KEEPING IT IN THE FAMILY: THE (RE-) PRODUCTION OF CONJUGAL CITIZENS THROUGH CANADIAN IMMIGRATION POLICY AND PRACTICE

by

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Abstract

This is an examination of how conjugality acts as an access point for Canadian citizenship. The conjugal family unit — married or common-law — continues to be privileged in Canadian law and policy; this is especially evident in immigration policy and practice. Family class immigration continues to be a steady source of immigrants for Canada, spousal/partner sponsorship being the primary type of family reunification. In order to control access, a strict understanding of conjugality is used to distinguish between legitimate and illegitimate families. When it comes to family class immigration, it is not simply a case of individuals sponsoring individuals; it is about the state producing and maintaining the ideal family unit through the provision of citizenship. My analysis proceeds in two main parts. First, I engage with mainstream Canadian citizenship theory — focusing specifically on the work of Will Kymlicka and Rita Dhamoon — and analyze its focus on the individual citizen. Moreover, I examine how the state’s asymmetrical treatment of conjugality has created two versions of the conjugal family — the inside family (families within Canadian borders) and the outside family (families outside Canadian borders). Second, I explore the state’s reliance on conjugal relationships in their assessment of potential immigrants and refugees in three areas of immigration policy — the assessment of sexual minority refugee claimants, the assessment of common-law couples seeking sponsorship, and the government’s current crackdown on marriage fraud. Combined, these examples speak to the Canadian state’s vested interest in privileging the conjugal family unit; furthermore, they highlight how the inconsistent and often ambiguous treatment of conjugality undermines its effectiveness as the primary mode of identification in family class immigration. In summary, this dissertation integrates families into a body of scholarship that has ignored the role that one’s personal relationships plays in the provision of state access.
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Chapter 1

Introduction

“Immigration control is not just a power symbol of nationhood and people, but also a means to literally construct the nation and the people in particular ways” (Luibhéid 2002, xviii).

On December 21st, 1967, Justice Minister Pierre Trudeau introduced an Omnibus Bill that called for significant changes to the Criminal Code, specifically the decriminalization of homosexuality. Trudeau’s appeal was grounded in the belief that what is done in private between consenting adults should not concern the state, that there is “no place for the state in the bedrooms of the nation”. Family as part of the private sphere meant that any happenings within the familial unit were believed to be impermeable to state influence. The state should therefore have no place in the construction of one’s familial networks. Fast forward to forty years later, Canadian law and policy has undergone a significant transformation with respect to relationship recognition, with the legalization of common-law and marital relationships for both opposite-sex and same-sex couples. Ironically, the extension of benefits to common-law and same-sex couples has solidified a more permanent role for the state in the families — and ultimately the bedrooms — of the nation. While the state’s view of marriage has been altered, this extension of protections occurs within a pre-existing framework, one that favours conjugality. Policy development transpires within a framework where conjugality continues to define the norms and limits of permissibility. As a result, not only does the state dictate which actions in the bedroom are acceptable and consequently, which actions are not, it establishes the conjugal family unit as the primary space for relationship recognition. The normalization of acceptable family practice in policy discourse highlights the ways in which the privileging of conjugality has become intertwined with discussions of state power and citizenship.
More often than not, family is absent from mainstream debates about Canadian citizenship. This is largely attributed to the fact that citizenship discourse in Canada relies on the individual as the primary unit of analysis. Though varied in their normative positions, Canadian citizenship theorists broadly claim that the equal treatment of citizens relies on state acknowledgement of individual difference. Relying solely on the individual however, disregards the role of families and family construction in the provision of citizenship. Whether welcomed or unwelcomed, one’s conjugal relationship status results in the provision of certain state protections and the withdrawal or refusal of others. Conjugality therefore acts as an access point for Canadian citizens, challenging the individualist nature of citizenship discourse.

This focus on the individual citizen in Canadian citizenship scholarship is compounded by the position that citizenship, a public mechanism of state governance, and the private domain of family are separate. Often framed as the antithesis to political society, families are conceptualized as apolitical. The assumption here is that family structure plays no role in the provision of citizenship, as it exists outside the parameters of state power. This assumption is tenuous because it ignores the reality that even when one claims that the “state has no place in the bedrooms of the nation,” the state’s position within the private sphere is solidified through its privileging of conjugality. By using one’s conjugal status to determine access to certain state protections, the line between citizenship and family is blurred.

This blurring of the line between citizenship and family is especially evident in Canadian immigration policy and practice. Family class immigration continues to provide a steady source of immigrants for Canada, spousal/partner sponsorship being the primary type of family reunification. In 2010, seventy percent of immigrants who applied through family class were sponsored as a spouse or partner (Citizenship and Immigration Canada,
In order to control access, Canada’s family reunification process is bound by a strict understanding of conjugality used to distinguish between legitimate and illegitimate relationships. The good citizen is the conjugal citizen; how we frame citizenship is therefore particularly important for understanding how current immigration practices shape family construction.

Two questions arise concerning the position of family class immigration within broader discussions of Canadian citizenship. First, is the study of Canadian citizenship best framed through the lens of individualism or are the interactions between citizenship and nation building, immigration and identity formation better analyzed through the incorporation of a family-based lens? Second, what specific and general insights can be generated for our understanding of citizenship and immigration policy development, when the provision of citizenship is analyzed through a family-based lens rather than standard individualist approaches?

In this dissertation, I argue that the Canadian state relies on the conjugal family unit as a point of access in its immigration policies, ultimately creating distinctions between those families living within its borders and immigrant families seeking admission. In the case of family reunification, it is not simply a case of individuals sponsoring individuals; it is about the state producing and maintaining the ideal family unit through the provision of citizenship. Immigrants are conceived of as citizens-in-waiting and, as such, the ways in which we define them as individuals, family members and conjugal beings has important implications for their interactions with the Canadian state.

My primary claim is that the Canadian state has a vested interest in the privileging of conjugal families for immigration purposes. While conjugality continues to define the terms of accessibility to state protections for families living within Canadian borders, these terms are becoming increasingly flexible depending on what is at stake. For those families
outside Canadian borders, state treatment of conjugality is inconsistent; however, it is clearly used to demarcate between legitimate and illegitimate families, ideal and non-ideal citizens. In doing so, a specific understanding of the Canadian nation is maintained both within Canadian borders and abroad, one that is premised on the conjugal family unit. With respect to Canadian immigration policy, what is therefore at stake is the fear of threat that foreignness presents for normalized assumptions about family, conjugality and the Canadian nation.

While the term “conjugal” has traditionally been used in reference to the relationship between husband and wife, what constitutes a conjugal relationship in Canadian law and policy has been expanded to include unmarried, cohabiting couples with the Modernization of Benefits and Obligations Act in 2000, and same-sex couples with the Civil Marriage Act in 2005. Therefore, for the purposes of this project, conjugal refers to state recognized conjugal relationships including both married and common-law, same-sex and opposite-sex. Moreover, legal interpretations of conjugality over the past thirty years have recognized the complexity of conjugal relationships (an argument I develop further in chapter three), understanding conjugality as composed of multiple levels of interdependency (e.g. sexual, economic, emotional, etc.). In assessing the role of conjugality in determining immigrants’ access to citizenship, I account for the multifariousness of the term conjugal and examine its role in a way that both embraces and critiques the state’s “more inclusive” approach towards the conjugal family unit.

Family class immigration is a crucial component of Canadian immigration policy and practice. Regardless of an applicant’s immigration category — Family Class, Skilled Workers or Refugee — immigration officers work under the assumption that successful applicants will apply to sponsor their immediate family members in the future. Family class immigration therefore shapes multiple areas of immigration policy development. The
prominence of family immigration is a simultaneous force of stability and instability for the Canadian state; family reunification allows the state to reproduce the nuclear family unit while subjecting it to constant threats of Otherness. As a result, family reunification has always been “a problematic area of immigration management” (Hawkins 1989, 85). State treatment of family reunification, particularly its reliance on the conjugal family unit, therefore warrants continued attention. If we are to continue relying on the family class as a primary source of immigration to Canada, then we need to be cognizant of the state’s inconsistent and unfair expectations for those seeking access to the Canadian state, both present and future.

Primary research for this project was conducted via three approaches — policy analysis, legal decision analysis, and interviews.

1) Policy Analysis

I undertook a thorough analysis of Canadian immigration policy documents, focusing specifically on those related to family class immigration. This included policy briefs, government manuals, immigration officer training manuals and government-initiated studies. Those documents I was unable to locate on either the Citizenship and Immigration Canada or Parliament of Canada websites, were retrieved at Library and Archives Canada in Ottawa.

My analysis of the government’s motivations behind a crackdown on marriage fraud (chapter six) relied on media coverage and news releases from Citizenship and Immigration Canada (CIC). Using Newsstand, fifteen articles from 2008-2012 were obtained from CBC

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I adopted Dobuzinskis et al.’s (2007) “third way” of policy analysis, which establishes a common ground between positivist and post-modern approaches. For this approach, the emphasis is on recognizing the need for better empirical research in terms of the impact of policy analysis and alternative outcomes.
News (5), Globe and Mail (6), and the Toronto Star (4). In addition to these articles, CIC released 6 news releases between 2010-2012 on the issue of marriage fraud. Finally, using the same search terms, I conducted a general search of parliamentary Hansard between 2008-2012 on the Parliament of Canada website. In total, there have been 25 mentions of marriage fraud. While these mentions primarily took place in Citizenship and Immigration Committee Meetings (17), marriage fraud was also discussed in House Debates (7) and the 2011 Speech from the Throne (1).

2) Legal Decision Analysis

A combination of published and unpublished decisions involving sexual minority refugee claims from the Immigration and Refugee Board (IRB) and the Federal Court were examined. While published decisions are readily accessible, they fail to comprise a representative sample of all refugee determinations, as only a small fraction of Canadian refugee decisions are published. The IRB is not obligated to publish positive decisions if there is no appeal, and decisions often selected for publication are those that “raise unusual fact situations or new approaches to issues” (Rehaag 2008, 70). To rectify this methodological challenge, unpublished decisions were also obtained from the IRB through a formal Access to Information request. In total, 100 unpublished decisions from 2006 were analyzed, constituting approximately 20% of sexual minority refugee claims decided by the IRB during this particular year (100 out of 577 decisions). Due to bureaucratic backlog,

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2 These articles were obtained using the search terms: “Marriage or relationship and: convenience or fraud or fraudulent”.
3 Published decisions were obtained from the CanLii database (http://canlii.org). These decisions were obtained by reviewing cases found by searching the terms: “refugee and: sexual minority or homosexual or gay or lesbian or bisexual”.
4 The Access to Information request was for 100 sexual minority refugee claims for 2006, as well as a request for data on the total number of sexual-orientation based claims reviewed by the IRB in 2006; the gender division of these claims; and the number of these claims that were made by claimants who identified as bisexual. Using the search terms that I provided (“refugee and: sexual minority or homosexual or gay or lesbian or bisexual”), the Access to Information Office provided me with the first 100 decisions their search produced.
personnel from the Access to Information Office at Citizenship and Immigration Canada recommended obtaining a dataset from 2006, as it is the most recent, complete set of written decisions. This sample included 30 decisions involving bisexual claimants, constituting 68% of the total number of claims made by bisexual claimants in 2006 (30 out of 44 decisions) and 13 decisions involving female homosexual and bisexual claimants.\(^5\) All of the obtained IRB decisions underwent content analysis, specifically for references to the claimant’s current relationship status as well as their relationship history. References included “lover”, “partner”, “sum of experiences”, “relationship”, “relationship length”, “active sexual activity”, “married”, “common-law”, “long-term relationship”, “intimate”, “sexual relations”, “correspondence between partners”, “proof of relationship”, “pictures of partners”, “committed relationship”, and “promiscuity”. When a reference was found, the following three questions were posed:

1) What was the nature of the reference (e.g. the details of that particular case)?
2) What was the tone of the reference in relation to the assessment of that particular case (negative or positive)?
3) Did the claimant’s relationship status/history influence the IRB’s assessment of the claimant’s sexual identity?

For my analysis of the Canadian state’s treatment of marriage fraud, I examined published appeal decisions from the IRB between 2006-2012.\(^6\) In total, I acquired 140 decisions including 76 decisions where the appeal was rejected (54%) and 64 where the appeal was successful (46%). This sample represents approximately 12% of all appeal

\(^5\) Bisexual refugee claims constitute approximately 8% of sexual minority refugee claims decided by the IRB in 2006 (44 out of 577 decisions) compared to a similar percentage between 2001-2004 (100 out of 1351 decisions) (Rehaag 2009, 421). The numerical difference between male and female claimants is consistent with LaViolette (2007). Equating current Canadian analysis of persecution with patriarchal notions of gender, LaViolette contends that traditional conceptualizations of the public-private divide shape claimant assessment, making it difficult for female claimants to satisfy requirements that rely on a public element of sexuality and sexual identity.

\(^6\) These decisions were obtained using the CanLii database using the search terms: “marriage or relationship and: convenience or fraud or fraudulent”.

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decisions filed with the Immigration Appeal Division of the IRB between 2006-2012 (Immigration and Refugee Board of Canada 2012). My choosing to analyze published appeal decisions instead of initial applications is two-fold. First, initial applications are not typically published and are therefore not as easily accessible. Second, appeal cases provide more insight into the IRB’s assessment of spousal sponsorship, as two officers examine these decisions — the initially assigned immigration officer and then an appeal officer. Appeal decisions therefore provide a detailed account of both decisions.

3) Interviews

In addition to policy document and legal decision analysis, I conducted twenty-nine interviews with former and current policy analysts and immigration officers from the Citizenship and Immigration Canada (8), former members of the Law Commission of Canada (2), immigration lawyers and former IRB members (2), and a collection of common-law and married couples (17) — both same-sex and opposite-sex — who successfully applied for spousal sponsorship. These interviews were non-schedule-structured and anonymity was guaranteed so that participants were able to share their experiences without fear that their answers would threaten their welfare. Also referred to as focused interviews, non-schedule-structured interviews are those that simultaneously incorporate degrees of structure and flexibility. It is important to note that I am not suggesting that these interviews are representative of these populations as a whole. Rather, I am adopting

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7 Neither the IRB or CIC distinguishes between appeal decisions in their statistics; therefore, there are no set numbers outlining what percentage of the total number of filed appeals involve an accusation of marriage fraud or marriage of convenience. Moreover, the IRB has not released its statistics on appeal decisions for 2012, so data obtained from the IRB only addresses appeal rates between 2006-2011.

8 This particular type of interview has four primary characteristics: respondents have a particular experience in common, the questions refer to situations analyzed pre-interview, the interviewer posits questions related to the research hypothesis, and the interview itself focuses on the subjects’ experiences in relation to the situation under study (Frankfort-Nachmias and Nachmias 2000, 215).
Platt’s understanding that the "use of case studies suggests that if these practices are possible in these cases, they may exist in other cases, and they must be taken into account in the formulation of general propositions about intimate life" (1988, 153).

Interviewed couples — all composed of one Canadian citizen or permanent resident and their sponsored spouse/partner — were recruited through immigrant settlement agencies in Kingston, Ottawa, Toronto and Mississauga; immigrant rights organizations; queer community centres; and word of mouth. For all of the couples, sponsorship took place within the past ten years; therefore after the passing of the Immigration and Refugee Protection Act in 2001. Key areas of focus for these interviews were as follows: a) the couple’s overall experience with spousal sponsorship; b) any advice the couple received from immigration officers or lawyers that shaped their application; c) perception of how their conjugal status impacted their application; and d) challenges the couple faced during the application process. In the event that interviewees mentioned several challenges, I asked follow-up questions about how these challenges impacted their application. Interviews lasted approximately two hours in length.

For my interviews with common-law and married couples, all questions were either open-ended or bidirectional to avoid assuming that any of the couples had a negative experience. For example, questions about their interactions with CIC were framed in the following way: “Tell me about your experience applying for spousal sponsorship. In what way did these experiences shape your application?” I used this approach in order to maximize the probability that whether positive or negative, the interviewees’ responses would be a genuine account of their experiences with the program (Merali 2009, 327). My interviews with current and former policy analysts and immigration officers from CIC,

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9 Scholars interviewing immigrants and refugees contend that community networking is one of the most effective ways to recruit these populations who are often isolated and difficult to access (Pernice 1994; Merali 2009).
immigration lawyers/former IRB members and former members of the Law Commission of Canada were more straightforward, as the primary purpose of these interviews was clarification of current policy and process. While former CIC employees were more liberal in the information they provided, current employees tended to refer to government documents.

With respect to interviewed couples, two methodological considerations are worth noting. First, this descriptive account of spousal sponsorship is one sided. I was only able to interview couples whose applications for spousal sponsorship were accepted; therefore my analysis does not include interviews with those couples that were denied access. In light of this, I have compared trends inherent in positive applications as illuminated by the interviewees to the content of my interviews with CIC personnel and immigration lawyers/former IRB members. This has allowed me to draw conclusions about the treatment of conjugal couples seeking spousal sponsorship. Second, the small sample size of interviewed couples (17 in total) can be attributed to the sensitivity of the issue. While my original intent was to interview a minimum of 30 couples, my recruitment efforts fell short.\textsuperscript{10} Discussions with individuals working in the fields of immigrant settlement and integration highlighted the possibility that immigrants would be hesitant to volunteer, fearful that any discussion concerning their application could potentially harm their current status in Canada, particularly individuals whose applications were refused and who might

\textsuperscript{10} The first round of recruitment involved sending information packages to immigrant settlement agencies in Toronto, Ottawa, Kingston and Mississauga. This process generated four interviews with married (2) and common-law (2) opposite-sex couples. The second round of recruitment involved sending packages to immigrant rights organizations in Toronto and Ottawa, generating six interviews with married (2) and common-law (4) opposite-sex couples. Concerned about the lack of same-sex couples, the third round of recruitment involved sending information packages to several queer support community centers in Toronto and Ottawa, focusing on those who provide support programs for new queer immigrants. This generated five interviews with married (3) and common-law (2) same-sex couples. Finally, two couples living in Kingston heard about my project and volunteered, generating two interviews with married (1) and common-law (1) opposite-sex couples.
now be living in Canada illegally. I accounted for this by explicitly stating in both my Letter of Information and recruitment packages that their anonymity would be protected throughout this process, and extending my search to organizations that provide services to already established immigrants. While the total number of interviewed couples is lower than my original goal, the couples interviewed provide a representative sample of married (8) and common-law (9), homosexual (5) and heterosexual (12) couples. Moreover, my sample is geographically diverse, as interviewed sponsored spouses/partners came from the United States (1), New Zealand (1), Bosnia (1), Slovakia (1), India (3), Bangladesh (4), China (2), Argentina (2), Vietnam (1) and Nigeria (1).

This thesis aims to provide a descriptive account of the operationalization of conjugality in current immigration policy and practice. More specifically, it makes a case for the incorporation of family into discussions of Canadian citizenship. My reliance on policy analysis, legal decisions, IRB transcripts, and interviews therefore allows me to accomplish two things. First, I am able to highlight trends in state treatment of conjugality as well as motivations behind the state’s enforcement of a specific understanding of conjugality in its immigration policy. Second, I draw attention to gaps between policy development and policy practice, focusing specifically on the implications the state’s “neutral” understanding of family has for those seeking access. In doing so, I map the positioning of conjugality in Canadian immigration policy and the implications — both normative and empirical — this positioning presents for immigrants and refugees.

Because the individual is the primary unit of analysis for scholarship on Canadian citizenship, suggesting a family-based lens does not suggest that this body of literature should be dismissed. Rather, it is important to examine how and why this approach has

Merriam (1998) highlights the utility of seeking a diverse sample from which the most can be learned in small-scale, in-depth qualitative studies.
evolved, and the logic that drives these individualist approaches towards understanding citizenship. Chapter two elaborates on the state of citizenship discourse in Canada, focusing on its reliance on the individual as the primary unit of analysis. From there, I establish a theoretical starting point for incorporating family into discussions of citizenship, using sexual citizenship theory, sexual exceptionalism, and governmentality.

Domestically, Canadians generally have the freedom to construct their familial units as they see fit; however, this elasticity is not replicated in our immigration policy. In chapter three, I examine how this differentiation in treatment creates two versions of the conjugal family — the inside family (families within Canadian borders) and the outside family (families outside Canadian borders). This chapter focuses on how the construction of inside and outside families shapes our understanding of the non-citizen.

Chapters four to six delve into three areas of immigration policy in which the conjugal family unit plays a role in the assessment of immigrants and refugees. An examination of the Canadian state’s treatment of conjugality in the assessment of homosexual and bisexual refugee claims (chapter four), the assessment of common-law couples seeking spousal sponsorship (chapter five), and the government’s current anti-marriage fraud campaign (chapter six) highlights how conjugality as a point of access is both ambiguous and contradictory, ultimately questioning its effectiveness. I chose to focus on sexual minority refugees and the family class, as the state privileges — whether intentionally or unintentionally — conjugality in the assessment of these applications. While conjugality does play a role in the assessment of skilled workers, it is often viewed as a detriment (Macklin 1992; Arat-Koc 1999; Bakan and Stasiulis 1997, 2002, 2005). This disconnect in treatment warrants further attention; however, for the purposes of this project, I have opted to explore cases in which the conjugal family unit is favoured. These chapters suggest that the state's targeting of certain groups reinforces a narrative of family
class immigration premised on a normalized conception of the conjugal family unit, an understanding that cuts across gender-, race-, ethnicity-, sexuality- and colonial-based lines. Moreover, they reinforce my central claim that the Canadian state has a vested interest in privileging the conjugal family unit in its immigration policy.

In chapter seven, I outline several proposed policy frameworks in which conjugality no longer holds primacy for state recognized relationships. Through an examination of these frameworks, this chapter aims to take stock of theoretical debates surrounding the state of conjugality in policy development, and to provide a starting point for future discussions on immigration, family and citizenship. This is complemented by an examination of several tensions in need of address should the execution of these frameworks be extended to immigration. This chapter establishes a space for discussing the potential for an immigration system in which conjugality no longer dictates the terms of permissibility for families seeking access.
Chapter 2

A Citizenship for all Seasons: The Invisibility of Family in the Canadian Conversation

“The study of the idea of citizenship, and of the multiple practices and institutions and experiences that the term is used to represent, are fundamentally inseparable” (Bosniak 2009, 147).

As it currently stands in Canada, citizenship suffers from an identity crisis. It is defined as a fixed set of rules, an ever-changing dynamic, a way of being, a source of social disunity, the answer to national unity — the list goes on. The multifariousness of citizenship presents challenges for policy development; the way in which citizenship is framed shapes policy development and conversely, developed policy reflects and reinforces the values inherent in our understanding of citizenship. It is therefore imperative that we recognize the complexity of citizenship, as it simultaneously dictates who is in and who is out. In the case of immigration policy, citizenship enforces this insider/outsider dichotomy in domestic and international arenas by organizing access (Thobani 2007). In addition to establishing criteria for determining access, citizenship shapes the treatment of immigrants once they have arrived in Canada through status (passport-holding), rights (provision of privileges) and identity (community belonging) (Joppke 2010). On the one hand, the way citizenship is defined informs immigration officers of the “type” of citizens we want (status), while on the other hand, successful immigrants challenge citizenship frameworks to be more inclusive (rights and identity). While this balance remains a point of contention, the interconnectedness of citizenship and immigration makes the conceptualization of one without considering the other troublesome.

The framing of citizenship in Canadian scholarship and the impact this has on our understanding of family immigration is therefore essential to this project. In this chapter, I will evaluate the state of Canadian citizenship discourse, focusing on its reliance on the
individual as the primary unit. I will then explore the implications current understandings of citizenship present for families, particularly how family is defined in immigration processes. Ultimately, theorizations of Canadian citizenship and the Canadian citizen narrowly focus on the individual, rendering the effects immigration has on the creation of families through the provision of citizenship invisible. From here, I will propose a new frame for theorizing citizenship; one that accounts for the role that family plays in citizenship projects. In doing so, this frame would allow for a discussion about the role conjugality plays in family sponsorship processes and consequently, the impact this has not only on immigration process, but citizenship more generally.

**Incorporating Family in Canadian Citizenship**

Whereas sponsorship of parents, grandparents and extended family has slowed due in combination to changes in government objectives and bureaucratic backlog, spousal/partner sponsorship remains consistent. In 2010, seventy percent of immigrants who applied through family class were sponsored as a spouse/partner (Citizenship and Immigration Canada 2011). Consensus among interviewees from Citizenship and Immigration Canada (CIC) is that spousal/partner sponsorship remains the easiest way to acquire status, “easy” referring to response time (Interview C, 2010; Interview D, 2011, Interview W, 2010; Interview X, 2010, Interview AA, 2011). The challenge lies in proving that your relationship is in fact legitimate as dictated by the Canadian state. Canada’s family reunification program is bound by a strict definition of conjugality used to distinguish between legitimate and illegitimate relationships. Despite significant transformation with respect to family diversity in Canadian law, what constitutes “family” in our family reunification policy still relies exclusively on conjugal ties. The good citizen is the conjugal citizen. Therefore how we frame citizenship is particularly important for our understanding of how current immigration practices shape family construction. For van Walsum, this begs
the question: “How have rules that address individual claims to belonging to both family and nation been reconciled with the trend towards individualization and what changes do they reflect in the ongoing tension between individual, family, and state” (2008, 13)? In the case of family reunification, it is not simply a case of individuals sponsoring individuals; it is about the state producing and reproducing a desirable familial type through the provision of citizenship.

Despite its role in the provision of citizenship, family is noticeably absent from Canadian scholarship on citizenship and state power. This is concerning because how we frame citizenship has consequences for family reunification. The way in which family reunification policy is structured has an influence on who can immigrate under the family class and ultimately become a citizen; the state is not only creating citizens, but families as well. When it comes to family reunification, the “ideal” citizen is therefore synonymous with the “ideal” family type. It is important to note that I am not suggesting there is a deterministic relationship between citizenship and family. Canada’s Citizenship Act is not structured according to any definition of family. It is therefore inaccurate to suggest that citizenship determines family construction because technically, the definition of family does not directly preclude people from becoming citizens. The purpose of this project is to situate the familial unit within Canadian citizenship circles and examine the types of families our immigration policies recognize. Furthermore, it aims to make a case for acknowledging that in citizenship discourse, family is an organizing principle of the state.

Conjugality is rewarded, albeit indirectly, through the provision of citizenship. Current citizenship frames in Canadian scholarship therefore limit our understanding of the relationship between immigration, citizenship and family, resulting in an incomplete picture of Canadian citizenship. Family reunification remains a primary means by which migrants come to Canada and, as such, the way in which we define family influences immigration
itself, and citizenship (van Walsum 2003, 223). Theorizing Canadian citizenship requires an understanding of the relationship between citizenship and family. Scholarship on Canadian citizenship has sidestepped the role conjugality plays in family sponsorship process and consequently, the impact this has not only on immigration, but citizenship more generally.

*Citizenship Literature in Canada: Revisiting the Canadian Conversation*

Labelled the "Canadian Conversation" by Kernerman (2005), the theorization of citizenship in Canada has been the focal point of much academic rigor from liberal theorists (Taylor 1993; Webber 1994; Tully 1995; Ignatieff 2000; Carens 2000) and critical theorists (Razack 1998; Bannerji 2000; Day 2002; Abu-Laban and Gabriel 2002; Arneil 2007; Thobani 2007) alike. For Kernerman, the Canadian Conversation is not solely defined by its content but by its perennial tension, that being deep-founded contentions between questions of unity and the accommodation of diversity. This site of political contestation — what Kernerman refers to as “multicultural nationalism” — is an ambiguous zone of Canadian political thought, as those involved in this conversation are “all multiculturalists, nationalists, and not least liberals,” however are “unlikely to understand themselves (or their various opponents) in these terms” (2005, 5). While these theorists situate themselves along liberal and critical lines, there are normative parallels among these positions. Visions of Canada reliant on an equality-as-sameness approach seem incompatible with those promoting an equality-as-difference rhetoric; however, the objective of both is to define the Canadian political community. Moreover, while both visions promote the idea of a unified nation, they accomplish this at the cost of recognizing certain identity-based groups and disregarding others. Ultimately, there are more similarities among scholars of Canadian citizenship than those who situate themselves.

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12 Kernerman recognizes the paradoxical nature of the term, as multiculturalism (the goal of accommodating diversity) and nationalism (the goal of achieving unity) are typically positioned as conflicting concepts; however, proposes that the contestation of this term lies not in the concepts themselves, but rather the contradictions outlined above (2005, 4–6).
within this discussion would care to admit. The polarization of the Canadian Conversation is therefore misleading, as dividing lines between competing positions are not as well defined as the literature suggests.

For Kernerman, the focus should not be on resolving these tensions but rather the logics that cultivate these positions (2005, 5). This section will do exactly that, focusing on how specific logics of family, conjugality and citizenship foster certain positions within the Canadian Conversation, and the implications this has for family immigration. I will commence with an examination of a liberal-critical dialogue between two Canadian scholars on citizenship issues: Will Kymlicka and Rita Dhamoon. I have chosen to focus on these particular scholars for two reasons. First, Kymlicka and Dhamoon’s work effectively captures the perennial tension inherent in the Canadian Conversation, which provides an appropriate starting point to discuss the absence of family immigration in this body of scholarship. On the question of managing diversity within a liberal democratic framework, Kymlicka challenges the perceived incompatibility between differentiated citizenship and national unity, claiming that multicultural states require a framework that recognizes differentiation in cultural needs in order to maintain unity (establishing parameters of the state) and manage diversity (recognizing the need for space for recognition of cultural differences). A relative newcomer to the Canadian Conversation, Dhamoon criticizes Kymlicka’s reliance on culture as the sole site of individual self-capacity, arguing that the politics of identity requires us to focus on the multiple relationships of power at play in citizenship discourse. For Dhamoon, an account of meaning-making allows us to conceptualize the role of power in the production and reproduction of difference, the very foundation of citizenship.

Second, an examination of these scholars highlights that while their positions are oppositional, they are motivated by similar logics, particularly in their reliance on the
individual. In line with Kernerman’s observations, any attempt to resolve these positions is futile — what is of importance for this project is to understand how certain logics within the Canadian Conversation produce and reproduce a specific understanding of family. While these two scholars arguably approach framing citizenship from competing positions, both represent an ongoing conversation in Canada concerning the interconnectedness of immigration and citizenship, and furthermore, the normative implications this holds for future citizens, current citizens and state institutions.

I recognize the diversity within the “Canadian School” (as presented by Kymlicka) and the “Critical School” (as presented by Dhamoon) in that the scholars who identify with these two schools of thought are not homogeneous in their theoretical viewpoints.13 There is variation within these groups and it would be misleading to assess this dialogue without theoretically situating the main participants appropriately. Therefore, I am in no way suggesting that the ideas put forth by Kymlicka and Dhamoon are indicative of these ideological alignments as a whole; rather, I am focusing on their dialogue to illustrate two prominent frames of citizenship discourse in Canada.

Inherent in the Canadian School’s approach to framing citizenship is the belief that a single uniform framework for citizenship claims is inadequate. Identifying the Canadian state as multicultural requires a framework that recognizes the differentiation in needs with respect to its citizens. This is what Carens has coined a “contextual” understanding of citizenship.14 For the Canadian School, liberal democracies have (and should have) overarching principles with respect to citizenship however, these values require a degree of

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13 I borrow these labels from Kernerman (2005).
14 For Carens, a contextual approach requires movement between theory and practice, recognition that normative ideals of citizenship often have various outcomes on the ground. While not dismissing the value of general theoretical principles, Carens argues that “we do not really understand what general principles and theoretical formations mean until we see them interpreted and applied in a variety of specific contexts” (2003, 3).
flexibility with respect to claims for cultural autonomy because how we interpret citizenship has different implications for different cultural groups. This framework challenges classic liberal theorizations of citizenship that are grounded in the belief that membership is rewarded with a single set of individual rights and these rights guarantee the equal treatment of all members of a given society. Citizenship, according to the Canadian School, is therefore responsible for establishing the parameters of the state while accounting for the need for space to recognize cultural differences. What that space looks like varies among scholars whose theoretical framework coincides with this school of thought.

Internationally recognized for his work in this area, Kymlicka is identified as a “major architect of the liberal multicultural approach” (Dhamoon 2009, 3). Kymlicka contends that a theory of justice grounded solely in universal individual rights is insufficient, as it fails to account for the differentiated needs of citizens living in multicultural states, stating that “a comprehensive theory of justice in a multicultural state will include universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or ‘special status’ for minority cultures” (1995, 6). Furthermore, contrary to liberal protest, Kymlicka views this dual approach to theorizing rights as consistent with liberal democratic values. In light of this, Kymlicka prescribes a liberal theory of minority rights, capable of justifying how these rights simultaneously co-exist with human rights and fit within a liberal democratic framework which champions individual liberty and social justice. Recognizing that the development of a single theory of minority rights is impossible, Kymlicka argues that we need to make certain types of generalizations “identifying at least certain common patterns of dynamics of state-minority relations, and trying to make sense of their underlying normative logic” (2009, 373). Through appealing to both normative theory and social practice, Kymlicka frames
citizenship in multicultural states as two-fold: it establishes an overarching normative framework responsible for upholding common liberal democratic values, and it allows for differentiation in the provision of rights themselves so that citizens have access to cultural self-autonomy.¹⁵

Kymlicka’s theory of minority rights informs his framing of Canadian citizenship. Due to its multinational and polyethnic composition, the Canadian state has a moral responsibility to adopt and encourage an understanding of citizenship that is multifaceted in its approach. Since my dissertation focuses on how current framings of citizenship intersect with immigration practices, my examination of Kymlicka’s framing of Canadian citizenship will limit itself to the implications it holds for immigrants. In this light, it is therefore possible to draw three conclusions from Kymlicka, ultimately highlighting how Canadian citizenship is framed specifically with respect to its “newer” citizens.¹⁶

First, as previously mentioned, citizenship is differentiated. The terms of differentiation are informed by the source of culture as well as the nature of rights in question. Kymlicka distinguishes between two sources of culture — multinationalism and immigration. Multination states are composed of multiple nations co-existing within its

¹⁵ While the breadth of Kymlicka’s work involves projects on liberal theory, liberal multicultural citizenship, Canadian multicultural citizenship and more recently, international models of multiculturalism, my focus will be Kymlicka’s Canadian citizenship projects. While these projects do not exist in isolation and there is a significant deal of overlap, the purpose here is to explore the implications Kymlicka’s framing of Canadian citizenship hold for family immigration. Therefore, in the name of conceptual clarity, I am working from the distinction of Kymlicka as a liberal multiculturalist and Kymlicka as a Canadianist, and am focusing on the latter (Léger 2011). As such, Kymlicka’s work as a Canadianist will inform the discussions laid out in this chapter.

¹⁶ Kymlicka recognizes the vagueness of his use of the term “immigrant” and acknowledges that in his discussions of cultural groups and integration, immigrant refers to newcomers and refugees, as well as second, third, etc. generation Canadians. For Dhamoon (2009), Kymlicka’s use of immigrant is synonymous with non-white. For the purposes of this project, my focus on “newer citizens” refers to those who have immigrated to Canada. In this case, “new” simply means that I choose to focus on the process through which they gained access rather than their experiences with integration.
In a multination state, smaller cultures that fit within this understanding of nation form national minorities and while many states are considered multinational, recognition of national minorities is not necessarily obvious in a state's national psyche. States with high levels of immigration and a commitment to allowing immigrants to practice certain aspects of their culture publicly are what Kymlicka refers to as “polyethnic” states. What distinguishes multinationalism from polyethnicism is the fact that immigrant groups are not considered nations; as Kymlicka points out, contrary to nations, the distinctiveness of immigrant groups is accommodated primarily through their private lives (e.g. family, voluntary associations, etc.) and does not hinder institutional integration (1995, 14). While immigrant groups have a claim to cultural accommodation, these claims are usually made within the context of pre-existing institutions of the dominant culture.

In addition to the source of culture, Kymlicka highlights three different types of rights that diversify Canadian citizenship. First, national minorities have a legitimate claim to self-government rights. The aim of self-government rights is for these minority cultures to “govern themselves in certain key matters, to ensure the full and free development of their cultures and the best interests of their people” (Kymlicka 1996, 155). A second type of right is categorized as polyethnic rights which tend to involve social backing and legal recognition of various cultural practices. Similar to self-government rights, polyethnic rights are permanent; however, the aim of polyethnic rights is to encourage integration into society at large. Finally, the third and less developed type of right Kymlicka identifies is special representation. Non-ethnic social groups who believe the current system to be disadvantageous typically bring these claims forward. Special representation measures are

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17 Kymlicka defines “nation” as a “historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture” (1995, 11).
often temporary in that once groups are considered on an even playing field, equality is achieved.

Liberal theorists who take issue with his combining of group-differentiated rights and traditional liberal rights challenge Kymlicka’s three types of group rights. Kymlicka responds to his critics that this perceived conflict between liberalism and group rights is unfounded. The labelling of group-differentiated rights as “collective rights” is misleading because it suggests a single homogenous understanding of collective rights. It is here that Kymlicka (1995) distinguishes between internal restrictions (claim of a group against its own members) and external protections (claim of a group against the larger society). While both are considered collective, their objectives are quite different. Minority groups often use internal restrictions to limit the freedoms of its members. On the other hand, external protections act as safeguards for minority groups against decisions of the majority that can potentially generate inequalities between groups. For Kymlicka, external protections are a key feature of multinational and polyethnic states, and it is therefore an obligation of liberal states to endorse initiatives of this nature.

Kymlicka’s attachment to liberalism’s compatibility with minority rights stems from his belief that a rich cultural structure is a necessary condition for one’s conception of the good life. In this sense, minority rights have the potential to further liberal values if we equate freedom with culture.18 The social nature of Kymlicka’s interpretation of culture suggests that the survival of culture cannot depend on shared values alone; shared institutions are required as well. According to Kymlicka, the link between culture and one’s conception of the good life is this: individuals need the freedom and resources to lead their lives from the inside; however, they also need the freedom and capacity to question their

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18 Kymlicka defines culture as that which “provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both private and public spheres” (1995, 76).
beliefs. Culture provides the space to explore these options in a way that makes these options meaningful — “People can stand back and assess moral values and traditional ways of life and should be given not only the legal right to do so, but also the social conditions which enhance this capacity” (Kymlicka 1995, 92). Group-differentiated citizenship creates cultural structures for individuals to develop identities and beliefs that are integral to one's conception of the good life, a fundamental principle of liberal thought. Therefore, the emphasis should not be on deciding which cultures should be recognized and consequently which ones should not; rather, attention should be on developing a fair approach to supporting all societal cultures within a framework of external protections.

Kymlicka's theory of minority rights challenges the principle of "ethnocultural neutrality" which he defines as the idea that “the state is 'neutral' with respect to the ethnocultural identities of its citizens and indifferent to the ability of ethnocultural groups to reproduce themselves over time” (2001b, 23). For Kymlicka, ethnocultural neutrality is a myth, as liberal states have played and continue to play a dominant role in regulating culture. In order for the state to protect certain liberties enjoyed by its citizens, the state must promote a dominant social culture in order to maintain a sense of national unity. This balance between cultural pluralism and social cohesion does not come about naturally; it is the product of state policy (Kymlicka 2001b). It is therefore possible for liberal states to recognize multiple cultures within a single state.

This is not to suggest that recognizing claims for group-differentiated citizenship for minorities is a logical extension from liberal states abandoning their attachment to ethnocultural neutrality. Kymlicka accounts for this by contending that if we agree that liberal states should not be neutral with respect to culture, we should also agree that assimilation is an indefensible option. This principle rests on a Rawlsian interpretation of justice that underscores the significance of remedying unchosen inequalities. Consistent
with his distinction between national minorities and polyethnic groups, Kymlicka provides a justice-based argument in favour of non-assimilative approaches to recognizing both. For Kymlicka, the goal should be to “make sure that all national groups have the opportunity to maintain themselves as a distinct culture should they choose to do so” (2001b, 113). Decisions concerning which aspects of a societal culture should be maintained should be up to individual members; however, individuals should have the freedom and capacity to explore these options and for Kymlicka, this opportunity is not possible through assimilation. The state is therefore obligated to establish and promote a support structure for those cultural groups who choose to preserve their distinctive features. In this light, true equality for national minorities and polyethnic groups refers to differential treatment in order to eradicate systemic disadvantage.

An important caveat of group-differentiated citizenship is that it is not unconditional — “external protections are legitimate only in so far as they promote equality between groups by rectifying disadvantages or vulnerabilities suffered by the members of a particular group” (Kymlicka 1995, 152). Ultimately, a liberal theory of minority rights necessitates freedom within minority groups as well as equality between minority and majority groups. For Kymlicka, these qualifications are inherently consistent with liberal values and are cognizant of the limitations of liberal accommodation. By challenging the normative assumptions that liberal states should be impartial to cultural difference and assimilative practices are the only approach that will maintain this objectivity, Kymlicka develops a normative logic for a liberal theory of minority rights, the aim being “to define fair terms of integration for immigrants” (2001b, 55).

The second conclusion one can draw from Kymlicka’s framing of Canadian citizenship is that a just interpretation of citizenship only involves those who are living within Canadian borders. In other words, the obligation of the Canadian state to recognize
diversity within its understanding of citizenship applies only to those already granted access. A consequence of this is that the processes used to determine who is granted access, that being immigration policy itself, exists outside Kymlicka’s framing of citizenship. The way in which citizens-in-making are constructed has no bearing on the liberal state’s approach to acknowledging rights claims put forth by polyethnic groups — the focus of differentiated citizenship is those who have or do not have access to mainstream institutions rather than who has access to the state itself. While the implications of this will be discussed later in this chapter, it is important to note that the primary focus of Kymlicka’s citizenship frame is not how citizens become citizens, it pays attention to the degree of access to integration for already established citizens.

Finally, group-differentiated citizenship does not undermine social unity in Canada. Critics of Kymlicka’s frame assume there is a zero-sum relationship between one’s identification with their cultural group and their identification with society at large. These critics assume if you are attached to a group identity, you are less likely to identify with a larger national identity. For Kymlicka, this apparent trade-off between diversity and unity is deceptive for several reasons. First, it suggests that without differentiated citizenship, citizenship today would be homogeneous. The reality is that citizenship is in fact less uniform than presupposed and as such, is recognized by the state regardless of whether this recognition is officially declared by the state. Second, it ignores the very nature of rights claims made by immigrant groups, which are typically demands for inclusion. As Kymlicka contends, “Groups that feel excluded want to be included in the larger society, and the recognition and accommodation of their ‘difference’ is intended to facilitate this” (1995, 176). Third, it conflates “unity” with “stability” and in doing so, avoids entertaining what social unity without accommodation would look like. Kymlicka argues that if we look globally, states that recognize rights for minorities tend to be more politically stable — “It is
the refusal to grant autonomy to minorities, or even worse, the decision to retract an already existing autonomy that leads to instability” (2001b, 63). Fourth, it presupposes that with differentiated citizenship, immigrants are unable to possess multiple loyalties. For Kymlicka, not only is this empirically unfounded — immigrants tend to be some of the most patriotic citizens in their new countries — but it suggests that Canadian citizens are unable to have multiple cultural affiliations. Furthermore, it assumes that in order to be a “true” Canadian, citizens must cut all nationalist ties from where they came from. Lastly, it implies a single understanding of social unity. Kymlicka suggests an understanding of social unity dependent on shared values, stating that “obviously citizens of any modern democracy do not share specific conceptions of the good life, but they may share certain political values,” including a belief in equality, support for diversity, etc. (1995, 187). Kymlicka is not dismissing the pressures of social cohesion; however, he warns of approaching these questions through a differentiated citizenship/social unity binary.

Collectively, Kymlicka’s framing of citizenship is grounded in liberal understandings of individual autonomy and equality, focusing on the good of cultural membership and the responsibility of the state in facilitating this. While other scholars within the Canadian School vary in their approach, these themes remain present. For critical theory scholars, the focus on cultural membership as the sole source of identification has serious implications for how we theorize citizenship. Departing from Kymlicka and liberal multiculturalism more generally, the Critical School aims to frame citizenship so that it is capable of recognizing culture within a broader web of injustice, suggesting that citizenship is a producer rather than a protector of difference.

A critical race theorist and scholar of identity politics, Dhamoon’s work focuses on the limits of liberal multiculturalism in terms of recognizing the simultaneous production
and reproduction of difference through citizenship.\textsuperscript{19} Taking issue with Kymlicka’s reliance on culture, Dhamoon questions the utility of framing culture as the dominant social identity for citizenship. While culture is not irrelevant, it should not be the primary category of analysis in citizenship discourse. Ultimately, Dhamoon advocates the importance of identity-difference politics in framing citizenship and argues that:

\begin{quote}
It is necessary to make an analytic shift away from the current preoccupation with culture as an explanatory framework through which to grasp conflicts of difference to a critical examination of how meanings of difference are produced, organized, and regulated through power, and the effects of these meanings on socio-political arrangements (2009, 2).\textsuperscript{20}
\end{quote}

For Dhamoon, this is a shift away from the liberal multicultural politics of culture to a \textit{critical politics of meaning-making}. This frame explores how power creates and recreates difference and further, how these differences shape institutions, values, beliefs, practices, etc. Ultimately, this frame is critical in that it aims to deconstruct relationships between the oppressors and oppressed.

Dhamoon’s matrix of meaning-making informs her framing of citizenship, as she recognizes that membership inevitably involves social relations of difference. While difficult to extract a concrete theory of citizenship due to the fact that the nature of Dhamoon’s work is predominantly deconstructive, it is possible to draw out three considerations. First, citizenship must be differentiated, however, this differentiation must go beyond one’s

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\textsuperscript{19} Young (2009) makes a distinction between what she refers to as a structural inequality model (used by Dhamoon) and a societal culture model (used by Kymlicka), both approaches to understanding a politics of difference. The former is grounded in the belief that institutional blindness in the name of equality further perpetuates systems of oppression while the latter proposes equal treatment for all in the form of sameness. While I would argue that this characterization of Kymlicka is unfair as the above discussion highlights the use of differential treatment in his framing, it does involve an element of sameness in that there is a single standard of equality that all citizens should be able to meet.
\textsuperscript{20} Dhamoon defines power as “a relation spread through the socio-political body instead of something possessed by the state . . . it is productive, not just coercive . . . it produces subjects and subjects are vehicles of power” (2009, 11–12).
\end{quote}
cultural identity. A reliance on culture as the sole characteristic of one’s identity for the purposes of citizenship is challenging for several reasons. For starters, it suggests that culture is static. Culture from a liberal multiculturalist perspective adopts features of stability, formal structure and longevity (Dhamoon 2007, 31). It implies a pre-determined set of characteristics groups must embody in order to be viewed by the state as a genuine cultural group. This is of concern, as it privileges one set of differences over others; cultural identity takes precedence over identity shaped through racialization, gendering, ableism, capitalism, heterosexuality and heteronormativity (Dhamoon 2007, 32). Furthermore, it favours certain aspects of culture over others. Narrowly defining culture in these terms renders differences between as well as within cultural groups invisible. Liberal multicultural theory uses culture to identify non-Western cultures that seek inclusion within Western institutions. This understanding of culture therefore depends on a process of Othering — the Other desires recognition of their cultural differences so that they are able to integrate while the state portrays an image of tolerance and accommodation by recognizing the Other. Interpreting culture as fixed overlooks the reality that as the boundaries of cultural recognition shift, so too does the Other; if new boundaries are drawn, new Others are created (Arneil 2007). Culture is therefore in constant flux and to suggest otherwise "ignores the reality that cultures are composed of multiple modes of interaction beyond nationality, ethnicity and linguistic differences" (Dhamoon 2009, 23).

