Case law that has upheld the notion that the *Charter* has no extraterritorial application is founded on the general reluctance that is seen to be interfering with the criminal process of a foreign country. This is a valid concern where a person is being extradited, but not where a person outside of Canada is seeking benefits from the Canadian government.[124]

Thus, the primary question when asking whether the *Charter* applies to foreign nationals being sponsored should not focus on whether they are physically present in Canada, but whether the *Charter* should constrain the actions of decision makers overseas. While the government may assert that they are not prohibiting family reunification *per se*, the government is aware that subsection 117(9)(d) prohibits family reunification in an unreasonable way, as it has been in force since 2002 and has been vigorously defended by the government in the courts since then. The government has not only created and sustained a situation of deprivation in which the security of vulnerable persons is being jeopardized, but is also fully aware of this deprivation.[125]

The government may assert that the applicants are asking for a positive right rather than showing there is a deprivation of rights. Persons subject to this regulation are not asking for a positive obligation to grant permanent residence status to family members writ large, but are simply asserting that their family members should be examined to see if they are admissible.

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122 *(Human Rights Commission)*, 2000 SCC 44 at para 56, [2000] 2 SCR 307.

123 *Crease v Canada*, [1994] 3 FC 480 at 491–92, 21 CRR (2d) 347 (TD); *R v A*, [1990] 1 SCR 992, 108 NR 214.

124 *Khadr v Canada (Minister of Justice)*, 2008 SCC 28 at paras 17–20, [2008] 2 SCR 125.

125 *Canadian Doctors*, *supra* note 72 at paras 500–02.

While the *Charter* does not confer a freestanding constitutional right of admittance to Canada, if the government does choose to put in place a scheme to reunite families in Canada, it must comply with the *Charter*.

1) Subsection 117(9)(d) Violates Canada's International Obligations

The principles of fundamental justice should be informed by international law.[126] Furthermore, the *IRPA* has integrated a positive obligation into subsection 3(3)(f) that it be construed and applied in a manner that complies with Canada's international obligations.

Subsection 117(9)(d) contravenes the *Convention on the Rights for the Child*, which states "the best interests of the child shall be a primary consideration" in government action and also that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."[127] Moreover, the Supreme Court of Canada has recognized that the interests and needs of children, *including non-citizen children*, are important factors that must be given "substantial weight" as they "are central humanitarian and compassionate values in Canadian society."[128]

The *Universal Declaration of Human Rights* provides for "the right to marry and to found a family."[129] The UNHRC has stated that the right to family reunification affects cases where "parents and children are residing in different countries" thereby obligating states to facilitate contacts and deal with requests for the purpose of reunification in a humane and expeditious manner.[130] As well, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) states that the family "is the natural

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126 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 60, [2002] 1 SCR 3; *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76; *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292; *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22–23, [2013] 3 SCR 157.

127 *Convention on the Rights of the Child*, 20 November 1989, 28 ILM 1448, arts 3(1), 10(1).

128 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 67, 75, 174 DLR (4th) 193.

129 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 16.

130 Torsten Heinemann & Ursula Naue, "Immigration and family reunification: The international legal framework" (November 2010), IMMIGENE, online: <www.immigene.eu/information/immigration-and-family-reunification-the-international-legal-framework/>.

and fundamental group unit of society" and deserves the highest possible protection.[131]

2) Arbitrary, Overbroad and Disproportionate

Subsection 117(9)(d) of the *Regulations* is also arbitrary, overbroad and disproportionate. An analysis of how this rule is arbitrary, overbroad and disproportionate will follow an overview of the law.

a) Arbitrariness

It is a principle of fundamental justice that laws should not be arbitrary.[132] "A law is arbitrary where 'it bears no relation to, or is inconsistent with, the objective that lies behind [it].'"[133] A law that imposes limits to a person's interests in life, liberty and/or security of the person "in a way that bears *no connection* to its objective arbitrarily impinges on those interests."[134] Further, the connection between the impugned legislation and the stated objective cannot be merely "theoretical."[135] There must be "a real connection on the facts" and "[t]he more serious the impingement on the person's liberty and security, the more clear must be the connection."[136]

b) Overbreadth

It is also a principle of fundamental justice that laws cannot be overbroad.[137] In other words, the means chosen to achieve a stated objective must be necessary to that objective. While "deference must be paid to the means selected by the legislator", where the "State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason."[138] The Supreme Court of Canada in *Canada (AG) v Bedford* described what makes a law overbroad in the following manner:

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131 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46, art 10 (entered into force 3 January 1976, accession by Canada 19 May 1976).

