The Intersection of Immigration and Family Law: Immigration Tips for Family Lawyers

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Introduction

In recent years, Alberta has become increasingly diverse. Immigrants, foreign workers and foreign students are flocking to the province in ever increasing numbers. Immigrants and temporary residents often have families. With that come the usual family law issues, including marriage, divorce, custody, access and support. Family lawyers are increasingly presented with cases where issues arise because one or both parties are not citizens of Canada. Missteps by family lawyers may have dire immigration consequences for their clients.

I do not pretend to know the first thing about Family Law. What I have learned is that many of my immigration clients have family law issues and many family law clients have immigration issues. Due to the intersection between Family and Immigration law, it is beneficial for Family lawyers to be aware of immigration issues so that they can flag potential problems and know when to refer a client to an immigration specialist. The purpose of this paper is to highlight some of the immigration related issues that you may encounter in your practice as a Family lawyer and to discuss implications from an immigration lawyer’s perspective.

References are to the Immigration and Refugee Protection Act (“IRPA”) or the Immigration and Refugee Protection Regulations (“IRPR”)

Some of the relevant issues include:

1. The effect of immigration sponsorship undertakings on support obligations
2. Restrictions on ability to sponsor spouses or other family members
3. The new conditional permanent resident status – the obligation to reside together for 2 years after arrival
4. Custody and access when one parent has foreign status
5. Foreign divorce law and implications for our courts
6. Marriage fraud, and allegations thereof
7. International adoptions
8. Misrepresentation
9. Maintaining permanent resident status when living abroad
10. Issues for Temporary Residents
11. The value of Canadian Citizenship

1. The Effect of Immigration Sponsorship on Spousal/Child Support Obligations

Sponsorship – An Unconditional Promise of Support

One key area of intersection between Family and Immigration law is the sponsorship of family members. Some of your clients may have sponsored family members for immigration to Canada, or may have themselves been sponsored. Both sponsors and sponsored persons carry certain
responsibilities which could impact their obligations and/or entitlements in the event of a relationship breakdown.

Canadian citizens and permanent residents have the right to sponsor certain family members for immigration to Canada. With a few exceptions, the class of sponsorable family members is currently limited to spouses/common-law partners and dependent children. Applications to sponsor parents and grandparents are not currently being accepted, but that is expected to change later in 2013.

Sponsorship is intended to ensure that sponsored immigrants do not become a burden on the state. In a sponsorship application, the sponsor enters an undertaking to be financially responsible for the sponsored person for a specified period of time. For sponsored spouses, the sponsor’s undertaking runs for three years from the date the applicant is landed as a permanent resident status. For dependent children, the sponsorship period is either ten years from the date of landing or the date on which the child reaches the age of 25, whichever comes first.

In order to file a sponsorship application, the sponsor and applicant must sign an “Application to Sponsor, Sponsorship Agreement and Undertaking”. In sponsorship of children or parents, this agreement may be co-signed by the sponsor’s spouse. In signing this agreement, the sponsor/co-signer undertakes to provide for the “basic requirements of the sponsored person” including “food, clothing, shelter, fuel, utilities, household supplies, personal requirements, and other goods and services, including dental care, eye care, and other health needs not provided by health care”. This undertaking is an unconditional promise of support, which is unaltered by a breakdown in the relationship or a deterioration of the sponsor’s financial situation. For the applicant’s part, s/he agrees “to make every reasonable effort to provide for my own basic requirements as well as those of my accompanying family members” and “to ask the sponsor... for help if I or my family members are having difficulty supporting themselves”.

The principle purpose of the sponsorship agreement is to allow the government to recoup the cost of any social assistance obtained by a sponsored person during the period of the undertaking. If a sponsored person obtains social assistance while an undertaking is in effect, the sponsor is deemed to be in default and the cost of the social assistance becomes a debt to the Crown. According to s. 132(1) of the IRPR, “the sponsor’s undertaking obliges the sponsor to reimburse Her Majesty in right of Canada or a province for every benefit provided as social assistance to or on behalf of the sponsored foreign national and their family members during the period”. If the sponsored immigrant receives social assistance, the province can make a subrogated claim for full restitution. In addition, the sponsor cannot sponsor any other family until the province is repaid in full.

In Canada (Attorney General) v. Mavi, 2011 SCC 30, a group of eight sponsors denied liability for the cost of social assistance which their sponsored family members had obtained after immigrating to Canada. The sponsors argued that s. 145(2) of the IRPA, which states that a sponsorship debt “may” be recovered by the government, gives rise to a Crown discretion to collect or not collect the debt depending on the circumstances of the debtor. The sponsors had various circumstances which they argued warranted debt forgiveness. The Ontario Superior Court held that the IRPA created a “purely administrative” collection procedure and that the government has no discretion in carrying out its duty to collect sponsorship debts. On appeal, the Ontario Court of Appeal held that the permissive language of s. 145(2) of the IRPA gives the government the discretion to consider on a case-by-case basis whether or not to collect the debt. The Supreme Court of Canada ultimately held that the legislation allows the government to defer, but not forgive, sponsorship debts.

This decision confirms that sponsorship debts may not be forgiven, regardless of the reason for the default or the financial circumstances of the sponsor. For example, a sponsor who is abandoned by her/his sponsored spouse immediately after arriving in Canada will be responsible for any social