A second and related implication of Kymlicka’s narrowed use of culture is that this reliance requires him to justify why one’s cultural identity takes priority. As previously discussed, Kymlicka endorses group-differentiated citizenship on the grounds that culture is an invaluable resource for individual self-realization. Culture is therefore an individual good. Kymlicka’s naturalization of culture, according to Dhamoon, highlights the value of culture in one’s conception of the common good and suggests that culture is an entity that
can be measured and assessed, but it fails to sufficiently rationalize its perceived supremacy. This leads to generalizations about what constitutes culture, generalizations Dhamoon believes are impossible to construct. Focusing solely on culture forces liberal multiculturalists to unattainably defend a position which views culture as the primary factor in self-identification, which for Dhamoon creates theoretically weak and morally unjust arguments for recognition.

Finally, relying solely on culture depoliticizes relationships of power that continuously produce and reproduce the cultural Other. Within the parameters of a liberal multiculturalist framework, group-differentiated citizenship is encouraged so long as it fosters integration. For Dhamoon, the state regulates the cultural Other through processes of inclusion and while the goal might be integration, the motivation is not necessarily equality (2009, 36). Other motivations including neoliberalism (Abu-Laban and Gabriel 2002), racialization (Razack 1998; Thobani 2007), patriarchy (Bannerji 2000) and heteronormativity (Luibheid 2005) steer integration policy. Therefore it is essential that we understand the cultural Other in relation to these other processes of identity formation. If identity is difference, then we must recognize that difference is not uni-dimensional and not all differences are considered equally significant. Dhamoon believes there to be analytical utility in culture; however, it cannot be viewed as the primary process of identity formation — “We should not weigh culture differently or make it more fluid . . . instead we should work from a position that does not champion or dismiss culture, a position that understands culture within a matrix of power” (2009, 46). In order to accomplish this, Dhamoon outlines four questions posed by a politics of meaning-making:

- How are meanings of difference constituted relationally through discourse?
- How do forces of power constitute subjects differently and differentially?
- How are meanings of difference constituted in different historical contexts and how do these play in social-political arrangements?
- How are the penalization/privileging of these meanings of difference disrupted?
An account of meaning-making attempts to answer these questions by highlighting various processes that produce and reproduce difference. Furthermore, it explores the social aspect of identity formation, particularly the ways in which certain relationships of power are normalized. The politics of meaning-making works from the assumption that identity is not pure — “Identities are located through multiple arrangements of power in which most people are insiders and outsiders by virtue of intersectionality” (Dhamoon 2009, 39).

From there, difference is understood in a manner reflective of its multi-dimensionality, accounting for the reality that when it comes to relationships of power, the amount of privilege one has varies depending on the context. The individual can therefore simultaneously be the oppressor and the oppressed. When theorizing citizenship, it is imperative that we understand one’s position within this matrix in order to highlight how multiple relationships of power shape not only who we are, but stemming from that, how they impact our interactions with the state.

A second and related consideration you can draw concerning Dhamoon’s framing of Canadian citizenship is that the adoption of a citizen/non-citizen binary is insufficient. Through immigration, the state constructs a discourse of desirable and undesirable citizens. Cutting across lines of race, religion, sexuality, gender, class, sexual orientation, ableism and colonialism, this discourse becomes the foundation for rules that dictate how an outsider (those applying for immigration status) can become an insider (those who receive immigration status). Dhamoon uses the example of race to highlight the internalization of whiteness in Canadian immigration policy — “Whiteness works to make citizens out of

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21 Intersectionality theory attempts to theorize the ways in which multiple systems of oppression interact. By recognizing that these systems do not act interdependently of one another, intersectionality theory highlights how oppression and privilege can simultaneously co-exist (Crenshaw 1991).
subjects and subjects out of citizens” (2009, 73). It is essential to deconstruct discourses of whiteness in order to contextualize how categories of white, semi-white and non-white vary across time and space. Additionally, variation does not solely exist within the category of non-citizen; it also exists among those labelled citizens by the Canadian state. Processes of meaning-making produce understandings of the immigrant as “strange” and “strangers” while the host nation is perceived as benevolent — “The immigration system is a means of further distinguishing outsiders from insiders through a policy that is made by ‘us’ but applies to ‘them’” (Dhamoon 2009, 78). This suggests that citizenship is not a uniform status equally applied to all; there remain implicit and explicit distinctions between Canadian-born citizens and immigrant citizens. A politics of meaning-making therefore examines the meanings of difference that highlight these distinctions between citizens, potential citizens, partial citizens and non-citizens. If citizenship is about status, then immigration policy is about exclusion.

A final consideration in Dhamoon’s framing of citizenship is the importance of policy itself. While Kymlicka focuses on those who have obtained citizenship, Dhamoon takes a broader approach by examining how meanings, values, and beliefs shape our immigration policy and vice versa. The institutional make-up of immigration policy directly affects not only the development of policy but the ideals of citizenship as well (Dhamoon 2010). In this light, Dhamoon frames citizenship as a mechanism of security. Challenging Kymlicka’s view of security and multiculturalism as oppositional, Dhamoon contends that multicultural citizenship is part of a securitization project aimed at “regulating various degrees of difference” (2010, 256). Security is therefore a discourse of meaning-making and citizenship reinforces this discourse. Formally establishing a distinction between insiders and

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22 Whiteness is a socially constructed term that is often used to identify structural privilege. While often described as invisible in that whiteness is the “unmarked norm against which other identities are marked and racialized,” critical race theorists identify whiteness as a prominent organizer of power in the world (Rasmussen et al. 2001, 8).
outsiders, citizenship furthers Canadian nation-building projects of territory (legitimizing defined territorial boundaries), identity (securing the notion that Canada is accommodating of diversity), whiteness (intentionally or unintentionally reinforcing distinctions between white and non-white bodies) and economic development (establishing a space for Canada in the global economy) (Dhamoon 2010). Differentiated citizenship is therefore possible so long as it is regulated; toleration is not without limits. Citizenship and security are therefore “co-implicated in reiterating processes of normalization and Otherness that consolidate unequal relations of power” (Dhamoon 2010, 257).

While the prescriptive component of Dhamoon’s project is vague, it is obvious that citizenship must be framed in a way that recognizes the multi-dimensionality of one’s identity and the processes of difference responsible for its formation. In doing so, citizenship is framed as a process that cuts across multiple lines of identification. Therefore while citizenship might not be critical itself because it is implicated within this broader matrix of power, it is imperative that we frame it with a critical eye, as it relies on some form of Otherness in need of deconstruction.

Dhamoon and Kymlicka provide a snapshot of the tensions inherent in the Canadian Conversation and the impact these tensions have on the framing of citizenship in current scholarship. While not indicative of their theoretical camps as a whole, their dialogue is reflective of several trends in this body of literature. First, as Kernerman suggests, the framing of Canadian citizenship is polarizing, with scholars adopting either an equality-as-sameness or equality-as-difference approach. Kymlicka advocates for differentiated citizenship; however, this is so cultural groups are able to integrate into the dominant society and enjoy the same set of rights as the dominant group. Equality is therefore tantamount to rights. Dhamoon argues that accommodations aimed at integrating minority groups into the dominant society further entrench systemic injustices, as they reinforce
existing relationships of power. Without questioning the very existence of the dominant society, equality cannot be achieved because what constitutes the dominant relies consequently on the existence of an Other. True equality requires us to challenge these relationships of power and explore how social processes produce and reproduce difference. This polarizing equality-as-sameness versus equality-as-difference debate — with all of its contradictions as highlighted by Kernerman — is misleading because it presents citizenship as black and white. While these normative standpoints might suggest that citizenship be framed as either one or the other, in practice, citizenship in Canada is much more complex. The Canadian state’s use of citizenship is both uniform (access to a set of universal rights) and asymmetrical (processes used to determine who had access to these rights). Canadian citizenship is used to create commonalities among individuals while at the same time reinforcing differences. Therefore, the normative schism typically used to frame citizenship is misleading in that it disregards the reality that citizenship in Canada simultaneously adopts both positions.

A second trend is that it reproduces longstanding liberal-critical theory debates. Liberal multicultural framings of citizenship have witnessed increased scepticism regarding their ability to account for the complexity of cultural identity and to properly come to terms with issues of injustice. Critical theorists have attributed this to the frameworks’ narrowness in scope and limited focus on rights, the result being that unity among groups is less obtainable. Calls for interpreting citizenship as a network of interconnected social struggles highlight the various power relationships that exist in these negotiations between the state and its citizens. However, absent from these critiques of liberal multiculturalism are applicable prescriptions for a new framework, a blueprint for a citizenship framework capable of addressing these questions of injustice. This is indicative of liberal-postmodern tensions not only in regards to citizenship theory, but the majority of scholarly discussions
concerning state power. Liberals are often criticized for attempting to work within current systems while critical theorists for focusing their efforts outside. The Canadian Conversation therefore replicates these tensions, generating unaccounted for space between the two sides.

These trends highlight both the utility of Kymlicka and Dhamoon’s frameworks in addition to their limitations. My intention is not to discredit these two interesting and important bodies of work. Both represent significant contributions to our understanding of citizenship both in Canada and abroad. The objective here is to use these authors to highlight the questions currently being asked about citizenship in academic circles and explore the implications these questions present for our understanding of family as a site of citizenship. This brings us to a third trend, and focus for the remainder of this chapter — both sides of the Canadian Conversation rely on the individual as the primary unit of analysis. Kymlicka endorses group-differentiated citizenship; however, his arguments remain tied to liberal understandings of the individual in that while cultural groups may receive rights, these rights are justified as providing the space for meaningful individual self-realization, the good of cultural membership. Similarly, Dhamoon’s focus on the relationship between power and identity construction encourages us to avoid making any type of group-based generalizations; rather, we should understand citizens as individuals implicated within broader systems of power. While their approaches differ in terms of where citizenship begins, the focus is on the position of the individual citizen with respect to liberal-democratic conceptions of the good (Kymlicka) or intersecting processes of privilege and oppression (Dhamoon). In the context of immigration, framing citizenship around the individual has obvious utility, as thousands of individual immigrants are welcomed into Canada every year; however, relying solely on the individual disregards the role of family, a significant source of immigration in Canada, in the construction of citizens — “The
discourse of migration is shaped by an array of variables, such as relationship to family and kin” (Stychin 2000, 604). How we frame citizenship has consequences for family reunification. The way in which family reunification is structured has an influence on who can immigrate and ultimately become a citizen; the state is not only creating citizens, but families as well. When it comes to family reunification, the “ideal” citizen is therefore synonymous with the “ideal” family type.

Scholars have attributed the absence of family in citizenship discourse to the general perception that family, located in the private sphere, is positioned outside the parameters of state control. Labelling family as “private” allows the state to bypass certain responsibilities; however, as this dissertation will demonstrate, state involvement with family is selective. In the case of immigration, it is imperative that we acknowledge “family as a key locus for state power and domination over immigrants” (Luibheid 2004, 229). This is echoed by Pessar who commented, ”The common claim that the immigrant family is an adaptive social form .. . diverts our attention from the important task of analyzing legislation and government policies that effectively block or limit the formation, unification, and material well-being of immigrant families” (1999, 583–84). In order to understand the relationship between family and state power, we must re-conceptualize this traditional logic of the public/private divide.

The work of sexual citizenship scholars provides a useful starting point for approaching this connection between citizenship and conjugality. Despite sexual citizenship being a more recent term, citizenship has long been a component of sexual politics — “All citizenship is sexual citizenship, as citizenship is inseparable from identity, and sexuality is central to identity” (Bell and Binnie 2000, 33). The central tenet of this framework is the belief that because citizenship is grounded in ideals of sexuality, citizens are constantly being “sexed”. By establishing specific conditions through this process of sexing, individuals
are categorized as “good” and “bad” citizens. What distinguishes them is the notion of sexual responsibility. Those who are responsible in their sexual endeavours represent ideal sexual citizens. This theoretical framework suggests that the state privileges certain sexual relationships in order to enforce citizenship defined through sexual practice. Constructing a discourse grounded in the creation of “good” and “bad” sexual citizens results in unequal access to claims for citizenship rights, therefore shaping sexual identities through processes of membership, compromise and exclusion.

Conceptualizations of sexual citizenship pose a new approach to understanding the public/private divide — “The sexual citizen makes a claim to transcend the limits of the personal sphere by going public, but the going public is, in a necessary but nevertheless paradoxical move, about protecting the possibilities of private life and private choice in a more inclusive society” (Weeks 1998, 37). Sexual citizenship claims use the public sphere to obtain a private space for the individual in question. This is what Weeks refers to as the “moment of transgression” — transgression occurs when the challenging of social norms (e.g. challenging what constitutes a “good” sexual citizen) results in adhering to the status quo (obtaining citizenship) (1998, 35). Weeks’ work on sexual citizenship as a form of transgressive politics has been challenged by several theorists (M. Warner 1999; Richardson 2000; Bell and Binnie 2000). Despite these criticisms, the value of Weeks’ work remains in his discussion about the creation of space. Relationships that do not fall within the parameters of what is believed to be “normal” are denied space.

Richardson (1996, 2000) echoes Weeks’ belief that citizenship discourse influences sexual politics. Furthermore, the majority of conceptual frameworks used to theorize human relations assume a naturalized understanding of heterosexuality, the result being
that heterosexuality is rarely problematized (Richardson 1996, 1). By recognizing that the framing of citizenship is inherently heteronormative, sexual politics has provided new scholarly possibilities. Richardson (2000) identifies two bodies of literature that deal with the relationship between sexuality and citizenship — that which focuses on rights and that which looks at broader implications of inclusion and exclusion. Within the first grouping, Richardson outlines three streams of sexual rights: conduct (practice)-based, identity-based and relationship-based. For the purposes of this project, I will turn my attention to the last stream.

While the language of rights predominantly focuses on the rights and responsibilities of the individual citizen, there are citizenship rights granted on the basis of relationships (Delphy 1996; Richardson 2000). While there are some exceptions, the conjugal couple is the norm against which these rights are gauged. Relationship-based rights claims fall into three categories. The first is the right of consent to sexual practice in personal relationships. Not to be confused with the right to engage in sexual practice — which Richardson classifies as a conduct-based rights claim — age of consent dictates the age when one is legally recognized as a sexual citizen with the right to participate in sexual conduct in personal relationships (2000, 123). Consent laws are gendered and sexualized, as they are often set at higher ages for certain types of personal relationships (e.g. higher age of consent for girls, male homosexual relations, etc.). The second claim is the right to freely choose one’s sexual partners. Having reached the age of consent does not necessarily mean the individual now has the freedom to engage in sexual conduct with any consenting partner. There remain restrictions on who has a legitimate claim to a sexual partner. The final claim is the right to have one’s sexual relationships publicly recognized should they

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23 Johnson (2002) makes a similar argument that the heterosexual nature of citizenship connotes processes of performativity. Passing as a heterosexual reasserts heteronormative privilege.
choose to do so. While same-sex marriage movements have adopted this claim, the question of social legitimacy and institutional support for non-heterosexual marital relationships affects various types of personal relationships.

Sexual citizenship is defined by individual responsibility and that responsibility is monitored by one’s intimate relationships. A sexual citizenship framework highlights the ways in which intimate relationships are simultaneously privatized and publicized through state policy. This framework has been used to contextualize debates surrounding same-sex marriage (M. Warner 1999; Bell and Binnie 2000; Brandzel 2005), the sexual citizen in popular culture (Cossman 2007), the rise of homonationalism and its impact on the creation of transnational bodies (Massad 2002; Puar 2007), queer diasporas (Halberstam 2005), and alternative citizenship projects capable of accounting for multiple sexual identities (Klesse 2005, 2007; Mackie 2001; Noel 2006; Phelan 2001; Plummer 2003). By challenging the public/private divide, sexual citizenship theory troubles traditional understandings of family. Ultimately, this framework proposes that instead of approaching family as a single universal entity, family ought to be interpreted as a “subjective reflection of contemporary reimaginings,” recognizing that there is “no simple continuum of public to private” for familial recognition (Sempruch 2011, 162).

A recent academic development is the adoption of sexual citizenship theory to critique current immigration policy in the United States. Immigration produces “foreignness” which for Honig (2001) is both a source of stability and instability for the American nuclear family. In terms of stability, family reunification enables the state to “create hetero-patriarchal relations for the recruitment and socialization of labour,” therefore reproducing specific state values through the provision of access (Reddy 2005, 103). This sense of stability is simultaneously compounded by elements of instability. While immigrants are prone to adopt conservative values with respect to familial make-up,
constant threats of Otherness challenge traditional family practice. Discussions of Otherness are therefore context specific. Recent work on American immigration has highlighted the way in which Otherness defined by sexuality shapes immigration processes which in turn influence state constructions of citizenship (Luibhéid 2002, 2004, 2005; Abrams 2005; Luibhéid and Cantù 2005; Epps, Valens, and Johnson-Gonzalez 2005). Luibhéid (2005) attributes this to a heteronormative logic within policy frameworks. This is evident throughout American history with the enactment of the Page Law (1875), the Chinese Exclusion Act (1882), the Familial Sponsorship Agreement with Japan (1908) and current attitudes towards homosexual applicants. These policy initiatives marked and continue to mark particular groups of individuals based on sexual stereotypes as outsiders. In this light, immigration control is not solely about securing the state from potential threats, it also acts as a mechanism for “constructing, enforcing, and normalizing dominant forms of heteronormativity while producing figures as supposed threats” (Luibhéid 2008, 296).

According to Luibhéid and Cantù (2005), the exclusionary nature of American immigration policy has two main implications. First, discriminatory immigration laws are grounded in discriminatory citizenship laws, both reinforcing each other. Second, marked citizens are stripped of any sense of national belonging. Ultimately, the state ascribes membership to those whose sexual values correspond with national values, denying outsiders symbolic worth.

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24 Luibhéid defines heteronormativity as “a range of normalizing discourses and practices that seek to cultivate and privilege a heterosexual population while nonetheless insisting that heterosexuality is ‘natural’ and timeless rather than a product of economic, society, culture and political struggle” (2008, 296). For Luibhéid, immigration scholarship disregards connections between heteronormativity, sexuality and immigration, despite the fact that sexuality “structures every aspect of immigrant experiences” (2004, 227).

25 Stevens (1999, 2010) shares a similar view in that the “state” and “nation” mutually reinforce each other. For Stevens, “the familial nation exists through practices and often legal documents that set out the kinship rules for particular political societies” (1999, 108). By shifting away from conceptualizing the two as separate, we can understand how
Similarly, scholars of immigration law in the Netherlands have focused their attention on the way in which family is defined through the provision of citizenship. The overlapping of Dutch immigration law with European human rights law and European Union immigration law has complicated family reunification, sparking a debate over what legitimately constitutes kinship. Concluding that immigration policy is shaped by particular assumptions about the relationship between family and the state, these studies have highlighted the inconsistent treatment of family reunification applicants through measures such as the “effective care” criterion (van Walsum 2009). This initiative stipulates that traditionally defined kinship (e.g., kinship via birth or marriage) is no longer sufficient. Dutch immigration authorities must now assess whether an affective family bond exists. While on the surface this may seem intuitive, the effective care criterion has consequences for those family units who are separated by conflict, employment, familial circumstances, etc. The result is that a specific version of family is privileged and certain family norms are “in many cases determinate for citizenship” (van Walsum 2003, 213). While this research is not limited to the Netherlands and the United States, these studies exemplify that while family reunification policies differ, the shared assumption is that there are perceived national family values in need of protection.

In addition to examining the provision of citizenship within state boundaries, we must also account for interactions between states. As our world becomes increasingly globalized, citizenship shapes not only the relationships between citizens and the state, but also relationships between states. It is therefore imperative that examinations of citizenship recognize that the “power relations that underlie national citizenship are not confined to dynamics within the nation-state and instead reflect and reinforce global relations of power such as the hierarchy of states in the overarching world system of states, and the migration rules shape and reproduce specific interpretations of sexuality via nationalist discourse.
increasingly transnational character of resistance in civil society” (Bakan and Stasiulis 2005, 13). In this light, citizenship takes the form of a negotiation monitored by “gatekeepers” — both state and non-state actors — who establish and reinforce mechanisms for determining access.\(^{26}\) It is through these negotiations that “foreignness” is both produced and regulated, as states alter definitions of “who gets in” in order to further nationalist projects at any particular time (Honig 2001; Abu-Laban and Dhamoon 2009).

This feeds into what Puar (2007) refers to as “sexual exceptionalism” — state inclusion of specific queer citizens to further nationalist projects. In times of national crisis, states often incorporate previously excluded individuals into the dominant population in order to portray a united front. A recent example is the insertion of “homonationalism” — instances of sexual normalization in which the state accepts certain queer identities, with the aim of protecting and expanding its empire — in American nationalist politics post-9/11. Here, Puar contrasts the Muslim terrorist against the free American citizen; the Muslim terrorist represents the sexual intolerance of non-Western states, while the included American queer (read white, affluent and male) represents the rights supporting, morally sound practices of the United States (2007, 2–11). Sexual exceptionalism therefore elevates select Western sexual identities but at the cost of refusing access to those sexual identities both inside and outside state boundaries considered “un-assimilative”.

This discussion of citizenship-as-negotiation and sexual exceptionalism reinforces earlier critiques of the Canadian Conversation’s reliance on the already established citizen. An account of the non-citizen is typically overlooked in this body of literature; focusing instead on the privileges that follow from citizenship and how membership is used to dictate who has access to these privileges. This scholarship draws attention to questions of

\(^{26}\) I borrow the term “gatekeepers” from Bakan and Stasiulis who claim that these individuals, organizations, etc., “interpret information and influence future policy changes that have a direct impact on the socially and politically constructed ‘needs’ and citizenship rights available to families” (2005, 63).
fairness concerning state distribution of privileges and rights to its citizens, but fails to address the circumstances that allow for the provision of membership in the first place — a common flaw of citizenship theory (Stevens 1999; Stychin 2000; Dhamoon 2009). In addition to constructing the “good” sexual citizen, states simultaneously construct the “good” sexual non-citizen. The “good” sexual non-citizen seeking access to the Canadian state through family reunification is therefore expected to conduct their personal life in a manner consistent with that of the “good” sexual citizen prior to even being considered for inclusion.

Undoubtedly, this way of approaching citizenship embodies Foucauldian undertones. Systems of sexual regulation are normalized, so entrenched in our institutions and social practices that eventually it becomes difficult to determine where state power begins and social influence ends. An example of this is the institution of marriage. While conjugality has not always been of primary interest to the state, it has become a means of reinforcing social and political structures through ritual (e.g. dowries, patriarchal division of labour, etc.) and active exclusion (e.g. refusal of access based on race, class, sexual orientation, etc.). These structures exist because there is a perceived social need for them. Therefore the idea that conjugality is crucial to the maintenance of the state becomes internalized, generating norms that are not only produced and reproduced by state actors, but also by non-state actors as well. This demonstrates the influence normalization has on governing — “Normalization has become one of the great instruments of power” (Foucault 1979, 184). While marriage in Canada has been extended to include common-law and same-sex couples, conjugality remains normalized through institutional and social practice. As this project will demonstrate, how we define conjugality has implications for personal relationships in terms of those internalized as socially acceptable and consequently, those that are not. Through normalization, conjugality becomes a way to “document the
judgement, that the practice of marriage (or in this case marriage-like relationships) (sic) is general or at least widespread in the dominant strata of the population” (Foucault 1988, 74).

Conjugality becomes a system of knowledge through which individuals are able to know themselves. It is here that recognizing family is crucial for our framing of citizenship. For Foucault, there are two concurrent discourses at play — a discourse that regulates state alliance and a discourse that aims to discipline behaviour. These discourses amalgamate within family, "the site where state power has penetrated into the most intimate domains of modern life, producing a society in which the population is governed by the individual governing the self” (van Walsum 2008, 20–21). Family is therefore integral to conceptions of state power and citizenship, as it is a prominent site for the production and reproduction of state power. Family, and arguably conjugality, are essential to the maintaining of Canadian citizenship. Foucault also heavily influences Dhamoon’s work, particularly in her understanding of power as a web of intersecting relations. Where Dhamoon’s work differs is in her focus on the state’s interest in regulating individuals and the implications this has for individual identity formation. While this is an aspect of sexual citizenship theory, scholars (Weeks 1998; Richardson 2000; Bell and Binnie 2000; Phelan 2001; Plummer 2003) — who in framing citizenship have turned their gaze towards the implications state regulation of identity has for one’s relationships — highlight the complexity of citizenship in influencing not only how one identifies one’s self to the state, but one’s relationships as well.

There is a piece missing in the Canadian Conversation — family, an integral component in the provision of citizenship, is non-existent. While Dhamoon provides a starting point for understanding the relationship between citizenship and identity formation, the role of families in the determination of access to citizenship requires attention. The purpose of this project is to demonstrate that the connection between
citizenship and family merits focus; the concept of citizenship becomes even more complex when we consider the ways in which a “private” development (family formation) influences a “public” action (claiming citizenship). It is therefore imperative that we deconstruct longstanding tendencies of citizenship scholarship in Canada and examine where and how family fits in the Canadian Conversation.

**Situating Families in the Canadian Conversation: Important Caveats**

Developing a theory of Canadian citizenship capable of recognizing the role of family requires identifying several prominent tensions present in discussions of family. These tensions include the apolitical nature of family, perceived inflexibility of family composition, the relationship between care and family form, and the notion of public stake in private family life.

1) **The Apolitical Nature of the Family Unit**

Understanding the relationship between citizenship and familial immigration requires recognizing that one has implications for the other and ultimately moving away from this idea that family remains an apolitical institution. Stevens (1999) examines how the public/private dichotomy is often synonymous with a kinship/political society dichotomy in political science scholarship, with kinship being relegated to the private sphere and political society to the public. Traditionally, labelling something as “public” suggests that a relationship of power exists. Therefore by consequence, kinship, family, and marriage, are concepts perceived impermeable to state influence. Applying the public/private binary to political science and kinship is misleading because it assumes kinship to be pre-political. Echoing Stevens, I argue that these concepts are political and play an influential role in state development by shaping rules of affiliation.
2) The Perceived Inflexibility of Family Composition

In addition to abandoning traditional understandings of the public/private divide, this re-framing of citizenship must also account for the fact that family is not static. Answers to the question “what constitutes family?” vary across ideological lines. As a result, the relationship between the state and family takes on multiple interpretations. Providing a more conservative approach, Collins and Coltrane outline four justifications for protecting the traditional nuclear family: childrearing, economic survival, moral/natural cohabitation and monogamous intimacy (1988, 25).

Childrearing

Raising children out of wedlock is seen as socially unacceptable; children are legitimate when born to married parents (Collins and Coltrane 1988, 32). While this position shifted with the legalization of common-law status, an attachment to two-parent childrearing model remains. Typically rooted in traditional Christian values, the belief that healthy families breed healthy children has become part of a common sense rhetoric imbued with cultural and nationalist undertones. This narrative assumes heterosexual conjugality to be the ideal site for social reproduction, as it “provides the foundation for a family” (Lyndon-Shanley 2004, 3). Butler discusses how the nuclear family as the primary focus of social reproduction is tied to Western claims of cultural survival — “The belief is that culture itself requires that a man and a woman produce a child and that the child have this dual point of reference for its own initiation into that symbolic order, where the symbolic order consists of a set of rules that order and support our sense of reality and cultural intelligibility” (2002, 29). In addition to the preservation of cultural identity, the nuclear family provides conceptual clarity. If two people are in a conjugal relationship, it is assumed that the male is husband to his wife and father to his children (Stevens 1999, 72). Conjugality therefore becomes a relatively straightforward way to organize familial
affiliation. This link between conjugality and childrearing shapes discourse surrounding the impact this deterioration of the nuclear family has on social well-being. Interestingly, this dialogue tends to focus on the endangerment of the father figure. Describing fatherhood as “society’s most important role for men,” Blankenhorn contends that fatherhood produces good men and children, arguing that a father’s contribution of physical protection, material resources, daily care and cultural identity enhances the well-being of children, in effect turning them into model parents/citizens (1995, 25). It is important to note that this interpretation of fatherhood is premised on gendered stereotypes of maleness and masculinity. As a result, fatherhood is synonymous with heterosexuality; straight fathers make for ideal role models. By advertising the nuclear family as the idyllic environment for raising children, the conjugal family form is normalized.

Economic Survival

Feminists have argued that conjugality is essentially used by the state to privatize the dependency of women and children on men (Fineman 2001, 47). Historically, the law made it impossible for women to be economically self-sufficient, undermining their ability to be independent. Marriage, as Pateman explains, was “their [women’s] only hope at a decent life,” establishing marriage as “nothing more than the law of the strongest, enforced by men in contempt of the interests of weaker women” (1988, 158). While the legal system as well as the institution of marriage more specifically has undergone changes to rectify gender discrimination, the marriage project continues to be pushed on citizens by their governments as a form of economic survival.27 Furthermore, the continued unequal economic status of women — as compared to men — reproduces gendered cycles of dependency (Little 2011). This is not to suggest that all marriages are economically

27 I borrow the term "marriage project" from Cossman who argues that popular culture has framed marriage as a type of self-betterment, an opportunity to “assume responsibility for the pursuit of your well-being” (2007, 73).
unbalanced or that all husbands use this inequality to their advantage; however, this does not detract from the patriarchal nature of the institution itself. As Delphy contends, “The particular individual man may not play a personal role in this general oppression, which occurs before his appearance on the scene; but, reciprocally, no personal initiative on his part can undo or mitigate what exists before and outside his entrance” (1984, 116). Marriage therefore continues to be a way for the state to privatize economic disadvantage in a way that is inherently gendered.

A more recent example of this is the passing of the 1996 Personal Responsibility Act (PRA) by the Clinton administration in the United States. Under the PRA, single mothers applying for welfare must provide information about the biological father so that child support payments can replace state welfare payments (A.-M. Smith 2001). The result is that once the biological father has returned to the picture — typically not by choice — the family in question is no longer eligible for assistance. Additionally, if a single mother is cohabiting with a man, she fails to qualify for social assistance regardless of their relationship status; the assumption being that all the children a woman might have were fathered by the male she is currently residing with and that male is economically supportive of those children. Those women who do not need social assistance, of course, are not obliged to divulge personal information about biological fathers or marital status at any time. The PRA works under the supposition that the nuclear family is a source of economic interdependency, ultimately letting the state off the hook for addressing issues of individual economic disadvantage. This policy not only has implications for discourses surrounding mothering and motherhood (Fineman 1995; A.-M. Smith 2001), but for fathering and fatherhood as well (Haney and March 2003). Marriage as a poverty solution relieves state burden to sustain citizens financially, making the nuclear family an assumed source of economic support.
Cohabitation as Moral and Natural

In defense of marriage, conservative theory contends that the individual cannot survive physically or mentally by him/herself (Collins and Coltrane 1988, 282). Cohabitation therefore provides the support required for the individual to succeed. This claim comes with an important caveat — cohabitation is only desirable so long as it is marital cohabitation. Cohabitating out of wedlock is considered both unnatural and morally corrupt. In reaction to the legalization of common-law status in Canada — a decision that challenged the idea that cohabitation is for married couples only — cohabitation became entwined with conjugality (Cossman and Ryder 2001). Apprehensive that expanding the definition of cohabitation would give anyone living together a claim to the same benefits married couples previously enjoyed, Canadian courts defined cohabitation as "the social and familial aspects of the relationship" (Bailey 2004, 159). Cohabitation therefore became something measurable. While systems of recognition for non-married cohabiting couples vary across Canada, the physical act of living together remains a constant in assessment.

Monogamous Romantic Love Between Two People

It is important here to distinguish between monogamy and love, as it is misleading to view them as synonymous concepts. While monogamy has been internalized as common sense, its primacy is taken for granted — "The predominance of monogamy was by no means a forgone conclusion" (Cott 2000, 9). Many cultural groups shared no preference for monogamous practices (Cott 2000; Carter 2008; Bailey and Kaufman 2010). Ethnographic studies on Aboriginal groups in late-nineteenth century Western Canada highlight the diversity of intimate relationships including monogamy, polygamy, same-sex marriage, divorce and re-marriage (Carter 2008, 5). Additionally, newly settled groups in the West had domestic units different from the monogamous model. Mormons, who view polygamy as God's instruction, had migrated from the United States and advocated for the state to
provide similar protections to that of monogamous relationships (Cott 2000, 105). Equating monogamy with civility, architects of this new Canadian region set out to curb non-monogamous practices through laws aimed at establishing monogamous marriage as the sole socially acceptable relationship type — “The health and wealth of the new region, and that of the entire nation, was seen as dependent on the establishment of the Christian, monogamous, and lifelong model of marriage and family” (Carter 2008, 8). Monogamous marriage therefore became part of the Canadian national agenda, a state project. Today, monogamy as Canadian common sense continues to be challenged, most recently with a constitutional challenge to section 293 (the illegality of polygamy) of the Canadian Criminal Code in a British Columbia provincial court. Ultimately, monogamy has become a form of state governance, used by the state to pursue its objectives.

In terms of marriage as part of a national agenda, the state is uninterested in the presence or absence of romantic love. According to Cott (2000), romantic love was initially viewed as an impediment to the higher virtues of political reality, religious devotion and a strong work ethic; it was not until the nineteenth century that love was accepted as normal and almost universally attainable. Love was therefore never the original purpose for state-recognized marriage for two reasons. First, love is not quantifiable. The challenge of using love as a justification for the status of marriage is that emotions are difficult to measure and are present in varying degrees. The second reason that love is not a primary characteristic of state-recognized marriage is because love is not enough — “If love is a commitment between persons which provides emotional support, then it is obvious that traditional marriage is not the only institution that can nurture it” (Bird 1979, 47). If relationship recognition were solely about love between individuals, it would be difficult to justify the privileged status of marriage. When love is considered, it is assessed in relation to other
characteristics of state-defined marriage; furthermore, it becomes intertwined with monogamy. Appropriate love according to the state, is monogamous love.

What is at stake in the politics of relationship recognition is not love; rather, it is desire. Desire in reference to what compels the state to recognize certain relationships and not others, and conversely, who can desire the state’s desire (Butler 2002, 22). The state’s reliance on a particular family unit qualifies certain individuals’ desires as worthy of recognition — “The state becomes the means by which a fantasy becomes literalized: desire and sexuality are ratified, justified, known, publicly instated, imagined as permanent, durable” (Butler 2002, 22). The state uses conjugality to validate specific forms of desire over others, not only in the form of sexual desire, but state desire as well. Conjugality dictates which relationships warrant state attention. By paying attention to some relationships and not others, the individual and their relationship is publicized, as the individual is obligated to compete for universal recognition (Butler 2002, 23). In this sense, recognition is closely associated with the stripping of privacy. While notions of love and desire are often conflated, love is not the primary characteristic of a state-recognized relationship.

These four functions of the traditional nuclear family (childrearing, cohabitation, economic survival and monogamous love) are perceivably under threat by modern changes in family dynamics. Conservative scholarship has attributed a perceived rise in social ills (e.g. crime, same-sex rights, teen pregnancy, etc.) with the deterioration of the traditional nuclear family. Moral decline is directly related to a shift from the heterosexual, two-parent family model to alternative family forms including (but not limited to) divorced, same-sex, single parent, blended and extended families. Social conservatives in Canada and the United States oppose the extension of marital rights to cohabiting and same-sex couples, arguing that this shift reduces heterosexual marriage to a personal relationship between individuals.
This reduction represents “a fundamental reinterpretation of the core social purposes of marriage” (Cere and Farrow 2004, 13). The loss of the heterosexual conjugal unit has been labelled the catalyst for the deterioration of the nuclear family, sparking pro-family movements focused on the re-entrenchment of the nuclear family model. While the American pro-family movement has enjoyed more success than its Canadian counterpart — a result attributed to variations in their political institutions — Canadian pro-family activists continue to warn of the consequences this deterioration holds for society at large (Fetner and Sanders 2011).

Critics argue that this connection between the nuclear family and societal destruction is embellished and question the very existence of this family unit as a nostalgic starting point. Coontz examines how advocates of the pro-family movement “continue to filter our changing family experiences and trends through the distorted lens of historical mythologizing about past family life” (1992, xi). The challenge with this is that it becomes difficult to pinpoint exactly what constitutes the “traditional family”. Even if we are to agree that the traditional family refers to the heterosexual married couple with 2.5 kids and a dog, that very unit has undergone significant transformation. From a feminist perspective alone, this unit has shifted from an inherently patriarchal environment to one reflective of increasing women’s rights both inside and outside the home. Additionally, family dynamics have been altered along the lines of class, race and sexual orientation. This return-to-a-traditional-family rhetoric is therefore void of substance, as the idea of a single traditional family unit is ultimately a myth. Furthermore, the inability to agree on a single point of reference in this debate complicates claims that families are changing for the worse (Coontz 1992,14). In order to understand the role of family, it is important that we “get past abstract nostalgia for traditional family values and develop a clearer sense of how past families actually worked and what the different consequences of family behaviours and values have
been” (Coontz 1992, 22). It is evident that we as individuals and as members of a state have a vested interest in the familial unit; what that interest is has yet to be determined.

In reality, the state of family is in constant flux, reflective of a growing body of literature focused on the changing nature of families along racial lines (Bakan and Stasiulis 1997; Razack 1998; Thobani 2007), economic lines (Sapiro 1990; Mink 1990; Lahey 2001; Hymowitz 2006; Little 2011), and queer lines (Butler 2002; Plummer 2003; Stacey 2004; Rayside 2008). This in turn sparked discussions concerning the relevancy of conjugality (Warner 1999; Cott 2000; Brook 2002, 2007; Lyndon-Shanley 2004) and the legal treatment of relationship recognition more generally (Cossman 1994; Cossman and Ryder 2001; Law Commission of Canada 2001; Bailey 2004; Barker 2006; Polikoff 2008). Theorizations of family composition have gone beyond focusing on blood and marital ties to explore how kinship is increasingly being defined by alternative relationships of care (Weston 1991; Smart and Neale 1999; Roseneil and Budgeon 2004; Weeks, Donovan, and Heaphy 2004; Smart 2000). Whether family is now considered a “pure relationship” in which sexual and emotional equality has been achieved (Giddens 1992), a post-familial entity that recognizes the antiquity of obligations/relationships in families past (Beck-Gernsheim 1998), or a personal community distinguishing between given and chosen relationships (Pahl and Spencer 2004), the ways in which individuals develop and nurture these relationships are multiple. In theorizing the role of family in (re-)producing citizens, it is therefore imperative that we recognize that family is not a single homogenous unit and more importantly, it never has been.

3) The Relationship Between Care and Family Form

My approach to this project therefore assumes that family dynamics are constantly shifting and furthermore, that we are now in a position to recognize that the politics of care does not necessarily dictate a specific family form. While traditionally, families were seen as
an automatic source of support (financial, emotional, personal, etc.), it has become evident that quite often, individuals look for support outside these networks (Finch 1989; Smart and Neale 1999). In their study of alternative relationships in the United Kingdom, Roseneil and Budgeon (2004) examine the replacement of traditional nuclear families with alternative forms of interdependency. Their study followed the lives of three kinship networks: Karen and Polly, co-parenting single mothers; Dale, a homosexual male whose “kinship network” consists of his friends, sister, ex-partners and ex-lovers; and Eleanor, a lesbian who recently battled cancer and is living with her gay brother’s ex-partner (2004, 144–5). For Roseneil and Budgeon, these relationships symbolized a new understanding of support. Family was not defined by marital or blood ties; rather, it was interpreted as systems of interdependency — “There was a high degree of reliance on friends, as opposed to biological kin and sexual partners, particularly for the provision of care and support in everyday life” (2004, 146). While these scholars might take offence to the fact that I choose to label these relationships “family”, as they claim these examples highlight the “extra-familial, radically counter-heteronormative nature” of familial relationships (Roseneil and Budgeon 2004, 137), I use their study to suggest that if we agree that family is about these links of interdependency and support, then we must recognize that what constitutes family is broader than we often admit in political science scholarship. Therefore, for the purposes of this project, family is defined as “vital social structures made up of specific individuals with specific interests who together generate their own normative registers concerning social responsibility” (van Walsum 2003, 223). Furthermore, this project reflects Sempruch’s position that “if care, in its full complexity, is to be understood as a set of social relations that shape and are shaped by access to variously defined citizenship rights, such as sexual, socio-cultural, and political citizenship, then all three aspects must be targeted
simultaneously” (2011, 167). The complexity of care requires adequate attention in citizenship discourse; it is essential that we avoid reproducing a one-size-fits-all approach.

4) Public Stake in Private Family Lives

Finally, I borrow Carens’ (2003) three normative principles for family reunification policies in liberal democratic states to guide this project in its exploration of the relationship between family, immigration and citizenship:

- Family reunification is about the moral claims of insiders, not outsiders;
- In addition to their interest in family life, people also have a deep and vital interest in being able to continue living in a society where they have settled and established roots;
- No one should be forced by the state to choose between home and family.

Making a case for justifiable moral limits to immigration policy, Carens challenges the perceived neutrality of family reunification and advocates for moral checks on states in their determining of who receives access. This conflict between moral guidelines and state sovereignty reflects “a tension between an approach to the definition of family that is open to analogies, cultural variability, and functional equivalents and an approach that is fixed and relies on criteria from the dominant culture” (Carens 2003, 98). While subsequent chapters will challenge these principles in certain respects, Carens’ illustration of the relationship between state power and moral responsibility poses two questions this project aims to answer:

- In the case of family immigration, how does the Canadian state behave towards potential immigrants whom the state has no special obligation to admit?
- In the case of family immigration, how should the Canadian state behave towards potential immigrants?

The assumption here is that with respect to family reunification, there is public interest at stake. The right to family reunification is a moral good, essential to individual well-being — “We are bound to our family members through a more richly complex web of relationships, a mixture of love and dependence, than we share with any other people . . . To deprive someone
of these relationships is to deprive him[her] of his[her] (sic) richest and most significant bonds with other human beings” (Meilaender 2001, 182). In this sense, we need to consider the idea of “doing family” instead of “being family”; recognizing family as performative allows us to explore “possibilities for understanding families as networks of love, support, and work, regardless of gender, blood, or marital ties” (Krull 2011, 28). It is important to explore the implications these normalized fantasies about the nuclear family have for citizenship, as they are guilty of maintaining “the heterosexist foundations of sexual difference and of private versus public space” (Sempruch 2011, 152). My project builds upon these assumptions and attempts to expand liberal understandings of family through a discourse of citizenship. It therefore aims to bridge the gap between liberal and critical theoretical tensions as discussed earlier in this chapter; it echoes liberal rhetoric of morality and public good but is simultaneously critical of current state frameworks used to translate this dialogue into actual policy practice.

**Conclusion**

As a disciplinary institution, family can compliment state objectives; however, it can also frustrate them (van Walsum 2003, 223). Citizenship is no exception. Family is defined through immigration policy but it also challenges policy to be more inclusive as family dynamics continue to shift. Despite its role in creating citizens, family remains absent in Canadian citizenship literature. Liberal and critical scholars alike have failed to acknowledge the position of family in determining citizenship. My dissertation aspires to rectify this by providing a detailed account of the ways in which family is used to (re-)produce Canadian citizens. In doing so, this theorization of Canadian citizenship works from four assumptions. First, family is not static; rather it is in constant flux. Second, family straddles public/private divides, as traditional understandings of family as apolitical ignore its role in state projects. Third, relationships of care and interdependency do not necessarily
dictate a specific family form; understanding care requires broadening our understanding of family. Finally, we as current citizens have a public stake in family reunification. Not only does family reunification shape the familial lives of future citizens, it also changes current family dynamics within the Canadian state.

Based on these four assumptions, the remainder of this project will explore the following questions:

• What role does conjugality perform in family reunification?
• What are the implications for family diversity in Canada?
• What are the implications for Canadian citizenship?
• Is it possible to incorporate family into dominant discourses of citizenship and immigration in Canada? If so, what would this look like?

As subsequent chapters will demonstrate, a transformation in familial composition in Canadian law and policy has brought relationship recognition to a crossroads — either maintain the current privileged state of conjugality or re-evaluate policy recognition of adult interdependent relationships. Either option requires reframing citizenship in order to account for the role family plays in the construction of the nation-state. We need to take these connections seriously in order to develop a richer, more robust theorization of Canadian citizenship.
Chapter 3

Inside/Outside Families: An Examination of the Politics of Relationship Recognition in Canadian Law and Policy

“Marriage is a bundle of contradictions”
(Solot and Miller 2006, 70).

It is no secret that the institution of marriage in Canada has been dramatically altered over the past hundred years. Used as a tool of colonial settlement, the architects of the Canadian nation viewed the heterosexual monogamous marriage model as protection against the unstable and potentially harmful relationship practices of Aboriginals, non-British immigrant groups, religious-based polygamists, and their American neighbours (Carter 2008). The success of the national project was therefore seen as reliant on the Christian marital unit as the core of prosperous family life. In addition to fending off perceived challenges to national strength, marriage was used to privatize women’s dependency. Pateman contends that due to their unequal position in society, women were deprived of the capacity to be independent; since marriage was the only chance at an economically sustainable future, women were obligated to enter into a marriage contract (1988, 158). Wary of Pateman’s narrative of women as universal, critical race scholars have highlighted the racialization of dependency that marriage performs as well. Marriage has been used to civilize Aboriginal women according to colonial standards (Carter 2008), justify the denial of immigrant status to Asian women during the first half of the 1900s (Reddy 2005), and to privatize cultural differentiation within the marital unit through the establishment of a universal marital narrative. Marriage was therefore the white, patriarchal, heteronormative life for two.

Today, marital rights have been extended to common-law couples (those in a cohabiting, conjugal relationship) as well as same-sex couples. Feminist mobilization has successfully challenged the male-breadwinner model in certain respects; while women
continue to make less than men, marriage is no longer a necessary condition for economic survival. Additionally, state use of marriage as a mode of racial purification has been deemed inconsistent with the human rights ideology imbued within the Canadian national identity. While the institution of marriage is not without flaw, marriage in Canada has become less of an obligation and more of a choice. The most recently released Canadian census data highlights the changing nature of conjugality: the number of common-law couples is increasing at a faster rate than married couples; the number of same-sex families continues to increase; childless family units are becoming increasingly popular; and the number of lone-parent families (predominantly female headed) is on the rise (Statistics Canada, 2011). Family dynamics are constantly shifting and governments in Canada have worked to extend the definition of conjugality in order to accommodate these changes.

Domestically, Canadians generally have the freedom to enter and exit intimate relationships as they see fit, a result of the flexibility in the state’s approach towards conjugality within its borders. In addition to there being a lag between Court decisions on changes in relationship recognition and the implementation of those changes in immigration processes, current immigration policy continues to rely on a strict definition of conjugality. With spousal/partner sponsorship currently the primary form of family class sponsorship, the state’s treatment of conjugality dictates the type of family granted access; family becomes defined around the conjugal unit. This differentiation in treatment therefore creates two versions of the conjugal family — the inside family (families within Canadian borders) and the outside family (families outside Canadian borders). This chapter will explore the narrative of these two families in Canadian policy discourse, highlighting the asymmetrical management of conjugality. Not only does this discrepancy in treatment lead to a vague understanding of permissible relationships in Canadian policy among those living in the country, it also establishes a double standard for state handling of inside and outside
families. I will compare changes in domestic (non-immigration policy areas) and immigration policy, highlighting differentiation in treatment of conjugality. This will be complemented by an examination of four theoretical frameworks used in the literature to explain the state’s motivations for enforcing a strict definition of conjugality in its immigration policy. Ultimately, this chapter focuses on the construction of inside and outside families in Canadian law and policy, and the ways in which this discourse of family shapes our understanding of good or bad families, ideal or non-ideal citizens.