132 *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 130, [2005] 1 SCR 791 [*Chaoulli*].

133 *Ibid.*

134 *Canada (AG) v Bedford*, 2013 SCC 72 at para 111, [2013] 3 SCR 1101 [*Bedford*].

135 *Chaoulli*, *supra* note 132 at para 131.

136 *Ibid.*

137 *R v Heywood*, [1994] 2 SCR 761 at paras 49, 53, 120 DLR (4th) 348; *R v Khawaja*, 2012 SCC 69 at para 37, [2012] 3 SCR 555.

138 *Ibid*.

> Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others […] For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*.[139]

In *Carter v Canada (AG)*, the Supreme Court of Canada stated, "A law that is drawn broadly to target conduct that bears no relation to its purpose 'in order to make enforcement more practical' may therefore be overbroad."[140]

c) Disproportionality

The principles of fundamental justice also provide that a law cannot be grossly disproportionate to the state's objective.[141] This is the case where a law's "effects on life, liberty, or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported."[142] The Supreme Court of Canada also stated in *Bedford*:

> The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.[143]

d) Subsection 117(9)(d) is Arbitrary, Overbroad and Disproportionate

Subsection 117(9)(d)'s purported purpose is to prevent persons from entering Canada through misrepresentation, and the sponsorship of foreign nationals who are not *bona fide* family members of a Canadian or permanent resident. The subsection applies automatically in an absolute liability fashion. The criteria by which subsection 117(9)(d) is triggered to exclude a family member from the family class is simply non-disclosure and/or non-examination of the family member. This criteria has very little connection to the objective of the regulation. There is no evidence that a complete bar to sponsoring a family member deters or prevents fraud and misrepresentation. The operation of this regulation makes no distinction between those who really are trying to mislead immigration officials and those that made innocent or ill-advised mistakes.

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139 *Bedford*, *supra* note 134 at para 113.
140 2015 SCC 5 at para 85, [2015] 1 SCR 331.
141 *Bedford*, *supra* note 134 at para 120.
142 *Ibid*.
143 *Ibid.*

The regulation prevents, rather than facilitates, family reunification and thwarts a principle objective of the *IRPA*.[144] The subsection does not use "consistent standards" in the processing of applications with the attainment of immigration goals in mind, another immigration policy objective. Instead, some family members are admitted and others are not for harsh reasons. The arbitrariness of the *Regulations* is further illustrated by pointing to the many other means at the government's disposal to combat the stated aims of fraud and misrepresentation, including section 40 of *IRPA*.

8. Conclusion

Subsection 117(9)(d) is a violent construction of a rule aimed at a problem that is not pervasive. The regulatory regime allows for a prejudicial and sticky generalization of immigrants. The exclusion that occurs due to subsection 117(9)(d) is overbroad: it relies upon one factual predicate (the non-disclosure and non-examination of a family member) to generalize that those family members are not *bona fide* family and therefore undeserving of reunification in Canada despite the fact that they may actually be family members.

While government officials may feel that this regulatory mechanism makes their lives easier—in that decisions regarding the family class are neatly organized in a predictable and efficient manner—the outcomes are not merely suboptimal, but inhumane and unconstitutional. Rather than advocating for rule-based decision making, the Canadian government should look towards the discretionary powers available in other parts of *IRPA* and trust immigration officials to use the tools already in place to evaluate whether there is misrepresentation or fraud. For *IRPA*'s objective of family reunification to be truly humanitarian, subsection 117(9)(d) must be eliminated.

144 *IRPA*, *supra* note 14, s 3(1)(e).