**Relationship Recognition Within Canadian Borders: The Creation of the Inside Family**

While research has been conducted on the influence of Parliament on judicial behaviour, Charter scholarship has predominantly focused on the judiciary's role in public policy development. Critics maintain that the bestowment of power to unelected judges allows them to pursue their own agendas through undemocratic means (Morton and Knopff 1992, 2000; Manfredi 2001). Others contend that the courts’ influence is inflated, arguing that legislators should internalize judicial review when developing and debating policy (Kelly 1999; Hiebert 2002). From either viewpoint, the Charter has impacted the development of policy options — "Legal considerations have become as important as fiscal considerations for policy development" (Dawson 1993, 55). The politics of relationship recognition in Canada is no exception; the extension of conjugal benefits to unmarried, cohabiting heterosexual couples and same-sex couples is a culmination of legal and legislative change. Canadians have used the courts to challenge the limited definition of spouse and these decisions have informed policy changes. An examination of legal treatment of conjugality is therefore crucial to understanding state recognition of relationships in Canada, as the courts have compelled several significant policy changes.

Our narrative begins with the *Molodowich v. Penttinen* (1980) decision that established what is referred to as the “functional equivalence” test used to legally determine
conjugality. Prior to this ruling, courts used the “subjective equivalence” test — premised on the assumption of a voluntary economic commitment “until death do us part” — to distinguish between conjugal and non-conjugal relationships (Cossman and Ryder 2001, 283). Challenging the definition of “spouse” in the Ontario Family Law Act, Tena Molodowich (Applicant) sought spousal support following the dissolution of her longstanding, non-marital, childless relationship with Lauri Penttinen (Respondent). Up until this point, a spouse was defined either as a married man or woman, or an unmarried man or woman who had cohabited continuously for no less than five years. While the couple had lived together off and on for several years, Molodowich claimed that this arrangement took place with what she thought was the intention of a permanent relationship. Furthermore, the applicant described her relationship with the respondent as “spouse-like”, as it involved conjugal elements including cohabitation, sexual intimacy, economic support, emotional interdependency and the division of daily tasks (e.g. meal preparation, cleaning, etc.).

This case challenged the subjective equivalence test in two ways. First, it confronted the assumption that the act of getting or not getting married is always a choice. This test interpreted conjugality as a consensual decision between a man and woman to officially commemorate their economic interdependency through the institution of marriage. Alternatively, those couples that chose not to do so consciously made a similar decision not to be financially responsible for each other. The applicant claimed that even though they had never discussed marriage, she considered herself to be the respondent’s wife — “I felt like a married person even though I had no certificate or ring. I felt secure and never expected the relationship would end”. On the other hand, the respondent did not view their association in the same way, often downplaying the relationship by referring to the

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applicant as “my friend” or “Tena”. Therefore the presence or absence of a formal conjugal relationship is not necessarily by choice. Despite having conflicting interpretations of the conjugal nature of their relationship — perhaps part of their legal strategies — the reality was that an interdependent relationship was formed between the two. Ultimately, conjugal relationships can develop in the absence of a consensual decision made between two people; choice is not a necessary condition for the establishment of interdependency.

The second way in which *Molodowich v. Penttinen* (1980) tested the boundaries of the subjective equivalence test was in its challenging of economic interdependency as the primary characteristic of a conjugal relationship. In addition to proving economic interdependency, the applicant used evidence of emotional intimacy between the two in order to strengthen her claim of spousal qualification. The evidence included long-distance telephone bills, correspondence, photos, family visits, sharing meals, vacations with friends, and testimonies from friends and neighbours confirming community perception of their relationship. In light of this evidence, Justice Kurisko acknowledged that the law’s strict reliance on economic interdependency was troublesome, as it neglected alternative moments of intimacy that separate conjugal from non-conjugal relationships:

> Marriage involves a complex group of human inter-relationships — conjugal, sexual, familial and social as well as economic. In more than the romantic sense, cohabitation and consortium are regarded as basic elements of marriage. It would be wrong to say that these elements are not present when persons, not legally married, live together as husband and wife.30

The Court’s response was the functional equivalence test, which expanded the definition of conjugality to include a broader range of relationship characteristics; conjugality would now be determined by the “objectively observable features of the relationship rather than the stated subjective understandings of the parties” *(Cossman and Ryder 2001, 287)*. The newly adopted test recognized the complexity of conjugal relationships and proposed that a series

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of factors be taken into consideration when attempting to assess the legitimacy of a conjugal relationship, ultimately recognizing that “marital equivalence is situated within a bundle of factors that together indicate the existence of an emotionally and economically interdependent relationship” (Cossman and Ryder 2001, 283). Proof required now went beyond the subjective claims of the participants involved.

The functional equivalence test involves seven functional attributes perceived capable of capturing the level of personal commitment required for non-married couples to qualify as conjugal. These attributes comprise the following:

- Shelter — cohabitation, sleeping arrangements, other roommates;
- Services — meal preparation, chores, household maintenance;
- Social — participation in community activities, familial interaction;
- Societal — community perception of the relationship;
- Support — financial arrangements, property;
- Children — attitude/conduct concerning children;
- Sexual/Personal Behaviour — sexual relations, fidelity, emotional intimacy, care.

These characteristics distinguish between the conjugal and consequently, the non-conjugal. This is crucial to our legal understanding of conjugality for two reasons. First, these relational attributes highlight how conjugal relationships are measured against characteristics believed to be part of the ideal marriage. Conjugality thus becomes synonymous with marriage, or more specifically, "how judges imagine marriage ought to be" (Cossman and Ryder 2001, 290). Second, they reveal that conjugality is not determined by economic interdependency alone. If state-recognized relationships were solely defined by financial arrangement or economic survival, proving conjugality would be a moot point. What separates economic relationships from conjugal relationships is the presence of intimacy. It is this assumption of intimacy as defined by the functional equivalence test that now steers court assessment of conjugality. Molodowich v. Penttinen (1980) set the tone for legal recognition of intimate relationships in Canada by conflating cohabitation and
interdependency in order to provide governments guidance when differentiating between legitimate (conjugal) and illegitimate (non-conjugal) relationships.

A review of non-married heterosexual relationship recognition cases post-
Molodowich v. Penttinen (1980) illustrates a continued reliance on the functional equivalence test to obtain economic protections. The claim was that while many unmarried couples consciously choose to remain exactly that, the denial of economic protections despite sharing multiple characteristics of state-defined conjugal definition is discriminatory. Gostlin v. Kergin (1986) involved the division of property among a conjugal-like couple; the Court deciding that for the purpose of maintenance and support obligations under the British Columbia Family Relations Act, the two qualified as conjugal.31 The extension of spousal accident insurance to non-conjugal partners was discussed in Miron v. Trudel (1995).32 In Fitton v. Hewton Estate (1997), widower relief legislation was revised to include long-term unmarried partners, the Court ruling that the definition of common-law spouse should recognize the appeal to “be financially and economically interdependent and to have the ability to enjoy a fulfilling life in the marketplace.”33 Combined, this series of decisions shaped a principle of “conjugal relationship equality”, challenging the legitimacy of legal distinctions between the married and unmarried for economic protections (Cossman and Ryder 2001, 275). In 2000, the federal government passed the Modernization of Benefits and Obligations Act, altering the legislative landscape of relationship recognition in Canada, as

32 Referred to as the “trilogy”, Miron v. Trudel (1995), 13 R.F.L. (4th) 1 (SCC), Egan v. Canada (1995) 2 S.C.R. 513, and Thibaudeau v. Canada [1995] 2 S.C.R. 627 are credited with “extending Charter protections to ‘non-traditional’ relationships” (Lahey 1999, 75). In all three cases, the litigants challenged traditional familial norms — Thibaudeau was a divorced single mother, Miron was in an unmarried cohabiting relationship, and Egan was in a long-term same-sex relationship. While the details of Thibaudeau v. Canada (1995) are irrelevant to this project, Miron v. Trudel (1995) will be examined in-depth in chapter five while Egan v. Canada (1995) will be discussed momentarily.
unmarried cohabitants now enjoy identical rights as married couples in all federal legislation.34

The push for state recognition of heterosexual common-law relationships was relatively smooth, as Molodowich v. Penttinen (1980) established a judicial precedent capable of recognizing the flexibility in conjugal and conjugal-like relationships. What remained untouched was the gender composition of the conjugal unit; relationship recognition remained focused on the one man-one woman model. As a result, same-sex couples were denied the symbolic and material benefits reserved for heterosexual couples (both married and unmarried). With the construction of the Canadian Charter of Rights and Freedoms came the promise of a legal mechanism for homosexuals to challenge the discriminatory nature of policy with respect to sexual orientation. “Sexual orientation” was not included in the original drafting of section 15 (s.15) — the section responsible for protecting equality rights — however, the drafters assured that the section’s open-ended language would protect sexual minorities (Lahey 1999, 30). This assurance appeared suspect, as discrimination based on sexual orientation remained invisible, forcing queer claims for Charter inclusion to emphasize discrimination based on sex. Courts continuously avoided questioning whether sex included sexual orientation through the following reasoning — discrimination against homosexuals was on the basis of sexual orientation instead of sex, but sexual orientation was not mentioned in the Charter and this type of discrimination was therefore not prohibited by the Charter (Lahey 1999, 31). Furthermore, the Charter’s framers insisted that even if the Charter did prohibit discrimination on the

34 The Modernization of Benefits and Obligations Act (2000) extends benefits and obligations previously restricted to married couples to “all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the Canadian Charter of Rights and Freedoms.” It is important to reiterate that this legislation only covers federal jurisdiction. Provinces can regulate spousal support as they see fit so long as their legislation is constitutional. While cohabitation requirements vary across governments, couples qualify for provincial common-law benefits after living together for a period of one to three years.
basis of sexual orientation, Charter rights are individual rights rendering them in applicable to relationships (Lahey 1999; Wintemute 2004). As this chapter demonstrates, the claim that the Charter is inapplicable to relationships is misleading, as the state regulates benefits according to relationship status and the Charter is clearly implicated in this process. When the three-year moratorium on s.15 was lifted in 1985, not a single piece of federal or provincial legislation had been passed to address the unequal treatment of sexual minorities.35 Priority was thus given to questioning the position of sexual orientation in discussions of sexual equality and the challenge lay in the courts’ ability to justify its continued invisibility.36

The significance of *Egan v. Canada* (1995) lay in the Supreme Court’s contribution to a number of cases that ruled s.15 prohibited discrimination on the basis of sexual orientation.37 James Egan and John Nesbit (plaintiffs), a same-sex couple in a long-term relationship for almost forty years, were denied spousal allowance under the *Old Age Pension Act*, as the Act’s definition of “spouse” did not include same-sex partners. The

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35 Following the passing of the *Constitution Act* in 1982 — which included the *Canadian Charter of Rights and Freedoms* — a three-year moratorium was placed on the effective date of s.15. This was to allow all levels of government to assess the section’s impact on policy development prior to formalizing who would be included and ultimately excluded.

36 After the collapse of Canadian Lesbian and Gay Rights Coalition in 1980, the gay rights movement lacked a federal-level lobby organization until the creation of EGALE in 1986. This role was fulfilled by a significant grassroots presence — including Gays of Ottawa — who made presentations to the 1985 parliamentary committee on the Charter (M. Smith 2008, 71–5).

37 These cases included Egan v Canada (1995) 2 S.C.R. 513; Veysey v Canada (Correctional Services) (1990) 109 N.R. 300 (F.C.T.D.) that challenged the denial of family visitation rights to homosexual inmates and their partners; Haig and Birch v Canada (1992) 9 O.R. 495 (O.C.A.) when the Ontario Court of Appeal read “sexual orientation” into the federal code; and Canada (Attorney General) v Mossop (1993) 1 S.C.R. 554 in which the Canadian Human Rights Tribunal ruled that the refusal of bereavement leave to homosexuals and their partners/partners’ families qualified as discrimination on the basis of “family status.”
plaintiffs claimed this was an infringement of their right to equal protection and equal benefit of the law (s. 15) and that this infringement was discriminatory on the basis of sexual orientation. The Court ruled in a 4-1-4 vote that the distinction the Act created between spouse and non-spouse was non-discriminatory because it had nothing to do with sexual orientation. More importantly however, dissenting judges argued that the distinction was based on nothing but one’s sexual orientation and was therefore discriminatory:

It may be correct to say that being in a same-sex relationship is not necessarily the defining characteristic of being homosexual. Yet, only homosexual individuals will form a part of a same-sex common-law couple. It is the sexual orientation of the individuals involved which leads to the formation of the homosexual couple. The sexual orientation of the individual members cannot be divorced from the homosexual couple. To find otherwise would be as wrong as saying that being pregnant had nothing to do with being female. The words “of the opposite sex” in the definition of ”spouse” specifically exclude homosexual couples from claiming a spousal allowance.38

Despite the Court’s dismissal of the appeal, the case was considered a success among gay and lesbian rights activists because of the unanimous stand among dissenting judges that sexual orientation was in fact an analogous ground under s.15 and was therefore a prohibited form of discrimination. This recognition however, provided no insight as to the extent to which courts would interpret this ruling.

Following Egan v. Canada (1995), the lobby for same-sex relationship recognition continued along a similar path used by heterosexual common-law couples, choosing to focus on obtaining the economic protections included in state recognition before challenging the definition of the conjugal family unit itself. Denial of spousal support to same-sex couples was discriminatory, as it implied that “same-sex couples are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples” (Wintemute 2004, 1155). By demonstrating their ability to participate in economically interdependent relationships, same-sex couples were entitled to protections

38 (1995) 2 S.C.R. 513 at 598, per Lamer C.J. and La Forest J.
awarded to state recognized common-law relationships. In *M. v. H. (1999)*, the Court ruled that the omission of same-sex couples from the *Ontario Family Law Act* (FLA) violated s.15 on the basis of sexual orientation and was not deemed a reasonable limit under s.1.\(^{39}\) This case involved the termination of a ten-year lesbian relationship in which M. claimed right to spousal support under the FLA. Upon the dissolution of their union, M. felt she was entitled to spousal support because H. was earning a higher salary. M. argued that the exclusion of same-sex couples from the definition of spouse violated s.15 of the Charter. Cossman describes this decision as instrumental in that “for the first time, the Supreme Court recognized the rights of same-sex couples, declaring these couples to the same protections as opposite-sex couples” (2002, 490). For Cossman, this was achieved because M. and H. were seen as cohabiting in an economically interdependent relationship — “The Court recognized that a same-sex couple may, after years together, be considered to be in a conjugal relationship and should therefore receive the same economic rights as opposite-sex couples” (Cossman 2002, 490). In *M. v. H. (1999)*, the focus was on the inclusion of same-sex couples in the provincial regime of spousal recognition; this decision therefore paved the way for same-sex marriage. The allocation of federal relationship rights to same-sex cohabiting couples was finalized with the *Modernization of Benefits and Obligations Act*.

For advocates of same-sex marriage, focusing solely on economic protections would limit the movement’s gains. Demonstrating economic interdependency made a strong case for state recognition in the form of relationship dissolution rights (e.g. spousal support); it did not, however, prove that same-sex relationships were equivalent to marital relationships. As debated in *Molodowich v. Penttinen (1980)*, what separates economic partnerships from conjugal relationships is the assumed presence of intimacy as narrowly defined by sexual relations, fidelity and care (Bala 2003, 94). Following the legalization of

same-sex common-law relationships, the Ontario Court of Appeal ruled in *Halpern v. Canada* (2003) that the denial of marital rights to same-sex couples was discriminatory because, “same-sex couples have the same aspirations of conjugal bliss and in fact live a life no differently from opposite-sex married couples” (Lee 2010, 6). Same-sex marriage was therefore a question of equality and human dignity. In this light, one’s dignity is violated when “gays and lesbians are not respected as being equally capable as their heterosexual counterparts of forming committed marital relationships” (Lee 2010, 7). While Lee takes issue with the vagueness of these ideals — a common critique of rights discourse (Russell 1983; Hiebert 1993; Morton and Knopff 2000) — and the implications this has for queer rights mobilization, she recognizes the success of this legal strategy with respect to the increasing legalization of same-sex marriage around the world. Cases like *Halpern v. Canada* (2003) paved the way for the legalization of same-sex marriage in Canada by deeming the gender composition of a conjugal relationship irrelevant and by conveying the message that state violation of same-sex couples’ dignity with respect to relationship recognition lacked constitutional backing.

It is important to note that there were those within the queer rights movement who did not support using the Charter for the pursuance of same-sex relationship rights. While reasons were varied, I will focus on two main concerns. First, the limits of “rights talk” in Canada would present challenges for the movement. The incorporation of a rights discourse

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41 Since 2001, same-sex marriage is now legal in ten countries (Argentina, Belgium, Canada, Iceland, Netherlands, Norway, Portugal, South Africa, Spain and Sweden) and parts of Mexico and the United States. Several countries do not perform same-sex marriage, but recognize those officiated in countries where it is legal. Additionally, numerous countries and jurisdictions have adopted a civil union/registered partnership scheme used as a starting point for the eventual legalization of same-sex marriage (e.g. Iceland, Sweden, Norway), in lieu of a marriage regime altogether (e.g. United Kingdom, Hawaii), or as a relationship category in its own right in addition to same-sex marriage (e.g. Netherlands, Canada).
was arguably the consequence of the Canadian legal system and the strengthened position of the Supreme Court through the Charter, making our judicial forum the ideal arena for minority groups (M. Smith 2007). Marriage itself is not a right, but it became entangled in a discourse of equality, individual liberties and the capacity for self-realization. This is not to suggest that adopting a language of rights was a poor choice or that the refusal of marital status to same-sex couples is non-discriminatory. Reserving access to the institution of marriage and defining those reservations along gendered, classist, racialized or sexualized lines is inherently unjust. One such implication of this legal strategy however, is the effect rights talk has on discussions of conjugality. Canadian legal scholars have explored the nature of rights talk and the limitations it presents for discussing social issues. While there are formal constraints on rights outlined in the Charter — that being the reasonable limits clause (s.1) and the notwithstanding clause (s.33) — there remains scepticism towards their utility (Russell 1983; Hiebert 1993; Morton and Knopff 2000).

The incorporation of conjugality into Canadian rights talk reflects these concerns, as the debate around same-sex marriage was polarizing — either you were for or against state recognition of same-sex conjugality. Consequently, one’s position on this issue was indicative of one’s stance on rights more broadly; anti-same-sex marriage became synonymous with anti-human rights and vice versa. Not only did this polarization further the divide between liberal and conservative camps; it also generated gaps within queer advocacy circles. Marriage as the primary objective resulted in the exclusion of alternative relationship forms; same-sex marriage became the sole legitimate option. Absent from these discussions was any questioning of the position of marriage within Canadian rights talk — Why is marriage considered a right? Why are conjugal relationships privileged over other personal relationships? Why is conjugality the main objective for same-sex couples? What interest does the state have in preserving conjugality? These questions were posed by legal
scholars during the same-sex marriage debates (Cossman and Ryder 2001; Law Commission of Canada 2001); however, the response was that in order for gays and lesbians to be full citizens, marriage must come first (Lahey and Alderson 2004). With the goal being conjugal since conjugal relationships are the only adult personal relationships recognized by the Canadian state, marriage and rights talk became logical bedfellows.

A second and related concern was that framing marriage within the context of rights talk invokes the trap of equality-as-sameness. Marriage as the ultimate goal meant that lesbians and gay men were framed as a minority group seeking access to a particular institution. As a result, marriage is conceptualized as the “neutral” norm when it comes to family formation. The continued normalization of marriage makes the pursuance of difference difficult in that, in order to obtain the right in question, one must be interpreted as worthy of that right. The easiest way to do so is to appear like those already enjoying state recognition, to present oneself as the same (Herman 1994; Stychin 1995; Gotell 2002; M. Smith and Grundy 2005). Arguments for same-sex marriage contended that same-sex relationships already existed in marriage-like form; therefore extending marriage would not drastically alter either the institution of marriage or same-sex relationships more generally. This minority rights framework — portraying gays and lesbians as a special “fixed” group in need of protection — is therefore realized at the expense of ignoring the assumptions that produce and reproduce these systems of discrimination in the first place (Herman 1994, 20–3; M. Smith 1999; Hiebert 2002, 164–7). Additionally, the equality-as-sameness trap runs the risk of replicating problems inherent in opposite-sex marriage, particularly its patriarchal nature. Feminist scholars warned of the implications the extension of marital benefits to same-sex couples would have for lesbian relationships, as the patriarchal family fosters and maintains the subordination of women (Herman 1989; Gavigan 1993; Majury 1994). The fear was that gender imbalances present in heterosexual relationships would be
replicated in state recognized homosexual conjugal relationships. The reliance on rights talk — specifically in discussions relating to same-sex marriage — arguably presented limitations for future work on queer relationship recognition.

There are however benefits to rights talk in Canada, as made evident by the legitimacy the Charter has provided social policy reform in the area of gay and lesbian rights (Matthews 2005). In this context, one could argue that the strategy of claiming rights for same-sex couples challenges traditional conceptualizations of the heterosexual nuclear family. The legalization of same-sex marriage presents a counterpoint to the assumed naturalness of the heterosexual conjugal family. This potential for reform explains the support behind using rights talk as a strategy for rectifying social and political discrimination based on one’s sexual orientation (M. Smith 1999; Hiebert 2002). The relationship between conjugality and rights talk has implications — both positive and negative — for same-sex relationships in Canada; it is therefore imperative that we account for these tensions in future conversations concerning queer relationship recognition post-same-sex marriage.

In response to Halpern v. Canada (2003), the Chrétien government drafted a new legislative definition of marriage to recognize marriage as a “lawful union between two persons”. Met with internal dissent from within his party as well as opposition from the Canadian Alliance Party turned Conservative Party of Canada (led by current Prime Minister Stephen Harper), Chrétien prolonged this legislative change by requesting that the Supreme Court answer three constitutional questions focused on “whether Ottawa has jurisdictional capacity to define marriage; whether the recognition of same-sex partners’ ability to marry is consistent with the Charter; and whether the Charter’s safeguarding of religious freedom protects religious officials from having to marry same-sex partners” (Hiebert 2003;
Prior to the Court’s ruling, Paul Martin replaced Chrétien as the leader of the Liberal Party and added a fourth question to the case — is the opposite-sex requirement for civil marriage in common law consistent with the Charter? Both Chrétien and Martin used the Supreme Court not only to delay the passing of this legislation in order to mitigate opposition, but also to capitalize on the Charter’s popularity and garner public support.

Not surprisingly, the Court answered the first three questions in the affirmative. When it came to addressing whether same-sex marriage was constitutionally required, the Court refused. This refusal was attributed to several factors. First, it is speculated that the Court recognized the reference case as political strategy and opted not to get involved (Bateman et al. 2008, 440). Second, considering the novelty of this case, there was no precedent for the Court. Finally, the Court indicated that because Parliament was planning on discussing the issue irrespective of the Court’s decision, the Court’s opinion on the fourth question was unnecessary. In 2005, the Martin government introduced the Civil Marriage Act — defining marriage as inclusive of both heterosexual and homosexual couples — passing by a vote of 158 to 133, making Canada the fourth country in the world to recognize same-sex marriage. The Act was a culmination of legal, social and political efforts, resulting in a significant transformation in Canadian law with respect to relationship recognition. A state recognized conjugal relationship was no longer solely available to opposite-sex

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43 Matthews (2005) examines the dramatic shift in public support for same-sex marriage and argues that instead of viewing this as a social change in values, we must turn our attention to changes in political foundations for support (e.g. courts and legislatures). Using this framework, Matthews argues that the same-sex marriage reference case was presented as an equality issue, consistent with liberal rhetoric that shapes the Canadian national identity. Furthermore, the institutional legitimacy of the Court resulted in public acceptance of their decision. This study challenges the idea that Canadians were suddenly enthusiastic about the legalization of same-sex marriage; rather, support was driven by institutional influence on public opinion.
couples. For supporters of the same-sex marriage movement, achieving marriage meant achieving citizenship, “... as lesbian, gay, bisexual, transgender and transsexual people have asserted their right to full human dignity, it has become impossible for the state to maintain the second- and even third-class status of same-sex couples” (Lahey and Alderson 2004, 9).

There has been some resistance at the federal level post-Act. Upholding an election promise, the Harper government held a free vote to re-examine the same-sex marriage debate in 2006. After the motion was defeated 175-123, Harper discussed invoking s.33, which was met with public backlash. Talk about reopening the same-sex marriage debate has since then disappeared from the immediate political agenda. Same-sex marriage is legal and as Canadian Charter history would suggest, social support for this decision is strong.44

From redefining conjugality in Molodowich v. Penttinen (1980) to the legalization of same-sex marriage in 2005, the courts have played an influential role in defining the parameters of conjugality in Canadian law and policy. Moreover, legislators have often looked to the courts to deliberate questions concerning state treatment of conjugality, questions legislators have been unable or unwilling to address. While court decisions have resulted in two major policy initiatives — Modernization of Benefits and Obligations Act and the Civil Marriage Act — the execution of these initiatives has varied across legislatures and policy domains. As a result, state treatment of conjugality is inconsistent; legislatures and courts are not necessarily always on the same page. These policy incongruities therefore warrant further attention.

Discrepancy Within Borders — Inconsistent Treatment of Conjugality Within the Canadian State

In current domestic policy frameworks, relationship recognition rights are available to both opposite-sex and same-sex common-law and married couples in all provinces and

44 An Angus Reid Public Opinion poll in 2010 found that 61% of Canadians want same-sex marriage to remain legal.
territories. This does not suggest that the treatment of conjugality is universal across governments. Policy asymmetry is not unique to federal systems; the Canadian state has been built on a series of intergovernmental exchanges, shifting policy power around federal, provincial and municipal governments (Milne 2005). *M. v. H. (1999)* sparked a variety of provincial responses, which included, albeit not surprisingly, a negative reaction from Alberta’s Progressive Conservative Party. In response in *M. v. H. (1999)*, Alberta Premier Ralph Klein initiated the passing of Bill 202 that revised the provincial Marriage Act so that marriage was defined solely as an opposite-sex conjugal relationship. Furthermore, the Bill invoked the notwithstanding clause (s.33) to protect it from Charter challenges for a period of five years.45 Prior to the Bill’s expiration in 2005, the Klein government introduced the Adult Interdependent Relationships Act (AIRA) in 2003, which provided some (but not all) rights enjoyed by married couples to cohabiting pairs. In reaction to *M. v. H. (1999)*, the Alberta government opted to recognize all relationships — conjugal or non-conjugal — in order to avoid providing “special recognition” to same-sex relationships. Ultimately, same-sex couples were to be absorbed within a new asexual legal category and were to be treated no differently than roommates, siblings, etc.; the nature of their relationships were to go from same-sex to no sex (Boyd and Young 2003). As Glennon contends:

> The AIRA shows that while policy moves to look beyond the ‘conjugal family’ may appear to be more progressive than the assimilation of same-sex relationships within dominant culture and legal norms, they [policy initiatives] can also be used in a less radical way to undermine, with various degrees of subtlety the express legitimation of same-sex partnership rights (2005, 160).

45 There was serious doubt as to the legality of Klein’s plan to invoke s.33. While the notwithstanding clause allows Parliament and provincial legislatures to override certain sections of the Charter for five-year renewable periods, it is not applicable to disputes over the constitutional division of powers. In the same-sex marriage reference case, the Supreme Court affirmed that Ottawa had the jurisdictional capacity to define marriage. Therefore, technically the Civil Marriage Act is not susceptible to s.33 because it is a piece of legislation, not a court decision. What was unclear was whether provincial governments could rely on their constitutional power to issue marriage licenses to frustrate Parliament’s attempt to legalize same-sex marriage (Hiebert 2003, 14–5).
The objective of the AIRA was to limit the use of “spouse” to married couples while ascribing spousal rights to a range of conjugal and platonic relationships with no mention of same-sex relationships explicitly. With the expiration date of Bill 202’s use of s.33 coincidentally timed with the federal passing of the Civil Marriage Act, Klein danced around the issue before following suit — citing the waste of tax dollars to justify the government’s decision to not pursue a legal challenge. The AIRA remains intact; however, same-sex marriage is now provincially recognized as well.

In addition to the differentiation in provincial response to federal changes for relationship recognition, both levels of government have demonstrated a degree of flexibility in their treatment of conjugality in domestic policy (Cossman and Ryder 2001). While there are numerous examples of this inconsistency, I choose to focus on three: *Falkiner v. Ontario (2002)* — a case involving the definition of “spouse” in Ontario’s social assistance legislation; *R. v. Labaye (2005)* — a Supreme Court decision that explored the parallels between activities like group sex and “swinging” in a Montreal nightclub with Canadian values of personal autonomy and liberty; and state handling of the polygamous community of Bountiful, British Columbia.46

*Falkiner v. Ontario (2002)*

After Ontario’s Family Law Act was amended in 1995 to include non-married cohabiting couples in the definition of “spouse”, individuals living together who were denied benefits because their relationships were now considered conjugal appealed the interpretation and constitutional validity of the new definition. The reformulated definition

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of spouse included persons of the opposite-sex living together who had “a mutual agreement or arrangement regarding their financial affairs,” meaning that once two people of the opposite-sex were living together, their relationship was assumed to be conjugal unless they provided evidence to the contrary. Ultimately, the new definition of spouse was extensive enough to “include relationships that lacked the meaningful financial interdependence that characterizes spousal relationships” (Bailey 2004, 158). This aspect of the new definition — referred to as the “spouse in the house” rule — was at issue in these appeals. *Falkiner v. Ontario (2002)* involved two such appeals, both of which involved an unmarried woman with dependent children who were in a “trial” relationship with a man for less than a year. The definitional change of spouse in 1995 led both women to lose their eligibility to receive social assistance as a “sole support parent”.47

The respondents claimed that the revised definition of spouse was an infringement of s.7 (individual autonomy and personal legal rights) and s.15 (equality rights) under the Charter. The Harris government defended the legislation, contending that the intention of the new legislation was to ensure equality between married and common-law couples, as well as to provide social assistance to those most in need. For the respondents, the new definition of spouse captured relationships that were not considered conjugal; furthermore, the legislation distinguished between social assistance recipients and non-recipients, as well as single mothers on social assistance and others on social assistance. These distinctions, they contended, discriminated on the basis of sex and reinforced stereotypes of single mothers on social assistance. The Ontario Court of Appeal ruled in favour of the respondents, recognizing that the current definition of spouse did infringe on their rights and that this infringement could not be saved by s.1. The Ontario government announced that it would not pursue an appeal; Attorney General Michael Bryant commenting that, “It’s

47 According to CBC, close to 10,000 Ontarians (the majority being single mothers) lost some or all of their benefits under the new legislation (CBC News 2004).
not the business of government to decide when a family is a family," which is ironic considering that is exactly what his government (and other governments) were doing, and continue to do (CBC News 2004). While the spouse in the house rule has been removed, welfare policies in Canada continue to interpret conjugality and family in a way that continues the dependency of single mothers on others (Little 2011).

What is interesting about this particular case is that while conjugality is typically used to exclude individuals, the Harris government was using the definition of spouse to include as many individuals as they could in order to reduce dependency on the state. Pushing the conjugal model onto non-conjugal couples allowed the state to privatize dependency; individuals would be increasingly reliant on each other with the removal of social assistance. In this sense, conjugality is consistent with the state’s desire to privatize economic interdependency (function); however, it is inconsistent with legal discussions concerning the composition of interdependency (form). Ultimately, function and form were conflated so that anyone who was cohabiting was automatically considered a spouse.

*R. v. Labaye (2005)*

In this decision, the Supreme Court ruled that group sex and swinging, which took place in a Montreal nightclub were consistent with Canadian values of personal autonomy and liberty. Jean-Paul Labaye was charged under s.210(1) of the Criminal Code for owning a club where individuals paid a membership fee in order to engage in sexual activities. Distinguishing the activities taking place at this club from sex work, Labaye contended that all activities were consensual and that members paid fees to the club instead of paying each other in exchange for sex. The majority focused on determining whether the activities taking place qualified as indecent, arguing that morality was no longer a sufficient way to assess indecency. Using past indecency cases, the Court wrote that indecency is measured according to what Canadians are able to socially accept; therefore, the indecency in question
must be proven harmful to certain people.\(^{48}\) For the majority, harm was the only measure of indecency in Canadian law; those in dissent argued that harm took primacy following this decision.

Using a harm-based approach, the Court understood indecency in Canadian law as something that endangers one’s freedom, subjects one to something undesirable, compels one to perform a transgression, or hurts someone while engaging in a specific act. While the Court recognized that there are sexual acts capable of constraining autonomy, the majority ruled that Labaye was not guilty of indecency because he facilitated the participation in these activities for willing individuals. Furthermore, the Court wrote that when assessing harm in sexual conduct, it is imperative that the threshold be high; certain kinds of sexual conduct should not be deemed impermissible simply because some Canadians are not in favour. The Court therefore concluded that the seriousness of the harm in \(R. \, v. \, Labaye \, (2005)\) need not be considered, as there was no evidence of harm — “Consensual conduct behind locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society”.\(^{49}\) Dissenting opinion criticized the majority’s dismissal of social morality, arguing that legislation concerning sexual conduct is not created in a vacuum. In the end, charges against Labaye were dropped, as the acts in his club were considered private and not harmful to the participants; therefore, the activities conducted in the club did not qualify as those defined in s.210 of the Criminal Code.

\(R. \, v. \, Labaye \, (2005)\) contributes to our understanding of the Canadian state’s inconsistent treatment of conjugality for two reasons. First, it highlights that while monogamous conjugal privilege shapes Canadian law and policy, the state’s understanding

\(^{48}\) These cases included \(Towne \, Cinema \, Theatres \, Ltd. \, v. \, the \, Queen \, (1985)\) 1 S.C.R 494; \(R. \, v. \, Butler \, (1992)\) 1 S.C.R. 452; and \(Little \, Sisters \, Book \, and \, Art \, Emporium \, v. \, Canada\) (Minister of Justice) (2000) 2 S.C.R. 1120, 2000 SCC 69.

\(^{49}\) (2005) 3 S.C.R. 728, 80 (SCC), supra 4.14 at 71, per McLachlin C.J.
of monogamy does not necessarily mean a life-long relationship between two people. For couples living within Canadian borders, serial monogamy is permissible. The relaxing of divorce laws in Canada has made it easier for individuals to enter into and exit conjugal relationships; it is not uncommon for one to engage in several conjugal relationships over the course of their lifetime. Furthermore, it is important to remember the clients of this particular establishment. In the case of *R. v. Labaye (2005)*, participants were conjugal couples looking to enhance their sex lives. The Court ruled that while some Canadians would disapprove of these couples’ decisions to engage in these activities, social condemnation does not necessarily warrant persecution. Serial monogamy is therefore permitted, and sometimes encouraged, when it relates to the formation and maintaining of conjugal relationships. A second and related contribution this decision makes to our understanding of conjugality and policy asymmetry within Canadian borders is in its discussion of private consent. According to the Court, couples came to the club as willing, consenting participants; this private decision made between individuals was therefore not considered a matter of the state. It is important to remember though that state involvement with the private sphere is selective. In the case of *R. v. Labaye (2005)*, couples were awarded privacy; however, the luxury of privacy is not an automatic assumption of the state. Ultimately, state allowance of sexual activities that challenge traditional understandings of conjugality are an exception to the rule.

*Bountiful, British Columbia*

The ongoing investigation into the community of Bountiful, British Columbia has brought the realities of Canadian polygamous living under public gaze. Although polygamy is illegal under s.293 of the Criminal Code, polygamous families continue to reside in Canada
with minimal state interference. In addition to the relatively unchanged existence of Bountiful for over sixty years, the current legal inquisition has highlighted the presence of polygamy throughout the country. This case sheds light not only on the inconsistent treatment of polygamy in Canada, but also on the state’s asymmetrical approach to monogamous conjugality. This is not to suggest that polygamous relationships exist in abundance in Canadian society; however, these proceedings question the effectiveness and ultimately the relevance of s.293. The Provincial Court of British Columbia found itself responsible for deciding whether s.293 infringes the religious rights of polygamous communities such as Bountiful. In November 2011, the Court ruled that s.293 was constitutionally valid and was to be upheld, Justice Bauman stating that the law’s objective is to prevent “harm to women, to children, to society and to the institution of monogamous marriage.” It is anticipated that this decision will be appealed in the upcoming months.

This asymmetrical treatment of conjugality in Canadian law and policy demonstrates that state privileging of conjugality at a domestic level is inconsistent. While not all relationships are recognized by the state, Canadian policy is generally flexible when it comes to the relationships of most inside families. Outside families on the other hand, are unable to enjoy this same level of flexibility; applicants who are unable to prove — or at least satisfy doubts — that their conjugal relationship is genuine, are denied entry. Immigration policy provides minimal flexibility on the question of conjugality. An

50 S.293 of the Criminal Code explicitly bans polygamy and threatens offenders with a five-year prison term.
51 As with other historically criminalized practices (prostitution, homosexuality, etc.), polygamous living in Canada has been pushed underground. The result is a lack of data on polygamous families, making it impossible to anticipate the impact striking down s.293 would have. Independent studies (generally conducted by polygamy advocacy groups and journalists) have shown that there are non-prosecuted polygamous families living in Canada. Motivations for adopting this type of familial unit range from religion (certain sects of Mormonism and Islam), to sexual orientation, to support (financial, parenting, etc.).
52 (2010) BCSC 1308, per Bauman C.J.
examination of family reunification in Canada highlights the increased importance
conjugality has in shaping the state’s understanding of family. In the case of immigration,
family has become synonymous with conjugality.

**Canadian Immigration Policy and Conjugality**

The 1976 *Immigration Act* highlighted three categories of immigrants —
independent (retirees, entrepreneurs, self-employed), refugees and family class. Introduced
in the *Act* was the point system, a method of assessment that assigns a score according to
one’s skills and education. Exempt from the point system, family class applicants are
individuals sponsored by family members who are Canadian citizens or permanent
residents. Also new to the Canadian immigration system, family class sponsors were
obligated to financially support their sponsored relatives for ten years. Under the previous
system, sponsors only had to publicly ensure that their family member would not be a
burden on the state. This proved to be ineffective, as sponsors failed to meet their financial
obligations and their immigrant family members ended up on social assistance. The new
system attempted to minimize the responsibility of the state by legally enforcing sponsor
accountability. Missing from this initiative however, was a lack of adequate enforcement
mechanisms capable of guaranteeing these promises were kept, as it is difficult to keep
track of immigrants once they have arrived in Canada (Kelley and Trebilcock 2000, 402).
Furthermore, there is minimal incentive for the federal government to track both sponsors
and the sponsored because integration is the responsibility of provincial and municipal
governments. Following the 1976 *Act*, amendments were added to include the sponsoring of
parents, dependent children and adopted children under the age of nineteen.

In their 1995 annual report to Parliament, Citizenship and Immigration Canada
highlighted family class immigrants’ reliance on Canada’s social welfare system. The report
estimated the social welfare cost of default in sponsorship obligation in 1993 as close to
$700 million (Citizenship and Immigration Canada 1995, 15). "Sponsorship breakdown" was identified as a primary concern in need of immediate attention.\footnote{Sponsorship breakdown is defined by Citizenship and Immigration Canada as “when the sponsor, for whatever reason, fails to fulfill the commitments of the sponsorship agreement” (1994, 38).} The proposed solution involved several initiatives including a revised sponsorship agreement, new financial standards, enforcement mechanisms and enhanced federal-provincial cooperation (Citizenship and Immigration Canada 1994, 39–41). Sponsorship breakdown is the impetus for improvements to family sponsorship policy, particularly with respect to spousal sponsorship. It frames discussion about sponsors/sponsored as a language of winners and losers with minimal reference to the state. The federal government has conceptualized the category of intimate partners in a way that recognizes the interdependent nature of these relationships. Conjugality thus is identified by the promise of interdependency. The more stable the relationship is perceived to be, the more legitimate the claim for family class status.

Consistent with domestic relationship recognition, this legitimacy was awarded solely to heterosexual, married couples prior to the Modernization of Benefits and Obligations Act (2000). Common-law couples were only considered under humanitarian and compassionate grounds and same-sex applicants were obligated to apply as independents under the point system. It was only when they failed to qualify as independents that they could make a case on humanitarian grounds. This came under fire in an immigration legislative review, the report proposing that the sponsorship program be consistent with the Canada v. Mosso (1993) decision, recognizing that “it is the social utility of families that we all recognize, not any one proper form that the family must assume” (Ministry of Public Works and Government Services Canada 1997, 43). Critical of the state’s reliance on the
traditional family model, the report concluded that the traditional heterosexual family form does not guarantee interdependency.

The solution was a three-tiered family class system, believed to be reflective of the varying degrees of interdependency inherent in intimate relationships. The first tier included “those included in the most intimate family core” — spouses and dependent children — this tier being the closest thing to automatic acceptance (Ministry of Public Works and Government Services Canada 1997, 46). The second tier was reserved for fiancé(e)s, parents and grandparents (only when one’s parents are deceased), recognizing the need for stringent sponsorship guidelines to avoid the increasing reliance of ageing immigrants on social services and health systems. Finally, the third tier was to account for “individuals who form strong emotional bonds with persons who are not their intimate partners or spouses, nor their biological partners, nor even blood relatives” (Ministry of Public Works and Government Services Canada 1997, 47). This tier was conceived to be inclusive of anyone ranging from a same-sex or common-law partner to a best friend. While this tiered system was arguably an earlier version of the AIRA guilty of reducing the conjugal nature of same-sex relationships to friendships, the report pre-emptively compensated for that by recognizing that the Canadian state was in the process of providing more sensitive treatment of same-sex relationships and advocated that immigration policy should eventually be reflective of these changes as well. The federal government chose not to adopt the proposed system; however, the report ignited a conversation concerning reliance of the Canadian immigration system on the traditional nuclear family.

The Immigration and Refugee Protection Act (IRPA) was passed in 2001, solidifying family reunification as one of the primary objectives of Canadian immigration policy (LaViolette 2004). This new piece of legislation expanded the category of family class to include spouses (married persons), common-law partners (cohabiting in a conjugal
relationship with a Canadian citizen) and conjugal partners (a conjugal relationship with a Canadian citizen), and reduced the sponsor financial obligation to three years. Due to their inability to marry in most countries, same-sex couples were obligated to apply as common-law partners. Attempting to develop a definitive method for same-sex couples to prove their relationships conjugal was difficult, as the cohabitation requirement failed to account for the persecution of gays and lesbians, “making it impossible for them to collect the documentation required to demonstrate a legitimate partnership” (LaViolette 2004, 982). Furthermore, the category of common-law partner was inconsistent with the definition of conjugality outlined in Molodowich v. Penttinen (1980) and M. v. H. (1999), which accounted for the various characteristics that make up a conjugal relationship, characteristics including but not limited to cohabitation. This claim was highlighted in Alfonso v. Canada (2002) where the applicant was denied permanent residency status on the grounds that the couple had failed to meet the cohabitation requirement despite having lived together — both in and outside Canada — for over three years.⁵⁴ In response, an amendment was added that promised couples unable to cohabit due to persecution or penal control they would be considered common-law for the purposes of a visa. As will be discussed in subsequent chapters, this amendment continues to have implications for the treatment of sexual minorities who seek Canadian protection. Ultimately, the increased focus on family reunification in the 2001 Act established a more prominent role for conjugality in the processing of family class applicants; with more relationships qualifying as conjugal, the state now had the power to assess the legitimacy of relationships in the absence of a marriage certificate.

There is a lag between changes to the familial unit in domestic policy and those changes being implemented into immigration policy. The inclusion of same-sex marriage to

the category of "spouse" is no exception. Same-sex marriage was legalized in 2005; however, married couples were unable to apply as spouses until 2007. The category of spouse is restricted only to those same-sex married couples who were married in a country where same-sex marriage is also legal, significantly minimizing the number of potential applicants. More important than the delay in changes to family between areas of policy, the inconsistent treatment of conjugality domestically does not cross over to immigration. The federal government explicitly privileges conjugal relationships in their immigration policy and as remaining chapters will demonstrate, the definition of conjugality has not changed with the incorporation of more relationships into the category of family class.

Changes in immigration policy concerning the parameters of conjugality have not been subjected to as extensive litigation as Canadian domestic decisions affecting conjugal relationships. This is largely attributed to two factors. First, the crux of immigration policy is state admission for non-citizens meaning that the individuals primarily affected are those who have limited access to our political institutions. Court challenges require substantive resources (time, money, etc.), resources difficult enough for Canadian citizens to obtain. For those seeking to immigrate, the difficulty in obtaining the appropriate resources is compounded by the fact that they are non-citizens. It is therefore challenging for applicants to question assessment practices at the judicial level. Second, as Dhamoon (2010) suggests, governments generally have more autonomy when it comes to developing stricter immigration policies because this policy domain is intertwined with questions of security. Because changes in immigration policy are framed as initiatives aimed at further protecting Canadian citizens, legislators are often given a free pass. As a result, modifications to our

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55 This was enforced as a preventative mechanism to reduce rates of marriage fraud, suggesting that the category of spouse is being misused by same-sex couples seeking access to Canada (Citizenship and Immigration Canada 2011).
immigration system are typically legislature-driven rather than responses to court decisions.

This is not to suggest that increasing Charter litigation of immigration decisions would necessarily challenge the state’s current focus on conjugal relationships. Technically, legislators are developing immigration policy in a manner consistent with judicial interpretation — family reunification is now available to common-law heterosexual and same-sex married and unmarried couples. Furthermore, judicial treatment of personal relationships remains fixed on the conjugal family unit; the extension of state recognition has transpired in a manner that upholds conjugal privilege. Policy incongruities are therefore not caused by a disconnect between judicial and legislative decisions affecting conjugal relationships; rather, the asymmetrical treatment of conjugality across policy domains is the direct result of both branches relying on a system of conjugal privilege and using this system — either intentionally or unintentionally — to maintain distinctions between inside and outside families.

**Why Does the State Care About Conjugal Immigrants?**

The Canadian state is invested in a strict definition of conjugality for processing members of the family class. The question then becomes why. The literature primarily relies on four theoretical frameworks to justify the inflexible treatment of conjugality in immigration policy. These frameworks include a neoliberal explanation of using conjugality to guarantee economic interdependence; a sexual citizenship interpretation of conjugality as a nation-building project; a Foucauldian framework that explores the concept of conjugality as a system of power; and a state-centric approach that recognizes the relationship between conjugality, political membership and state definition. While explanation is not limited to these four approaches, these frameworks effectively capture
the complexity of the work conjugality performs in distinguishing between inside and outside families.

Neoliberalism and Conjugality

Immigration policy is motivated by neoliberal values (Abu-Laban and Gabriel 2002; Reddy 2005; Harder 2007). The neoliberal state is defined by its support for an unregulated market and the privatization of social services. It is premised on the assumption that “the power of the state has extended too far with deleterious consequences for the market and individual freedom” (Harder 2007, 173). By decentralizing control and downloading services, the state is able to aid economic growth by securing access to foreign markets and encouraging a favourable investment climate at home. The success of this ideological project depends on the internalization of neoliberal values. Neoliberalism becomes a self-motivating mentality causing daily practice to correspond with neoliberal values including individuality, self-governance and self-sufficiency (Harder 2007, 172). In turn, the neoliberal state generates a remarkably coherent form of citizenship (Richardson 2000). Good citizens are defined by their ability to make responsible lifestyle choices and to govern themselves in a manner acceptable to the state.

In the case of Canadian immigration policy, the neoliberal citizen is established through selection criteria. Applying strict restrictions on spousal sponsorship and support obligations demonstrates the push for the self-sufficient immigrant. In this light, a stringent definition of conjugality to guarantee economic interdependency is inherently logical (Harder 2008, 4). The success of a neoliberal immigration system relies on the familial appropriateness of its applicants. Neoliberal states are supportive of selecting conjugal citizens, that is, those who are exercising lifestyle choices viewed as low-risk to society (Richardson 2005; Luibhéid 2005). Those wanting to become part of the neoliberal state must internalize these values and construct their families with these values in mind. In
terms of immigration, conjugality is identified by economic interdependence. Furthermore, this commitment is used to forecast a couple’s ability to continue being economically interdependent upon immigrating to Canada. The state has been less flexible around the subject of conjugality in immigration discourse because it is arguably increasingly difficult to gauge the capacity of economic interdependency when the conjugal nature of the relationship in question is unclear. By removing the aspect of permanency from a relationship — a characteristic perceived to be lacking in non-conjugal relationships — the promise of upholding neoliberal values is allegedly weakened. Thus, it becomes difficult to challenge current immigration policy so long as conjugality is normalized through discourses surrounding the economic and social well being of Canadian society.

Neoliberalism requires a specific family function — the ideal family should be a self-sufficient unit able to economically support all members. A neoliberal framework suggests that the conjugal family unit possesses the permanency necessary for this level of assured economic interdependence. It is misleading however, to conflate concepts of form and function when discussing the neoliberal family. While the role of the neoliberal family is clear, the form of the neoliberal family is more ambiguous. On one hand, scholars like Richardson (2005) and Duggan (1995, 2002) argue that neoliberalism prescribes a specific family form — that which produces neoliberal citizens — reproducing citizenship through “the voluntary governance of the self” (Richardson 2005, 518). By privileging conjugality, the state appoints status to those whose relationships are emblematic of the legitimate neoliberal family form. On the other hand, others have argued that while neoliberalism enforces a specific function, it is agnostic on family form (Cossman 2007; Harder 2009a). Neoliberalism is characterized by a push for the privatization of citizenship; citizenship is therefore restructured to emphasize the self-reliant family unit. Cossman contends that in addition to the individual, familial spheres are recoded with “less emphasis on the
normative structure of the family, and more emphasis on the support functions of the family" (Cossman 2002, 484). In addition to addressing the inherently heteronormative nature of neoliberalism, Cossman argues that the desire for a particular family form is outweighed by the desire for families to be reproducers of economic stability — the privatization of citizenship ultimately disrupts the nuclear family form. The key objective of neoliberalism is therefore economic prosperity and this is achieved through family function. Family form is therefore irrelevant, as it is not conceived of as a necessary condition for economic interdependency.

Economic interdependency has been the defining feature of conjugality because it distinguishes between conjugal and non-conjugal relationships in Canadian law and policy. This theoretical framework suggests that the state has an interest in these relationships because their interdependent nature allows the state to further privatize dependency. Favouring conjugality in immigration policy allows the state to welcome self-sufficient families. In this light, the function of the neoliberal family is clear — to provide a site for interdependency so that the burden of support is not on the state. What is not clear is the connection between conjugality and interdependency. It is a tenuous position to assume that all conjugal relationships involve economic support for the participants involved and alternatively, that all non-conjugal relationships lack an element of financial interconnectedness. Conjugality does not guarantee economic self-sufficiency. This suggests that privileging conjugal relationships in Canadian immigration policy is not solely about enforcing a particularly family function. If this were the case, conjugality would be irrelevant; legitimacy would solely be determined by the degree of economic support within the relationship in question. The reality of the situation is that applicants are not necessarily denied access because their relationship is not interdependent. What is happening is that while family function plays an important role in the selection of legitimate outside families,
family form is also relevant. A neoliberal framework therefore fails to fully account for state attachment to conjugality in immigration policy.

Sexual Citizenship Theory and Conjugality

If neoliberalism is more about economic interdependency and less about family form, how can we make sense of the persistence of the conjugal family in the context of neoliberal states? An alternative explanation as to why the state has a vested interest in conjugality is that defining proper sexual citizenship as conjugal is directly tied to defining and reproducing the state. Families are the focal point for nation building, as they establish parameters for membership not only through blood, but also through socialization as well. As a result, certain values are reproduced inter-generationally — “Overlapping layers of familial and political membership rules are the ones crucial to the reproduction of the nation” (Stevens 1999, 9). Sexual citizenship thus becomes a tool of nation building. Stychin contends that sexuality has always played a prominent role in the construction of national identities — “Sexuality appears to be a volatile symbol in debates about the character of national identities” (1998, 9). Essential to successful nation building is the establishment of “normalcy”, and this normalcy refers to the construction of fixed sex roles. Furthermore, the state seeks control over the sexual nature of its members and justifies this process by claiming the betterment of the nation (Pryke 1998, 540). Accomplishing this goal depends on a degree of acceptance on the part of the state and an element of acquiescence on the part of society. In the Canadian context, acceptance has been demonstrated with expanding the traditional definition of conjugality to include same-sex couples and common-law relationships. Arguably, acquiescence is also evident in the normative force of conjugal practice in the zeitgeist of Canadian attitudes towards sexuality. This is not to suggest that Canadians are not open to relationship diversity; however, challenges to these norms remain outside mainstream discourse.
Pryke exemplifies two ways in which the state has configured sexuality within the discussion of nation building — the ability to restrict what is acceptable behaviour on the part of the national citizen and the role fertility plays in nation building. The state's concern with "acceptable behaviour" links to the identification of traditionally "immoral" sexual acts (e.g. masturbation, pre-marital sex, homosexuality, etc.) as practices that threaten the health of the nation. Anti-conjugal conduct falls into this category of unacceptable sexual practice. Additionally, fertility is an essential aspect of nation building; because traditional understandings of the nuclear family have heteronormative roots, reproduction is encouraged among stable two-person parental units. Immigration blurs national boundaries and is perceived of as threatening the dominant culture. By limiting the range of acceptable expressions of sexuality in immigration policy, the national identity is protected from outside contagion. Canadian immigration policy works to extend a conception of the virtuous family as the nuclear family outwards, by demanding that people with different cultural practices subscribe to the Canadian version of family. Immigration is therefore not solely "a powerful symbol of nationhood and people, but also a means to literally construct the nation and the people in particular ways" (Luibhéid 2002, xviii). This narrowed definition of sexual citizenship is reproduced both by the state and its citizens, the result being a nation composed of responsible, conjugal citizens.

It is important to recognize that heterosexuality is no longer the Canadian standard for all forms of citizenship; sexual citizenship has undergone a transformation (Cossman 2007). In light of this, those working within a sexual citizenship framework must question who is today's sexual citizen, and consequently, who is now being excluded. Despite significant transformation with respect to family diversity in Canadian law and policy, what constitutes family in our family reunification policy still relies on conjugal ties. The good citizen is the conjugal citizen. Therefore, a sexual citizenship framework is particularly
important in our understanding of how current immigration assessment practices shape the sexual identities of applicants, and ultimately, family construction. Furthermore, it highlights that sexual identity is reinforced along racist, colonialist, gendered, classist and heteronormative lines (Crenshaw 1991). In the case of family class immigration, it is not simply a case of individuals sponsoring individuals; it is about the state creating a desirable familial type through the provision of citizenship. Therefore, contrary to the neoliberal approach, a sexual citizenship framework highlights the necessity of both family function and form in maintaining and reproducing Canadian national values.

What is troublesome about this framework is that it treats the privileging of conjugality as a state imposed project; individuals seek out conjugal relationships because the state inadvertently instructs them to do so through the provision of access. While this is arguably true, it glosses over the complexity of nation building projects. Processes that shape the conjugal citizen are so entrenched in our institutions and social practices that they are constantly being reproduced through normalization. We are expected to seek out a conjugal relationship over the course of our lifetime and, consequently, we expect others to do the same. Therefore, the (re-)production of the conjugal citizen often takes place without the direct influence of the state. Ultimately, while a sexual citizenship framework accounts for the interconnectedness between sexuality, citizenship and family, it overlooks the positioning of this relationship within a broader matrix of power that normalizes conjugality as privileged familial practice.

Foucault and Conjugality

In his discussion of governmentality, Foucault aims to understand how the relationship between power and knowledge is used by the state to develop particular courses of action geared towards guiding human behaviour (1991, 96). Contrary to more traditional interpretations of the state as a sovereign disciplinary power, Foucault
approaches governance as technologies of the self that “permit the individual to effect by their own means or with the help of others a number of operations on their own bodies and souls, thoughts, conduct and way of being, so as to transform themselves in order to attain a certain happiness, purity, wisdom, perfection or immorality” (1988, 18). In addition to establishing one’s own “rules of conduct,” individuals are constantly transforming themselves in order to meet their own set of predetermined expectations. For Foucault, self-governance is interconnected with the maintenance of the state. Technologies of the self are essential to the existence of the modern state, as it permits the state to control its population without the threat of physical force. A state’s welfare is therefore reliant on the physical, mental and moral health of its population. As Foucault explains, this is where a discourse of sexuality and health emerges, instead of condemning sexual activity, it is “managed [by the state], inserted into systems of utility, regulated for the greater good of all, and made to function according to an optimum” (Ransom 1997, 97). In this light, sex is not just judged; rather, it is administered.

Numerous scholars have used this approach to explore how states rely on the self-government of individuals (Rose 1996; Dean 1999; Hunt 1999; White and Hunt 2000; Cossman 2007). By incorporating self-discipline and governance, conjugality becomes a point of access for the state. As Rose contends, “individuals are incited to live as if making a project of themselves: they are to work on their emotional world, their domestic and conjugal arrangements, their relations with employment and their techniques of sexual pleasure, to develop a ‘style’ of living that will maximize the worth of their existence to themselves” (1996, 157). Those who engage in conjugal relationships avoid penalization, which in the case of Canadian immigration policy is the refusal of access; conjugality

56 Foucault refers to this process as “reason of state”; the strength of the state is dependent on the health of the population. Therefore reason of state requires an interest in the individual (not the individual human being, but the population as a single unit) (Ransom 1997, 63).
becomes a system of knowledge. Conjugality therefore acts as an organizing principle used to buttress state power through processes of normalization — “Foucault’s framework suggests that immigration-control practices, down to their most mundane procedural details, produce and naturalize these identities” (Luibhéid 2002, xxii). Ultimately, immigration is part of a larger nation building project — bigger than what a sexual citizenship framework suggests — whose existence relies on processes of Othering. Conjugality is one such process of Othering, reinforcing the state’s reliance on the construction of difference.

The difficulty with relying solely on a Foucauldian critique of the normalization of power is that in the case of immigration, this theoretical framework does not fully address the coercive nature of the state. Conjugal privilege is reproduced and normalized through a combination of state- and self- regulation; however, it is imperative that we recognize the uniqueness of immigration policy in comparison to other policy domains. While domestic policy deals with citizens within a state’s borders, immigration policy establishes conditions for how outsiders become insiders. Moreover, the state plays an active role in determining these rules of entry. Self-regulation of intimate relationships has significant implications for family construction, but when it comes to immigration policy, the state is invested in regulation. A Foucauldian approach therefore insufficiently accounts for the variation of state interest across policy domains and, more specifically, the differentiation between domestic and immigration policy.

*Political Membership and Conjugality*

The previous three frameworks fail to attend to the role that membership plays in immigration policy. Membership is an essential component of establishing state boundaries of power — “Political society is to the nation as grammar is to a sentence” (Stevens 1999, 11). What distinguishes domestic from immigration policy is the connection between
citizenship and national membership. Political membership is defined by blood and familial ties that leave Canadian-born individuals with the option to either passively accede to their membership within Canadian borders or leave. While immigrants who meet the criteria have the choice to become Canadian citizens, they must subscribe to the Canadian state’s version of citizenship. Stevens defines the state as “a certain kind of membership organization, namely a form of political society” (1999, 60). Distinguishing one political society from another are their unique rules of membership. Membership rules cannot arise by virtue of the state; rather, they are constitutive of the state itself. As Harder argues, “The rules governing sexual citizenship lie at the root of political membership; the law’s articulation of sexuality is also an articulation of the state” (2007, 174). Other areas of policy are not as intertwined as immigration policy with issues of membership because they pertain to Canadian citizens who are already members of the Canadian state.

Immigration policy not only dictates who can become a member, but more importantly, who cannot. As a result, the boundaries of the Canadian state are defined in terms of access. This is often perceived as an inevitable consequence of immigration control, the assumption being that when it comes to determining access, lines have to be drawn somewhere. Membership is therefore important, as it allows the state to manage its citizens by dictating who becomes a citizen. Additionally, establishing the parameters of citizenship distinguishes the Canadian state from others. Canadian national identity is simultaneously constructed and reproduced through immigration. So long as immigration remains controlled, membership works to reinforce the borders of the state, both inside and outside.

A primary concern for political membership is state capacity to provide for its citizens, an example being the impact immigration has on the welfare state. Public resource allocation is computed over the entire life-cycle of a citizen; services one might not utilize as much while younger might be exercised when older. Health contends that, “states enforce
territorial boundaries in order to control the flow of public goods both inside and outside the state” (1997, 347); states allocate their resources on the assumption that all citizens will need these services at some point in their lives. Flexible immigration controls challenge this, as it makes it more difficult for the state to plan for service delivery. This is compounded by the increasing sentiment that immigration threatens the very existence of the welfare state, a perceived trade-off between a commitment to immigration and a commitment to social services promised to citizens (Banting and Kymlicka 2006). In this light, membership is important, as it allows the state to manage the provision of services by dictating who has access to them.

The type of membership a state desires directly translates into the type of members it seeks. This is where conjugality comes into play, as membership cuts across familial lines. The state constructs an understanding of the desirable family through immigration policy, dictating how outsiders (those applying for status) can become insiders (those who have status). Furthermore, this rhetoric embodies certain assumptions about race, religion, sexuality, gender, class and sexual orientation. It is essential that we deconstruct discourses of difference in order to contextualize how interactions between intimate relationships and state membership vary across time and space. Approaching membership through a citizen/non-citizen dichotomy is therefore misleading because the composition of these categories is constantly shifting. This variation is dictated by meanings of difference that inform conceptualizations of what constitutes a “desirable” citizen and ultimately enlightens the rules of immigration. Conjugalism becomes a way in which membership is allocated to desirable familial units. While the Canadian state’s treatment of conjugalism within its

57 While empirical research suggests that these perceived threats are grossly overstated (Banting et al. 2006; Soroka, Johnston, and Banting 2007), these apprehensions highlight the unintended sociological effects of multiculturalism and immigration in Canada.
borders is both hypocritical and contradictory, conjugality becomes a prominent factor for families seeking membership.

Privileging conjugality establishes a narrowed interpretation of family and while the Canadian state’s reliance on conjugality is more flexible within its borders, this limited understanding of family is explicit in its immigration policy. Family class immigration is defined by responsibility, and the type of intimate relationship one forms defines that responsibility. In doing so, relationships in need of state approval are simultaneously publicized and privatized. Outside families are obliged to prove that their relationship is conjugal, stripping applicants of the privacy generally enjoyed by Canadian citizens. Spousal sponsorship requires applicants to provide physical proof that their conjugal relationship is genuine in order to gain access. Ultimately, these applicants must make their relationship public in order to gain private space in the form of Canadian citizenship, a luxury typically awarded to those residing in Canada. The intimate relationship of the “good” citizen is tolerated by the state so long as it corresponds with state values and norms, blurring familial form and function. This is why depending solely on a neoliberal framework — that reduces conjugality to economic interdependency — to explain state motivation for privileging conjugality is insufficient. Sexual citizenship theory suggests that this occurs so that national values of sexual responsibility are maintained and produced within the Canadian state. A Foucauldian framework takes this a step further by highlighting the ways in which conjugality is normalized through self-governance. Finally, maintaining a conjugal nation is dependent on membership. Membership rules define who is granted and denied access. By understanding the role conjugality plays in the provision of membership, we gain clarity as to why the state is invested in defining the rules of entry. Separately, these examinations of why the Canadian state enforces a strict definition of conjugality in its immigration policy are inadequate because it is clear that they are interconnected; the use
of one of these theoretical frameworks in isolation offers a fragmented picture. Combined, they provide a more complete picture. The state therefore benefits in a multitude of ways by privileging conjugal families.

**Conclusion**

There is no doubt that conjugality is the preferred adult personal relationship with respect to Canadian law and policy both inside and outside the state. The extension of conjugal rights to common-law and same-sex couples permitted the state to be more inclusive, while maintaining a definition of family that revolves around the conjugal unit. While conjugal relationships hold primacy, those living in Canada generally have the freedom to develop their own familial networks. This is a result of the flexibility in the state’s approach towards conjugality within its borders. As this chapter demonstrates, domestic treatment of conjugality is inconsistent, as it is often under-enforced (e.g. Bountiful), or over-enforced (e.g. spouse in the house rules). As a result, our understanding of permissible relationships in Canadian policy is convoluted. This both helps and hinders individual decision-making regarding personal relationships.

Despite the consequences of definitional elasticity, there is generally less flexibility in our immigration policy. Spousal sponsorship is currently the primary form of family class sponsorship; therefore, the conjugal unit demarcates the legitimate immigrant family. The Canadian state’s inconsistent treatment of conjugality has established two versions of the conjugal family — the inside family (families within Canadian borders) and the outside family (families outside Canadian borders). This is evident through an examination of changes related to relationship recognition in both policy domains. While the courts have had less influence on changes to immigration policy compared to domestic policy, both judicial and legislative interpretation of adult personal relationships relies on upholding a system of conjugal privilege. The second half of this chapter explored the state’s interest in
reinforcing this distinction, arguing that the state benefits from a strict understanding of conjugality in its family class program. The four theoretical frameworks discussed highlight that while the Canadian state is a conjugal state, this is not without contradiction. Therefore, we must account for the role conjugality performs in state practice and question the often silent power it holds in determining access to the Canadian state. Subsequent chapters will examine the treatment of conjugality in Canadian immigration policy in depth, focusing on how conjugality shapes those relationships deemed legitimate by the state. While inconsistent treatment of conjugality has resulted in a complex understanding of acceptable personal relationships both inside and outside the Canadian state, the remaining chapters aim to provide some clarity.
Chapter 4

Haunting of Relationships Past: The Role of Conjugality in Canadian Refugee Determination Process for Sexual Minorities

"Heterosexuality is at once necessary to the state’s ability to constitute and imagine itself, while simultaneously marking the site of its own stability" (M. Jacqui Alexander 1997, 69).

In 2006, a bisexual male from Brazil filed a claim for refugee status in Canada. Claiming to be in need of protection, the claimant testified that he had been the victim of a violent attack in his neighbourhood and discrimination at his place of employment, attributing both events to his sexual orientation. When questioned by Canadian officials of his relationship history, the claimant responded that while he had dated both men and women, he had never been in a long-term relationship; he explained that he had never felt safe enough to develop the types of long-term relationships he desired. While officials accepted the applicant’s claim that he was a victim of physical violence, they were sceptical that this was a direct result of his sexual orientation, as they were not convinced that the claimant was actually a bisexual. The claimant’s application was refused on the grounds that, “The claimant has never resided with either a man or a woman, therefore, it is impossible to identify the claimant’s true sexual identity” (TA5-07054, 5). The claimant’s lack of long-term relationship history resulted in his claim being denied; the absence of conjugal living was interpreted as the absence of a legitimate sexual identity.

Canada’s allowance of refugees who are victims of persecution as a result of their sexual orientation has positioned the country as a protector of sexual minority rights worldwide. While the Canadian state has taken a progressive stance — comparatively speaking — on gay and lesbian rights, there remain issues with the assessment of refugee claimants who fear persecution as a result of their sexual orientation. Primarily, these criticisms focus on how assessment practices reinforce heteronormative sexual stereotypes.
Furthermore, the presence or absence of intimate relationships is inherent in these stereotypes, despite the fact that the refugee program is an individualized process. Refugees claiming persecution because of their sexual orientation are obliged to prove that their sexual identity is legitimate, which in the case of the Canadian refugee claimant, involves testimony about their relationship history. What is unsettling is that the Immigration and Refugee Board (IRB) uses certain characteristics of their relationship history (sex of partner, duration of relationship, public perception of relationship, etc.) to assess the validity of one's testimony. In doing so, relationship history becomes an influential factor in determining the legitimacy of the refugee claimant's sexuality, which in turn evaluates the seriousness of the claimant's experienced or feared persecution. This is not to suggest that the conjugal nature of one's intimate relationships is the sole determinant in refugee assessment cases; however, conjugality does play a role in case assessment. This has implications for those seeking refuge, as the Canadian state's understanding of sexuality and sexual identity shapes the type of claimant capable of gaining access.

This chapter will explore the implications that the IRB's reliance on relationship history present for homosexual and bisexual refugee claimants. It argues that current IRB assessment protocol for sexual minority refugee claimants is flawed both in terms of the stereotypes that shape refugee policy and the mechanisms used to assess claimant testimony. I situate this chapter within a discussion concerning the relationship between immigration and sexual orientation. This is followed by an overview of Canada's refugee system in order to explore how claimants of sexual persecution are treated from a policy-

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58 I am adopting Rehaag's definition of "bisexual", which refers to "a person whose sexual orientation, sexual identity, or sexual behaviour is not directed exclusively towards persons of one particular sex or gender" (2009, 417). While there have been several cases involving transgender claimants (see Montoya Martinez v. Canada (Citizenship and Immigration) (2011) FC 13), I have chosen to examine only homosexual and bisexual refugee claimants for this project. I am by no means suggesting that transgender refugee claimants are any less important; this is an area of refugee studies in desperate need of further development.
based perspective. Finally, I examine the repercussions the current policy has on homosexual and bisexual claimants; this will shed light on how sexual minority claimants are treated from a practice-based perspective. This discussion will be based on an analysis of a combination of published and unpublished IRB decisions obtained through the Access to Information Act. In doing so, this chapter highlights a gap between the theory and practice of refugee policy in Canada, specifically for sexual minority refugee claimants.59

Refugee Policy and Sexual Exceptionalism

The ability to migrate between countries is both empowering and restricting. Canada’s refugee system provides those who are persecuted because of their sexual orientation with the opportunity to flee their situation; however, obtaining access requires adhering to a specific understanding of sexuality. Furthermore, the system obliges claimants to provide intimate details about incredibly stigmatized aspects of their lives, leaving claimants with little choice about the ways in which these experiences are shared (LaViolette 2007). The restrictive nature of this process is typically overlooked, as state allowance of refugees is framed as an act of benevolence. As a result, this discourse masks power imbalances between the state and refugees; the refugee is conceptualized as “strange” or “stranger” while the host nation is perceived as compassionate.

As previously discussed, the success of sexual exceptionalism is reliant on the simultaneous production and exclusion of the sexualized, racialized Other. Morgensen’s work on “settler homonationalism” examines how the Canadian state was established by wiping out those sexual practices found in Aboriginal populations deemed aberrant by

59 I am using the term “sexual minority” with the objective of consistency, as the Canadian government uses the term “sexual minority” to categorize non-heterosexual sexualities. I believe however, that this language is limiting and inaccurate, as many queer people do not consider themselves part of a sexual minority. Furthermore, current immigration policy recognizes “sexual minorities” as consisting of homosexuals, and more recently bisexuals. As a result, many individuals who identify as queer are rendered invisible under existing sexual minority refugee claimant assessment protocol.
colonial powers. This suggests that homonationalism relies on the continued colonization of Native peoples (Morgensen 2010, 107). Furthermore, it demonstrates that sexual exceptionalism as a mechanism of the state is not a recent phenomenon as Puar suggests. The Canadian state was founded on a system of heterosexual privilege and uses this system of privilege to police non-heterosexual sexualities and sexual identities. Through immigration policy — and in this case, refugee assessment policy — sexual exceptionalism takes new forms. In this instance, the Canadian state embraces select sexual minorities, but at the cost of further alienating un-assimilative sexual minorities both inside and outside its borders.

This discourse therefore creates hierarchies of sexual acceptance within Western states, and between Western and non-Western states. Moreover, Western narratives of both sexuality and sexuality-based harm shape the non-Western sexual minority. In addition to papering over systems of privilege that produce and reproduce this Western/non-Western sexual binary in the first place, this discourse also fails to account for the possibility that individuals do not necessarily experience or understand their sexuality along these lines (Massad 2002; Reddy 2005; Wekker 2006). Therefore it is imperative that we account for the imposition of Western definitions of sexualities when examining the Canadian state’s treatment of sexual minority refugees.

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61 It is important to note that in referring to Western conceptions of sexuality, I am not suggesting that these conceptions of sexuality are homogeneous. I do however adopt Mohanty’s position that “it is possible to trace a coherence of effects resulting from the implicit assumption of ‘the West’ (in all its complexities and contradictions) as the primary referent in theory and practice” (2003, 17–8). I therefore use the term “Western conceptions of sexuality” not as a descriptor for the sexualities of citizens living in Western states, but rather as the ideal model of sexuality marked by several characteristics including innateness, public and acceptable (Weeks 2010, 47–55, 77–89).
Increasing attention has been paid towards homophobic undertones in European refugee processes (Stychin 2000; Cagnolini 2011; Gitari 2011; Jansen and Spijkerboer 2011; Middelkoop 2011; Subner 2011), barriers to queer migration in the United States (Epps, Valens, and Johnson-Gonzalez 2005; Luibhéid 2002, 2004, 2005, 2008; Luibhéid and Cantù 2005; Sommerville 2005), homosexual immigration in Canada (Dhir 2000; Casswell 2004; LaViolette 1997, 2004, 2007, 2009), and most recently, the invisibility of bisexuality in discussions of sexual persecution (Rehaag 2008; 2009; Namaste, Rehaag, and Vukov 2010). What ties this literature together is its challenging of the paradoxical nature of Western states that recognize sexual orientation as a well-founded form of persecution. On one hand, these states are progressive, as the majority of states choose not to recognize homosexual rights domestically, let alone in their immigration systems. On the other hand, however, the adoption of a Western understanding of sexuality — more specifically, conjugality — has implications for refugee claimants, as it restricts them from gaining access. The Canadian refugee system is predicated on a specific understanding of sexuality, defined in part by one’s history of intimate relationships, used to simultaneously present a national discourse of tolerance and inclusion, and restrict those claimants labelled undesirable sexual citizens. In doing so, the Canadian state has revitalized its own rhetoric of sexual exceptionalism.

**The Canadian Refugee System and Sexual Minorities**

Since 1989, the refugee determination process has been the responsibility of the IRB, an independent tribunal. While the government of the day sets the immigration policy agenda, the IRB is expected to provide a non-partisan, independent assessment of refugee claims. In theory, IRB decisions are not to be influenced by the political climate. Following the allowance of sexual minorities to claim refugee status in 1991, the IRB has processed thousands of persecution claims based on sexual orientation (LaViolette 2009, 440). The
IRB’s Refugee Protection Division (RPD) assesses claims brought forward by those seeking refugee status; the RPD is therefore responsible for deciding “whether they believe the claimant’s evidence and how much weight to give to that evidence” (Citizenship and Immigration Canada 2012). In this light, a well-founded fear of persecution requires both a subjective and an objective requirement. Refugee claimants must possess a fear of persecution; however, that fear must be objectively evaluated in order to determine if a valid basis to that fear exists. This is typically achieved through independent country information, consisting of governmental, non-governmental and media reports concerning conditions for sexual minorities. As Hathaway states, “it is clear that even the most fervently stated fear of persecution will not be enough if objective evidence tends to deny the existence of risk” (1991, 71). Objective evidence is therefore a compulsory and pivotal element in refugee claims.

The Canadian state is internationally obliged to uphold the 1951 United Nations’ Convention Relating to the Status of Refugees, defining a “refugee” as an individual:

62 This was recognized in Adjei v. Canada (Minister of Citizenship and Immigration) (2007) IRB: TA5-14829. Joseph Adjei, a Ghanaian seeking Convention refugee status by reason of political opinion and his membership in the Trade Union congress and the People’s National Party, was denied entry on the grounds that he failed to provide an objective element to his claim of feared prosecution in his home country. The Federal Court ruled that while the claimant must experience a subjective fear of persecution, the mere possibility of persecution is not considered a substantive ground for refugee status. It is the responsibility of the IRB to assess the claimant’s subjective fear of persecution against characteristics of the claimant’s home country that speak to the probability of their fear being realized (e.g. human rights record, political climate towards homosexuality, state of police force, existence of queer communities, etc.).

63 LaViolette (2009) contends that existing country documentation is insufficient due to a scarcity of information — a common struggle for non-governmental organizations working on the ground to collect information concerning the treatment of sexual minorities in homophobic countries — as well as the use of inappropriate sources as substitutes for information from these organizations (e.g. gay tourism pamphlets). While LaViolette recognizes the importance of this documentation, she proposes that the IRB recognize the gaps in this information and to avoid confusing silence with conditions suitable towards sexual minorities. Comparatively speaking, studies have shown that the IRB spends more money on information collection than other immigration tribunal boards; however, there remains work to be done (Dauvergne and Millbank 2003, 311).
Who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in particular social group or political opinion is outside their country of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of that country (UNHCR 1951).

The IRB is therefore not bound by a Canadian definition of refugee; rather, the Canadian refugee determination system relies on the interpretation of this international convention. The primary constraint on the IRB’s interpretation of this definition is Federal Court decisions where the limitations of current refugee assessment processes are addressed.

Members of the IRB — those who review claims — do not operate under an explicit understanding of acceptable and unacceptable evidence; rather, members must be convinced that the evidence presented by the claimant is “probably so”. The assigned member must therefore be persuaded that a) the refugee claimant is a sexual minority; b) the claimant has a well-founded fear of harm in their home country as a result of their status as a sexual minority; and c) the claimant’s home country is either unable or unwilling to provide protection from that harm. While this vague approach to evidence is beneficial — as it recognizes that formal types of evidence (police reports, government documents, etc.) are not always attainable — discretion can be a double-edged sword. The capacity to entertain a broad spectrum of evidence also gives members the leeway to justify rejecting a broad spectrum of evidence, establishing an unequal power dynamic between themselves and refugee claimants.

Because sexual orientation is not enumerated in the Office of the United Nations High Commissioner for Refugees’ (UNHCR) definition of “refugee” — a concerning omission — legal strategies to include sexual orientation are multiple and contested (LaViolette 1997; Millbank 2002; 2009; Rehaag 2008; 2009; Gitari 2011). I will briefly examine five strategies: persecution due to membership in a particular social group defined by innate characteristics; membership in a particular group defined by voluntary association perceived as fundamental to human dignity, gender, religion and public opinion.
Persecution due to Membership in a Particular Social Group — Innate Characteristics

Canada v. Ward (1993) — a Supreme Court decision — made clear that sexual orientation qualified as a “particular social group” to which refugees could claim membership.64 Interestingly, the case had nothing to do with sexual orientation; the appellant was a former member of the Irish National Liberation Army (INLA) who sought refugee status in Canada, claiming fear of persecution as a result of his affiliation and criminal actions with the INLA. For Justice La Forest, the issues here were the actual meaning of a “particular social group” and the relevancy of state complicity, as “international refugee protection is to serve as surrogate shelter coming into play only upon failure of national support.”65 With respect to state complicity, the Court ruled that well-founded claims of persecution do not solely rely on situations in which the state is an accomplice; persecution can take place in situations where states are simply unable to protect their citizens. Independent human rights documentary evidence confirmed that the appellant’s home country was unable to protect its citizens from the actions of the INLA. This established a broader interpretation of state compliance, recognizing that state action as well as inaction (either voluntary or involuntarily) contributes to instances of persecution.

In deciding what constitutes a particular social group, Justice La Forest identified three distinct types of social groups:

1) Groups defined by an innate or unchangeable characteristic;
2) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3) Groups associated by a former voluntary status, unalterable due to its historical permanence.66

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65 (1993) 2 SCR 689, supra note 35 at 739.
66 (1993) 2 SCR 689, supra note 37 at 739.
Using this three-pronged approach, the Court ruled that INLA members failed to qualify as a particular social group and Ward was denied “Convention Refugee” status. As previously mentioned, *Ward* had no direct connection to sexual persecution; however, sexual orientation was mentioned in the Court’s offering of examples for these social group categories. Justice La Forest interpreted the first grouping — groups defined by an innate or unchangeable characteristic — as including, “individuals fearing persecution on such bases as gender, linguistic background and sexual orientation.”

Incorporating homosexuals into this category suggests they are deserving of international protection because they are unable to change the personal characteristic for which they are being persecuted for, that being their sexual orientation. The IRB’s immediate adoption of this understanding of a particular social group undoubtedly produced positive results for gay men and lesbians seeking refuge in Canada. As LaViolette contends:

> Panel decisions published since the 1993 Supreme Court decision no longer reveal a variety of views on whether gay men and lesbians constitute a particular social group for the purposes of the *Convention’s* definition of refugee. Nor do they disagree on the reasons why membership in a sexual minority can ground a claim of state persecution (1997, 22).

The Court’s decision in *Ward* resulted in the IRB’s acceptance of sexual orientation as an immutable characteristic in need of state protection.

The categorization of homosexuality as immutable highlights a long-founded tension between determinist (homosexuality as natural) and social constructivist (homosexuality as socially constructed) debates. A determinist approach suggests that sexual orientation should be understood as innate; individuals do not choose to be gay, they just are. Furthermore, they should not be persecuted for reasons that are beyond their control. Social constructivists, on the other hand, contend that sexual identities are socio-historical constructions. Challenging the perceived fixed nature of sexuality inherent in determinist

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conceptualizations, social constructivists interpret sexuality as fluid, context-dependent, and defined by ever-changing social, economic and political dynamics (LaViolette 1997, 29). For social constructivists, culture, not human nature, defines sexual orientation. Determinist understandings of sexuality ignore the state’s role in the production of sexual identities.\footnote{Dissatisfied with the polarizing nature of both theoretical perspectives, LaViolette (1997) proposes a middle ground, an approach that acknowledges both the innate and social factors responsible for influencing sexual identity.}

While the Court’s interpretation of sexual orientation as innate has been beneficial, it is not without consequence. By construing sexual orientation as unchangeable, the Court failed to make a distinction between status and conduct. Assuming that one’s homosexual identity is beyond their control means that the individual will only engage in homosexual acts and will only self-identify as homosexual. Moreover, this interpretation suggests that if possible, individuals would avoid being homosexual (Cagnolini 2011, 6). This understanding neglects to recognize the fluidity of sexual identity (LaViolette 1997; Rehaag 2008). Moreover, this provides the IRB with a rigid definition of homosexuality. As will be discussed in the latter part of this chapter, this has implications for queer refugee claimants. Approaching sexual orientation as immutable removes the capacity for sexual minorities seeking refugee to self-identify.

Additionally, sexual orientation as an innate characteristic simultaneously simplifies processes for homosexuals seeking refuge and complicates processes for non-homosexual queer identified refugee claimants. Rehaag (2008, 2009) contends that while homosexuality is viewed as unchangeable, the IRB approaches bisexuality as a choice. Because the sexual orientation, identity and behaviour of those who identify as bisexual is not directed exclusively towards persons of one specific sex or gender, the IRB works under the assumption that bisexuals can choose to pass as heterosexuals. In this light, unlike homosexuals who are persecuted for something that is beyond their control, bisexuals
possess the ability to avoid discrimination. Bisexuality therefore tests the state’s reliance on a rigid interpretation of sexuality where homosexuality or heterosexuality is seen as a fixed, innate characteristic of one’s identity. The Court’s interpretation of sexual orientation — while producing positive results — has implications for how sexuality is legitimized and assessed with respect to refugees. Despite these criticisms, the IRB has generally relied on understanding sexuality-based persecution as persecution based on membership in a particular social group defined by an innate, unchangeable characteristic (Interview BB, 2011; Interview CC, 2010).

Persecution due to Membership in a Particular Social Group — Voluntary Association Fundamental to Human Dignity

Critics of the previous approach propose that we understand sexual minorities to be members of a particular social group who voluntarily associate for reasons so fundamental to their human dignity. The assumption here is that sexual minorities should not be entitled to refugee protection because their sexuality is unchangeable; rather, their claim to refugee status should be grounded in the belief that asking sexual minorities to repress their sexual identities is a violation of human dignity. Referring to this as the “fundamental human dignity approach,” Rehaag contends that instead of debating whether one is able to change their sexuality, this approach would allow sexual minorities to secure refugee status “irrespective of the ebbs and flows of the debates on the ‘causes’ of sexual orientation” (2009, 419). This is not to suggest that one necessarily chooses their sexual orientation; the benefit of this approach is that it sidesteps this debate altogether. Instead of focusing on whether sexual orientation is pre-determined or socially constructed, the fundamental human dignity approach draws attention to the fact that forcing sexual minorities to forego their association in order to avoid persecution fundamentally infringes their human dignity.

In addition to re-framing the debate about sexual minority rights, this approach minimizes the amount of scrutiny claimants undergo. Instead of claimants having to prove
that they qualify as a sexual minority, the IRB would only need to determine "whether a person is likely to associate — or to be perceived as associating — with others in a manner that challenges the inevitability or desirability of exclusive heterosexuality" (Rehaag 2008, 99). In this light, the severity of persecution is assessed on public perception of the claimant’s sexual identity instead of the claimant’s sexual identity itself.

_Persecution due to Gender_

In 1993, the IRB developed a handbook titled "Women Refugee Claimants Fearing Gender-Related Persecution," which recognized that individuals are often targeted for their failure to commit to traditional gender roles and norms, specifically acknowledging that, "women may suffer abuse because of the gender division in social roles or because of the particular relationship between women and the state" (LaViolette 2007, 172). The inherently gendered nature of oppression reinforces normalized understandings of men and women, male and female, masculinity and femininity. In doing so, those perceived to conduct themselves in ways contrary to these interpretations are cast as deviants. Discussions of gender-based persecution have typically focused on women; it is assumed that because states are characteristically patriarchal, women who choose not to adhere to gender-specific roles are targeted. This is evident in the variety of cases brought before the IRB; female refugee claimants have feared persecution because of their refusal to obey their home countries' discriminatory gendered practices including dress codes, arranged marriages, sexual violence, genital mutilation, etc. The adoption of the Handbook was forward thinking on Canada's part, as it was the first country to take gender differentiation in experiences of persecution seriously (LaViolette 2007).
Gender-based persecution could potentially be a locus for sexual minority refugee claims. While sexuality is absent from the Handbook, two parallels have been highlighted between gender-based and sexuality-based refugee claims (Rehaag 2008). First, sexual minorities often simultaneously experience persecution as a result of their gender and sexual identities. Lesbians, for example, often encounter discrimination in their home countries because of their gender and sexual orientation (e.g. rape, family-based violence, forced marriage, etc.). Furthermore, once obtaining refugee status, they are frequently exposed to gender-based discrimination in their host countries (e.g. employment, housing, access to social services, etc.). It is therefore imperative we recognize that while gender-based and sexuality-based persecution should not be conflated, there is often considerable overlap. A second and related parallel is that in many cases, persecution against sexual minorities targets one’s non-conformity with traditional gender norms and assumptions. As LaViolette contends:

Social, political, and legal disapproval of homosexuality is more often a reaction to the non-compliance to gender and social roles than a simple expression of contempt for the sexual practices of homosexuals. Generally, gender roles are based on a heterosexual orientation. Non-conformance with gender norms by gay men, lesbian, and transgendered persons implies a refusal to behave in ways dictated by their biological sex and social classification (2007, 185–6).

In this light, any experience of sexuality-based persecution is also an experience of gender-based persecution, as the individual is targeted because of their failure to adhere to heteronormative expectations of gender roles. Framing sexuality-based persecution as an example of gender-based persecution is therefore a useful and strategically successful approach to incorporating sexual orientation within current conceptualizations of well-founded refugee claims.

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69 Traditionally, immigration scholarship has either conflated sexuality and gender, or ignored it altogether. Regardless of their interconnectedness, the question of sexuality and the question of gender are not one and the same, and should therefore be interpreted as distinct factors in the migration process (Sedgwick 1990).
Framing sexuality-based persecution in this vein provides multiple benefits both for claimants as well as the IRB (LaViolette 1997; Rehaag 2008). IRB members would be encouraged to account for the intersection of identities — in this case, gender and sexuality — inherent in refugee claims. Furthermore, it would emphasize the co-dependent relationship between heterosexuality and traditional gender identities. Finally, adopting this frame has the potential to "encourage IRB members to consider how traditional gender roles may be enforced not only through heterosexist persecution, but also monosexist persecution" (Rehaag 2008, 97). The application of a gender-based persecution frame therefore provides a channel for those who do not identify as heterosexual or homosexual. Including sexuality-based persecution in the IRB's understanding of gender-based persecution would allow the IRB to assess these claims in a determination process that is cognizant of the interconnectedness between gender and sexuality.

*Persecution due to Political Opinion and Religion*

In addition to framing sexuality-based persecution as a form of voluntary association essential to one's human dignity and as a form of gender-based persecution, Rehaag (2008) examines the utility of political opinion and religion for sexual minority refugee claims. In *Ward*, the Court defined political opinion as “any opinion on any matter in which the machinery of state, government and policy may be engaged.”70 This definition of political opinion has been successfully used to claim persecution, particularly among queer rights activists. As Rehaag explains, considering the prominence of the heterosexual family as society's fundamental unit, "violence and discrimination targeting those who challenge heteronormativity can reasonably be characterized as persecution on account of political opinion" (2008, 94). This approach operates under the assumption that sexual minorities challenge the politically dominant discourse of heteronormativity, in which the

heterosexual nuclear family unit holds primacy. As a result, sexual minorities are often targeted because their beliefs about sexuality run counter to mainstream views. Not useful solely for activists, persecution on account of political opinion could be a suitable venue for all sexual minority refugee claimants.

Similarly, the tendency of religious authorities to view “heterosexuality as the only natural or religiously sanctioned form of human sexuality,” makes the category of persecution on account of religion a potential locus for sexual minority refugee claims (Rehaag 2008, 94). Duggan contends that instead of focusing on the language of rights, queer movements should “borrow from and transform another liberal discourse, that surrounding the effort to disestablish state religion, to separate church and state” (1995, 188–9). Replacing state religion with the religion of heteronormativity, Duggan proposes understanding state-imposed sexuality as no better than state-imposed religion — “... a heterosexual presumption has no more place in public life than a presumption of Christianity” (1995, 189). The Canadian state is secular, recognizing that no religion (albeit some exceptions) should receive special treatment. Accordingly, its refugee determination process accounts for the reality that many states do not share these views, and that individuals are persecuted for having religious beliefs that are inconsistent with the dominant religious views of their home state. Both Rehaag and Duggan suggest that the approach to religious persecution could be useful for claims of sexuality-based persecution. If we agree that “the state may no more establish a state sexuality than a state religion,” then sexual minorities could frame refugee claims as an example of religious persecution, as their sexual identity fails to correspond with their state’s religious privileging of heteronormativity (Duggan 1995, 189). While the categories of political opinion and religion hold less weight in current refugee determination process for sexual minority
claims, legal commentators are encouraging the IRB to take these types of claims more seriously (Rehaag 2008, 2009; Millbank 2002, 2003).

While legal scholars have proposed several frameworks aimed at incorporating sexual orientation into the current working definition of refugee, the IRB has typically relied on an understanding of sexuality as fixed and unchangeable (Interview BB, 2011; Interview CC, 2010). In addition to the challenges this conceptualization of sexuality presents for sexual minority refugee claimants, the current determination process is further complicated by two factors. First, the issue of claimant credibility often hampers assessment. Considering sexual minority refugee claimants generally come from homophobic climates in their home countries, claimants often lack physical evidence to corroborate their claims of sexual persecution. As a result, assessment is often based on claimant testimony alone, ultimately highlighting issues of credibility (Millbank 2009). The issue of claimant credibility presents challenges unique to sexual minority refugee assessment that are due in large part to pre-existing prejudices towards sexuality and sexual orientation. The second challenge is the establishment of harm. A reliance on exogenous harm has made it difficult for immigration tribunals to assess the threat of persecution, particularly when physical evidence is absent. Courts have called for boards to account for endogenous harms — specifically the affront to one’s dignity as a human being — however, the spectrum of endogenous harm remains under interrogation (Hathaway and Pobjoy 2012, 333). While sexual orientation claims compose a small minority of refugee claims worldwide, the implications of these challenges manifest themselves differently for sexual minority refugee claimants compared to other types of claimants.
Trends in Treatment of Sexual Minority Refugee Claimants

Out of the 100 obtained unpublished decisions, 99 involve a negative result. In reference to the success of cases of sexual persecution, studies conducted by Dauvergne and Millbank (2003) and Rehaag (2008) conclude that "grant rates for refugee claims by members of sexual minorities are similar to the grant rates for traditional refugee claims" (Rehaag 2008, 61). Thus, while the majority of obtained decisions are negative (e.g. claims that were denied), this does not suggest that sexual minority claims are less successful than non-sexual minority claims. Moreover, negative decisions are often successfully appealed (Interview BB, 2011). I am aware of the limitations a lack of positive decisions presents; because reasons only need to be provided by the IRB when the decision is negative, the representativeness of this dataset is questionable. In light of this, the purpose of this chapter is not to suggest that the IRB’s understanding of sexuality and conjugality leads to misjudged cases. It is impossible for me to decide whether a refugee should have been accepted based on the IRB decisions that are included in this study. Instead, I argue that this is a flawed process, as the IRB’s rhetoric of relationship history reproduces sexual stereotypes and reinforces the notion of the “good” sexual citizen.

It is important to note however, that while grant rates for sexual minority and non-sexual minority refugees are comparable, bisexual refugee claimants have more difficulty obtaining status compared to homosexual refugee claimants (Rehaag 2008, 2009). This has been attributed to the general invisibility of bisexuality in Canadian law and policy, and the IRB’s reliance on an understanding of sexual orientation as fixed (as determined in Ward). For Rehaag, bisexuality challenges the state’s essentialist understanding of sexual orientation in two ways — bisexuality is often perceived as flexible and partly chosen, and it

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distinguishes between identity and activity (concepts the courts and the IRB tend to conflate) (2008, 87). This is compounded by the perception that because bisexuality is partly chosen, bisexuals have access to heterosexual privilege and are therefore not subjected to persecution. These stereotypes of bisexual identity construct what Rehaag refers to as the “bisexuality myth”, putting bisexual claimants in the position of “having to substantiate their sexual identity to adjudicators who might not believe that bisexuality exists, and who do not have a sense of what bisexuals might look like if they do exist” (2008, 87).

Out of the 100 obtained unpublished decisions, 66 decisions included references of this nature, with 131 individual references made in total. References to relationship history were made in all 30 of the decisions involving bisexual claimants and 36 decisions involving homosexual claimants. Out of the 131 individual references, 115 (87%) were negative; a finding that is not surprising considering the sample overwhelmingly consisted of negative decisions. Positive mentions of relationships and/or relationship history were made either to confirm a claimant’s past relationships or their relationship patterns upon arriving in Canada.

It is important to reiterate that because claimants must satisfy the IRB’s doubts concerning the credibility of their testimony, there is no single formula for assessment. While all members assess applications within a framework dictated by international convention and court decisions — a framework that provides suggestions as to the type of evidence a member can request — how this evidence is weighed is the discretion of the assigned IRB member (Interview BB, 2011; Interview CC, 2010). As will be discussed, this inconsistency in treatment is troublesome for multiple reasons. This does not suggest however, that irregularity in assessment automatically means the absence of trends in assessment. My review of decisions involving homosexual and bisexual refugee claimants in
Canada has highlighted three trends. First, the IRB relies on stereotypes of sexual orientation and assumptions about sexuality more generally to assess the credibility of sexual minority refugee claimants. A second and related trend is that conjugality is used to distinguish between legitimate and illegitimate claims of sexual identity, ultimately reproducing these stereotypes. Finally, this distinction is then used as proof when assessing whether or not a well-founded fear of harm exists. While conjugality is not necessarily the deciding factor in refugee determination process, it noticeably influences the IRB’s assessment of claimant trustworthiness. It is therefore imperative that I attempt to account for these three primary observations.

Reliance on Sexual Stereotypes

How the IRB understands “what (homo)sexuality is and how it is and ought to be expressed,” is essential to the determination process (Millbank 2002, 145). As it currently stands, claimants provide the IRB with personal narratives of their experiences of persecution, a positive development for many scholars who believe that storytelling creates possibilities for the deconstruction of sexual stereotypes (Delgado 1989; Plummer 1995; Weeks 1998). Supporters of storytelling in legal and political forums contend that the sharing of personal narratives has the potential to emphasize individual differences in a way that invites listeners to “participate, challenge their assumptions, and lower their defences [sic]” (Delgado 1989, 2412). In this light, a determination process based on individual narrative would be beneficial for sexual minority claimants, as it arguably avoids the application of a single sexual minority mould to all applicants. In reality however, the IRB’s reliance on personal testimony has failed to produce such results. Millbank’s study concludes that IRB members have difficulty taking narratives of sexual minority refugee claimants seriously when those narratives fail to meet their pre-conceived notions of sexual
identity (2002, 177). This is evident in Re P.W.Z. (2000) — a published sexual minority refugee decision — where an IRB member stated:

The claimant presents as an articulate, professional, well-groomed, and attractive young woman. Based on all of these considerations . . . the panel cannot conclude that the claimant’s sexual orientation would be physically obvious to intolerant and bigoted segments of Columbian society.72

Or similarly commented in Re K.Q.H. (2003):

With the goal of determining whether . . . the claimant is gay, the panel asked him about his social activities since arriving in Canada. We asked him if he went to the gay bookshop and he answered “no” . . . We asked him if he went to gay bars or discotheques in Montreal . . . The claimant explained . . . that he went more often to the downtown bars. Because of his . . . ignorance of the gay reality . . . I find that the claimant is not credible.73

While comments about one’s physical appearance have typically been used to confirm the claimant’s identity post-UNHCR Guidance Note, occasional negative decisions based on appearance continue to take place, with IRB members making comments such as “no signs of being gay,” “effeminate voice and manner,” and “looked gay”.74 Personal narratives define the refugee determination process, these narratives are measured against IRB members’ personal conceptions of sexual orientation and sexual identity. This places sexual identity

72 P.W.Z. v. Canada (Minister of Citizenship and Immigration) (2000) C.R.D.D. involved the denial of a sexual minority refugee claim made by a woman from Colombia. The IRB concluded that because the claimant’s presentation of herself failed to match preconceived notions of lesbian women, the claimant was capable of “passing” as a heterosexual and therefore was not under threat of sexuality-based persecution.

73 Similar to Re P.W.Z. (2000), K.Q.H. v. Canada (Minister of Citizenship and Immigration) (2003) R.P.D.D. highlighted assumptions of a “gay reality” that reinforce heteronormative assumptions about sexuality and sexual identity. The negative decision involved a man from Mexico, who feared persecution because of his sexual orientation. In addition to these decisions upholding homosexual stereotypes, the presumption of a single “gay reality” is misleading, as it ignores intersections between sexual orientation and gender, race, class, geographical location and immigration status (Rehaag 2008, 73).

74 The UNHCR (2008) released its Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, seeking to recognize that sexual minorities encounter a specific set of problems when seeking refugee status. While guidance notes are considered less authoritative, they are often a first attempt at dealing with emerging legal issues. These decisions — TA4-04080, TA4-13131 and TA5-02888 — were obtained in a study conducted by Millbank (2009). All three were copies of expedited reports from the IRB that were not intended for public release.
under heightened scrutiny; personal narratives simultaneously become a site of legitimacy and illegitimacy.

This is compounded by the IRB’s reliance on documentary evidence. Claimant testimonies are assessed against existing country documentation; those narratives in conflict with this documentation are deemed suspicious. In a decision involving a claimant from Mexico who feared returning to his home country because of his homosexual identity, the assigned IRB member questioned his testimony, as it contradicted documentary evidence highlighting positive steps the Mexican government had taken towards combatting homophobia. The claim was therefore refused on the grounds that “although the situation pertaining to homosexuals may not be perfect in Mexico, there has been significant progress made as well as many positive developments within the political and legal landscape” (MA5-02382, 3).

This was echoed in a decision involving a lesbian woman from the Philippines seeking refuge, the assigned IRB member concluded:

I find that if societal or governmental abuse amounting to persecution or to a risk to life or to a risk of cruel and unusual punishment against gays and lesbians was prevalent in the Philippines, human rights organizations such as Amnesty International, the Country Reports on Human Rights Practices or the International Lesbian and Gay Association (ILGA) would have informed the Refugee Protection Division (TA5-11796, 5).

This suggests that country documentation trumps claimant testimony should the two disprove each other. LaViolette (2009) warns of the limitations of relying on this type of documentation, specifically information availability and the use of inconsistently defined concepts including discrimination, persecution and state protection. What these decisions demonstrate is that these shortcomings are typically ignored; a claim is considered well-

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75 Interestingly, approximately 30% of the 100 unpublished decisions involved claims made by citizens of Mexico, all of which were denied by the IRB due to documentary evidence citing progressive steps made by the Mexican government towards sexual minorities. For more information on queer Mexican migration, see Cantú’s Well-Founder Fear: Political Asylum and the Boundaries of Sexual Identity in the U.S.-Mexico Borderlands (2005) and The Sexuality of Migration: Border Crossings and Mexican Immigrant Men (2009), Ramirez’ Claiming Queer Cultural Citizenship: Gay Latino (Im)Migrant Acts in San Francisco (2005).
founded if it can be corroborated with documentary evidence. Ultimately, claimant testimony is considered well-founded so long as it corresponds with the IRB members' preconceptions of sexual identity and external documentary evidence.

*The Role of Conjugality in Upholding Sexual Stereotypes*

The bolstering of sexual stereotypes with existing country documentation makes it challenging for sexual minority refugee claimants to provide testimony deemed legitimate by the IRB. An example of this is preconceived assumptions about the relationship between sexual orientation and relationship tendencies. Historically, Western cultures have had a habit of understanding sex as a destructive force — referred to as “sex negativity” by Rubin (1984) — redeemable solely if used for the purposes of procreation within marriage. This in turn produces a hierarchy of sexual value; “good” sex is heterosexual, married, monogamous, private and procreative, while “bad” sex is homosexual, unmarried, promiscuous, public and non-procreative (Rubin 1984, 13). As Rubin explains:

> Individuals whose behaviour stands high in this hierarchy are rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits. As sexual behaviours or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions (1984, 12).

In line with the belief that sexuality is fluid and context-dependent, it would be wrong to assume that this hierarchy is fixed. The legalization of same-sex marriage in Canada has arguably made some homosexual sex (e.g. conjugal, monogamous, homosexual sex) “good” sex at the expense of further shaming other types of homosexual sex, what Warner refers to as “selective legitimacy” (1999, 82). While the boundaries between “good” sex and “bad” sex are in constant flux, the linking of queer sexualities to assumed promiscuity continues to shape sexual stereotypes. Interestingly, medical experts (past-classification of homosexuality as a mental illness), social conservatives (homosexuality as a threat to
traditional family values) and queer scholars (challenging the appropriation of the heteronormative marriage model on queer couples) alike have drawn attention to this stereotype.76

These preconceived assumptions about sexuality and sexual behaviour shape the IRB’s assessment of claimant testimony. The assumption that homosexuals are naturally promiscuous and should therefore engage in multiple homosexual experiences separates the legitimate from the illegitimate, an example being when the IRB took “the sum total of the claimant’s homosexual experiences” into consideration when assessing the testimony of an Ethiopian gay male claimant (TA5-16633, 6). The claimant testified that he had engaged in two homosexual experiences, one as a teenager and then one in his early twenties. For the IRB, two sexual experiences — despite them taking place in a recognized homophobic country — was “hardly a pattern of active homosexual activity . . . that would lead someone to accuse the claimant of homosexuality” (TA5-16633, 9). This logic also pervades the assessment of bisexual claimants, resonating with stereotypes of bisexuals as “sexually voracious or pathologically promiscuous” (Rehaag 2009, 426). In a decision involving an 18-year-old bisexual female from Saint Lucia, the IRB found the claimant’s lack of sexual activity during her time in Canada suspicious — “The claimant testified that she has not been sexually active [in Canada]. She [the claimant] says she is underage to go to gay clubs and she is busy with going to school. It is difficult to believe how a person sexually active with a male and two females from the age of 14 is living a celibate life now” (TA6-12910, 4). Stereotyping homosexuals and bisexuals as promiscuous leads to inconsistencies between the IRB’s assumptions about relationship history and claimant testimony.

76 This is not to suggest that these three groups universally rely on a connection between sexual orientation and promiscuity. While medical experts and social conservatives have used these assumptions to further demonize and punish queers, queer scholars have typically used this stereotype to advocate both for same-sex marriage (Sullivan 1995), and for the legal and social recognition of the differences between queer and non-queer relationships, as well as within queer relationships (M. Warner 1999).
Interestingly, one’s relationship history is also assessed with regards to the degree of permanency. While claimant testimony is deemed suspicious when it fails to match predetermined understandings of queer sexual experience, long-term relationships — while contradicting the IRB’s reliance on the assumption of promiscuity — often lend an element of legitimacy to the claim. References including “a two-year homosexual relationship” (TA5-16134, 1), “She does not currently have a partner” (TA6-00989, 4), and “It was pointed out by the claimant in his oral testimony that he had a ten-year relationship” (TA6-02210, 4), suggest that the seriousness of the relationship factors into the IRB’s assessment of homosexual claimants. This is not to suggest that being in a long-term relationship automatically qualifies you for refugee status; however, it appears to strengthen the claim that one is in fact a sexual minority. Furthermore, relationships must be long-term homosexual relationships in order for one to be considered truly homosexual by the IRB. A lesbian woman from Nigeria seeking refuge was denied access on the grounds that she had previously had a common-law heterosexual relationship that included children (TA6-00989). Relationship history, more specifically the type of relationship history, is important in proving one’s sexual identity. Moreover, being a sexual minority means consistently being a sexual minority, and consistently being a sexual minority means being unswervingly homosexual. These expectations place sexual minority refugee claimants in a double-bind. Claimants who fail to meet preconceived assumptions about sexual promiscuity are questioned, while at the same time long-term relationship history strengthens their claims. In this light, sexual minority refugee claimants are damned either way.

In addition to the IRB examining claimants’ relationships in their home countries, claimants who spend time in Canada prior to applying for refugee status are expected to
develop relationships in Canada that lend legitimacy to their claimed sexual identity.77 Fearful of the homophobic climate in their countries of origin, claimants describe Canada in their testimonies as a place where they can be their true selves free of violence and discrimination. For the IRB, this means that upon arriving in Canada, sexual minority refugee claimants should be taking advantage of this newfound sexual freedom. As the obtained decisions demonstrate, failure to do so calls the claimant’s sexual identity into question. This was evident in a decision involving a homosexual male from Indonesia where the assigned IRB member commented, “You [the claimant] had no homosexual relationships since you have been in Canada . . . I find your actions after arriving in Canada are inconsistent with your comments that you make in your PIF [Personal Information Form], that you are here in fact to have an open gay lifestyle. I find that you are not a homosexual” (TA6-03304, 4). Similar justifications for claim refusal were used in a decision involving a lesbian claimant from China, the assigned IRB member stating that he was “not convinced she [the claimant] was a homosexual because she had not entered into any homosexual relationships with anyone while in Canada” (TA6-03337, 3), and another involving a gay male from Ukraine, the assigned IRB member concluding that the Board “could not ignore that the claimant has not participated in any homosexual relationships in Canada despite having been there for a year” (TA5-03780, 4). Applicants who have the opportunity to develop same-sex relationships in Canada and fail to do so are met with uncertainty regarding their sexual orientation. The IRB bases their assessment of the sexual identity of sexual minority refugee claimants on their relationships with others, both in their home

77 In many negative decisions, a postponement between arriving in Canada and claiming refugee status was interpreted by the IRB as challenging the seriousness of the claimant’s experience of sexual persecution. Claim delay was identified as a “relative element” for assessing claimant credibility in Huerta v. Canada (Minister of Employment and Immigration) (1993), 157 N.R. 225 (F.C.A.), as it addresses the existence of a Convention refugee claim — a clarification outlined in Cruz, Fernando Rodriguez v. M.E.I. (F.C.T.D., no. IMM-3848-93), Simpson, June 16, 1994.
countries as well as in Canada. As confusing and contradictory as the state’s reliance on relationship history is, a claimant’s sexual conduct with others impacts their claim of sexual minority status.

The IRB’s focus on relationship history has implications specific to bisexual claimants as well. As indicated by both published and unpublished IRB decisions involving bisexual claimants, the relationship history of the claimant is used to determine whether the claimant is heterosexual or homosexual. For example, in a case involving a female bisexual claimant from Iran, the assigned IRB member commented:

The claimant arrived in Canada with a male companion . . . In response to the question as to whether they were planning to get married, the claimant replied, ‘So far there is a commitment but officially we haven’t signed a paper or anything’ . . . [The claimant’s] actions are those of a heterosexual woman.78

Similarly, in another published decision involving a bisexual woman from Saint Lucia, the Court concluded that the claimant was not legitimately bisexual because of her opposite-sex sexual conduct at the time of application:

A problematic part of the testimony is her reference to her being in a relationship with a man after the end of her lesbian relationship. . . . That finding of a relationship with a man was preceded by a reference to her own testimony that she was bisexual. A review of the transcript indicates that she seems to have moved, over time, from heterosexual, to lesbian, to bisexual orientation, ultimately questioning the credibility of the claimant’s account.79

In both decisions, the seriousness of the relationship as well as the biological sex of the participants involved has an impact on the legitimacy of bisexual claimant testimony. This was made clear in Gyorgyjakab v. Canada (2005) where the IRB cited evidence suggesting that at the time of application, the bisexual female claimant was living with her boyfriend80;

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79 Christopher v. Canada (Minister of Citizenship and Immigration) (2008) FC 964.
and another case involving a male bisexual claimant, where the assigned IRB member concluded:

At the hearing, the claimant testified that he loved his wife and believed in women again, his wife did everything he wanted, and they had a variety of sexual activities, satisfied each other, and lived together as a family. When asked whether he saw himself as a man having a need for sex only with his wife, the claimant answered that it was the case at the moment. . . . The claimant's testimony . . . supported the panel's conclusion that he did not establish his homosexuality or bisexuality with persuasive evidence (TA1-28696).

Similar to homosexual claimants, bisexual claimants are also questioned about their lack of homosexual relationships upon arriving in Canada; in a case involving a bisexual male from Chile, the assigned IRB member concluded, "The claimant is not an active bisexual by choice, as he did not act upon his alleged bisexuality in Chile nor in Canada. Ultimately, there is no indication that he will practice it in the future" (MA5-04358, 5). The assigned IRB member on a decision involving a bisexual male from St. Vincent made an analogous query stating, "The claimant stated he did not have a current partner and had not had any partner in Toronto since he arrived. The Board found this explanation to be unsatisfactory and believes the evidence regarding his homosexuality or bisexuality to be lacking in credibility" (TA5-01198, 4). These decisions imply that the IRB understands sexual orientation as a spectrum with heterosexuality at one end and homosexuality at the other. Instead of approaching bisexuality as a sexual identity that is constantly shifting along this spectrum, the IRB attempts to pinpoint which end of the spectrum the bisexual claimant is closer to. In doing so, the IRB can determine what type of bisexual the claimant is, which determines whether the claimant is genuinely in need of protection from the Canadian state.

The IRB’s treatment of bisexuality is troublesome for three reasons. First, the current refugee determination process fails to take the reality of bisexual experiences seriously. One's sexual identity is generally determined by the gender of their current or recent sexual partner. As a result, bisexuality is not seen as a sexual identity in and of itself;
rather, it is an identity that lends itself to one end or the other of the sexual orientation spectrum. The IRB’s treatment of bisexual claimants highlights how one’s relationship history further complicates this, ultimately ignoring the possibility that bisexuals are capable of engaging in relationships with concurrent sexual partners or in long-term monogamous relationships — something that coincidentally enough, heterosexuals and homosexuals do as well. The rhetoric used by the IRB in bisexual refugee decisions suggests that bisexuality is a form of dabbling; individuals are either gay or straight, and use the label “bisexual” when they choose to dabble in the other. This flippant attitude towards bisexuality erases experiences that are unique to those who identify as bisexual. If we understand sexual identity and sexual behaviour as connected but not necessarily co-dependent, then it is unclear “in what respect evidence that a refugee claimant maintains a sexually exclusive relationship could plausibly be read as challenging the credibility of his or her asserted bisexual identity” (Rehaag 2009, 428).

Second, the IRB attempts to determine the “true” sexual orientation of bisexual claimants in order to assess the degree of harm the claimant has or could experience assumes that the homosexual aspect of bisexuality is the only side that is susceptible to harm. In an Australian case involving a bisexual claimant, the Refugee Review Tribunal noted, “the notion of a group defined as ‘bisexuals’ has been considered insofar as the homosexual side of bisexuals[s] . . . were an issue” (N95/07313). Similarly, the IRB ruled in Re B.D.K. (2000) — the first refugee decision in Canada involving a bisexual claimant — that the claimant qualified as a sexual minority because he was a “bisexual man who prefers men.”81 This suggests that refugee boards are willing to consider the possibility that bisexuals can qualify for refugee status so long as the persecution experienced is a result of their “homosexual side” (Rehaag 2009, 426). More importantly however, claiming

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bisexuality is insufficient for refugee determination boards assumes a claimant has a homosexual side; this is where the claimant’s relationship history comes into play. As Rehaag points out, this is concerning for bisexuals as well as homosexuals; while this approach minimizes bisexual identity, it also interprets homosexuality as "the absence or antithesis of heterosexual desire" (2009, 426). A bisexual claimant’s relationship history is used to distinguish between one’s homosexual and heterosexual sides and to assess which side is more prominent, constituting the claimant’s “true” sexual identity. In doing so, the claimant is evaluated on their ability to pass as a heterosexual, relieving the Canadian state of any obligation to provide protection.

Third, assessing one’s ability to pass as a heterosexual ignores the complexity of homophobia. Johnson (2002) explores how discourses of heteronormativity rely on a politics of passing; traditional interpretations of passing are extended to include certain sexual minorities capable of “fitting in” within a normalized heteronormative framework.82 It is evident in the obtained decisions that the IRB assesses bisexual refugee claimants on their ability to pass as a homosexual, accusing a bisexual male claimant from Nigeria of “downplaying his heterosexual life in order to impress the Board about his homosexual life” (TA5-07252, 3), and commenting on a case involving a bisexual male claimant from Jamaica that, "If he [the claimant] was having a relationship with a person of the opposite sex as a cover up for his homosexuality, then surely his second heterosexual relationship seems to be overkill" (TA5-10217, 4). This discourse of passing assumes that homophobia is not experienced by those deemed capable of fitting into the heterosexual world. One can experience homophobia on a multitude of levels, regardless of their ability to pass. Adopting a rhetoric of passing for the assessment of bisexual refugee claimants reinforces

82 This argument is echoed by Puar (2006, 2007) in her discussions of sexual exceptionalism and homonationalism.
heteronormative privilege, as it attempts to push claimants who pass as heterosexual into a space where they are perceived to be immune from persecution.

The invisibility of bisexuality in Canadian law and policy has made it difficult for the IRB to pinpoint what constitutes a well-founded claim of sexual persecution for bisexual refugee claimants. As a result, bisexuality is interpreted by the IRB as a middle ground between homosexuality and heterosexuality, placing one's relationship history at the forefront of possible indicators determining where one falls on the sexual orientation spectrum. The notion that relationship history sufficiently serves as concrete proof for bisexual claimants is unsustainable, as an ambiguous understanding of bisexual identity directly translates into flawed assessment mechanisms for refuge seekers. By not taking bisexual identity seriously, the IRB inevitably approaches the relationship history of bisexual refugee claimants with unfounded scepticism.

*Relationship History as “Concrete Proof” of Sexuality*

In addition to relying heavily on relationship history, the IRB expects claimants to provide physical proof in order to corroborate their narratives of relationships past and present. In a decision involving a lesbian claimant from Nigeria, the assigned IRB member questioned the seriousness of the claimant’s current relationship noting, “In spite of her close bond with her partner, she never received any correspondence from her while travelling abroad” (TA6-00989, 4). This was echoed in the assessment of a gay male claimant from Pakistan, the assigned IRB member drawing attention to the perceived suspiciousness of the claimant’s nine-year relationship with another man, stating:

He [the claimant] was also asked during the nine-year period he and XXXX were together, whether they exchanged any letters or cards. The claimant replied that he did not have any. He was asked if they ever had a picture taken together and responded they had once, but he does not have one. The panel finds that the claimant has not established his identity as a homosexual (TA6-02210, 5).

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Despite the claimants’ testimony that they were both in long-term same-sex relationships, the IRB members assigned to these cases questioned the lack of physical proof they believed necessary to substantiate their claims.

The expectation of physical evidence sends mixed messages to claimants. On one hand, it suggests that genuine relationships require a public element. This is particularly evident when claimant testimony included discussions of long-term relationships; in the obtained IRB decisions, a lack of correspondence between couples raised suspicions concerning the legitimacy of the relationship, and ultimately the individual’s claim of sexual minority status. Written communication (letters, e-mails, etc.) between individuals is typically considered private; however, it becomes public when used as a way to gain state recognition. The IRB’s comments in the decisions above therefore suggest that a public component to the claimant’s discussion of relationship history adds to the legitimacy of the testimony.

On the other hand, claimants are often accused of unsuccessfully keeping their homosexuality hidden; in “homophobic countries”, individuals are expected to “know better” and remain “in the closet” so as to avoid being the target of violence. In a case involving a lesbian woman from Nigeria, the assigned IRB member wrote, “The fact that Nigeria is a homophobic society . . . suggests that the claimant, as a lesbian, could not be unaware of the continuing peril she faced” (TA6-00989, 5). This was echoed in a second decision involving a Nigerian where the validity of the claimant’s testimony — specifically his account of getting caught kissing another man at his place of employment — was challenged by the assigned evaluator who commented, “I asked the claimant why he and his friend would have started kissing and hugging in the store in view of passers by, knowing how much homosexuality is rejected by Nigerian society” (MA4-06500, 4). In these decisions, failure to fly under the radar led to the claimant’s testimony being deemed non-
credible; the assumption being that “true” sexual minorities living in homophobic countries are never caught engaging in non-heterosexual acts and those who are never caught are never accused of being homosexual.

This highlights the Canadian state’s paradoxical understanding of sexual persecution. Claimants are expected to prove they have experienced physical violence — or at the very least, a serious threat of physical violence — as a result of their sexuality; however, they are expected to keep their sexual orientation private in order to avoid encounters of this nature. It therefore becomes difficult for claimants to substantiate their claims of sexual persecution, when getting caught in a homosexual act is used to ascertain whether the claim is well-founded. This position is further complicated when claimants are then expected to provide a paper trail that verifies their relationship history narrative. The IRB’s current refugee determination process consequently places sexual minority refugee claimants in a no-win situation. Claimants are either criticized for getting caught or for not having proof of their non-heterosexual relationships, proof that could inevitably lead to them getting caught. The IRB’s reliance on physical proof as evidence for one’s relationship history is therefore contradictory and establishes vague expectations for sexual minority refugee claimants.

Relationship history as an indicator of sexual orientation is therefore troublesome for several reasons. First, the IRB’s reliance on relationship history is inconsistently applied. Homosexual claimants are simultaneously accused of not living up to stereotypes that paint them as promiscuous beings, and penalized for not engaging in long-term same-sex relationships. Furthermore, relationship history is used to assess the “true” sexual identity of bisexual claimants, ultimately determining whether claimants can pass as heterosexuals or require protection from the Canadian state. Uneven treatment of relationship history
makes it difficult for sexual minority refugee claimants to have their sexual identity taken seriously, let alone obtain status.

Second, relationship history is used by the IRB to encourage Western conceptions of sexuality and reproduce sexual stereotypes, reinforcing distinctions between legitimate and illegitimate sexual identities. Programs like the Canadian refugee system rely on an understanding of the Western sexual minority in order to assess the non-Western sexual minority; a process developed by “us” to help “them”. Sexual refugee claimants constitute a universal victimized group in need of liberation that only the Canadian state can provide. As a result, the IRB fails to account for the reality that individuals do not experience their sexuality in a uniform fashion.

Third, relationship history as proof of sexual orientation makes it difficult for sexual minority refugee claimants to meet the expectations of the IRB. Considering that sexual minorities seek refugee status in order to flee the homophobic climate of their home country, the obligation to prove that a relationship history does exist through the provision of physical proof is unobtainable for the majority of claimants. Moreover, those capable of providing proof are accused of being careless, subjecting their testimony to further scrutiny. The question then remains: how can the IRB rely on relationship history when they expect homosexual and bisexual relationships to be hidden?

Finally, it suggests that even in an individualized process like refugee assessment, relationships matter. The IRB works under the assumption that upon obtaining status,

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83 The production/reproduction of this Western/non-Western sexual minority binary is consistent with Mohanty’s (2003) work on the effects of Western feminist scholarship on the production of the “Third World woman”. Cast as a universal subject, the Third World woman is typically characterized in this body of scholarship as the victim in need of Western liberation. While feminist scholarship is typically premised on the assumption that men obtain power at the expense of women, Mohanty contends that Western feminist scholarship is guilty of assuming that the Third World woman has less agency than the Western woman. For Mohanty, this is misleading, as it “assumes an ahistorical, universal unity between women based on a generalized notion of their subordination” (2003, 31).
refugees will either start a family here or start the process of sponsoring family members from abroad (Interview BB, 2011; Interview CC, 2010). What is interesting however, is that following the acceptance of their claim, a refugee must apply to become a permanent resident. It is not until they become a permanent resident that they can apply to sponsor family members. Refugees are therefore assessed according to their future family formations without the guarantee of family reunification. Relationship history is used to filter sexual minority refugee claims despite the fact that claimants apply for status as individuals and refugee status is not a necessary or sufficient condition for future family development.

*Where do we go from here?*

As it currently stands, the sexual minority refugee claimant is responsible for convincing the IRB of three things — the claimant is a sexual minority, the claimant has either experienced or possesses a well-founded fear of harm in their home country as a result of their status as a sexual minority, and the claimant's home country is either unable or unwilling to provide protection from that harm. There is a need for screening mechanisms, as immigration systems are open to abuse; however, narratives used to assess the legitimacy of homosexual and bisexual claimants, particularly narratives regarding relationship history, complicate the claimant’s ability to satisfy these requirements. Canada’s refugee determination system must be re-evaluated so that sexual minorities encounter a more just assessment process. While proposals for reform vary (Rehaag 2008, 2009; Namaste, Rehaag, and Vukov 2010; Jansen and Spijkerboer 2011), I offer four alterations to the current sexual minority refugee determination process. These reforms include revisiting the role of self-identification, questioning the IRB’s methods of questioning, deconstructing Western conceptions of sexuality, and further research on the treatment of bisexuality in Canadian law and policy.
Revisiting the Role of Self-Identification

In an attempt to develop universal standards for state treatment of Lesbian-Gay-Bisexual (LGB) refugee claims, the UNHCR released an addendum to their Handbook in 2011, proposing an assessment process reliant on claimant self-identification. The Handbook understands self-identification as the following:

Self-identification as LGB should be taken as an indication of the individual’s sexual orientation. While some applicants will be able to provide proof of their LGB status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity. Where the applicant is unable to provide evidence as to his or her sexual orientation, and/or there is a lack of sufficiently specific country of origin information, the decision-maker will have to rely on that person’s testimony alone. If the applicant’s account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt (UNHCR, 2012).

The main premise of this definition of self-identification is that individuals should have the capacity to declare and confirm their sexual orientation without external confirmation. While external evidence can support a claimant’s application, the legitimacy of one’s claim of sexual minority status should not be determined by third party confirmation alone. This is not to suggest that a claim of persecution should be made without evidence; rather, self-identification refers to claimants not having to convince the IRB that they are in fact a sexual minority. Evidence would therefore be used to evaluate claims of persecution. In this light, the IRB should be convinced that a claimant is a sexual minority by their declaration alone.

In the current refugee determination system, claimants identify themselves as a sexual minority at the time of application; however, self-identification alone is insufficient. Instead, self-identification is evaluated against a collection of evidence including proof of sexual identity (correspondence between partners, testimony from friends and family, physical appearance, etc.), proof of sexual persecution (police reports), and proof of state failure with regards to the provision of protection (documentary evidence). In the event that the claimant is unable to satisfy the last two criteria, the IRB focuses on the first and
tries to determine the validity of the claimant’s self-identification as a sexual minority. Self-identification is only taken seriously so long as it satisfies the IRB.

This leaves me with two questions. First, how should we understand self-identification? Taylor writes that the discourse of recognition happens on two levels, the first being on an intimate level, “where we understand the formation of identity and the self as taking place in a continuing dialogue and struggle,” and the second being public recognition of one’s self-identity (1994, 37).84 If self-identification is solely about claimants being able to declare their sexual identity when applying for refugee status, then one could argue that the Canadian refugee determination process is based on a system of self-identification. By allowing sexual minorities to qualify for refugee status, the Canadian state permits this type of self-identification to take place. However, if self-identification requires an element of public recognition as Taylor suggests, then the extent to which this is possible under current determination practices is unclear. In the case of sexual minority refugee claims, public recognition of self-identification is reliant on corroboration between the claimants’ testified sexual identity and provided evidence. As this chapter suggests, such evidence includes one’s relationship history. Public recognition is therefore contingent on external evidence, not self-identification alone. Current methods of assessment for sexual minority refugee claims thus need to be re-visited in order to ascertain how the Canadian state understands self-identification and whether this interpretation is consistent with the UNHCR’s guidelines.

The second question worth positing is whether self-identification — as understood as a combination of self-formation of identity and public recognition of that identity — is a viable goal? Considering that self-identification relies on the IRB’s method of assessment, it

84 Taylor was using this framework to examine national minority rights and would probably take issue with the suggestion that sexual minorities fall into this category. I can assure you that this is not my intent. The utility of this framework lies in its ability to examine the limits of self-identification.
becomes difficult to gauge whether self-identification in the truest sense of the term is achievable. Reforms involving self-identification should take priority; however, I question the extent to which this can take place when the UNHCR's guidelines recognize the need for refugee boards to assess these decisions. Ultimately, self-identification only goes so far. In addition to focusing on expanding the terms of self-identification, attention should also be on methods adopted by the IRB to assess the self-identification of sexual minority refugee claimants. While self-identification is imperative to sexual identity (Butler 1993; Weeks 1995; Berlant and Warner 1998; Halley 2001; Phelan 2001; Johnson 2002), it remains limited by mechanisms used by the state to control immigration. Examining these control mechanisms, particularly the IRB’s reliance on relationship history, could provide a more useful starting point for revisiting current treatment of homosexual and bisexual refugee claimants.

*Questioning IRB Methods of Questioning*

It is safe to assume that the credibility of the claimant is connected to the IRB’s approach to questioning and/or the types of questions asked during the application process. The types of questions posed by the assigned member shape answers provided by the claimants. Framing questions in a way that is confusing to the claimant could lead to answers deemed suspicious by authorities. Claimants may relate to themselves in ways that are unfamiliar to the IRB members, or could have difficulty framing their answers in a way that claimants can understand, another complication of self-identification. This is particularly evident when dealing with relationship history. Individuals develop their personal relationships differently, causing a potential rift between one’s own perception of their relationship history and the perception of the assigned IRB member. Furthermore, the IRB’s inconsistent treatment of relationship history makes it difficult for claimants to anticipate questions related to relationship patterns and sexual encounters. The IRB needs
to create space for sexual minority refugee claimants, allowing them to feel comfortable about disclosing intimate details of their sexual orientation. In doing so, the IRB can still control for fraudulent claims; however, hearings could be conducted in a way that minimizes the possibility for claimants’ responses to be overly swayed by the IRB’s questioning methods. Ultimately, questioning the IRB’s methods of questioning could increase the number of successful sexual minority refugee claims, by making the system more accessible for claimants.

Deconstructing Western Conceptions of Sexuality

In order for sexual minority refugee claimants to convince the IRB that their claim of persecution is well-founded, testimonies must adhere to Western conceptions of sexual orientation. Westernized models of sexual identity are generally conceptualized as a linear progression from discovery during one’s teenage years to coming out and being comfortable with one’s sexual identity as an adult (Berg and Millbank 2009; Cagnolini 2011). These models assume that those claiming refugee status — a public declaration of their sexual identity — are at ease with discussing their experiences of sexual persecution. Claimants are expected to produce a Western narrative of their sexuality, despite experiencing their sexuality within a non-Western context. A Western narrative of both their sexuality, and the harm they endured as a result of their sexuality therefore shapes the non-Western sexual minority. It is imperative that the IRB accounts for the possibility that Western conceptions of sexual minority relationship patterns are not applicable to all refugee claimants. Furthermore, the IRB needs to recognize that sexual minorities do not constitute a universal

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85 Millbank (2003) examines the importance of space for refugee claimants of sexual persecution. Traditional understandings of space as two separate spheres — public and private — obscure refugee assessment, as it reinforces the reliance of these spheres on gendered stereotypes of sexual activity (e.g. gay male sex as public sex and lesbian sex as private sex). For Millbank, we need a broader conceptualization of space in lieu of “a sense of ensnarement in a perilous public/private divide” (2003, 735). In this sense, space refers to reconceiving the refugee determination process so that sexual minority refugee claimants have the capacity to explore and express their sexual identities.
group; relationship patterns vary between sexual minorities and non-sexual minorities, as well as among sexual minorities. In order to make the sexual minority refugee determination process more accessible, immigration policy stakeholders need to deconstruct Western conceptions of Western, and consequently, non-Western sexuality.

_Future Research on Bisexuality in Canadian Law and Policy_

An emerging theme in this chapter is the relative invisibility of bisexuality in Canadian law and policy. Scholars examining the experiences of bisexuals decisively conclude that the system is flawed, as it fails to take the notion of bisexuality as a sexual orientation unto itself seriously (Klesse 2005, 2007; Rehaag 2008, 2009; Namaste, Rehaag, and Vukov 2010). While the position of bisexuality in discussions of policy and sexuality remains undetermined, the reality is that bisexuality is currently treated as a sexual identity in need of protection from the Canadian state. Moreover, current determination methods for bisexual refugee claimants are flawed, as they rely on false assumptions about sexuality and sexual identity. The IRB’s approach towards relationships and the relationship history of claimants has implications unique to bisexual applicants because bisexuality challenges the state’s interpretation of sexual orientation as fixed. The IRB has responded to this challenge by attempting to fit bisexual claimants within this fixed interpretation of sexuality, continuing to treat all sexual minorities as one and the same. Construing sexual orientation as fixed hinders the assessment of bisexual refugee claimants, and sexual minority claimants more generally, as it imposes a specific understanding of intimate relationships and family on claimants. The type of company you keep, or the people you call “family”, influences the assessment of one’s testimony. Further empirical analysis should be undertaken on the treatment of bisexuality in refugee law and policy, as well as Canadian law and policy more broadly.
Conclusion

When developing refugee policy, it is essential that “we bear in mind that the stakes in refugee determinations are immense” (Rehaag 2009, 429). Sexual minorities seek refugee status in order to flee from violently oppressive practices in their countries of origin; negative and wrongly decided claims result in claimants being deported to situations where they will potentially face persecution, torture and death. It is therefore imperative that determination processes for sexual minority refugee claimants be able to consistently accommodate differentiation within this group of potential claimants. As this chapter demonstrates, the Canadian state’s reliance on relationship history is unevenly applied, causing inconsistencies in claimant assessment. Furthermore, intimate relationship patterns are used to reinforce sexual stereotypes. As a result, current refugee determinations ignore lived experiences of homosexual and bisexual refugee claimants.

Legal precedence has paved the way for treatment of homosexual refugee claimants; however, there has not been a similar path for bisexuels seeking refuge. Consequently, this has resulted in bisexual claimants being assessed according to the IRB’s understanding of homosexuality and heterosexuality. Ultimately, methods of assessment for both homosexuals and bisexuels are flawed both in terms of the stereotypes that shape these policies and the mechanisms used to assess claimant testimony. The second half of this chapter explored how proper reform requires deconstructing sexual stereotypes, including the connection between relationship history and sexual orientation. While determination processes are necessary, there is room within the current framework to make Canada’s refugee system more accessible for sexual minorities. Institutionalized assumptions about sexual minorities and their relationship patterns makes for policy that is both exclusionary to potential claimants and unresponsive to the lived experiences of sexual minorities in Canada and abroad.
Chapter 5
An Education in Conjugality: Experiences of Common-Law Couples under the Canadian Immigration Spousal Sponsorship Program

“I have come to the conclusion that ‘cohabit’ and ‘conjugal’ involve overlapping and interwoven concepts, each word, in a sense, an echo of the other and both an integral and essential element encompassed by a modern day concept of ‘marriage’” (Justice Kurisko, Molodowich v. Penttinen 1980).

After living together in Canada for two years, Juliet — a Canadian citizen — applied to sponsor her partner Peter — a citizen of New Zealand — for permanent resident status through the spousal sponsorship program. Having met in university, Peter’s student visa was reaching its expiration date, forcing the couple to examine their options to enable Peter to remain in Canada and maintain their relationship. Following their lawyer’s advice, Peter and Juliet applied as a common-law couple. The result was a lengthy application process that focused on the intimate details of their relationship. For Peter and Juliet, the objective of this process was to prove to Citizenship and Immigration Canada (CIC) that their relationship was genuine, that it was not formed solely for the purpose of allowing Peter to remain in Canada. This meant providing CIC with physical evidence that corroborated their narrative of legitimate conjugal living pre-application, used by CIC to assess the continuousness of the relationship post-application. In their account of the application process, the couple explained that proving conjugality required an invasion of their privacy; however, this was an invasion they were obliged to accept, and indeed, invite, considering that the sponsorship process was determined by the state. Ultimately, the power imbalance between the Canadian state (the provider of access) and the couple (the seekers of access) resulted in Peter and Juliet compiling an application compliant with CIC’s criteria.

86 As discussed in chapter three, the Canadian state recognizes all unmarried, conjugal couples (common-law couples) that have been cohabiting for a minimum of one year.
The story of Peter and Juliet is by no means novel. In 2010, seventy percent of immigrants who applied through the family class were sponsored as a spouse/partner (Citizenship and Immigration Canada, 2011). While there are no publicly available statistics regarding the breakdown of spouse/partner sponsorship with respect to the percentage of married versus common-law couples, interviewed policy analysts from CIC have confirmed that similar to trends within Canada, common-law spousal immigration is on the rise (Interview C, 2010; Interview D, 2011; Interview W, 2010). What is unique about Peter and Juliet’s experiences with the spousal sponsorship program — and the experiences of common-law couples more generally — is the requirements for assessing conjugality for common-law and married couples. State inclusion of common-law relationships transpired through the extension of marital benefits to unmarried, cohabiting couples; common-law relationships were treated identically to marital relationships. As a result, the Canadian state implemented a “one-size-fits-all” approach for conjugal relationship recognition, an approach that, as will be discussed momentarily, is more glaring in immigration policy than other areas of policy in Canada. When it comes to spousal sponsorship, married and common-law couples are uniformly assessed according to a single understanding of conjugality, suggesting equal treatment; however, by treating all conjugal couples identically, the spousal sponsorship program presents obstacles for common-law couples seeking sponsorship, obstacles that for the most part have been unaccounted for.

In this chapter, I examine several of the implications of the current spousal sponsorship assessment process for common-law couples. While common-law relationships within Canadian borders are generally defined by cohabitation, the criterion used by CIC to assess common-law conjugality interprets common-law as synonymous with marriage. My analysis highlights how CIC’s treatment of conjugal relationships as a universal group fails to account for differences between married and common-law relationships. To continue my
investigation of the Canadian state’s use of conjugality to differentiate between inside and outside families through its immigration policy, I contend that despite its neutral phrasing, the current spousal sponsorship program favours married couples. More specifically, I explore how this favouring of marital conjugality results in a program that is only accessible for those common-law couples capable of providing a similar relationship narrative to married couples. In order to do so, I provide a brief recapitulation of common-law relationship recognition within Canadian borders, focusing primarily on the importance of cohabitation. Following that, I examine CIC’s approach towards assessing applications for spousal sponsorship; this will highlight differences in treatment between common-law couples living in Canada and those vying for sponsorship. Finally, using data generated from interviews with policy analysts, immigration officers, immigration lawyers/former members of the IRB, and married and common-law couples who were successfully reunited through the spousal sponsorship program, I investigate the implications of the current program’s understanding of conjugality for common-law applicants.

**Common-Law Conjugalit y within Canadian Borders**

The extension of rights to unmarried, cohabiting couples is an iconic illustration of the Canadian state’s reluctant efforts to develop policy that reflects changes in social reality. An increase in unmarried cohabitation in the sixties sparked voluntary incremental changes with respect to the rights and obligations associated with conjugal relationships (Holland 2000, 119). Heterosexual common-law relationships therefore started receiving state recognition through the legalization of support obligations in the seventies and the division of property rights in the eighties. These modifications focused on support obligations, laws and policies outlining the terms of relationship dissolution. By recognizing that unmarried, cohabiting, heterosexual relationships involved varying elements of interdependency, federal and provincial governments incorporated this type of familial arrangement into
discussions of support obligations, the objective being to protect vulnerable parties as well as the state itself. While the federal government regulated cohabitation for their own reasons, the regulation of domestic relationships is a provincial responsibility, and as discussed in chapter three, provincial response varied. As a result, there were a whole host of responses towards cohabitation, and these responses happened at different times and with distinctive rationale.

While *Molodowich v. Penttinen* (1980) recognized the possibility of conjugal living without a marriage certificate, it was not until several years later that the category of common-law was put on the legislative agenda. This was in response to a series of Charter challenges aimed at drawing attention towards the discriminatory nature of restricting conjugal benefits to married, heterosexual couples, combined with census data confirming the increase of unmarried, heterosexual common-law households in Canada. A consequence of using the Charter to advance claims for common-law recognition was that issues of discrimination were addressed on a case-by-case basis and were not necessarily addressed in a logical fashion (Holland 2000, 119). An examination of these challenges highlights the piecemeal nature of relationship recognition — the division of property (*Gostlin v. Kergin 1986*), widower relief legislation (*Fitton v. Hewton Estate 1997*), and the provision of social assistance (*Falkiner v. Ontario 2002*). This is not to suggest that governments were necessarily resigned to a reactive role, but federal and provincial treatment of common-law relationships has typically been in response to court decisions.

Two Supreme Court rulings were instrumental in challenging the validity of the institutional gap between married and unmarried conjugal cohabitants (Cossman and Ryder 2001, 275). The first ruling was in *Miron v. Trudel* (1995), a decision that challenged the limiting of benefit provisions to married couples in the *Ontario Insurance Act*.\(^8^7\) The

applicants, John Miron and Jocelyne Valliere, were an unmarried cohabiting couple that submitted a claim under Valliere's insurance policy after Miron was injured in a car accident. Their claim was denied on the grounds that only married spouses were entitled to these benefits, leading Miron to file a Charter complaint that the Act was discriminatory on the basis of marital status and therefore violated s.15. The Court recognized that unmarried, cohabiting couples “constitute a historically disadvantaged group,” as marital status “touches the essential dignity and worth of the individual and touches the individual’s freedom to live life with the mate of one’s choice in the fashion of one’s choice, a matter of defining importance to individuals” (Holland 2000, 131). Moreover, the Court felt the refusal of accident insurance was not in line with the policy’s legislative goal, that being the financial protection of families when a member of that family is injured. In a 5-4 ruling, the Court held that the refusal of insurance benefits to cohabiting, unmarried couples was discriminatory under s.15, as it unfairly differentiated between individuals according to their marital status. Justice L’Heureux-Dubé concluded that the protection of family is “one of the most important interests imaginable in our society,” and while family is traditionally defined by marriage, it can also be defined, “in a workable and acceptably certain way by reference to the length of a relationship.” This decision was considered a victory for heterosexual unmarried couples, as it made clear that unmarried cohabitation was like marriage with respect to the degree of interdependency.

The second decision, M. v. H. (1999), led to the Court’s ruling that the exclusion of cohabiting same-sex couples from s.29 of the Ontario Family Law Act — which defines “spouse” as including only married and cohabiting heterosexual couples — was constitutionally unsustainable. As discussed in chapter three, this decision involved a

woman who had been in a same-sex relationship for ten years and was seeking spousal support following the relationship’s dissolution. Similar to Miron v. Trudel (1995), the Court recognized that the primary objective of conjugal benefits is the equitable resolution of economic disputes when intimate relationships end. This in turn reduces the financial burden of relationship breakdown for the state by shifting the obligation of support to the partner. Prohibiting same-sex cohabiting couples from accessing these benefits did not help the state with realizing this objective, as certain families were excluded from these policies.90 While dissenting judges supported the restriction of s.29 to heterosexual couples only, those in favour ruled that the Ontario provincial government failed to justify the refusal of conjugal benefits to same-sex couples. Interestingly, in order to avoid the anticipated domino effect of reading-in same-sex couples into spousal support policy more broadly, the Court opted to focus solely on s.29 of the Act and provided the government with a six-month window to alter its legislation. Despite this limiting move, this decision established a precedent that legislation applicable only to opposite-sex couples would almost always be considered in violation of the Charter.

Combined, these decisions questioned “the validity of all differences in the legal status of married and unmarried cohabitants,” by highlighting the conjugal similarities between heterosexual married couples and unmarried, cohabiting heterosexual and homosexual couples (Cossman and Ryder 2001, 275). The Court’s fragmentary approach to relationship recognition — as a result of these decisions being made on a case-by-case-basis — meant, however, that these legal changes were not immediately translated into policy. Provincial response varied as governments contemplated the best way to incorporate legislative changes, particularly with the extension of conjugal benefits to unmarried, same-sex couples. It was not until the passing of the Modernization of Benefits and Obligations Act

90 (1999) 2 S.C.R. 3, per Bastarache J.
in 2000 that the federal government recognized unmarried cohabiting couples beyond the context of pension and taxation law (Cossman and Ryder 2001, 276). Under the Act, unmarried cohabitants are now privy to the same rights as married spouses in all federal legislation.

In theory, state extension of conjugal benefits to common-law couples suggests a transformation with respect to how family is defined. The Court’s ruling in *Molodowich v. Penttinen* (1980) that the existence of a conjugal relationship is not solely dependent on a marriage certificate demonstrates that interdependent relationships exist outside the traditional marriage model. Recognizing the complexity of conjugality, courts would now approach conjugality as being composed of a series of factors including cohabitation, economic interdependency, public perception and sexual intimacy (Cossman and Ryder 2001). While supportive of expanding the legal definition of family to include common-law couples, several prominent legal scholars took issue with how the category of common-law was defined. The *Ontario Law Reform Commission* (OLRC) accused the courts of continuing to interpret a conjugal relationship as a marital relationship, “placing considerable emphasis on the existence of economic dependency, a sexual relationship, and the parties being identified in public as a couple” (1993, 62). This was echoed by Cossman and Ryder who stated, “the idealized functional approach sets up a monolithic and mythical image of the marital relationship, against which all relationships are evaluated” (1993, 78). While functional similarities exist between marital and common-law relationships, critics were concerned by the courts’ continued reliance on the conjugal relationship as defined by, “a stereotypical model of marriage that fails to account for the existing diversity of marital relationships” (Ontario Law Reform Commission 1993, 62). Contrary to the theoretical expansion of conjugality to include common-law couples, the actual application of this "expanded" family unit continued to have implications for unmarried, cohabiting partners.
Instead of revisiting pre-existing legislation, the federal government took a one-size-fits-all approach, simply adding in “common-law partner” anywhere that married partners were mentioned. Furthermore, the term common-law partner was gender neutral, extending the same blanket status to same-sex couples as well. A consequence of this approach was that there was never a discussion about the difference between unmarried cohabiting and married couples. Using the Charter to question the Canadian state’s restriction of conjugal benefits to married couples required unmarried cohabiting couples to prove that their relationships were marriage-like. In both Miron v. Trudel (1995) and M. v. H. (1999), parallels were drawn between unmarried cohabiting relationships and the institution of marriage. Legal strategy adopted to advocate for heterosexual common-law status was therefore grounded in the desire to prove that when it comes to conjugal relationships, the only thing separating heterosexual unmarried cohabitants from heterosexual married couples was a piece of paper. Building on this, same-sex couples adopted a similar strategy, replacing marriage certificate with sexual orientation. The result is that under the Modernization of Benefits and Obligations Act, common-law couples are treated identically to married couples; common-law couples are essentially married without a marriage certificate.

The conflation of common-law and marriage under the umbrella of conjugality has had significant implications for common-law couples, as they are marked by the assumption that common-law relationships are in fact marital relationships. This is further complicated by the fact that marriage itself is a slippery category in Canadian policy. The state has a history of over- and under-enforcing conjugality depending on what is at stake. The inconsistent treatment of conjugality combined with its extension to include common-law relationships has made it increasingly difficult to pinpoint what exactly a marriage is. While conjugality has become the dividing line between cohabiting and non-cohabiting
relationships, it remains unclear as to how conjugality is defined (Cossman and Ryder 2001, 297–8). The issue therefore is not just that unmarried cohabitation is equated with marriage, without understanding that marriage and cohabitation can be different; but also that we don’t really know what a marriage is either.

From an international perspective, state approaches towards recognizing the unmarried, cohabiting family unit are varied. Some governments have legalized same-sex marriage since recognizing same-sex unmarried cohabitation, creating a relationship regime in which heterosexual and homosexual couples can live conjugally, married or unmarried. In addition to Canada, the Netherlands and Belgium have also taken this approach; however, common-law couples in the latter two countries must officially register in order to obtain state recognition. Other governments established a common-law option for same-sex couples only, and then removed the category once same-sex marriage was legalized (e.g. Norway, Finland, Sweden), the assumption being that a common-law option was no longer necessary now that everyone had access to the institution of marriage regardless of sexual orientation. Another response has been the creation of a common-law regime for homosexual couples, while still restricting same-sex couples from marrying; examples of this include the pacte civil de solidarité in France, civil unions in the United Kingdom, registered domestic partnerships in Hawaii, and de facto unions in Colombia. These relationship regimes are considered to be equivalent to marriage; however, same-sex couples are denied the symbolic recognition of being married. This type of relationship regime has also been taken in the opposite direction with governments creating domestic

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91 Quebec’s civil union regime requires unmarried couples to register for recognition. In Quebec (Attorney General) v. A (2013) SCC 5 (also know as ‘Eric’ v. ‘Lola’), the Supreme Court ruled that the Quebec government’s decision not to recognize unregistered common-law relationships was constitutional.

92 On February 5, 2013, the House of Commons in the United Kingdom approved the second reading of a bill legalizing same-sex marriage. The bill now faces another vote in the House of Commons and then in the House of Lords.
partner regimes that are limited to same-sex couples, but are not considered an institutional equivalent to marriage (e.g. Czech Republic and Slovenia). Legal recognition of unmarried, cohabiting couples has therefore taken on numerous forms, particularly for same-sex couples.

The common-law relationship is now clearly established as an option that many Canadian families have endorsed. Census data confirms a steady increase in the number of common-law in Canada from 1,142,415 in 2001, to 1,376,865 in 2006, to 1,567,910 in 2011 (Statistics Canada 2012). Between 2006-2011, the number of same-sex common-law couples increased 15% to 43,560 (Statistics Canada 2012). Provincially/Territorially, common-law cohabitation constitutes around 20% of Canadian couples, with Newfoundland and Prince Edward Island below average (12%) and Quebec, Yukon, Northwest Territories and Nunavut above average (34%, 29%, 34% and 42% respectively) (see Table 4.1).

![Bar chart showing percentage of married and common-law relationships by province/territory in 2006](chart.png)

4.1 Percentage of Married and Common-Law Relationships by Province/Territory in 2006 (Data obtained from 2006 Census, Statistics Canada)

With the exception of Alberta, common-law couples are defined as unmarried, conjugal couples that meet the cohabitation requirement, conjugal being defined by characteristics

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93 This information was obtained through the official government websites of these respective countries.
outlined in *Molodowich v. Penttinen* (1980). This is exemplified in the *Modernization of Benefits and Obligations Act*, extending benefits and obligations previously restricted to married couples to, “all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*.” On, paper, common-law status is therefore perceived as a combination of cohabitation and conjugality.

In practice, a common-law relationship in Canada is primarily defined by cohabitation. *Miron v. Trudel* (1995) and *M. v. H.* (1999), along with the series of relationship recognition related cases outlined in chapter three, highlight the scrutiny relationships have undergone when couples were seeking legal recognition for the purpose of obtaining conjugal protections. In all cases, couples had to prove that their relationships were like marriages; this required them to provide evidence that went beyond cohabitation. In order for a relationship to be recognized as dissolved by the courts, couples had to prove that a relationship actually existed. When it comes to applying for government benefits as a common-law couple however, cohabitation alone is sufficient. While requirements vary across governments, couples typically qualify for common-law status after living together for a period of one to three years. This is not to suggest that cohabitation is the sole prerequisite for obtaining common-law status; cohabitation requirements are often reduced

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94 As discussed in chapter three, Alberta’s Adult Interdependent Relationships Act (AIRA) provides some (but not all) rights enjoyed by married couples to cohabiting heterosexuals and homosexuals, regardless of their conjugal status.
96 The cohabitation requirement for common-law status ranges from twelve months (federal government), to twenty-four months (British Columbia, Newfoundland, Nova Scotia, Northwest Territories, Yukon, Nunavut and Saskatchewan), to thirty-six months (Ontario, Prince Edward Island, New Brunswick and Manitoba. Quebec and Alberta are the only provinces without a minimum cohabitation time period, applicants must have a shared residence. Cohabiting partners in Alberta can register as Adult Interdependent Partners (AIP) at any point in time, but the provincial government ascribes AIP status after three years regardless of registration. As for Quebec, cohabiting couples must register for *civil union* status.
when a couple is already living together with a child. Even with a child however, cohabitation remains the focal point for the provision of common-law status.

State reliance on cohabitation as the primary indicator of common-law status is consistent across governments. Canada Revenue Agency defines a common-law partner in its General Income Tax and Benefit Guide as someone who is **not your spouse** (emphasis included), but someone you have been living with in a conjugal relationship for at least twelve continuous months. What qualifies as conjugal however is not outlined in the Guide. Common-law couples that opt to name each other on their tax returns are not obliged to prove that their relationship is conjugal in nature. Moreover, couples do not have to prove they are in fact cohabiting; filing as common-law simply requires couples to check the “living with a common-law partner” box on the form. Similar requirements exist for Canada Pension Plan Survivor Benefits and Old Age Security.97 These federal programs use cohabitation as the primary prerequisite for unmarried couples to qualify as common-law.

This is evident in provincial common-law relationship regimes as well. For Alberta’s AIRA, the Common-Law Partners’ Property and Related Amendment Act in Manitoba and Quebec’s Civil Unions, the primary qualification is conjugal cohabitation without having to prove the conjugal part. Even private insurance policies typically rely on cohabitation, as I recently discovered when my partner added me as a common-law benefactor on his insurance policy at work; the sole requirement was a minimum one-year cohabitation period. A reliance on self-declared cohabitation for determining common-law status is evident across government programs as well as across levels of government. Without having to prove that the relationship is conjugal, common-law couples are primarily defined by their living arrangements. Cohabitation has become the default method of assessment for

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97 For common-law couples applying for Old Age Security benefits, the applicant must add his/her partner to the policy and then the partner is required to fill out a Statutory Declaration Form confirming their conjugal relationship in the event that the policy holder dies and the other partner applies to receive the benefits.
assigning common-law status in Canada. It is therefore not about the state acknowledging the integrity of the relationship; rather, the state uses the relationship as a proxy for the imposition of support obligations.

Bearing in mind that common-law couples in Canada are primarily defined by cohabitation, the remainder of this chapter will examine how common-law relationships are assessed for spousal sponsorship. Furthermore, it examines the implications this one-size-fits-all policy approach has for common-law couples seeking family reunification. The extension of conjugal benefits to common-law couples has, no doubt, revolutionized the Canadian state’s attitude towards intimate relationships; however, this has been accomplished through drawing parallels between common-law and marital relationships, heavily favouring what the state believes marriage is or ought to be. While this has had less of an impact on domestic policy — as a common-law relationship is typically assessed by length of cohabitation — conflating common-law with marriage has implications for common-law couples that are unique to spousal sponsorship.

**Family Class Conjugal Immigration in Canada**

Critical scholarship on the regulation of family in immigration policy has predominantly focused on the ways in which family immigration has been used by states to bolster nationalist (Bell and Binnie 2000; Stychin 2000; Thobani 2007; van Walsum 2003, 2008; Weeks 1998), neoliberal (Abu-Laban 1998; Abu-Laban and Gabriel 2002; Harder 2008), and security (Dhamoon 2010) projects. While justifications for state interest in the family class differ, this body of literature concurs that the family class plays an important role in the development of immigration systems. The desire to keep families together combined with the policy reality that immigrants tend not to immigrate alone, continues to situate familial sponsorship at the forefront of the immigration policy agenda, both in Canada as well as internationally.
Familial sponsorship is instrumental to immigration policy in Canada, not only with respect to the Family Class specifically, but also for Refugees and Skilled Workers. Regardless of an applicant’s immigration category, immigration officers must be cognizant of the reality that these applications are not typically restricted to the applicant alone — as a policy analyst described, “You’re [immigration officers] left with the issue of as soon as you bring a person in, it is not one person, it is potentially a group — almost nobody has nobody” (Interview D, 2011). Immigration officers work under the assumption that while Canada’s Refugee and Skilled Workers programs are for individual applicants, there is the possibility that upon obtaining citizenship, these individuals will apply to sponsor their immediate family members. This is why applicants must provide immigration officers with a list of immediate family members (e.g. spouse/partner, parents and children) who they might potentially sponsor in the future. Irrespective of the type of applicant — whether it is family class, refugee or skilled worker — familial sponsorship plays a role in all areas of immigrant application assessment.

This presents difficulties for CIC, primarily in the areas of agenda setting and policy development. CIC’s agenda setting is informed by the values of the government of the day, public opinion and state capacity. State capacity refers to operational challenges; it is imperative that logistical roadblocks be taken seriously when determining target projections of admitted immigrants. While these projections are not necessarily fixed, they establish guidelines for those responsible for accepting immigrants. These projections are divided among the three categories (family class, refugee and skilled worker), the proportions being largely determined by the government of the day (Interview D, 2011).

98 Refugees have to provide this list in their application for permanent residency status.
99 Recently, Minister of Citizenship, Immigration and Multiculturalism Jason Kenney announced the Harper government’s plans to propose changes to the immigration system that would favour the Skilled Workers Program (Fitzpatrick 2012). While this has
The challenge of familial sponsorship is that when it comes to controlling the number of applications, target projections only go so far. Considering that immigration officers work under the assumption that all immigrants will apply to sponsor their families at some point, it becomes difficult for CIC to accurately predict what the projection in any given year will look like. As a former CIC policy analyst explains:

> In Canada, we have an ever-expanding family class. Let’s say you want 250,000 immigrants, and you say okay, what share of that population should be family class, what share should be skilled workers and what share should be refugees . . . it is impossible to control the family class and it squeezes out the other classes. You cannot make policy saying a strict number for family class because you can’t control it (Interview W, 2010).

Therefore, in the case of family reunification, CIC has less control over predetermining the number of applications for family sponsorship.100 This is not to suggest that there are no control mechanisms in place to filter the number of immigrants coming to Canada, Canada is a country of regulated immigration. It becomes difficult however for Canada, and other immigrant-receiving countries, to fully predict levels of demand for familial sponsorship.

A lack of control over fully accurate admission projections as a result of familial sponsorship has two main implications for policy development. First, policy analysts are hesitant to engage in discussions focused on opening up immigrant admission. Any discussion about immigration is a discussion about numbers. The consensus among former CIC policy analysts was that while aware of flaws in the system, “no one wanted to bring that forward, no one wants to bring legislative change forward” (Interview D, 2011). This was echoed by another policy analyst who commented, “once you open legislation, all hell breaks loose” (Interview X, 2010). Proposing legislation requires revisiting admission implications for family class immigration, the current government has made it clear that economic considerations steer future changes to Canada’s immigration policy.

100 A rough guideline for immigration officers used to be “no more than fifty percent”; however, this guideline has become increasingly difficult to respect with an ever expanding family class (Hawkins 1989, 86).
projections and compels policy analysts to attempt to account for the potential number of applications such a change would accommodate.

Furthermore, the inability to fully account for application projections is compounded by the reality that immigration is a divisive issue within Canadian society at large. Prior to introducing Bill C-86 in 1992 — a bill involving significant amendments to the 1976 Immigration Act — CIC conducted a series of intensive consultations across the country on immigration. Accumulated research concluded that Canadians were more accepting of immigrants if they had experience with immigrants. Those who were wary attributed it to the fact that they saw immigrants doing bad things; instead of being exposed to success stories, all they witnessed were “stories of shootings in major cities, queue jumpers, etc.” (Interview W, 2010). For the most part, the perception was that immigrants are bad people. Through these consultations, it became evident that participants were generally receptive to the state accommodating more immigrants if they believed the government was going to control for the “bad eggs” (Interview D, 2011). Immigration policy analysts must therefore maintain a balance between easing admission restrictions in the name of fairness and appeasing public opinion; a balance made difficult by the lack of control over exact application projections.

The second implication of the unpredictability of familial sponsorship is that in order to compensate for the uncertainty surrounding the numbers, CIC adopts a specific understanding of family used to distinguish between legitimate and illegitimate familial relationships. Immigration officers — responsible for assessing immigration applications — are provided with guidelines used to assess the legitimacy of the relationship. While certain family class relationships can be proven through the provision of a birth certificate (e.g. when one is sponsoring their parents and/or children), spousal relationships undergo more scrutiny. This is reflected in training for immigration officers, with a significant portion of
the six-week training program dedicated to spousal sponsorship assessment (Interview C, 2010). Spousal sponsorship assessment requires immigration officers to accumulate evidence that suggests a conjugal relationship exists, and then evaluate the genuineness of that relationship. Training therefore involves an examination of ideal examples of physical evidence, red flags to look for when comparing testimony provided in the written application and the interview, and assessment tips aimed at encouraging immigration officers to evaluate applications based on the facts rather than emotional connection (Interview C, 2010).

The federal government’s manual *OP2: Processing Members of the Family Class (OP2)* outlines what immigration officers should look for when assessing the legitimacy of a marital or common-law relationship in a spousal sponsorship application. When a Canadian citizen wishes to sponsor his/her non-Canadian spouse/partner, the couple must prove that their relationship is genuine and was not entered into primarily for the purpose of acquiring immigration status.\(^{101}\) While historically, marriages were viewed as less suspicious — because unlike common-law status which is typically ascribed to couples, one’s marital status can be confirmed through formal documentation — recent concerns about marriages of convenience have placed both categories under heightened scrutiny (Interview C, 2010; Interview Y, 2010). As outlined in *OP2*, the federal government’s approach to assessing the genuineness of conjugal relationships depends on whether the relationship is marriage or common-law. Marriage is seen as “status based”, meaning that the relationship exists from the day the marriage is legally valid until the day it is legally terminated through death or divorce. Common-law relationships are considered “fact based”, which means that the relationship exists “from the day in which two individuals can demonstrate that the

\(^{101}\) CIC refers to this as a “relationship of convenience”, a marriage or common-law relationship that is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the *Immigration and Refugee Protection Act* (Citizenship and Immigration Canada 2006, s.6).
relationship exists on the basis of facts” (Citizenship and Immigration Canada 2006, s.5.25). In *OP2*, CIC recognizes significant differences between married and common-law relationships; however, the department states that they choose to focus on the similarities and attributes this to the “history of the recognition in law of common-law relationships and their definition” (2006, s.5.25).

According to *OP2*, the primary similarity between marriages and common-law relationships is conjugality. This is what separates legitimate relationships deserving of reunification from illegitimate relationships. As *OP2* outlines, conjugal does not solely refer to sexual partners; it symbolizes an intimate attachment between two people (2006, s.5.25). Basing their assessment of conjugality on the Molodowich v. Penttinen (1980) decision, *OP2* stipulates that all conjugal relationships, married or unmarried, should embody the following characteristics to some degree:

- mutual commitment to a shared life;
- exclusive – cannot be in more than one conjugal relationship at a time;
- intimate – commitment to sexual exclusivity;
- interdependent – physically, emotionally, financially, socially;
- permanent – long-term, genuine and continuing relationship;
- present themselves as a couple;
- regarded by others as a couple;
- caring for children (if there are children) (2006, s.5.25).

These characteristics are to be validated through the provision of documentary evidence, particularly for common-law couples whose relationships are considered fact based. Acceptable documentary evidence includes proof of cohabitation (e.g. mortgage, lease), joint bank accounts and insurance policies, proof of joint large-item purchases (e.g. car, furniture), proof of continuous communication (e.g. emails, letters, long distance phone bills), testimonies from friends, family members, and community/religious leaders, and photographic evidence of trips and major events (e.g. birthdays, holidays, commitment ceremony) (Citizenship and Immigration Canada 2006, s.10.1) (See Table 4.2).
### Table 4.2 Evidence Categories for Assessment of Conjugal Relationships from OP2: Processing Members of the Family Class (Citizenship and Immigration Canada 2006).

<table>
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<th>Factor</th>
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| **Financial aspects of the relationship** | • Joint loan agreements for real estate, cars, major household appliances;  
• Joint ownership of property, other durable goods;  
• Operation of joint bank accounts, joint credit cards evidence that any such accounts have existed for a long period of time;  
• The extent of any pooling of financial resources, especially in relation to major financial commitments;  
• Whether one party owes any legal obligation in respect of the other. |
| **Social aspects of the relationship** | • Evidence that the relationship has been declared to government bodies and commercial or public institutions or authorities and acceptance of such declarations by any such bodies;  
• Joint membership in organisations or groups, joint participation in sporting, cultural, social or other activities;  
• Joint travel;  
• Shared values with respect to how a household should be managed;  
• Shared responsibility for children; shared values with respect to child-rearing; willingness to care for the partner’s children;  
• Testimonials by parents, family members, relatives or friends and other interested parties about the nature of the relationship and whether the couple presents themselves as partners. Statements in the form of statutory declarations are preferred. |
| **Physical and emotional aspects of the relationship** | • Knowledge of each other’s personal circumstances, background and family situation;  
• Shared values and interests;  
• Expressed intention that the relationship will be long term;  
• The extent to which the parties have combined their affairs, for example, are they beneficiaries of one another’s insurance plans, pensions, etc.?  
• Joint decision-making with consequences for one partner affecting the other;  
• Support for each other when ill and on special occasions; letters, cards, gifts, time off to care for each other;  
• The terms of the parties’ wills made out in each other’s favour provide some evidence of an intention that the relationship is long term and permanent;  
• Time spent together;  
• Time spent with one another’s families;  
• Regular and continuous communication when apart. |

It is important to clarify that while conjugality takes primacy in family reunification, not all relationships that qualify as conjugal are viewed as legitimate. OP2 relies on pro-
monogamous language used to differentiate between legitimate and illegitimate conjugal relationships. The manual explicitly states that bigamous (the act of entering into a marital relationship while still legally married to someone else) and polygamous (a marriage that includes more than two partners) marriages are not permitted (2006, s.6). Should an individual in a polygamous relationship wish to sponsor a partner, they can only sponsor one partner. If they want to sponsor a second partner, they must divorce the first partner before filing an application. Additionally, the policy takes precautions against sponsoring children of polygamous families, who might sponsor their mothers (e.g., additional wives) upon arrival. Failure to account for all partners and children at the time of application can lead to refusal or deportation if the application is approved and then later proved invalid.

On paper, immigration policy provides zero flexibility on the question of polygamy. This does not suggest that all polygamous families are blocked from immigrating to Canada. When asked about the possibility of polygamous immigration, a former immigration officer responded:

If you talk to people who work in immigration, they'll tell you that almost certainly, there are polygamous families that get in. Usually what happens is that the man applies to come to Canada with his wife and his wife's sister. They come up with another relationship, which allows them to bring in the other wife/wives. It is a little bit difficult, they have to play games, but it can be done (Interview C, 2010).

There are loopholes for polygamous families to obtain immigration status; however, OP2 establishes stringent guidelines for immigration officers to avoid having these loopholes abused. Pro-monogamous language sets the tone for this processing manual, clearly stating that for the purposes of spousal reunification, legitimate conjugality is monogamous conjugality.

Another example of selective conjugality is the treatment of “fiancé(e)s”. Individuals who are dating with the intent of marrying or cohabiting do not qualify as conjugal. The current immigration system therefore excludes not only non-monogamous couples, but also
monogamous couples unable to satisfy these conditions of conjugality. The category of fiancé(e) is viewed as an illegitimate relationship under Canadian immigration law; although the intent to marry exists, traditional views on engagement assume that long-distance engaged couples have yet to establish a sexual relationship (Citizenship and Immigration Canada 2006, s.10.1). As Harder points out, “Canada’s definition of good sexual citizenship would thus seem to suggest that pre-marital sex is an immigration requirement” (2008, 10). These examples demonstrate that if we approach relationship recognition from a conjugal/non-conjugal dichotomous way of thinking, it is imperative that we recognize differentiation within these categories as well; conjugality is not a universal concept.

Similar to other areas of federal policy, CIC defines a common-law partner as a person who is “cohabiting in a conjugal relationship for a period of at least one year,” including both heterosexual and homosexual couples (Citizenship and Immigration Canada 2006, s.6). While immigration officers are instructed to account for the possibility that continuous cohabitation might not be realistic — particularly when one partner is living in Canada and trying to sponsor the other — common-law couples that are separated at the time of application must prove that a) they have lived together continuously for a year (pre-break), and b) prove that they would still be living together in the absence of these extenuating circumstances. Ultimately, the longer a couple is living separately, the more challenging it is to ascertain that a conjugal relationship exists (Citizenship and Immigration Canada 2006, s.5.36). Up until this point, it appears that common-law couples seeking reunification are treated the same way as common-law couples requesting conjugal benefits within Canadian borders. Both rely on an understanding of common-law that is defined by permanent conjugal cohabitation. This however is where the similarities end. While the technical definition for common-law is the same, the Canadian state’s understanding of common-law has implications unique to those couples applying for spousal sponsorship.
The differentiation in treatment between those common-law couples living in Canada and those applying for sponsorship manifests itself in two primary ways. First, unlike trends in domestic policy discussed above, cohabitation alone is insufficient for spousal sponsorship. While common-law status in Canada is defined as “conjugal cohabitation,” couples are generally not obligated to prove that their relationship is in fact conjugal in order to obtain conjugal benefits. If common-law partners name each other on their tax returns, the assumption is that they live together and their relationship is a conjugal one. This logic fails to translate to common-law couples applying for sponsorship. If a person is applying to sponsor his/her common-law partner, the combination of cohabitation and desiring sponsorship does not automatically convince immigration officers that the relationship is conjugal. Couples applying for spousal sponsorship therefore receive differential treatment compared to their domestic counterparts. When it comes to family reunification, the outside family must prove that their arrangement is actually conjugal, while the inside family is given the benefit of the doubt so long as cohabitation requirements are met. For both types of families, conjugality matters; however, it matters in different ways.

Second, the weight given to conjugality in the assessment of spousal sponsorship applications means that the way conjugality is defined shapes how the genuineness of these relationships is evaluated. Both married and common-law relationships undergo intense scrutiny when comparing spousal sponsorship to areas of domestic policy; however, *Molodowich v. Penttinen (1980)* highlights parallels between conjugality and the state’s definition of marriage. Immigration officers are therefore instructed to use the state’s understanding of marriage to assess the conjugal nature of both marital and common-law relationships, reinforcing the government’s one-size-fits-all approach to conjugal relationship recognition.
Challenges for Common-Law Couples Seeking Sponsorship

It is important to reiterate that similar to my earlier discussion of Refugee Protection Officers and their assessment of sexual minority refugee claimants, there is no single standard formula for the assessment of spousal sponsorship applications. OP2 provides immigration officers with guidelines for evaluation; however, the assigned officer determines the amount of evidence required. Despite assessment being primarily left to the discretion of individual officers, my interviews with CIC employees and common-law couples have underscored three trends. First, focus tends to be on the early stages of the relationship rather than the state of the relationship at the time of application. Since common-law relationships are considered fact based, couples must provide proof that documents the entire relationship from its beginning to current time. Second, considerable emphasis is placed on the wedding, or its absence. Finally, current reliance on evidence to prove that conjugality exists — as well as the types of permissible evidence required — ignores the implications this has for common-law couples, particularly same-sex common-law couples. The remainder of this chapter will examine these three observations in detail.

Relationship Present vs. Relationship Past

The first trend is that in contrast to domestic policy where common-law relationships are generally assessed on present-day status, those applying for spousal sponsorship must provide a timeline of conjugality. In both M. v. H. (1999) and Molodowich v. Penttinen (1980), the courts acknowledged that marriage is not a necessary condition for a relationship of interdependency. This acknowledgement challenged the assumption that relationships of interdependency always develop by choice. Testimony from both Penttinen and Molodowich provided conflicting interpretations of the nature of their relationship. Molodowich claimed that despite the two not being legally married, she considered herself to be Penttinen’s wife Alternatively, Penttinen maintained that he did not view their
relationship in the same way. The decision not to marry was therefore not Molodowich’s choice; the absence of a formal conjugal relationship was not necessarily a conscious decision made by both parties. Furthermore, this draws attention to the reality that often, interdependent relationships are not always the product of an official decision between both participants either. The element of choice in conjugal relationships was discussed in *Walsh v. Nova Scotia (2002)*, a decision involving the dissolution of a relationship between an unmarried, cohabiting couple.\(^{102}\) In the dissenting opinion, Justice L’Heureux-Dubé concluded:

To recapitulate, the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry, or alternatively not to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called “non-traditional” relationships, however, I dare say that notions of “choice” may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between “choice” or “no choice”. Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law [Emphasis in original].\(^{103}\)

The language of choice is therefore a slippery slope, as it ignores the multitude of motivations for relationship development.

Contrary to marriage, common-law relationships tend to develop more organically (Bowman 2010). Quite often, couples move in together with no intention of officially identifying as common-law, but over time become increasingly interdependent with the fusion of finances, joint filing of taxes, raising of children, etc. This is evident in the case of Molodowich and Penttinen; whether or not Penttinen felt his relationship with Molodowich was “marriage-like”, the relationship had become conjugal. By contesting the language of choice previously inherent in legal discussions of conjugality, these decisions accounted for

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the possibility that interdependent relationships are not necessarily the by-product of an official decision made between two people.

Additionally, these decisions highlight that common-law relationships are typically undefined until the point when a couple establishes contact with an institution. It was not until Molodowich sought spousal support that she had to provide evidence that her relationship with Penttinen was conjugal. For married couples, getting married means being automatically entitled to marital benefits provided by the state. Common-law couples however, are not recognized as common-law until they seek those benefits. While recognition is followed by benefits for the married, they are one and the same for common-law couples. Generally speaking, the courts have taken this difference into consideration by focusing on the nature of the relationship at the time of court examination. Cognizant of the reality that state recognition of common-law relationships transpires once a couple applies for state benefits, the courts have recognized the less official ways interdependent relationships develop in their assessment of common-law conjugality.

Discussions about choice and the nature of recognition are evident in a series of cases involving support obligations following the termination of unmarried cohabiting relationships post-\textit{Molodowich v. Penttinen (1980)}. Even in cases where the terms of relationship dissolution are not being discussed, the courts have recognized the complexity of common-law cohabitation. In \textit{Egan v. Canada} (1995) — a decision involving a gay couple that was denied spousal allowance under the \textit{Old Age Pension Act} — dissenting judges concluded that as it currently stood, the relationship between the plaintiffs was no different than that of a heterosexual conjugal couple and thus, that they were facing discrimination solely because of their sexual orientation. A similar logic was adopted in \textit{Canada v. Mossop

(1993), Veysey v. Canada (1990), and Kane v. Ontario (1997). For all of these decisions, the details of one’s relationship at the time of the hearing were the subject of scrutiny. This framework for assessing common-law relationships accounts for the possibility that these relationships evolve in ways that are distinct from marital relationships. While recognition of the nuances between marital and common-law relationship development may not have been the original intent of the courts, the history of common-law relationship recognition post-Molodowich v. Penttinen (1980) highlights a focus on where the relationship stands when it is before the court.

In the case of common-law couples applying for spousal sponsorship, increased attention is paid towards the beginning of the relationship. In addition to the general family class application process, spouses/partners must complete the Sponsored Spouse/Partner Questionnaire. For this part of the application process, couples are divided into two groups, partners currently living in Canada and partners living outside of Canada. The category determines the length of Questionnaire that a couple is obligated to complete. Both married and common-law couples are required to fill out the same Questionnaire, supporting criticisms that the federal government has adopted a one-size-fits-all approach.

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105 Kane v. Ontario (Attorney General) (1997) 152 D.L.R. involved an applicant claiming insurance benefits after her same-sex partner was killed in a car accident. The applicant’s request was denied, as the definition of “spouse” was limited to heterosexual conjugal relationships, resulting in the applicant claiming a violation of her s.15 equality rights because of her sexual orientation. In light of Miron v. Trudel (1995) and M. v. H. (which was being heard in a lower court at the time), the Ontario Court of Appeal ruled in favour of the applicant.

106 This is not to suggest that there is a set formula for court assessment of marital relationships; assessment for both marital and common-law relationships is guided by powerful presumptions about family and relationship formation. What an examination of these decisions reveals is that the courts have recognized nuances between these two relationship categories.

107 The Questionnaire for those living in Canada and those living outside Canada is two and six pages respectively. Those applicants currently living in Canada undergo less questioning about the details of their relationship, the assumption being that if the relationship has developed domestically, it is more likely to be consistent with Canadian values (Interview D, 2011).
towards accommodating common-law relationships. The first section of the Questionnaire — titled “First Meeting” — includes the following questions:

- When and where did you first meet your sponsor in person?
- Did anyone (individual or organization) introduce you to your sponsor?
- Did you give your sponsor any gifts?
- Did your sponsor give you any gifts?
- Give any additional details describing the circumstance of your first meeting with your sponsor.\(^{108}\)

The second section — titled “Development of Your Relationship” — posits:

- Describe how your relationship developed after your first contact/meeting with your sponsor and if you and your sponsor dated or went on any outings or trips together.
- Was your relationship known to close friends and family?
- Did your sponsor meet any of your close friends and family?

According to interviewed immigration officers, this section is used to highlight arranged marriages and to assess whether the relationship in question is a marriage of convenience (Interview C, 2010; Interview Y, 2010; Interview AA, 2011). If an applicant answers “no” to any of the questions outlined in the second section, an explanation is required. These questions require applicants to provide a detailed account of how their relationship evolved into something conjugal. Furthermore, when an applicant answers “yes” to any of the questions, they are required to provide photo and documentary evidence that supports their claims.

While both married and common-law couples must complete these two sections, it was the interviewed common-law couples that expressed difficulty. Their frustrations manifested themselves in two ways. First, they generally found it challenging to provide concrete details about the beginning of their relationship and to provide evidence capable of sufficiently corroborating their claim that they were in a conjugal relationship. This was

\(^{108}\) The focus on gifts is primarily for the assessment of arranged marriages (Interview C, 2010). This suggests that CIC has adopted a specific narrative for arranged marriages as well.
due in part to the fact that for the majority of common-law interviewees, they did not officially identify as common-law until they chose to apply for spousal sponsorship, as mentioned by Peter and Juliet who commented, “we didn't consider ourselves common-law, even after a year of living together” (Interview F, 2011). This was echoed by another couple who mentioned, “It is the kind of thing that nobody asks you to define [the status of your relationship], unless you are communicating with the state. So socially, we weren't going around identifying ourselves as common-law because it doesn't often naturally come up in conversation” (Interview E, 2011). These couples felt added pressure to satisfy officers' doubts that their relationships qualified as common-law, particularly when they had not identified officially as common-law themselves pre-application.

This is compounded by the fact that, unlike marriage, the legal category of common-law is not a universal concept. An interviewee from Bosnia stated:

In Bosnia, there is not a direct translation for common-law status. It exists legally but it is not part of colloquial understanding. So even in the translation, it was “latinized”. Friends and family in Bosnia were laughing that my parents were attesting that they knew their daughter was in a monogamous, exclusive, conjugal relationship (Interview E, 2011).

The cultural particularity of common-law status further complicates the application process for unmarried, cohabiting couples. Without a common language of non-marital conjugality, it can be challenging for applicants to provide an application that satisfies all conditions:

I felt there is more pressure because we were common-law. At the same time, we know that even if we had been married, we could have still had to document that there was a relationship. So maybe there was not more pressure, but definitely more stress because the terms of common-law status are fuzzy compared to marriage (Interview G, 2010).

Ultimately, the ambiguous language of unmarried cohabitation combined with the reality that common-law relationships tend to develop organically, puts pressure on common-law couples to produce a narrative consistent with Canadian standards of conjugality.
A second and related frustration with the application process is the invasion of privacy. For married applicants, a marriage certificate provides a starting point for state identification of a legitimate conjugal relationship; evidence included in the application merely offers context that a genuine relationship existed and continues to exist pre-/post-wedding. Alternatively, common-law interviewees expressed that their relationships lacked a finite starting point and, as such, required more evidence that the relationship was “genuine, monogamous, exclusive and conjugal” (Interview F, 2011). This process was described as a "CSI investigation of our relationship because we had to prove a timeline of being common-law, as well as the awkward component of proving on paper that not only do we cohabitate, but we do so in a conjugal manner" (Interview G, 2010). The common sentiment among interviewees (both married and common-law) was that with a marriage certificate, the “monogamous, exclusive and conjugal” aspects of the relationship were assumed; ultimately, the only proof required was that supporting the applicants’ claims that their marriages were not marriages of convenience. On the other hand, applying as common-law requires proving that all four components (genuine, monogamous, exclusive and conjugal) exist.

What is interesting here is that — returning to Molodowich v. Penttinen (1980) — these four components are not actually requirements of marriage. Rather, they are part of a group of characteristics that favour the presence of an interdependent relationship over a sexually intimate relationship. Common-law applicants however, are encouraged by immigration lawyers to include more evidence outlining the intimate details of their relationships (Interview C, 2010; Interview Y, 2010; Interview CC, 2010). Common-law applicants therefore took more time to frame their application about this exclusive, monogamous, conjugal language, in order to gain access.
Contrary to the Canadian state’s focus on cohabitation for common-law relationship recognition in domestic policy, cohabitation alone is insufficient for common-law couples applying for sponsorship. Additionally, while Canadian legal history of relationship recognition post-*Molodowich v. Penttinen* (1980) highlights a trend of focusing on the current status of relationships in order to assess conjugality, the first two sections of the *Questionnaire* pay more attention to the early stages of a relationship. As expressed by common-law interviewees, this adds stress to the application process, particularly when trying to prove that a conjugal relationship exists without previous state recognition. This pressure is further intensified by a lack of a universal common-law language and the required provision of immensely private details in order to prove that a common-law relationship exists. While the *Questionnaire* is to be completed by both married and common-law couples, common-law interviewees generally expressed more frustration with questions regarding their relationship’s development compared to married couples. Furthermore, they believed themselves to be at a disadvantage due to the less structured nature of their relationships. Ultimately, focusing on relationship establishment has implications unique to common-law couples.

*Marriage – Wedding = Common-Law*

A second trend is that for both married and common-law couples, a significant amount of attention is paid toward the actual wedding. For married couples, there is a section in the *Questionnaire* titled “Information About Your Marriage” that requires details about the proposal, the engagement and the wedding ceremony itself. With regard to the wedding ceremony, couples are asked to provide particulars on the date, location, number of attendees, family members in attendance, and religious component of the ceremony, confirming these details with photographic evidence. Additionally, couples are expected to provide analogous specifics about the wedding reception, as well as the honeymoon.
Similar to sections discussed above, answering “no” to any of these questions requires explanation. Moreover, applicants must provide further explanation if they answer “yes” but are unable to provide details requested by CIC. So for example, if a couple got married without their family in attendance, they are required to explain why this was the case. This suggests that CIC expects a wedding narrative that coincides with traditional Western notions of marriage and marital ceremony.

CIC’s focus on the wedding speaks to its performative aspect (Freeman 2002). While typically seen as one and the same, distinguishing between a wedding — the act of getting married — and the actual marriage — the act of being married — highlights the social, economical and political importance of the ceremony itself. As Freeman contends, “there is a productive non-equivalence between the institution of marriage and the ritual that supposedly represents and guarantees it” (2002, xv); the wedding is performative, as it is a public site for enacting specific forms of social intimacy. This corresponds with the state’s focus on the wedding in the Questionnaire; details about the wedding add a level of “publicness” to the marriage, which in the end adds legitimacy to the couple’s claim for spousal sponsorship.

For immigration officers, the absence of wedding or wedding traditions results in applications being red flagged (Interview C, 2010; Interview Y, 2010). As one immigration officer explained:

If there is no actual ceremony, I want to know why. If no one attends the ceremony, I want to know why. If there are no photos of the event, I want to know why. Most couples that get married have a wedding, have their families there, eat cake and dance, etc. So if I have an application and those details aren’t there? That means I have to ask more questions to make sure it is not a marriage of convenience (Interview Z, 2010).

Another interviewed immigration officer justified CIC’s reliance on the wedding by referring to its universality, commenting:
Whether you’re in an arranged marriage or a non-arranged marriage, both are typically celebrated with a ceremony of some kind. So this section of the Questionnaire is not meant to distinguish between different kinds of marriages, it is meant to weed out the bad ones (Interview AA, 2011).

By partaking in this normalized rite of social intimacy, a married couple’s relationship is more likely to be viewed as genuine for the purposes of immigration.

The pressure not only to adhere to this narrative of the wedding ritual, but also to observe it in a manner consistent with CIC’s expectations was expressed by one of the interviewed married couples. Having decided to get married at Toronto City Hall in lieu of a more traditional wedding ceremony, this couple then faced the challenge of explaining their decision in the Questionnaire. In their account of the application process, they concluded that, “The most difficult part was explaining the circumstances of their wedding [getting married at City Hall]. We had to explain why our parents were not there, why they were not invited, why we chose not to have a formal ceremony afterwards and why we chose not to go on a honeymoon” (Interview N, 2011). On the surface, their reasoning was simple — they wanted to get married at City Hall. When it came to completing the Questionnaire however, they were advised by their lawyer to overcompensate by providing more evidence that their relationship was genuine in order to counterbalance their non-traditional ceremony — “He told us that while a wedding at City Hall wouldn’t raise that many eyebrows, a wedding at City Hall without our families, or a reception, or a honeymoon probably would” (Interview N, 2011). As a result, the couple constructed a response claiming that the only reason they were married at City Hall was a financial one. They explained that their current financial status led to their choosing to hold a small service (them and two witnesses) at City Hall. Their response implied that if they had the financial resources, they would have had a more traditional wedding (Interview N, 2011). In light of this, choosing to get married at City Hall comes across as a failure, a failure warranting explanation. CIC’s focus on the wedding pressures married couples to produce a
narrative that not only provides a public element to their conjugal relationship, but also one that is consistent with traditional expectations of the ceremony itself.

Interestingly, CIC’s focus on the presence or absence of a traditional wedding ceremony has implications for common-law couples as well. Consistent with discussions above that publicly celebrating one’s conjugal relationship further legitimizes the seriousness of the relationship, common-law couples are asked in the Questionnaire to discuss whether there was a formal ceremony to recognize/celebrate the relationship. Like wedding-related questions for married couples, common-law couples are required to provide details if there was a ceremony and an explanation if there was not. Moreover, couples must explain the absence of family members and friends even if there was a formal ceremony. All of these questions are consistent with earlier discussions about the distinction between ceremony as ritual and the upholding of certain relationships of social intimacy. Common-law couples are expected to validate their relationship with some sort of public display.

In addition to having to answer questions regarding ceremony, common-law couples are obligated to explain why they are not married and if they intend on getting married in the future. A former policy analyst justified this question claiming that it assists in their assessment of common-law couples because “most common-law couples end up getting married at some point” (Interview D, 2011). For several of the interviewed common-law couples, responding to this question required a very careful answer, as one interviewed couple remarked:

It is a loaded question. There are several ways you could answer that . . . we object to the institution of marriage and the subjugation of women in this institution, that is not going to play well with bureaucrats. So what we said was — and this is partially true — is that we’re poor and we are looking to get married in the future, but we’re both away from our families and cannot afford a wedding. So we constructed that into a carefully worded paragraph (Interview F, 2011).
This was echoed by another couple that explained in their application that they had postponed getting married until they could marry in the groom’s home country in order for his ailing mother to attend (Interview G, 2010). From a policy-based perspective, the purpose of the Questionnaire is for immigration officers to assess the likelihood of the relationship continuing post-sponsorship (Interview W, 2010); however, in practice, continuousness for a common-law relationship is defined by the promise of marriage. As one interviewed common-law couple commented:

There is a heightened sense of legitimacy to the act of marriage that if you are common-law, there is more of a burden on the genuineness of the continuousness of a relationship. What is interesting is that there are couples who are in common-law relationships for years, couples who get married after a month, and there are couples in arranged marriages . . . all of which who are in genuine, continuous relationships. So marriage and a continuous relationship is not necessarily one and the same. Even long-term marriages and continuous relationships are not one and the same (Interview K, 2011).

These couples experienced pressure to justify their decision not to marry, but to do so in a way that avoided suggesting they opposed the institution of marriage. In this light, a common-law relationship comes across as a transitional period between singledom and marriage, instead of a life choice in and of itself. Common-law couples are then faced with a dilemma — either defend their decision to choose a common-law relationship over marriage and jeopardize their chances of being approved or provide a misconstrued account of why a marriage has yet to take place and a promise of marital plans for the future.109

Ultimately, this discussion concerning CIC’s focus on the wedding in its Questionnaire highlights two important points. First, for both married and common-law

109 It is important to reiterate here that nothing from my research shows that common-law couples are less likely to be approved if they were to express dissatisfaction with the institution of marriage in their Questionnaire. Due to the attention paid to the wedding in the Questionnaire however, interviewed common-law couples perceived this to be a possibility. Considering what was at stake in this process, they were hesitant to provide any answers that might put their application at risk.
couples, a significant amount of attention is paid towards the wedding. Married couples are required to provide details of the ceremony, reception and honeymoon; couples that do not have a wedding or opt for a non-traditional wedding must provide an explanation. Common-law couples are asked to provide similar details about the presence or absence of a formal ceremony to recognize their relationship. Furthermore, they are obligated to explain their choosing common-law over marriage — “Clearly a marriage is not always ubiquitous of what a good relationship is; however, it is from a bureaucratic point of view” (Interview M, 2010). While both married and common-law couples are scrutinized, they are assessed according to the state’s interpretation of the ideal marriage.

Wedding-related questions in the *Questionnaire* suggest that relationships that have undergone a ritual of public recognition are more likely to be viewed as legitimate by the state. Marriage provides CIC with an important interrogation opportunity. As interviewed policy analysts and immigration officers confirmed, the details of a marriage story are a great place to spot fraud (Interview C, 2010; Interview D, 2011; Interview W, 2010; Interview X, 2010; Interview Y, 2011; Interview AA, 2011). The normative force of marriage has made it an expeditious site for detection of false claims. The problem is that in their quest for expediency, CIC has developed an application premised on a single understanding of conjugality and conjugal ceremony. The state’s approach to these concepts is generally synonymous with marriage or perceptions of the ideal marriage as defined by the ceremony itself. While focus on the wedding has implications for both married and common-law couples, the framing of the *Questionnaire* establishes a standard for conjugality that is more conducive to married couples resulting in the unfair treatment of common-law couples. Instead of being defined primarily by cohabitation, common-law couples are required to justify their relationship decisions in reference to the presence or
absence of ceremony, which in the case of Canadian conjugalitly is epitomized by the wedding.

Second, interviewees expressed pressure to provide an account of their relationship that corresponded with cultural narratives of relationship patterns, as made evident in one couple’s response:

For me, a big wedding is not important, but our answer suggested that we were not married because we could not afford the big wedding that we want to have. But really, you can get married for 100 bucks. So the fact that we were poor really has no significance if we were really committed to being married. The plausibility of our answer however . . . the woman who wants the big wedding . . . our answer is really good and did not raise any suspicion even though, it is partly true, but we have many reasons why we are not actually married (Interview F, 2011).110

This was echoed by several of the other interviewed couples that claimed financial status as their primary justification for either not having a traditional wedding, or not getting married at all. The decision to emphasize financial constraint is an interesting one, as sponsors are also evaluated on their ability to financially provide for their sponsored spouse or partner. Returning to neoliberal justification for current family reunification policy, legitimate conjugalitly embodies the assumption of economic interdependency. The Canadian government is concerned about ensuring that a sponsor has adequate funds to support their family members; therefore, any weakness on that front — in this case being unable to afford a wedding — should be considered a risky strategy. Common-law couples who used this justification however were encouraged by immigration lawyers to use financial status as their primary reason to not marry, as one couple commented, “He asked us why we weren't married and we gave a couple reasons . . . we had never discussed marriage, our families

110 The wedding as a form of gendered commercialization has been the focus for many feminist scholars. Freeman describes the standard wedding as a “profound product of capitalism,” attributing every aspect including “the veiled bride in a white satin dress, attendants in matching dresses, rings and bouquets, special music, showers, bachelor-bachelorette parties, large receptions, wedding gifts and a honeymoon” to the establishment of a relationship between intimacy and economic production (Freeman 2002, 25–6).
lived far away, we couldn't afford a wedding. He stopped us right there and said 'Yes. That's it. Use the lack of money reason.' So we did” (Interview G, 2010). These couples were under the impression that while mentioning financial weakness might be risky, the legitimacy of their relationship and its proximity to the marital norm was of greater risk to a positive assessment. This supports the claim I made in chapter three that family reunification policy is therefore driven by family form, not family function. For couples whose relationships were not marked by a public ceremony or were marked by a non-traditional public ceremony, the challenge was to construct a conceivable explanation that would not minimize the particular narrative of conjugality engrained in Canadian society.

When it comes to assessing the genuineness of married and common-law couples for the purpose of sponsorship, the presence or absence of a wedding plays an influential role. Applicants are required to provide details regarding the public solemnization of their conjugal relationship (e.g. a wedding ceremony for married couples and a commitment ceremony for common-law couples.), and to explain the absence or non-conventional aspects of these events. The procurement of this information suggests that public recognition further legitimizes one’s private relationships. As confirmed by interviewed policy analysts and immigration officers, the wedding story is an easy site to identify fraud; therefore, missing or re-written pages are generally red flagged. Couples are thus encouraged to produce a narrative that is consistent with popularized notions of conjugality. CIC’s framing of the Questionnaire places unfair expectations on both married and common-law couples; however, in way that is more conducive to marriage. Ultimately, this puts common-law couples on the defensive, encouraging them to construct answers in anticipation of potential issues that could emerge during assessment rather than providing an honest account of their relationship decisions.
One could argue that this process is no different than any other state program that demands certain behaviours in order to qualify. Indeed, as chapter three suggests, domestic policy in Canada relies on a specific understanding of the conjugal family unit. What is different about conjugal relationships in the context of immigration is that citizenship is at stake. Whether a couple living within Canadian borders chooses to get married or not get married, to live together or not live together, their decisions could result in the refusal of state recognition of their relationship; however, their citizenship would not be revoked. At the end of the day, regardless of what type of personal relationships an individual forms, he/she is still a citizen. For the sponsorship seeking couple, the provision of citizenship relies on the genuineness of the relationship as determined by the assigned immigration officer. Therefore, while there are other state programs that require a specific type of behaviour in order to qualify, access to citizenship is not hanging in the balance.

*Proving Conjugality*

The third and final trend is that CIC’s reliance on evidence to prove that a conjugal relationship exists is oblivious to the implications it holds particularly for common-law couples. CIC’s approach to assessing common-law applications is fact based, meaning that conjugality is evaluated on the existence of factual evidence. Examples of evidence include proof of cohabitation (e.g. mortgage, lease), joint bank accounts and insurance policies, proof of joint large-item purchases (e.g. car, furniture), proof of continuous communication (e.g. emails, letters, long distance phone bills), testimonies from friends, family members, and community/religious leaders, and photographic proof of trips and major events (e.g. birthdays, holidays, commitment ceremony) (Citizenship and Immigration Canada 2006, s.10.1). Couples are expected to use evidence to support a timeline of conjugal living deemed worthy of immigrant status by the assigned immigration officer. All interviewees — married and common-law — discussed the tedious nature of this process, having to organize specific
details in order to provide the immigration officer with a clear, comprehensive application. Comparatively speaking however, common-law couples expressed more discomfort with the process than their married counterparts. This discomfort was primarily equated with the perceived pressure to prove that in the absence of a marriage certificate, their relationships were conjugal; this begs the question — if common-law conjugality is treated as synonymous with marriage, what are the implications of the current fact based approach for common-law couples?

As previously discussed, interviewed common-law couples found it difficult to provide details about the early stages of their relationship that corroborate their claim of common-law status, particularly because they did not seek state recognition prior to applying for spousal sponsorship. Peter, an interviewee sponsored by his common-law partner, commented:

I had come to Canada on a student visa, which was close to expiring, and was looking at my options post-graduation to work in Canada. I qualified then as a federal skilled worker because of my research experience . . . that was a really drawn out process. I went to a few information sessions about the immigration process and was told that I was looking at a minimum of two years to be assessed. We went to an immigration lawyer and found out that we could apply as common-law. I could be sponsored through Juliet. He [the lawyer] was saying “absolutely go through common-law as it is much quicker . . . as long as you can show evidence that proves your common-law status, then that is the way to go” (Interview F, 2011).

For Peter and Juliet, it was not until they applied for spousal sponsorship that they identified as common-law. While they had lived together for over two years at the time of application, their relationship had evolved without any official declaration to the state — “There were things we did consciously in ‘common-lawliness’, but formally it was the immigration application” (Interview F, 2011). The other common-law interviewees provided similar narratives; they lived in conjugal relationships that were officially recognized by the state when one partner applied to sponsor the other.
Couples can marry primarily for the purpose of acquiring immigration status — what CIC refers to as a marriage of convenience — but because of cohabitation requirements, common-law couples must already be common-law in order to qualify. This is not to suggest that common-law couples are incapable of forming relationships of convenience; however, unless there are extenuating circumstances, a one-year cohabitation period is obligatory. This often leads immigration officers to assume that because common-law couples have lived conjugally for an extended period of time, they should be able to provide proof similar to that of married couples (Interview C, 2010). Due to the less formal development of their relationships, interviewed common-law couples elaborated on the challenge of amassing evidence to substantiate their claim of being more than roommates. For some couples, not planning to formally claim common-law status meant that they had not anticipated having to provide physical evidence of conjugal living. This is evident in the range of evidence provided by interviewees including train ticket receipts, photos, boarding passes, leases, bank statements and bills. In order to prove that their relationship was conjugal and monogamous, one couple included the receipt of a queen sized bed they had co-purchased; another couple provided their immigration officer with emails they had exchanged while apart. Both couples felt this was an invasion of privacy — “Due to the personal nature of the emails, we felt our privacy was being violated so we tried to weed out some of the more personal emails, but were still trying to demonstrate that we were more than friends” (Interview G, 2010).

Married couples are required to prove that their relationship is genuine, while common-law couples must prove that their relationship is conjugal. To put it simply, married couples are considered conjugal until proven non-conjugal and common-law couples are considered non-conjugal until proven conjugal (Interview Y, 2010). This differentiation in approach however, fails to translate into varied expectations depending on
the relationship in question. Therefore, an implication for common-law couples is that the current program is not cognizant of the difference in starting points for married and common-law couples, resulting in frustrations for common-law couples with respect to the provision of evidence.

These frustrations were particularly evident for same-sex common-law interviewees. Comparatively speaking, the Canadian state has been favourable towards homosexual relationship recognition. This is attributed to the institutional importance of the Supreme Court (Matthews 2005; M. Smith 2007), successful mobilization of gay and lesbian groups (Lahey and Alderson 2004), and a rights-supportive societal culture (Epp 1998). It is important to remember however that Canada is only one of a handful of countries that recognize same-sex marriage and same-sex domestic partnerships (common-law). More recently, the Harper government announced that same-sex marriages performed outside Canadian borders will only be recognized if they were officiated in countries where same-sex marriage is also legal (Payton 2012). As a result, the number of potential same-sex married couples immigrating to Canada is limited. Similar restrictions do not exist for same-sex common-law couples — having only to prove that they have lived together for a year — suggesting that in the case of same-sex common-law couples, the Canadian state is sympathetic to the presence of institutional homophobia. One could assume that because obtaining immigration status as a common-law couple is not solely dependent on home state recognition, the Canadian state is conscious of the reality that same-sex, unmarried, cohabiting couples do not have universal access to state legitimation. What is concerning about this assumption is that while it clearly accounts for institutional homophobia, CIC’s reliance on physical evidence to assess conjugality ignores societal homophobia.

After living together in Slovakia for two years, Sarah — a Canadian citizen — applied to sponsor her partner Alena. While compiling their application, the couple found it difficult
to collect physical evidence that proved their relationship was conjugal. In their account of the process, Sarah explained:

We were living together in a relationship, but we were not public about it . . . that is not something you do where we were. When we applied [for spousal sponsorship], we had a hard time giving them proof that we were in a serious relationship . . . we didn’t have many photos, our family didn’t know we were together . . . we lived in a two bedroom apartment. It was difficult to prove that we were more than roommates (Interview I, 2011).

By neglecting the homophobic social climate of many countries, common-law same-sex couples are expected to provide evidence that might be difficult to obtain. The required criterion assumes that same-sex and opposite-sex common-law couples are treated similarly. Furthermore, it supposes that all same-sex couples are “out” to their friends, family and community. For Sarah and Alena, providing physical evidence of their monogamous, conjugal relationship was challenging as a result of the intersection between their sexual orientation and geographical location, factors unaccounted for in the spousal sponsorship application. Therefore identical evidence requirements for married and common-law couples have implications for common-law couples as a group, as well as those specific to same-sex couples.

Finally, in order to prove that their relationships are genuine, common-law couples (both same-sex and opposite-sex) require third party validation — “You are officially advised to provide a list of people who can attest to having known you as a conjugal couple” (Interview H, 2011). When applying for common-law benefits within Canadian borders, a couple’s declaration of their relationship to the state is theirs alone. In the case of spousal sponsorship however, couples are encouraged to include testimony from friends, family members and community/religious leaders who can speak to the conjugal nature of their relationship. This links back to earlier discussions of the need for public validation for one’s intimate relationships; letters of relationship reference provide an element of public legitimacy that the state believes genuine conjugal relationships possess.
This is particularly fascinating for several reasons. First, it assumes that our friends, family members and community/religious leaders are fully aware of the intimate details of our personal relationships. By attesting to the conjugal nature of the relationship in question, these testimonies suggest that references are confident that the relationship is monogamous, conjugal and exclusive. While it is impossible to speak for all couples, I find it difficult to believe that couples typically share these details with others, at least to the extent that renders these individuals qualified to speak to them for the purpose of immigration. Ultimately, these testimonies are based on assumptions, which challenges their effectiveness in application assessment.

Second, returning to Sarah and Alena, it assumes that family members, friends and community/religious leaders are willing to speak to the conjugal nature of these relationships. For this couple, acquiring references was challenging because they were not “out” to many. This challenge however, is not limited to same-sex couples. Potential references might not want to provide testimony if they have never met the partner, have only met the partner a few times, disapprove of the relationship for religious or cultural reasons, or are estranged from the couple. There are situations where these testimonies are difficult, if not impossible, to obtain. Therefore, it is incorrect to assume that letters of reference are easily accessible.

When the issue of references was brought up in my discussion with CIC policy analysts, one interviewee explained that this is why CIC has a “conjugal” category (Interview D, 2011). Returning to chapter three, the Immigration and Refugee Protection Act recognizes spouses (married persons), common-law partners (cohabiting in a conjugal relationship for a minimum of a year), and conjugal partners (a conjugal relationship with a Canadian citizen). The third category — conjugal partners — is reserved for those conjugal couples that are unable to live together as a conjugal couple. In theory, couples like Sarah and Alena
could apply under the conjugal category and the state would assess their application accordingly. Interviewed immigration officers however, told a different story. When asked about the conjugal category, one interviewee claimed that the conjugal category was reserved for rare occasions. Moreover, interviewees admitted that in the absence of cohabitation, success rates for couples applying under the conjugal category are low.\(^{111}\) As one interviewed immigration officer commented, "In my twenty-five years as an immigration officer, I have maybe seen fifty conjugal applications and in those fifty, I think I passed two" (Interview AA, 2010). The conjugal category therefore does not guarantee same-sex common-law couples or non-cohabiting opposite-sex common-law couples a more fair assessment process.

Finally, requesting third party validation to assess the authenticity of a common-law conjugal relationship means that when it comes to spousal sponsorship, the process does not solely involve the applicant couple — "In a much more minimal way, it does entail other people...it isn’t just about us" (Interview F, 2011). The social element of one’s intimate life underscores that the state is always in the bedrooms of the nation. Considering the stakes of this process, interviewees recognized what they were asking of their references — they must testify to CIC that the couple’s relationship is monogamous, conjugal and exclusive. Without third party validation, applications are called into question, as they “lack any account of social perception of their relationship” (Interview C, 2010). Common-law couples applying for state protection within Canadian borders do not require references to speak to the seriousness of their relationship; however, self-identification is insufficient for sponsorship-seeking couples. In order for these relationships to be considered genuine,

\(^{111}\) Despite filing an Access to Information request for the number of couples applying under the conjugal category since the passing of the Immigration and Refugee Protection Act and asking my interviewees about these numbers, I was unable to receive an actual number. The response to my request was that while CIC tracks the number of successful spousal sponsorship applications, there is no differentiation between married, common-law and conjugal couples.
someone outside of the relationship must corroborate the couple's application. Ultimately, this puts pressure on potential references, as well as the couple themselves.

Both married and common-law couples applying for spousal sponsorship are obliged to prove that their relationships are genuine and not solely formed for sponsorship. While all applications undergo scrutiny, they are assessed according to a series of criteria informed by the courts that while vague, have been adopted by CIC for the assessment of couples. Furthermore, as legal scholars have critiqued, the ideal conjugal relationship continues to be defined by the idyllic marriage. This one-size-fits-all approach has implications for all common-law couples, particularly those seeking sponsorship. Current criteria ignore differences between married and common-law relationships, as well as between same-sex and opposite-sex common-law relationships. By treating all conjugal relationships as a monolithic group, the evidence required for the spousal sponsorship presents a series of challenges for common-law couples, as expressed by the interviewees. These challenges include providing evidence that substantiates a coherent narrative of their relationship's development despite the often-casual nature of common-law relationship evolution, that overcomes the presence of social homophobia in home countries, and that provides sufficient third party validation of the relationship in question. While assessment measures are required, it is imperative that we develop policy cognizant of the differences in our intimate relationships. Ultimately, conjugal criteria for spousal sponsorship should be accommodating of these variations.

**Conclusion**

My analysis of relationship recognition in Canada highlights the differentiation in treatment between inside conjugal couples (those with access to the Canadian state) and outside conjugal couples (those seeking access to the Canadian state), between married couples and common-law couples applying for spousal sponsorship, and between those
same-sex and opposite-sex common-law couples applying for spousal sponsorship. This sheds light on the complexity of conjugality and draws attention to the inadequacies inherent in the current one-size-fits-all approach to conjugality in Canada. The Canadian state’s treatment of common-law as marriage in its immigration policy has implications unique to common-law applicants, resulting in a limited interpretation of what defines conjugal living. Instead of ignoring these differences, it is imperative that we account for differences within intimate relationships by developing policy that is reflective of them.

The primary point of this chapter is not that policy architects should simply extend current immigration policy to be more accommodating of conjugal relationships. Rather, the key lesson is that we need to take a step back and re-evaluate what makes a conjugal relationship conjugal, and then examine how different types of intimate relationship forms fit into this. Ultimately, policy communities need to have a discussion that should have taken place twelve years ago when the federal government officially recognized common-law conjugality. Since passing the Modernization of Benefits and Obligations Act (2000), governments have failed to have a meaningful discussion concerning policy and conjugality, as I argued in this chapter with regards to spousal sponsorship, and the current government has actually gone backwards with its crackdown on marriage fraud, as I will argue in the next chapter.
Chapter 6

Marriage Fraud Beware! : Canada’s Anti-Marriage Fraud Campaign and the Production of “Legitimate” Conjugal Citizens

“The best disinfectant is sunshine. The more people are aware of the problem, the less likely they’ll be victimized by it”
(Minister of Citizenship and Immigration, Jason Kenney 2010)

In a national anti-marriage fraud commercial recently released by the Government of Canada, viewers are faced with a familiar image — a tiered white wedding cake, topped with an ornamental white bride and groom of colour, the wedding march playing in the background. The music fades out and is replaced by a voiceover: “Many Canadians marry people from other countries. Sometimes the marriage is a scheme to jump the immigration queue. Victims are left financially responsible if the sponsor goes on welfare.” At this point, the ornamental groom disappears from the top of the cake, the bride left to stand alone — “Being a sponsor is no cakewalk.” This commercial is part of Citizenship and Immigration Canada’s (CIC) anti-marriage fraud campaign launched in the spring of 2011. For CIC, this campaign is a way to publicly demonstrate the government’s commitment to tackling the issue of marriage fraud, an issue deemed top priority in their 2011 Speech from the Throne. Under the current government, marriages of convenience — marriages entered into primarily for the purpose of acquiring immigration status — have become one of the principle foci for their recent string of immigration reform proposals.112

As it currently stands, sponsored spouses and partners are automatically entitled to permanent residency status. This is complemented by a three-year financial commitment by the sponsor, meaning that the sponsor is held financially responsible if the sponsored individual receives any type of monetary assistance from the state. This financial

112 While technically, a marriage of convenience is one example of marriage fraud, CIC uses the terms marriage fraud and marriage of convenience synonymously.
commitment remains intact regardless of the status of the relationship between the sponsor and the sponsored. Therefore if the sponsored abandons the sponsor after arriving in Canada, the sponsor remains financially responsible for the three-year period. While “sponsorship breakdown” was identified as a concern in CIC’s 1995 annual report to Parliament, marriage fraud specifically has received minimal attention. Parliamentary debates highlight that while the topic of marriage fraud emerged in policy discussions in 2008 — particularly during Citizenship and Immigration Committee meetings — it was not identified as a policy target by the government until 2010 (Citizenship and Immigration Committee Meeting, December 6, 2010). Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, attributes this to an increase in reported cases of marriage fraud, calling for a “crackdown” on marriages of convenience. This crackdown has since taken the shape of a national advertising campaign, a series of town-hall consultations between Minister Kenney and constituents, an online survey, and multiple policy reform proposals aimed at both preventing and stigmatizing the formation of relationships in order to immigrate to Canada.

In this chapter, I examine the implications the government’s crackdown on marriage fraud has for family class immigration, and what is at stake in the Canadian state’s regulation of desirable and undesirable relationships. In the case of sponsorship-seeking couples, what is at stake is access through family reunification; for the government, it is the preservation of a specific understanding of the conjugal family unit through a rhetoric of immigration system integrity. The impacts of such a campaign are therefore various and widespread. Using published marriage-fraud appeal decisions from the Immigration and Refugee Board (IRB), my analysis highlights how the recent crackdown on marriage fraud furthers the divide between inside and outside families, producing new elements to the discourse surrounding the ideal conjugal citizen. I contend that while the language of the campaign
appears to be neutral, relationships continue to be targeted along culturally-, gendered-, and sexuality-based lines. More specifically, I explore how the targeting of certain groups allows the government to reinforce a narrative of family class immigration based on a normalized conception of the conjugal family unit. I then explore the government’s motivations behind this campaign. Finally, using evidence generated from media analysis of the government’s anti-marriage fraud campaign, parliamentary debates, and interviews with stakeholders (policy analysts, immigration officers and anti-marriage fraud organizations), I investigate the implications this crackdown on marriage fraud has for current and future spousal/partner sponsored relationships.

**Defining Marriages of Convenience**

In *Chen v. Canada (2010)*, Yo Long Chen’s application to sponsor his second wife was refused on the grounds that the marriage was not genuine and was entered into primarily for his wife to gain admission to Canada. Following the death of his first wife in 2005, friends in China put Chen in touch with the woman — also married once before — who would eventually become his second wife. After a brief long-distance relationship, Chen travelled to China and the couple were married in 2006. The assigned immigration officer expressed several concerns about the relationship, specifically the applicant’s relationship with her ex-husband, and her inability to recall important details including the date of the death of her sponsor’s first wife. Therefore, despite the couple’s consensual decision to get married and have Chen sponsor his wife, the officer concluded that their relationship was disingenuous and the couple was underserving of reunification. This case is one of hundreds of appeal cases the Immigration Appeal Division of the IRB receives on a yearly basis. Aside from issues of criminality (e.g. the sponsored spouse/partner having a criminal record),

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113 *Chen v. Canada (Citizenship and Immigration)* [2010], TA6-14852.
disingenuous conjugality for the purpose of immigration is the primary reason for the refusal of spousal sponsorship applications (Interview C, 2010).

CIC defines a “relationship of convenience” as a marriage or common-law relationship that is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the *Immigration and Refugee Protection Act* (Citizenship and Immigration Canada 2006, s.6). The assessment of spousal sponsorship applications is therefore two-pronged, as it is possible that a couple’s relationship can be interpreted by an officer as genuine but still considered chiefly formed in order to get into Canada and therefore denied approval. The genuineness of one’s relationship is ultimately only part of the sponsorship process. CIC recognizes three different types of marriage fraud — sponsors that agree to marry/sponsor an individual in exchange for money; sponsors who marry in good faith and are abandoned by their sponsored spouse or partner upon their arrival to Canada; and relationships “purchased” through an external organization (e.g. fake wedding photos, relationship testimonies, etc.). In light of my analysis of IRB appeal decisions and CIC documentation, I would add a fourth category — couples that marry for the purpose of immigration without monetary payback, malice or ill-intent. This includes couples currently living in Canada who marry in order to avoid deportation, and Canadian citizens who marry abroad in order to sponsor a loved one so that they can immigrate. While both of these examples involve loving relationships between two consenting adults, these relationships would be denied access by the IRB. Unlike relationship patterns within Canadian borders, in the case of marriages of convenience, the presence or absence of consent does not hold top

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114 This distinction was highlighted in *Ajaz v. Canada (Public Safety and Emergency Preparedness)* [2011], TA9-13190. The appeal officer ruled that while the couple’s relationship was genuine, it was a genuine relationship that was primarily for immigration purposes. The officer further acknowledged that it was rare for a conjugal relationship to be deemed genuine but then be refused access, claiming that if a relationship between two citizens from different countries were genuine, it would make sense that the couple would seek reunification. Recognizing the rarity of this situation, the couple’s appeal for sponsorship was granted.
priority. It is important to note that marriages of convenience are not always detectable at the time of application. Reports of Canadian citizens who successfully sponsor their spouse or partner only to have them disappear upon arrival in Canada have shaped the government’s anti-marriage fraud campaign. Therefore, the government’s approach towards marriage fraud is both proactive (cutting off marriage fraud at the source) and reactive (punishing those whose fraudulent marriages come to light post-application).

**IRB Assessment of Marriages of Convenience**

Criteria used by the IRB to assess whether the relationship in question is in fact a marriage of convenience are similar in most respects to criteria used to assess the conjugality of a relationship as discussed in the previous chapter. When evaluating suspected marriages of convenience, officers examine the following aspects:

- Intent of the parties;
- Length of the relationship;
- Amount of time actually spent together;
- Conduct at time of meeting, engagement, and/or wedding;
- Behaviour subsequent to the wedding;
- Knowledge of each other's relationship histories;
- Levels of continuing contact and communication;
- Knowledge of and sharing of responsibilities for care of children brought into the marriage;
- Knowledge of and contact with extended families of parties;
- Knowledge about each other's daily lives (Interview C, 2010).

Similar to couples applying for spousal sponsorship, couples that choose to appeal a decision bear the responsibility of convincing the appeal officer that their relationship is conjugal. Furthermore, couples who file an appeal experience further scrutiny regarding the personal details of their relationships. While initial assessment focuses on the structural components of a relationship (e.g. living arrangement, sharing of finances, public perception, etc.), assessment of appeals evaluates the presence or absence of intimacy (e.g. sharing of personal information, knowledge of intimate details, etc.), the assumption being that couples
in a genuine relationship should have more in common than just sponsorship (Interview AA, 2011).

My analysis of published appeal decisions suggests that while IRB protocol requires officers to assess appeals according to this list of criteria, evaluation tends to rely on two primary factors: compatibility — which is not included on the list of criteria — and relationship history. In fact, with the exception of “length of the relationship”, relationship history was the only other criterion mentioned in my sample of appeal decisions.115 Couple compatibility plays an influential role in determining whether a relationship is genuine or was manufactured for the purpose of sponsorship. As these decisions suggest, compatibility is measured in several ways. One way in which compatibility is assessed is age. While age was only mentioned in one positive decision — Yu v. Canada (2008) — appeal officers frequently commented on age differences between couples in negative decisions.116 In Brobbey v. Canada (2006) — a decision involving a female Canadian citizen who was sponsoring her Ghanaian husband — the officer remarked, “The applicant [the sponsored] is over eight years older than the appellant [the sponsor]. In light of this, I find that this is a non-genuine, immigration marriage.”117 Age difference was also mentioned in a decision involving a sponsored spouse from Bangladesh in Begum v. Canada (2008) when the officer stated, “Also of concern is the difference between the ages of the couple.”118 The assigned officer in Simpson-Lee v. Canada (2006) took issue with the eighteen-year age gap between the couple, questioning whether the couple had anything in common considering their age difference.119 Age difference, particularly when cases involved younger women sponsoring older men, acted as a starting point for officers to assume the presence or absence of couple

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115 References were made to relationship length in 36 of the 140 decisions.
116 Yu v. Canada (Citizenship and Immigration) [2008], TA7-00735.
117 Brobbey v. Canada (Citizenship and Immigration) [2006], TA4-01703.
118 Begum v. Canada (Citizenship and Immigration) [2008], MA8-00393.
119 Simpson-Lee v. Canada (Citizenship and Immigration) [2006], TA4-14172.
compatibility. Critics have questioned the relevancy of age in the assessment of compatibility — calling for attention to be paid towards what a representative from Parkdale Immigration Services in Toronto referred to as “the substance of relationships” (Citizenship and Immigration Committee Meeting, November 3rd, 2009).

A second measure of compatibility is education; differences in education levels act as a red flag for marriages of convenience. This was evident in Hung v. Canada (2009) — a decision involving the sponsorship of a Chinese spouse — where the officer commented, “The appellant is better educated and westernized, and the applicant is an accounting clerk.” Similarly, a Canadian citizen’s appeal to sponsor her Chinese spouse was denied, with the officer remarking:

I had a problem with their testimonies with regards to why they liked each other or why they found each other compatible and suitable. . . . The appellant graduated from the University of Toronto with a Bachelor in Business Administration and the applicant is a hairstylist. He completed high school level education and did vocational schooling.

Compatibility with respect to educational background, which arguably translates to class compatibility, influences assessment of spousal relationships because it assumes that similar education levels translate to similar interests.

In addition to age and education, religion is also used by the IRB to measure compatibility. Mentioned in both successful and unsuccessful appeal decisions, religious consistency is viewed as a positive. In Amaral v. Canada (2011) — a positive decision involving the sponsoring of a spouse from Mexico — the officer remarked:

I must also take into account the fact that after having been married in a civil ceremony in Toronto, the couple were re-married in Mexico in the Roman Catholic Church. Both parties come from a Roman Catholic religious tradition and I am of the view that by choosing to be married in the Church, they have indicated that they wish their matrimonial bond to be blessed by their

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120 Hung v. Canada (Citizenship and Immigration) [2009], TA7-09697.
121 Li v. Canada (Citizenship and Immigration) [2011], TA9-06490.
religion, which incidentally does not recognize divorce. To my mind, this is a strong indicator that the marriage is genuine.\textsuperscript{122}

A lack of religious compatibility was discussed in \textit{Chen v. Canada (2010)}, the officer mentioning, “The appellant and applicant are not compatible in religion, as the appellant describes himself as a Christian and is obviously very involved in his church. The applicant, who knows of the appellant’s religious faith is not a Christian and has made no real effort to learn about Christianity.”\textsuperscript{123} This was echoed in \textit{Huayra v. Canada (2010)} — a negative decision involving a Canadian citizen attempting to sponsor his Peruvian spouse — the assigned officer commenting, “The panel also finds that in a genuine relationship, the appellant would have had an elaborate religious wedding in Peru, instead of the Spartan civil ceremony they underwent there, and would not wait to have a religious ceremony in Canada once they are united here.”\textsuperscript{124}

In this light, religious compatibility works in two ways. In addition to the couple being religiously compatible, there is the expectation that genuine marriages involve a ceremony consistent with their religious beliefs.

Moreover, this suggests that the IRB conflates religious and cultural compatibility. In the previous chapter, interviewed common-law couples discussed the pressure to provide a relationship narrative consistent with cultural norms of relationship development and ceremony. My analysis of appeal decisions adds a new level of complexity to this discussion. Comments about religious and cultural compatibility imply that couples are also expected to provide a relationship narrative the officer believes to be consistent with the cultural norms in the applicant’s country of origin. The assigned officers in these decisions assumed that if the couple is from the same country of origin — which was the case in 67 of the 140 decisions — the expectation is that their relationships follow a pattern of cultural compatibility coherent

\textsuperscript{122} \textit{Amaral v. Canada (Citizenship and Immigration)} [2011], TA8-08075.

\textsuperscript{123} \textit{Chen v. Canada} [2010], TA6-14852.

\textsuperscript{124} \textit{Huayra v. Canada (Citizenship and Immigration)} [2010], MA8-16540.
with the IRB’s assumptions about that particular culture. Therefore, as examined above, a Peruvian couple is expected to provide a relationship narrative consistent with perceived Peruvian cultural norms. A lack of religious/cultural compatibility acts as a warning sign in the assessment of appealed spousal sponsorship decisions.

Like religion, cultural compatibility is also conflated with ethnicity. Positive commentary was provided by officers with the couples in question described as “ethnic Chinese” (Yu v. Canada 2008; Hung v. Canada 2009; Lin v. Canada 2011; Li v. Canada 2011), “Bangladeshi” (Begum v. Canada 2008), “truly Ethiopian” (Tadessa v. Canada 2009), and “devoted Mexicans” (Amaral v. Canada 2011).125 In all of these decisions, officers considered the fact that these couples were ethnically “well-matched” a positive. Recognition of ethnic compatibility however translates to the expectation that couples’ actions will correlate with religious and cultural norms associated with their particular ethnic group. In Begum v. Canada (2008), a Bangladeshi couple was refused sponsorship, the officer remarking, “You didn’t have a formal wedding and none of your family members attended that wedding. . . . The circumstances of your relationship are inconsistent with the norms, traditions, and expectations of your own culture.” This was echoed in Rathod v. Canada (2008) — a decision involving the sponsoring of a spouse from India — the officer refusing the appeal on the grounds that “The appellant and applicant had sexual relations prior to their marriage contrary to the cultural norms and customs of their community.”126 This suggests that either religious or ethnic compatibility only goes so far; a positive evaluation of cultural compatibility requires that both of these components line up with the officer’s expectations of cultural norms in a given country, a consequence of the IRB’s conflation of these terms.

125 Lin v. Canada (Citizenship and Immigration) [2011], TA8-05954; Tadessa v. Canada (Citizenship and Immigration) [2009], TA7-12352.
126 Rathod v. Canada (Citizenship and Immigration) [2008], TA7-02205.
Cultural compatibility is therefore reliant on traditional and static cultural norms that must be observed and performed.

Finally, officers use the presence or absence of common interests shared by couples to assess compatibility. In Li v. Canada (2011) — a decision involving the sponsorship of a Canadian male’s Chinese spouse — the assigned officer took issue with a lack of shared interests, mentioning, "She [the applicant] did not for example speak to those things they had in common, what types of things they talk about, if he had a sense of humour, etc. Her answer in my view was very basic and void of any real information that would point to a genuine relationship."127 Similar commentary was provided in Li v. Canada (2011) (same name, different decision) when the officer drew attention to the fact that:

When they asked what they had in common, what they both said was rather general. For example, the appellant, when she was first asked, the first thing that I heard was that he was handsome, then she said that he was honest and that he cares about people a lot, that they care about each other, that he and her make jokes, that they respect elders and parents and that he likes to help people. . . . When he was asked, "what do you love about the appellant?" he indicated that she is very understanding, considerate, caring; he indicated that he loves her and he is very happy and content with her.128

The assumption of shared interests is generally pre-determined by age, educational background, religion, ethnicity and culture; couples considered incompatible according to these factors are assumed to have less in common. In Canada, where citizens are generally free to develop personal relationships as they see fit, it seems odd that something as subjective as common interests shapes the assessment of sponsorship-seeking couples. Furthermore, it is disquieting that in a self-declared multicultural society, the state generally finds sponsorship-seeking couples that are religiously, ethnically and culturally compatible less suspicious than spouses that come from different backgrounds. While the state plays no role in the assessment of compatibility for couples living within Canadian borders, the IRB’s reliance on compatibility

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127 Li v. Canada (Citizenship and Immigration) [2011], TA9-05367.
128 Li v. Canada (Citizenship and Immigration) [2011], TA9-06490.
to assess marriage fraud appeal decisions is both conceptually flawed and normatively unsound.

The second factor used in the assessment of appeal decisions is relationship history of both the sponsor and the sponsored. Several aspects of one's relationship history are considered red flags for a marriage of convenience including previous marriages, relationship length and sponsorship history (Interview C, 2010; Interview AA, 2011). Sponsors who have applied to sponsor multiple spouses at different times are considered highly suspicious; as are individuals who are sponsored and then sponsor someone else quickly after their relationship with the initial sponsor has ended (Interview Y, 2010). While these accusations were not made in the obtained appeal decisions, relationship history was mentioned in 87 decisions. In *Chen v. Canada (2010)*, the applicant was described as a "44-year-old divorcee" who “still retained possession of her former matrimonial home with her first husband” and was “owed 200,000 RMB by her former husband.” For the officer assigned to this case, these three factors aroused enough concern for her relationship with the sponsor to be deemed disingenuous. In her defence, the applicant claimed that, “she had retained possession of the former matrimonial home and would not be giving up her interest in the property until she had received the payment of 200,000RMB that was owed to her in the matrimonial settlement.” The officer neglected to account for gendered power imbalances in divorce settlements, ultimately penalizing the applicant for maintaining a connection to her first husband in order to receive what was owed to her. In these 87 decisions, one’s relationship history, particularly in relation to marriage and divorce, was mentioned in the assessment of the genuineness of the relationship in question.

The length of one’s previous relationships as well as the length of the relationship in question is also evaluated. In *Li v. Canada (2011)*, the officer was suspicious of the sincerity of

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129 Renminbi (RMB) is the official currency of the People’s Republic of China.
the couple’s relationship after finding out that prior to their brief courtship, both parties had been involved in long-term marital relationships. This was evident in the officer’s remarks:

When examining a marriage of two persons coming out of a long-term relationship and re-marrying in a short period of time, I am of the view that there has to be some substance to the evidence. That is to say, there has to be some indication that the two people involved are able to talk about the relationship; that they are able to describe those things that attracted them to the other person in detail; that they can speak to those things that are annoying to the other person or difficult situations. In other words and especially in a situation where two people have not spent a great deal of time together prior to marriage, the marriage has to make some sense.\textsuperscript{130}

In this decision, the officer assumed that because both parties had been in long-term relationships prior to marrying each other, they should be well aware of what a genuine relationship looks like. Moreover, they should be able to translate that knowledge to their shorter-term relationship if their intent to marry was sincere. In this light, relationship history is used by the IRB to automatically disqualify applicants like in Chen v. Canada (2010), or generate unreasonable expectations that are then used to scrutinize the validity of relationships like in Li v. Canada (2011).

A lack of couple compatibility has traditionally been overlooked when children are involved. For example, in Aujla v. Canada (2008), the initially assigned immigration officer refused the application citing incompatibility with respect to age (there was a three-year difference between the couple), educational background (the appellant was more educated), and relationship history (this was the applicant’s second marriage).\textsuperscript{131} When the decision was appealed, the appeal officer agreed with the initial assessment of compatibility, but ruled that the relationship was genuine because there were children involved. The presence of children as the exception changed following Mansro v. Canada

\textsuperscript{130} Li v. Canada (Citizenship and Immigration) [2011], TA9-05367.
\textsuperscript{131} Aujla v. Canada (Citizenship and Immigration) [2008], TA7-03154.
In this decision, the officer recognized there were children involved; however, took issue with the lack of communication between the appellant — who was living in Canada at the time of application — and his children who were living with the applicant in India. While the appeal officer reversed the initial decision, the officer made it clear that the presence of children did not automatically confirm that a relationship was genuine, commenting, “Typically the existence of a child of a marriage is an important factor which must be considered, and would be indicative of a relationship of some substance. However, the existence of a child of the marriage is not determinative of the genuineness of the marriage.” This decision has since been used to refuse appeals that involve children. In the case of Gill v. Canada (2011), the officer made reference to Mansro v. Canada (2008), ruling that the relationship was illegitimate despite the fact that the couple had two children together, remarking:

Based on the documentary evidence made available to the panel, it does not appear that the applicant has contributed to his wife’s support while she was pregnant nor to the children’s support since their birth. No viva voce nor documentary evidence was presented to provide the panel with any evidence as to the applicant’s relationship with the children, accounting of course for the distance and their ages. Has their father seen them, be it via Skype or any other webcam method? How was the applicant told of their birth and when? What information passed between the spouses during the course of the appellant’s pregnancy? There would surely be a plethora of such evidence, either oral or documentary, in a genuine marriage.

In the assessment of sponsorship-seeking couples, it is no longer safe to assume that children will trump couple compatibility.

The IRB relies on compatibility and relationship history to distinguish between genuine spousal relationships and marriages of convenience, the aim being to maintain the integrity of the Canadian immigration system. It is this discussion of system integrity that frames current discourse surrounding marriage fraud. In negative appeal decisions, couples

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132 Mansro v. Canada (Citizenship and Immigration) [2008], VA6-01540.
133 Gill v. Canada (Citizenship and Immigration) [2011], TB0-00040.
were accused of “engaging public policy considerations involving the integrity of the immigration system” *(Kagayutan v. Canada 2011)*, and “undermining the integrity of the immigration system, which depends on the honesty of applicants” *(Huayra v. Canada 2010)*. Minister Kenney has used, and continues to use this language of system integrity as justification for the government’s recent focus on marriage fraud. In 2010, Kenney prefaced a discussion of reform proposals with the following comments: “I think most Canadians intuitively understand that broad public support for immigration, and frankly diversity in our society, is contingent on having a well-managed, rules-based, fair immigration system. I think they understand that we all have a stake in maintaining such a system” *(Citizenship and Immigration Committee Meeting, December 6th, 2010)*. Those who engage in marriage fraud are framed as a serious threat to the execution of a fair, well-balanced and effective immigration system. The integrity of our immigration system therefore rests on the state blocking out external threats, which in this case is perpetrators of marriage fraud. Furthermore, the government has committed to defending Canadians from this external threat in order to “protect the integrity of our immigration system”, by introducing measures to “address marriage fraud — an abuse of our system that can victimize unsuspecting Canadians and vulnerable immigrants” *(Speech from the Throne, June 3rd, 2011)*. The government has labelled marriage fraud a top priority of their immigration policy mandate. This begs the question: how do we explain this recent focus on marriage fraud?

**Motivations for a Crackdown on Marriage**

In an examination of parliamentary Hansard, the issue of marriage fraud did not receive much airtime before the government’s policy position in 2010. Prior to 2010, calls for the government to take marriage fraud seriously were generally voiced by individual

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Members of Parliament (MP) who failed to receive any type of policy response. Concerns about marriage fraud were framed in two ways: concerns about couples marrying for the purpose of spousal sponsorship and concerns about the Canadian state’s allowance of common-law couples to apply for spousal sponsorship. Former Liberal MP Gurbax Malhi addressed the former in 1998, stating, “I draw attention of the House to the fact that some individuals are marrying Canadian citizens or permanent residents for the primary purpose of entering Canada as a member of the family class. Since fraudulent marriages cause pain to innocent spouses, we must take action” (Malhi: House Debate, February 18th, 1998). For Malhi, the harm, both current and potential, of marriage fraud for citizens and the government warranted attention. Canadian Alliance-turned-Conservative MP Leon Benoit addressed the latter, commenting:

   The department [Citizenship and Immigration Canada] is already dealing with the huge problem of verifying whether a marriage is a marriage of convenience to accommodate immigration or whether it is a genuine marriage. How on earth would we deal with that when we allow a common-law marriage to be used under the bill? It is an administrative impossibility and an administrative nightmare (Benoit: House Debate, February 27th, 2001).

For Benoit, the extension of conjugal benefits to common-law couples was a potential catalyst for an increase in marriage fraud. Apart from these discussions, marriage fraud was not on the government’s agenda pre-2008.

   From an electoral standpoint, the Harper government’s focus on marriage fraud is a logical policy target for three reasons. One reason is that a crackdown on marriage fraud coincides with the party’s mandate of “keeping families strong” (Conservative Party of Canada 2012). When marriage fraud was brought up during a House debate in 2008, the Harper government was accused of failing to address the perceived seriousness of the issue. NDP MP Olivia Chow — arguably the most vocal MP on issues of spousal sponsorship and marriage fraud — criticized the government’s inconsistent treatment of marriage fraud. At the time, couples that lived in Canada and applied for spousal sponsorship could be
temporarily considered a marriage of convenience and the sponsored spouse deported until CIC assessed the application. Due to an application backlog, couples could be separated for two to three years. Moreover, CIC could rule that the relationship was a marriage of convenience and the application would be denied. Chow argued that the government’s handling of marriage fraud was misguided, as it focused on already established families living within Canadian borders. For Chow, the state’s approach towards marriage fraud was in need of reform, and this required the government to reassess its position on the protection of families — “For over a decade, minister after minister talked about supporting families and yet they failed to support loving couples. It is absurd and cruel to separate families, and cause untold emotional and financial hardship just because of a failure or a political will or because Parliament is not paying attention. I say it is time for fairness of immigrant families” (Chow: House Debate, May 6th, 2008). Then Parliamentary Secretary to the Minister of Citizenship and Immigration, Ed Komarnicki, defended the government’s position, remarking, “We have established a fair and adequate process in this country which ensures people are protected . . . while the majority of spousal applicants are bona fide and in bona fide relationships, some do abuse our programs. This is why we must take that reality into consideration” (Komarnicki: House Debate, May 6th, 2008). Former Liberal MP Andrew Telegdi refuted Komarnicki’s justification, commenting:

I am shocked, and I am sure all the opposition parties are shocked, because for years we listened to that party stand in this House and defend family values. How much more of a family value can we have than not splitting husband from wife, father from child, sons and daughters, or mothers from their children? That is what this whole issue comes down to. If the case were that somebody was found to have a relationship that was not bona fide and it was a marriage of convenience, nobody is arguing that this person be allowed to stay here (Telegdi: House Debate, May 6th, 2008).

For opposition parties, the government’s position on marriage fraud was contradictory. On one hand, the government boasts a pro-family platform; on the other hand, families living
within Canadian borders were being separated due to the suspicion of a potential relationship of convenience.

In this particular debate, opposition parties were not dismissing the issue of marriage fraud; rather, what was at stake was whom current policy was targeting. Couples already living in Canada were not the enemy; calls for attention were focused on the outsider using marriage to gain access to the Canadian state. In this light, the government’s newly developed campaign against marriage fraud arguably accomplishes that. It allows for the protection of Canadian families — a prominent focus of their policy mandate — and perceivably maintains the integrity of the immigration system by keeping out those believed to be taking advantage of the institution of marriage in order to immigrate to Canada. The objective of the anti-marriage fraud campaign is therefore not solely to distinguish between conjugal and non-conjugal families, but also between legitimate and illegitimate conjugal families. This is evident in Minister Kenney’s comments to the media — “While we want to keep the doors open for legitimate spouses or partners, we also want to make sure the doors are not open to those who would break our laws and exploit Canadians” (McKie 2010). This discourse furthers distinctions between legitimate and illegitimate conjugal families, permitting the government to enact policy reform consistent with their electoral promise of protecting Canadian families (e.g. legitimate conjugal families) by refusing access to fraudulent immigrant families (e.g. illegitimate conjugal families). Strategically speaking, focusing on marriage fraud in the name of keeping the conjugal family unit intact is a plausible policy manoeuvre for the Conservative government.\footnote{This is not to suggest that all Conservative governments have been inclined to reduce family class migration in the name of protecting traditional family values. In several of my interviews with CIC employees, interviewees mentioned that the Mulroney government was surprisingly committed to weakening barriers for family class migrants. One interviewee commented, “We had a PM [Mulroney] at the time who for personal reasons that I have not}
A second reason why the Harper government's crackdown on marriage fraud can be perceived as strategically beneficial is that it is being framed as a way to protect immigrants already living within Canadian borders. While Kenney recognizes that marriage fraud is not a new problem, he claims that increases in marriage fraud have predominantly affected foreign-born Canadians:

I'll tell you, there are very few native-born Canadians who have ever raised the issue of bogus spousal sponsorship with me. I have held a series of public forums across the country, and hundreds of people have come out, in Brandon, Vancouver, Montreal and elsewhere. I think all, or almost all of them, are immigrants to Canada, and they have insisted that we find ways to tighten up both the rules and the enforcement of the rules to prevent bogus spouses from coming to Canada as permanent residents (Citizenship and Immigration Committee Meeting, December 6th, 2010).

Individual MPs who have addressed the issue of marriage fraud in Parliament tend to represent ridings with a high foreign-born Canadian population. Conservative MP Nina Grewal, NDP MP Olivia Chow, former Liberal MP Ruby Dhalla, and former Liberal MP Gurbax Malhi — all four of them calling for attention towards marriage fraud in Parliament — represent ridings composed of 27%, 28%, 37% and 28% immigrant populations respectively, the majority of immigrants in all four ridings coming from India and China (Census Canada 2012). Studies show that new Canadians vote at the same rate as Canadian-born citizens (Anderson and Black 2008, 56–7), making foreign-born citizens an important portion of the electorate — a portion largely monopolized by the Liberal Party from the 1960s to the early 2000s. The “crisis” of marriage fraud in Canada has been framed as an immigrant issue, which coincides with the Conservative Party’s aggressive “ethnic outreach”

 figured out besides the fact that his wife’s family was immigrants, was committed to immigration” (Interview D, 2011). This supports my discussion in chapter three that policy development is primarily shaped by the government of the day. While the Mulroney government worked towards making Canada’s immigration system more inclusive, the Harper government has recently passed reforms that restrict accessibility of the current system (for more on this, see Bill C-31).
strategy (Friesen and Sher 2011; Kenney 2012). Therefore, targeting marriage fraud corresponds with the Harper government’s focus on the immigrant vote.

Finally, an anti-marriage fraud campaign allows the Harper government to discuss restrictions on family class immigration in a way that is consistent with public support for the maintenance of a fair and well-balanced immigration system. As discussed in the previous chapter, national public consultations conducted by CIC in the early nineties highlighted general support for immigration so long as the "bad egg" (e.g. the queue jumper) is denied access. A crackdown on marriage fraud is framed as a form of protection against system cheaters. This rhetoric speaks to the perceived fear that queue jumpers ultimately challenge the integrity of the Canadian immigration system. In this light, the government is able to introduce barriers to immigration in the name of protecting the state and its citizens from the "bad eggs", while at the same time unfairly targeting certain conjugal couples. Ultimately, this allows for the government to initiate more restrictive policies without being questioned by the general public.

In terms of bureaucratic attention to marriage fraud, “sponsorship breakdown” was identified as a primary concern in CIC’s 1995 annual report to Parliament; however, this referred to the state holding sponsors financially accountable for their sponsored family members. Marriage fraud specifically has received minimal attention prior to the campaign. This is generally attributed to two reasons. First, there is a lack of finite statistics of rates of marriage fraud in Canada. In a 2007 parliamentary debate, former NDP MP Bill Siksay asked the government how many individuals had been deported or had their permanent residence status cancelled by CIC for engaging in marriage fraud. Then Minister of Public Safety, Stockwell Day, was unable to provide that information due to a lack of numbers, responding:

The CBSA [Canada Border Services Agency] recognizes that some Canadians and permanent residents are deceived by foreign nationals into marriage for
the purpose of acquiring permanent residence. The scope of this issue is unclear, however, because our computer system does not track this information. The system only recognizes misrepresentation in general and does not allow for differentiation between specific types of misrepresentation, including fraudulent marriages and marriages of convenience. For this reason, it is not possible to identify the number of people who have been deported or who have had their permanent residence status cancelled by CIC, for reasons of fraudulent marriages or marriages of convenience (Day: House Debate, June 8, 2007).

The absence of documentation has made it difficult for CIC to track reported marriage fraud, leaving marriages of convenience off the bureaucratic radar.

Second, there is a differentiation in priorities between CIC and CBSA. While CIC is responsible for processing applications for immigration to Canada, CBSA physically monitors who gets into the country. Both agencies deal with access; however, they have explicitly expressed a difference in priorities during discussions concerning the severity of marriage fraud. When questioned about the government’s plan of action for tackling marriage fraud in 2008, then Minister of Citizenship and Immigration Diane Finley responded that “CIC and CBSA are both concerned about marriages of convenience” and that both “departments are engaged in the investigation of these cases” (Finley: House Debate, May 6th 2008). This united front between CIC and CBSA was questionable however, considering comments made by CBSA regarding the prioritization of marriage fraud. At a Citizenship and Immigration Committee meeting in 2008, CBSA Director of Inland Enforcement identified marriage fraud as low-priority, stating:

Marriage of convenience is an issue. Because it is on our lower-priority scale for areas that we enforce, it’s not an area we’ve put a lot of resources on, but it is an issue. The priorities for immigration enforcement activities are those who pose a risk to national security, so your terrorist types. Once we’ve looked after those people, we go after failed refugee claimants, and then all others — those who overstay, and those who work, study, or misrepresent themselves, including marriages of convenience — are our lowest priority” (Citizenship and Immigration Committee Meeting, March 10th, 2008).

In 2011, Minister Kenney publicly criticized CBSA’s inaction towards marriage fraud, calling for its reprioritization — “It’s not for me to dictate how many cases they take up. When they
get complaints, we want them to follow up on those and, whenever they can build a credible case, bring charges for fraud against the person who is breaking our immigration laws” (McKie 2011). CBSA defended their agenda stating that their priorities are not typically dictated by outside influences — in this case Minister Kenney — reasserting that the agency “focuses its investigative efforts on high-priority cases where individuals post a safety or security risk and where national security, organized crime, crimes against humanity, serious criminality and criminality are involved” (McKie 2011). This resistance was short-lived however, as CBSA announced the commencement of “project honeymoon” three days later, which involved the reopening of three dozen investigations of marriage fraud and an inquiry into organized criminal involvement in arranging marriages of convenience. The disconnect between CIC and CBSA has made it difficult for CIC to fully enact the government’s crackdown on marriage fraud.

Whether or not there has been a significant increase in reported cases of marriage fraud, the numbers are vague. As previously mentioned, the government does not track the number of people who have either been deported or lost their permanent residency status specifically because they were found guilty of engaging in a marriage of convenience. The government monitors misrepresentation as a single category, therefore failing to differentiate between various types of misrepresentation. As a result, those who lose their immigration status due to marriage fraud are grouped in the same category as those deported for other forms of misrepresentation (e.g. failure to declare dependent children, criminal record, security concerns, medical issues, etc.). This makes it difficult for the government to provide firm data that supports the claim that marriage fraud is on the rise in Canada. Pre-2010, there was no discussion of actual numbers regarding marriage fraud; when asked about rates, then CBSA Director of Inland Enforcement ambiguously responded that, “they get complaints all the time” (Citizenship and Immigration Committee Meeting,
March 10th, 2008). When asked specifically to provide a numerical amount in Parliament, then Minister Finley remarked, "Quantifying the rate of marriage fraud is difficult as relationships can break down at any time, from the date of entry to Canada to several years into the marriage. The CIC takes all tips, complaints, and reports of alleged marriages of convenience seriously and investigates when there is sufficient information to do so" (Finley: House Debate, May 6th, 2008). The conflation of various types of sponsorship misrepresentation makes it impossible for the government to pinpoint the actual rate of marriage fraud. The uncertainty in rates of marriage fraud have made it difficult to provide evidence supporting the government’s declaration that marriage fraud in Canada is reaching a “crisis” point.

The anti-marriage fraud campaign has sparked increased opposition and media pressure, particularly on Minister Kenney, to produce numbers; however, even those numbers have been inconsistent. At a Citizenship and Immigration Committee Meeting in 2010, Kenney claimed that he had been contacted by hundreds of marriage fraud victims since taking on the position of minister. An investigation undertaken by CBC in 2010 concluded that out of the 49,500 spousal sponsorship applications filed in 2009, 10,000 (20%) were rejected for several reasons, including suspicions of marriage fraud (CBC News 2010). When asked what proportion of these rejected cases was labelled bad-faith marriages, CIC’s response was “many”. Similarly, CIC stated that in 2010, 16% (9,250) of 46,300 spousal sponsorship applications were refused for non-specified reasons (Curry 2011). When CBSA began compiling figures between 2008-2010 — following the announcement of “project honeymoon” — the agency stated that 39 out of 200 (19.5%) reports of marriage fraud warranted a formal investigation; out of these 39 investigations, charges were laid in 7 (18%) (CBC News 2011). CIC’s website states that 1,000 fraudulent marriages are reported annually, challenging CBSA’s claim of 200 reports of marriage fraud.
Concrete rates of incidents of marriage fraud put forth by Minister Kenney, CIC and CBSA have been varying at best. The empirical backing for the government’s anti-marriage fraud campaign is therefore questionable, as it lacks a clear picture of the current state of marriage fraud.

Another factor that muddles discussions about marriage fraud is the government’s failure to distinguish between reports of marriage fraud and CBSA ruled cases of marriage fraud. For those Canadians who wish to report an incident of marriage fraud, they can file their complaint through CBSA’s Border Watch Tip Line — a toll-free phone line where individuals can report their suspicions directly to CBSA. Complaints are then triaged and investigated by CBSA and law enforcement bodies, a process that has been neglected according to Minister Kenney, remarking, “I told the President of CBSA that I didn’t think it was acceptable that people who make complaints to CBSA haven’t even got the courtesy of a response” (McKie 2010). This discrepancy in institutional objectives between CIC and CBSA highlights an important point — reported cases of marriage fraud are not the same as ruled cases of marriage fraud. When we talk about reported cases, the numbers are significantly higher than those cases where an individual has been found guilty and then penalized accordingly. The government’s current discourse around marriage fraud is therefore misleading, as it conflates these terms, often failing to distinguish between reported and ruled cases.

Aside from resource limitations, the primary challenge to investigating reported cases of marriage fraud is proving that the accused individual married their Canadian sponsor with the sole intent of immigrating to Canada. While applicants are denied

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136 Several immigration lawyers and former members of the IRB have come to CBSA’s defense. While they recognize the department’s shortcomings with respect to the handling of marriage fraud, they attribute this to a lack of financial resources (McKie 2010). Julie Taub, immigration lawyer and former IRB member commented, “It is unfair to blame CBSA for these issues. They can’t do the hiring. They don’t control the budget. I believe they’re doing the best they can with their limited staff and limited resources” (McKie 2010).
sponsorship because they are suspected of engaging in a marriage of convenience, CBSA cannot deport immigrants post-sponsorship if they have only been accused of committing marriage fraud. Unless there is actual proof (e.g. phone records, photos, emails, witnesses), investigations generally turn into a sponsor-said/sponsored-said battle (Interview C, 2011).

The challenge of proof has been used by the government to justify the small number of individuals who have actually been officially charged with marriage fraud, despite marriage fraud being touted as an area of national concern (Finley: House Debate, May 6th, 2008). Furthermore, they have used the challenge of marriage fraud investigations to rationalize focusing on proactive measures aimed at preventing perpetrators of marriage fraud from gaining access to the Canadian state in the first place, as made evident by Minister Kenney’s remarks, “Because we need to be able to go to a court and prove that they entered into their marriage with bad faith, it’s virtually impossible for us to get successful convictions on marriage fraud cases after the fact. Which is why we need additional screening tools” (CBC News 2011). As a result, the government has directed their attentions towards preventative courses of action, attempting to attack the issue of marriage fraud at its source.

**Canada’s Anti-Marriage Fraud Campaign**

This focus on proactive measures is the foundation for the government’s anti-marriage fraud campaign. The campaign commenced with the launching of a publicly accessible online consultation in 2010 that was open on CIC’s website for three months. In addition to announcing the survey’s presence via CIC news release, it was sent by CIC to approximately 50 stakeholder organizations including private sector employees, chambers of commerce, immigration lawyers/consultants, professional associations, immigration service organizations, civil rights organizations, ethno-cultural organizations and other non-government organizations at the national, provincial and local levels (Citizenship and Immigration Canada 2011). Prior to completing the survey, participants were asked to read
a background document defining what constitutes a marriage of convenience, and outlining the government's current approach towards preventing marriage fraud. The document explains that while there are no firm numbers on the extent of marriage fraud in Canada, it is an issue in need of attention. Furthermore, the document states that concerns about marriage fraud can only be remedied through amendments to s.4 — the section that deals specifically with bad faith marriages — of the Immigration and Refugee Protection Act (IRPA). The document then provides a brief overview of measures undertaken in Australia, United States, New Zealand and United Kingdom to combat marriages of convenience.\textsuperscript{137} The document concludes by recognizing that while the prevention of marriage fraud demands resources, the re-evaluation of current priorities in the name of maintaining the integrity of our immigration system is necessary (Citizenship and Immigration Canada 2011).

From a methodological standpoint, the execution of this survey was flawed. The background document participants were asked to read prior to completing the survey explains that people are “abusing spousal sponsorship by entering marriages of convenience so that they can sidestep Canada’s immigration law,” and that these relationships “weaken our immigration system and make it harder for genuine immigrants to get through the system” (Citizenship and Immigration Canada 2011). CIC provides no firm numbers on rates of marriage fraud in this document other than claiming that in 2009, 20\% of spousal sponsorship applications were refused, some of them because they were ruled marriages of convenience (Citizenship and Immigration Canada 2011). The document

\textsuperscript{137} In Australia, New Zealand and the United States, a sponsored spouse/partner is prohibited from sponsoring a new spouse/partner for five years from the time they are sponsored. While Canada has a sponsorship bar on Canadian citizens (they are unable to apply to sponsor another spouse/partner for three years), there is no similar bar on sponsored individuals. A conditional visa system is used in the United States, Australia and the United Kingdom, granting permanent residency to sponsored spouses after a probationary period of generally two years. There is currently no type of probationary system in Canada.
provided survey participants with a negative picture of the current state of marriage fraud in Canada; participants were therefore exposed to CIC’s position before completing the survey. Studies show that the attachment of an attitude or position to a respected individual or agency can bias survey responses — support is arguably increased compared to what it would be had the attitude or position not been revealed prior to completing the survey (Babbie 1999, 131). By stating their position on marriage fraud, CIC possibly biased the results, as participants would be more likely to support measures aimed at combatting marriage fraud if CIC claimed that these measures were necessary. Moreover, in its discussion of measures adopted in other countries, CIC provided no evidence that these measures have actually reduced rates of marriage fraud. This lack of information meant that respondents were therefore expected to provide an uninformed opinion as to whether Canada should replicate these measures. The survey was ultimately premised on a limited amount of information, information that was slanted towards government action.

An additional methodological flaw lies in CIC’s sampling methods. The questionnaire was sent to identified stakeholders and posted on CIC’s website for public consultation. Critics of online sampling methods warn that posting it online does not mean that responses are reflective of the general population — “At the very least, not everyone in the population will even be aware of the poll” (Babbie 1998, 199). Unless the survey was recommended to individuals by recipient stakeholder organizations or individuals came across the survey while perusing CIC’s website, most Canadians would not even know this questionnaire existed. Given who CIC’s sampling strategy targeted — immigration stakeholders and visitors to CIC’s website, most of whom would arguably support government action — results would probably be biased in favour. If the sample were representative, we would probably see more negative responses. Therefore, for CIC to conclude that, “the majority of Canadians support measures aimed at reducing marriage fraud” is misleading (Citizenship
and Immigration Canada 2011). Furthermore, CIC is using the evidence gathered from this one-time survey to support their argument that rates of marriage fraud are increasing. While one-time studies are useful in reflecting the views of a population at a particular moment of time, they provide little in terms of comparative analysis. Longitudinal results would therefore strengthen claims that marriage fraud is on the rise.

After reading the attached document, participants were then asked to complete a ten-question questionnaire. The questionnaire aimed to gauge public concern about marriages of convenience and support for government action. In order to do so, the survey asked respondents to rate their opinion on the following issues:

- The seriousness of marriages of convenience;
- Public awareness about marriages of convenience;
- Sponsor responsibility;
- Government action;
- Longer processing times as a consequence of increased investigation into potential incidents of marriage fraud;
- Sponsorship bars (limitations on how many spouses one can sponsor within a certain period of time and on sponsored spouses for future sponsoring);
- Conditional visas (probationary period in lieu of automatic permanent residency);
- Increased spending/resources for government action (Citizenship and Immigration Canada 2011).

The questionnaire also provided space for those respondents who have been victims of marriage fraud to share their experiences. In its three-month period, the questionnaire generated 2,431 responses — 2,342 (96%) from the general public and 89 (4%) from self-identified stakeholders (Citizenship and Immigration Canada 2011). Out of the 2,342 respondents from the general public, 37% specified that they had sponsored a spouse to come to Canada, 11% identified themselves as victims of marriage fraud, and an additional 11% indicated that a Canadian citizen had sponsored them.

On the issue of the seriousness of marriages of convenience, 77% of respondents indicated that marriage fraud is a very serious or serious threat to Canada's immigration
system. Not surprisingly, victims of marriage fraud identified this as a very serious threat more than non-victims. When questioned about the ways in which marriage fraud poses a threat, respondents cited effects on the immigration system (e.g. longer wait times, system integrity), effects on individuals (e.g. financial, emotional), and effects on Canadian society (e.g. welfare, health care) (Citizenship and Immigration Canada 2011). A strong majority of respondents (77% non-victims, 88% victims) supported the need for increased public awareness and education about marriage fraud. Interestingly, approximately 90% of respondents believed that a sponsor should bear either a lot or a moderate degree of personal responsibility for making sure that their relationship with the sponsored is genuine; however, 50% of those respondents stated that the government should be responsible for protecting Canadians from marriage fraud. The most supported government measures to combat marriage fraud were penal (e.g. deportation, financial penalties) and preventative (e.g. conditional visas, public awareness) actions. 52% of respondents indicated they were unwilling to tolerate longer processing times in order to investigate potential cases of marriage fraud, citing that the current application process is already too lengthy. Finally, approximately 58% supported the diverting of more federal resources to investigate reported cases of marriage fraud, while 32% were sceptical that devoting more resources would rectify the issue and believed that the government should not play a role in determining whether a marriage is genuine in the first place. Overall, participants in this online consultation expressed concern about marriages of convenience and considered marriage fraud to be a legitimate threat to the integrity of the Canadian immigration system. Furthermore, participants supported some form of government action aimed at preventing and penalizing perpetrators of marriage fraud.

In addition to the online questionnaire, Minister Kenney hosted town hall meetings in Brampton, Vancouver and Montreal in 2010 to discuss marriages of convenience. This
provided Kenney with the opportunity to meet victims of marriage fraud, an experience that has inspired the anti-marriage fraud campaign, as made evident by Kenney's remarks:

In town hall meetings I held in 2010 with victims of marriage fraud, I heard first-hand from victims who were still suffering the consequences years later. They implored me to do something to stop this from happening to others. The problem with marriage fraud is serious and will only get worse if we don’t put measures in place that protect the integrity of our immigration system while deterring people from trying to use a marriage of convenience to cheat their way into Canada (Citizenship and Immigration Canada 2012a).

Kenney made similar comments in another CIC news release, explaining, “I held town hall meetings across the country to hear from victims of marriage fraud. In addition to the heartbreak and pain that came from being lied to and deceived, these people were angry. They felt they had been used as a way to get to Canada” (Citizenship and Immigration Canada 2012b).

In response to the online and in-person consultations, the government introduced two primary changes to the IRPA: residency requirements for permanent residency status and sponsorship bars. The first amendment is a two-year conjugal residence requirement in order for a sponsored spouse/partner to obtain permanent residency status. Upon arriving in Canada, a couple would have to live conjugally for two years before the sponsored spouse/partner could apply for permanent residency. According to Kenney, the objective of the measure is to “weed out people trying to use a phony marriage as a quick and easy route to Canada” (Citizenship and Immigration Canada 2012b). The second measure requires sponsored spouses to wait five years from the day they are granted permanent residence to sponsor a new spouse/partner. This accomplishes two things. First, it gives CBSA time to investigate reported marriages of convenience before the sponsored spouse obtains permanent residency; the enactment of sponsorship bars would mean that CBSA has two years. Second, it prevents those who do marry in order to get into Canada from immediately sponsoring another spouse/partner. As it currently stands, a sponsored spouse receives
permanent residency status upon arriving at the airport and can apply to sponsor another spouse/partner should their relationship with their sponsor deteriorate. By suspending permanent residency and sponsorship privileges, the government believes that these measures will deter "fraudsters who lie and cheat to jump the queue" (Citizenship and Immigration Canada 2012c).

These measures have garnered much criticism, particularly from feminist communities. A disproportionate number of sponsored spouses are wives; in their 2005 Annual Report to Parliament, CIC claimed that 60% of sponsored spouses are women (Citizenship and Immigration Canada 2005). Studies have shown that sponsored women often experience what is referred to as a “sponsorship debt”, defined as a “family behaviour pattern where a husband and his family emphasize that the sponsored wife owes them for bringing her to Canada and keeping her here” (Cote, Kerisit, and Cote 2001; Merali 2009). Sponsored wives often find themselves in a vulnerable position upon arriving in Canada and are therefore more susceptible to domestic abuse (Merali 2009). Feminist critique of residency requirements is premised on the concern that sponsored wives who are already in a precarious position will choose not to report incidents of abuse in order to protect their immigration status (Yao-Yao Go, Balakrishna, and Sharma 2011). This is not to suggest that sponsored spouses are less likely to be abused if they have permanent residency status; rather, the argument is that abusive sponsors can now hold permanent residency over their sponsored spouse’s head for two years. The government responded to these concerns, claiming that the residency requirement would not apply in instances where there is

138 Canadians Against Marriage Fraud (CAIF) and Canadian Marriage Fraud Victims Society are vocal supporters of both measures. Sam Benet — President of CAIF — stated, “We applaud Minister Kenney for taking bold steps to address the growing problem of marriage fraud and for protecting the integrity of our immigration system” (Citizenship and Immigration Canada 2012c). Interestingly, both organizations fail to provide any statistics on actual rates of marriage fraud on their websites either. In an attempt to rectify this, I contacted both organizations and requested information on rates of marriage fraud in Canada, but received no response.
evidence of abuse or neglect; however critics fear that the vulnerable position of these sponsored women will result in them enduring abuse in order to obtain permanent residency.

Parliamentarians have also criticized these measures, citing differential treatment between relationships involving sponsored spouses and those involving Canadian citizens. As Don Davies — NDP Immigration Critic — commented, “The plan is problematic because divorce rates in North America are so high — about 50 percent — within the first two years. The mere fact that a marriage doesn’t work out within two years is not by itself an indication that the marriage wasn’t legitimate” (Radia 2011). According to Davies, a residency requirement for immigrant families is inconsistent with the state’s allowance of Canadian citizens to enter and exit conjugal relationships at their own discretion. For both groups of critics, these measures enacted by the government are both dangerous and unrealistic.

In addition to these legislated measures, the government has enacted several changes that did not require amending the IRPA. The most significant of these changes has been increased scrutiny of spousal sponsorship applications. Minister Kenney has announced that immigration officers will undergo supplementary marriage fraud identification training and are expected to be more diligent in their assessment of conjugal relationships (Citizenship and Immigration Canada 2012a). While the specifics of this training program have yet to be revealed, discourses surrounding the anti-marriage fraud campaign foreshadow the targeting of certain relationships in the name of preventing marriages of convenience. In an open letter to “ethnic Canadians” in April 2011, several Canadian immigration lawyers warned that the government’s proposed policy would result in all sponsorship-seeking couples facing “additional, harsher, longer and more invasive scrutiny” (Radia 2011). The neutral phrasing of these measures suggest that scrutiny would
be uniform; however, parliamentary debates, media coverage of the anti-marriage fraud campaign and the government’s policy initiatives highlight that the actual enactment of these measures is far from neutral. By placing too much emphasis on trying to catch deviant applicants pre-application, certain relationships are targeted and certain discourses surrounding these relationships are (re-) produced.

In my analysis of the government’s anti-marriage fraud campaign, I have identified three primary discourses — a discourse of the Canadian victim and the evil foreign queue jumper; a discourse of same-sex couples and marriage fraud; and a discourse focused on countries of caution with respect to marriage fraud. Combined, these discourses lend themselves to the targeting of certain relationships and the manufacturing of a culture of suspicion around conjugal immigration. Furthermore, these discourses reinforce — both directly and indirectly — the normalization of the conjugal family unit, a unit that embodies particular racial and sexual identities.

The Canadian Victim and the Evil Foreign Queue Jumper

Arguably the most publicized Canadian example of marriage fraud, the case of Lainie Towell has received national attention. After marrying Fode Mohamed Soumah in Guinea in April 2007, Towell — a Canadian citizen — sponsored Soumah at the end of that same year. Twenty-nine days after arriving in Canada, Soumah left Towell, claiming that Towell’s personality changed once he arrived. Towell, a performance artist, charged that she had been duped into marrying Soumah so that he could immigrate to Canada. Donning her wedding gown with a red door strapped on her back, the words written “Mr. Immigration Minister, it’s getting heavy” on the door, Towell walked to Parliament Hill explaining that her performance symbolized the fact that her marriage was nothing but a doorway into Canada for Soumah (Page 2012). In 2009 the IRB ruled that there lacked sufficient evidence to find Soumah guilty of engaging in a marriage of convenience, as the couple had a long
romance in Guinea pre-marriage and it was Towell who had proposed to Soumah. Interestingly however, Towell provided the IRB with emails sent to Soumah suggesting he had fathered a child in Africa with another woman. In response to this information, the IRB ruled that Soumah had made a “false representation” by failing to declare the existence of a dependent child in his application for sponsorship and was subsequently deported.139

Despite the fact that the IRB did not rule their relationship was a marriage of convenience, Towell publicly branded herself a victim of marriage fraud and Soumah as a “marriage fraudster” (Page 2012). Capitalizing on her national exposure, Towell now markets herself professionally as a “hoopla guru” — acting as a publicity stunt consultant — and the self-published author of How to Catch an African Chicken: A Canadian Woman’s outrageous but True Story of Marriage Fraud; meanwhile, Soumah is back in Guinea filing an appeal. Both Towell and Soumah have become the poster children for the two main characters in this story of marriage fraud — Towell, the Canadian citizen who married for love only to be used and abandoned by her sponsored spouse, and Soumah, an evil foreigner who saw marriage as a one-way ticket to Canada. The language of victimization has taken center stage in the anti-marriage fraud campaign; painting sponsors as helpless prey that fall victim to the malicious sponsorship-seekers. While there are victims of marriage fraud, this distinction between “citizens as victims” and “non-citizens as evil queue jumpers” is misleading, as it ignores the complexity of spousal sponsorship.

The sponsorship process consists of a series of power dynamics between the sponsor and the sponsored. When discussing sponsorship with interviewed common-law and married couples, the consensus was that during the application process, the sponsor has all of the power because without their cooperation, the sponsored spouse/partner would not gain access to the Canadian state. The relationship changes once the sponsored

139 Soumah is now appealing the decision, claiming he has paternity test results that prove he is not the father of the child in question (Page 2012).
spouse/partner arrives in Canada; the sponsor is now financially responsible for their spouse/partner regardless of whether the relationship stays intact. Put simply, there is a lot of trust invested in the sponsorship process itself. All relationships endure varying degrees of stress; however, couples seeking sponsorship face a unique type of stress that comes with the reality that when it comes to spousal sponsorship, citizenship is on the line. This was made evident by Juliet — whose common-law relationship was discussed in the previous chapter — commenting, “This kind of process could break people up because it is frustrating, time-consuming, annoying and it has that aspect that all of a sudden I hold these cards and could impact Peter’s life. Then right now, if Peter really wanted to, he could make my life miserable because now I’m legally responsible for him to apply for healthcare, prescription coverage and social security” (Interview F, 2011). This suggests that when it comes to sponsoring a spouse/partner, power either belongs to the sponsor or the sponsored, it is never shared.

What is missing from this conception of power — and what the government’s Canadian victim and the evil foreign queue jumper dialogue highlights — is the issue of citizenship. Soumah’s deportation shows that even with permanent residency, citizenship is not guaranteed. Soumah was deported because the IRB charged him with “false representation” — a charge that is currently being contested — however, the accusation that Soumah fathered a child with another woman was only brought to the IRB’s attention after his relationship with Towell had ended. Whether or not the charges against Soumah are valid is not important for this discussion; rather, the point here is that after the spousal sponsorship process is finished and the sponsored spouse/partner arrives in Canada, the sponsor is not without power. In this particular situation, Towell had the government on her side. This is not always the case — as previously discussed, government response to reports of marriage fraud has been lacking. Moreover, I do not wish to minimize the
emotional toil individuals undergo when their relationship deteriorates shortly after sponsorship takes place. What the case of Towell and Soumah demonstrates is that in circumstances of marriage fraud where the lines of citizenship have to be drawn, power imbalances between citizens and immigrants are reinforced. While the current system is not perfect, the Canadian citizen is not without agency. Citizenship is not a uniform status equally applied to all; there remain distinctions — both implicit and explicit — between Canadian-born and foreign-born citizens. This dialogue fails to account for distinctions between citizens, potential citizens, partial citizens and non-citizens.

Another interesting aspect of this dialogue is its racial component. In light of Towell’s protest at Parliament Hill, CBC’s The Passionate Eye released the 2010 documentary on marriages of convenience titled True Love or Marriage Fraud?: The Price of Heartache. Using Towell’s story as context, the film follows three Caucasian Canadian women as they apply to sponsor their Moroccan male spouses. While all three women were convinced that their husbands married them for love and not sponsorship, the film is premised on suspicion, inadvertently asking the women “You think you know . . . but do you really know” as the women defend both their relationships and spouses. Despite the fact that spouses are sponsored from all over the world, the documentary focuses on three white women and their foreign spouses of colour. This visual of the white Canadian woman who is naively marrying for love and the foreign male of colour who is using marriage to get into the country has also been used in the government’s anti-marriage fraud campaign. Returning to the commercial with the couple standing atop a wedding cake, the bride is white and the groom is a man of colour. The racialization of this dialogue does two things. First, it reinforces the eroticization of interracial relationships, casting these relationships as deviations from normalized conceptions of the traditional nuclear family (Yu 2001; Luibhéid 2002; Barnard 2004; Luibhéid and Cantù 2005). In between interviews with the
women, there are scenes of the women exploring “exotic” Morocco — it is dusk, the markets are bustling, the air is sticky, the women are receiving attention from men as they wander the streets, and they love it. This effectively captures the Canadian victim and the evil foreign queue jumper dialogue; these women are innocently lured into this land of exotic romance, unable to think clearly about the intentions of their new husbands. Second, it recasts the man of colour as someone to be feared. This dialogue generates a culture of suspicion around foreign men — particularly foreign men of colour — suggesting that relationships between white Canadian women and foreign men of colour are less likely to be genuine. The dialogue of the Canadian victim and evil foreign queue jumper has established a narrative in which Canadian citizens are rendered helpless and foreign sponsorship-seeking spouses are portrayed as immoral in comparison to the morally strong white Canadian citizen.

Same-Sex Couples and Marriage Fraud

Another less publicized discourse inherent in the government’s anti-marriage fraud campaign is the focus on same-sex relationships as relationships of suspicion. Prior to the inclusion of same-sex family class immigration in the IRPA, it was possible for same-sex partners to be admitted to Canada on the basis of “humanitarian or compassionate considerations” (H&C). In 1992, the federal government issued an immigration visa to a Canadian citizen’s same-sex partner after the couple challenged the constitutionality of the state’s restrictive definition of “spouse” in a Federal court (Casswell 1996). Same-sex partners admitted to Canada based on H&C considerations however, were granted permanent residency as an independent immigrant instead of a member of the family class. While the admission of same-sex partners on the basis of H&C considerations was a positive advancement, it was nonetheless flawed. The treatment of same-sex partners who immigrated to Canada as independent immigrants means that the number of partners
reunited in Canada because of H&C considerations is unknown, as all independent immigrants are considered a single, monolithic group (Casswell 2004, 208). Moreover, because this process was discretionary, it was extremely difficult to challenge a negative decision. In total, there are two reported cases concerning H&C considerations of same-sex partners, ultimately highlighting the difficulties in this past admissions process (Casswell 2004, 209).140

Those same-sex couples that failed to qualify for H&C consideration were left with few options. In order for lesbians and gay men to remain with their Canadian partners, many spent years renewing student visas, living underground, and engaging in “sham” heterosexual marriages (Casswell 1996; LaViolette 2004). Because Canadian immigration regulations restricted “spouse” to partners of the opposite-sex, it was not uncommon for lesbians and gay men to enter into mutually benefitting heterosexual marriages with Canadian citizens so that they could be sponsored as a spouse (Leslie 1993; LaViolette 2004).141 A marriage of convenience was therefore a way for lesbians and gay men to be reunited with their Canadian partners at a time when the state prohibited them from sponsoring each other.

The inclusion of same-sex common-law couples (2001) and same-sex married couples (2007) in the Canadian state’s definition of family class has provided Canada’s lesbian and gay citizens the opportunity to enjoy sponsorship rights previously limited to heterosexual citizens. In the name of cracking down on marriages of convenience however, the government has made several changes that directly impact same-sex sponsorship. The recently introduced measure to only recognize same-sex marriages performed outside

140 For more information on these decisions, see da Silva v. Canada (Minister of Citizenship and Immigration) [2000], 14895 (FC) and Rodriguez v. Canada (Minister of Citizenship and Immigration) [2001], 22124 (FC).
141 For a discussion of same-sex marriages of convenience in the United States, see Dueñas (2000).
Canada that are officiated in countries where same-sex marriage is also legal limits the
number of potential married same-sex couples that qualify for sponsorship, as Canada is
only one of ten countries that recognizes same-sex marriage. Moreover, the government’s
call for the further interrogation of sponsorship applications means that the existence of
physical evidence — evidence that is often difficult for same-sex couples to obtain, as
discussed in the previous chapter — will carry even more weight in the assessment process.
The anti-marriage fraud campaign has allowed the government to initiate subtle changes to
same-sex immigration, ultimately curbing the number of potential same-sex couples that
cqualify for sponsorship. Furthermore, this has been done in a way that suggests that same-
sex couples are more likely to engage in marriages of convenience, despite the fact that
sham marriages were generally used by lesbians and gay men who wanted to be reunited
with their Canadian same-sex partners, a strategy no longer required with the inclusion of
same-sex partners in the definition of “spouse”.

What is arguably at stake with this discourse is Canada’s international reputation as
a protector of homosexual rights. While our current system is by no means perfect, the
Canadian state is internationally recognized as sympathetic to sexual minority rights and
the state uses that recognition to its advantage. Even the current government — who has
been vocally opposed to gay rights as made evident by Harper’s attempt to re-open the
same-sex marriage debate (2006), the blocking of any reference to queer rights in Canada’s
new citizenship guide (2009), and continuous funding cuts to domestic non-profit
organizations working in the area of social justice — has used Canada’s progressive stance
on gay rights to justify its place in the international arena. Most recently, the government
launched an initiative to reach out to gay and lesbian refugees in Iran, providing links to
media reports covering the government’s efforts to protect sexual minority refugees. Critics
accused the government of “pinkwashing” its policy activity in an effort to make their
government sound friendlier to sexual minorities than they actually are (McGregor 2012).

The government’s position on same-sex spousal sponsorship highlights its
paradoxical stance on gay and lesbian rights in Canada. While they continue to use Canada’s
progressive stance on homosexual rights to promote its human rights agenda abroad, they
are simultaneously making it increasingly difficult for foreign-born same-sex spouses to
enjoy these rights, a blatant example of sexual exceptionalism. While the government has
not said they intend on decreasing the number of same-sex sponsored couples, these
measures make it more challenging for sponsorship-seeking couples to gain access. This
discourse therefore relies on out-dated patterns of gay and lesbian immigration to justify
limiting the number of same-sex couples able to qualify for spousal sponsorship to Canada.

Countries of Suspicion

The third and final discourse inherent in this anti-marriage fraud campaign involves
the targeting of certain countries believed to be producing more marriages of convenience
than others. In addition to the campaign drawing attention to the marriage fraudster who
dupes their Canadian spouse and the same-sex couple seeking to take advantage of the
rights respecting Canadian state, the government has also focused on organized marriage
fraud. Singling out India as a country of concern, Minister Kenney used a “wall of shame”
metaphor — referring to a wall in the Canadian visa office in the Indian city of Chandigarh
plastered with a selection of fraudulent documents ranging from fake death certificates to
university diplomas, all of which are produced in exchange for a fee — to highlight a rise in
organized marriage fraud (Citizenship and Immigration Committee Meeting, December 1st,
2009). This rise was confirmed by an Assistant Deputy Minister at CIC, who remarked, “It’s a
trend we’re starting to see, and the department is concerned that there’s organized fraud
taking place in India” (Citizenship and Immigration Committee Meeting, December 1st,
In addition to India, China has also been red flagged by CIC, as made evident by the Director General of CIC’s International Region, commenting, “What we found out from our office in Hong Kong is that, especially in the provinces of Guangdong and Fujian, there were groups that were organized to do exactly that [produce false documents for the purpose of spousal sponsorship]” (Citizenship and Immigration Committee Meeting, December 1\textsuperscript{st}, 2009). In the case of organized marriage fraud, couples can obtain the documents required for a spousal sponsorship application (e.g. wedding photos, third-party testimonies, marriage certificate) for anywhere from $15,000 to $60,000 (Interview C, 2010). According to CIC, trends of organized marriage fraud have been increasingly prominent in India and China, putting these countries at the top of the list in the government’s anti-marriage fraud campaign.

Consistent with the previous two dialogues, the government has provided minimal empirical data supporting their claim that rates of fraudulent applications are higher in India and China. While the refusal rate for spousal applications in China in 2009 was 50%, it is unclear what percentage were ruled marriages of convenience (Citizenship and Immigration Committee Meeting, November 3\textsuperscript{rd}, 2009). Moreover, CIC has confirmed that a significant portion of that refused 50% wins their appeals, further reducing the amount of actual marriage fraud cases (Citizenship and Immigration Committee Meeting, November 3\textsuperscript{rd}, 2009). CIC believes that high refusal rates discourage fraudulent couples from applying, attributing the decline in marriage fraud — again, without any discussion of actual numbers — to the government’s “constant vigilance” on this issue (Citizenship and Immigration Committee Meeting, March 3\textsuperscript{rd}, 2011). In the case of India, the majority of marriages are ruled genuine, with approximately 85% being approved (Citizenship and Immigration Committee Meeting, February 15\textsuperscript{th}, 2011). With only a 15% refusal rate and those refused not necessarily being marriages of convenience, it becomes difficult to justify increased
attention to this particular country. These rates provide mixed messages as to the severity of marriage fraud committed in these countries, and beg the question of whether heightened scrutiny in India and China is warranted. Furthermore, there has been no discussion in Parliament or committee meetings about how refusal rates in India and China compare to rates elsewhere. Both the government and CIC have done a poor job of proving that marriage fraud is higher in these countries and that sponsorship-seeking couples from these countries are deserving of this suspicion.

In addition to its weak statistical foundation, this dialogue is tenuous for three other reasons. First, assessment of spousal sponsorship applications in India and China has become increasingly intensive. Canadian immigration officers working in these countries have been instructed to be assiduous in their assessment of applications (Interview R, 2010). An anti-fraud unit was established at the visa office in New Delhi where trained officers are expected to prevent and detect marriages of convenience. As a former immigration officer explained, “Case assessment is entirely dependent on the area in which you’re located. When I was stationed in London, cases were rarely refused. When I was stationed in Delhi, couples were considered guilty until proven innocent. Geographical location meant everything” (Interview C, 2010). In most countries, immigration officers have the authority to waive interviews with a couple if they are satisfied that the relationship is genuine based on the written application alone. In China however, this is not the case; all spousal applicants must be interviewed in order for concerns of fraud to be quelled (Citizenship and Immigration Committee Meeting, March 3rd, 2011). There is a strong bias among officers posted in these countries, as they are trained to assume that immigrants here are more likely to use marriage as a ticket to immigrate to Canada. The consequence is that whether or not the relationship in question is genuine, all sponsorship-seeking couples from India and China unfairly endure higher levels of suspicion.
Second, as a result of heightened scrutiny of applications combined with high refusal rates, wait times for family reunification are longer. At a Citizenship and Immigration Committee meeting in 2009, Elizabeth Long — an immigration lawyer — discussed the status of sponsorship wait times, specifically in relation to high refusal rates in China. The average wait time for assessment of a spousal sponsorship application in most countries is twelve months. Should the application be refused and the decision is appealed, the average wait time for appeals is eighteen to twenty months (Citizenship and Immigration Committee Meeting, November 3rd, 2009). In China, where the refusal rate is more than 50% and appeal rates are high, you are looking at couples that have been separated for a minimum of three years. As Long remarked, wait times for couples applying through visa offices in China tend to be even longer, ranging from three to five years (Citizenship and Immigration Committee Meeting, November 3rd, 2009). The geographical location of visa offices therefore dictates a difference in wait times for sponsorship-seeking couples. In addition to the financial implications of applying for sponsorship — costs that are drawn out when wait times are extended — separated couples experience an emotional toll as well. Moreover, as Olivia Chow commented in Parliament, “this unfair, cruel and mean-spirited practice is really asking that when Canadians fall in love and decide to get married, they should double-check to make sure the person is not of a precarious immigration status” (Chow: House Debate, May 26th, 2009). This dialogue unfairly vilifies and penalizes couples from certain countries, further distinguishing between the “good” and “bad” sponsored spouse.

The third implication of this dialogue is that in addition to certain countries being targeted, certain types of conjugal relationships — specifically arranged marriages — are overly scrutinized as well. Common in many countries, including India, long-distance matchmaking between Canadian citizens and their foreign spouses has long been a
contentious issue. The anti-marriage fraud campaign has some Canadians with ties to South Asia concerned that arranged marriages are now more likely to be labelled marriages of convenience (CBC News 2010). In a traditional arranged marriage, the conjugal relationship typically begins post-wedding; for couples in a long-distance arranged marriage, the development of a conjugal relationship is often prolonged until the spouse is successfully sponsored. This often presents challenges for couples in arranged marriages to prove that their relationships are conjugal at the time of application. As Imran Qayyum, Chair of the Canadian Migration Institute commented, “Spouses in arranged unions often don’t get to know each other until after they’ve wed, which can raise red flags with immigration officials — even though such marriages are statistically more likely to hold together than romantic matrimony” (CBC News 2010). As previously discussed, CIC has accounted for the unique situation of couples in arranged marriages by assessing couples according to predetermined assumptions and stereotypes of cultural compatibility. Sponsored spouses in arranged marriages from India are therefore in a double bind, as their application is automatically compromised by their geographical location and then further scrutinized to determine whether their relationships are consistent with the Canadian relationship narrative for arranged marriages.

While the government’s anti-marriage fraud campaign appears neutral, its framing has produced three separate discourses that emphasize the government’s biased approach towards combatting marriages of convenience. First, Canadian citizens have been portrayed

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142 Feminist scholars have focused on the negative impacts arranged marriages have on women. For more on this, see Cote et al.’s Sponsorship for Better or Worse: The Impact of Sponsorship on the Equality Rights of Women (2001) and Merali’s Experiences of South Asian Brides Entering Canada After Recent Changes to Family Sponsorship Policies (2009). Additionally, for an interesting discussion about the challenges of theoretically situating the arrange marriage debate within a liberal framework, see Deveaux’s Personal Autonomy and Cultural Tradition: The Arranged Marriage Debate in Britain (2007).
as victims and foreign spouses as evil queue jumpers using marriage as a way to immigrate to Canada, ultimately absolving Canadian sponsors of any type of agency. Moreover, this dialogue reinforces gendered and racialized stereotypes, producing a culture of fear.

Second, the government has relied on out-dated patterns of gay and lesbian immigration to justify limiting the number of same-sex couples able to qualify for spousal sponsorship to Canada. The final discourse involves the explicit targeting of countries of suspicion, specifically India and China, countries where rates of marriage fraud are believed to be higher. Combined, these discourses highlight how the government’s crackdown on marriages of convenience produces policies of inconvenience for specific couples demarcated by race, sexuality and geographical location. Furthermore, these dialogues have established an added element of suspicion to spousal sponsorship, an area of immigration already deemed suspicious. As a result, the ability of couples to prove to the Canadian state that their relationships are legitimate becomes increasingly complicated.

According to Minister Kenney, what is at stake in the crackdown on marriage fraud is system integrity; those who immigrate to Canada under false pretenses undermine the legitimacy of our immigration system. Marriage fraud does affect a state and its citizens; however, the extent to which this is affecting the Canadian state and its citizens remains ambiguous. Without clear data on rates of marriage fraud, it is difficult for the government to claim that marriage fraud has reached a crisis point in Canada. Moreover, the framing of this campaign and the discourses that it has produced suggest that there is more at stake than immigration system integrity. What connects this examination of the government’s anti-fraud campaign with earlier discussions concerning the role of relationship history in the assessment of sexual minority refugee claims and the treatment of common-law couples under the current spousal sponsorship process is that in addition to maintaining system integrity, Canadian governments have developed and continue to develop immigration
policy that protects both the conjugal family unit and the institution of marriage. Put simply, marriages of convenience are considered a threat to normalized understandings of family and marriage. This campaign allows the government to protect the conjugal family unit and the institution of marriage in a way that reinforces access to certain types of personal relationships. By developing discourses that target certain couples, relationships that challenge traditional notions of family and marriage continue to be labelled deviant. The integrity of the Canadian immigration system is therefore reliant on more than simply restricting the “bad apples” from gaining access, it depends on the state limiting entry while simultaneously reinforcing particular understandings of family, marriage and conjugality.

**Conclusion**

My analysis of the government’s anti-marriage fraud campaign highlights the implications a seemingly neutral awareness program has for family class migrants. While the effects of these policy measures have yet to be realized, the campaign is far from neutral. This is compounded by the fact that as discussed in my examination of published IRB appeal decisions, legitimate conjugality is typically defined by a series of arbitrary factors including: age; educational background; religious, ethnic and cultural compatibility; and relationship history. Conjugality — as understood by the state — therefore becomes this mess of indefinable and subjective characteristics used to distinguish between legitimate and illegitimate relationships.

The consequences of immigration fraud should not be minimized; however, the government’s anti-marriage fraud campaign — without any clear empirical justification — warrants questioning. Even if a more rigorous analysis of rates of misrepresentation confirmed the government’s claim that marriage fraud has reached a crisis point in Canada, their strategy of making spousal sponsorship more restrictive is not the answer. This is primarily due to the fact that these restrictions are not uniform; government scrutiny is
selective. Furthermore, instead of focusing on how to keep people out, attention should be turned towards examining how the arbitrary nature of state-recognized conjugality lends itself to being easily replicated. The government should be asking: is the concept of conjugality (as defined by the state) an effective mode of identification in family class immigration? Is conjugality as a point of access doing what it is supposed to be doing? It is these questions that I now turn my attention towards in the final chapter.
Chapter 7

Rethinking Conjugality: Family Reunification and the Capacity for Non-Conjugal Relationships in Canadian Immigration Law and Policy

"Extending legal rights and obligations to conjugal couples, as many Western countries do, is a start, but it is not enough. 'Couples', meaning two people with a commitment grounded on a sexual affiliation, should not be the only unit that counts as family" (Polikoff 2008, 4).

In their article What is Marriage-Like Like? : The Irrelevance of Conjugality, legal scholars Brenda Cossman and Bruce Ryder (2001) contend that a trend exists in Canadian law — when it comes to outlining the boundaries of conjugality, the once important sexual component is becoming increasingly insignificant. With the court’s ruling in Molodowich v. Penttinen (1980) that intimate relationships believed to be worthy of state recognition should be evaluated according to a set of functional attributes (e.g. shelter, sexual and personal behaviour, services, social, societal perceptions of the couple, economic support, and children), the existence of a monogamous, sexual relationship no longer holds primacy in determining conjugality. Recognizing the complexity of intimate relationships, this decision accounted for the reality that "marital equivalence is situated within a bundle of factors that together indicate the existence of an emotionally and economically interdependent relationship" (Cossman and Ryder 2001, 283). Interestingly, while the courts’ understanding of conjugality became more expansive, answering the question “what is conjugality?” remained elusive (Cossman and Ryder 2001, 270). For Cossman and Ryder, state recognition of conjugal relationships as consisting of a series of attributes means that less attention is paid towards whether the couple in question is sleeping together, and more attention is paid towards establishing whether a relationship of interdependency exists. As a result, the irrelevancy of a sexual component further blurs the line between conjugal and non-conjugal relationships; the assumption being that if we take away the sexual

component, a relationship traditionally identified as conjugal is now no different from relationships of interdependency between friends, family members, etc. Ultimately, it becomes increasingly difficult for the state to uphold this distinction between conjugal and non-conjugal relationships. Cossman and Ryder thus conclude that conjugality plays a minimal role in Canadian state recognition of personal relationships.

The question of whether conjugality has become irrelevant in Canadian policy is an ongoing theme in my dissertation. I have examined the role conjugality plays in our immigration processes, more specifically, its part in determining who gains access to the Canadian state and consequently, who does not. As my findings suggest, the state retains a vested interest in conjugality depending on what is at stake, the result being the inconsistent treatment of conjugality in Canadian law and policy. My investigation of three areas of immigration policy highlights this. First, relationship history is used to assess the genuineness of sexual minority refugee claims. Sexual stereotypes of non-heterosexual relationship patterns are reinforced, as labels like “promiscuous” and “committed” are used to assess the legitimacy of one’s sexual identity and whether that sexual identity is in need of state protection. Furthermore, this has implications unique to bisexual refugee claimants, as relationship history is used to determine whether the claimant is more homosexual or heterosexual, and therefore in need of protection. Second, the Canadian state’s treatment of common-law status as synonymous with marriage in family class sponsorship creates unfair and inconsistent expectations for Canadian citizens wishing to sponsor a common-law spouse. While common-law status is defined primarily by cohabitation within Canadian borders, cohabitation alone is insufficient for common-law couples seeking access via immigration. Couples applying for spousal sponsorship must prove that their relationships are conjugal; as my interviews with common-law couples suggest, the assumption of a sexual component is not immaterial to determining conjugality. The result is that the
spousal sponsorship application process is geared towards married couples, establishing discriminatory assessment mechanisms for non-married, cohabiting families. Finally, the government's current crackdown on marriages of convenience has encouraged an increasingly restrictive understanding of conjugality in the family class immigration program. Moreover, this crackdown has resulted in the government targeting certain types of conjugal families (e.g. same-sex conjugal families, families from certain countries). This suggests that even within the conjugal family unit, families receive differential treatment; the Canadian state's privileging of conjugality is not universal.

To return to Cossman and Ryder's question — is conjugality irrelevant in Canadian law and policy — my answer is no. These three areas of immigration policy highlight that while citizenship is individualized, the type of citizen the Canadian state seeks influences family formation. Changes in family immigration are driven primarily by family form, not by family function. Citizenship is therefore not awarded to the conjugal family unit because this family formation best performs the functions of citizenship; rather, the provision of citizenship is pre-determined by state conceptions of family, care and interdependency. While my conclusions concerning the relevancy of conjugality in Canadian law and policy conflict with Cossman and Ryder, there is a common parallel in these discussions. My examination of our immigration system's reliance on conjugality highlights the important role conjugality plays in distinguishing between legitimate and illegitimate relationships; however, like Cossman and Ryder, I too question whether this privileging of conjugal relationships best serves the objectives of the Canadian state. The question is therefore not does conjugality matter, but should conjugality matter? If conjugality should not matter, how can we re-evaluate law and policy in Canada to make it more accommodating of personal relationships more broadly and what are the implications of such a reassessment?
In this chapter, I examine several policy frameworks capable of accounting for non-conjugal relationships. While these frameworks are a combination of theoretical and actual, none of them have been applied to immigration policy. An examination of the political implications such a transformation would entail is required. My analysis poses the following questions:

- How well does the current pluralistic model of relationship recognition serve the objectives of the Canadian state with respect to immigration?\(^{144}\)
- What are the implications of current immigration policies for intimate relationships?
- What implications do these frameworks for non-conjugal relationship recognition have for Canadian immigration?
- For scholars of immigration law and policy, how could today's dialogue of non-conjugal relationships be framed?

Through an examination of these frameworks, this chapter aims to take stock of theoretical debates surrounding non-conjugality, and to provide a starting point for future discussions on immigration, family and citizenship. This will be accomplished in three parts. First, I commence my analysis with the 2001 report *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, issued by the Law Commission of Canada (LCC), examining the report's recommendations for non-conjugal family reunification and the treatment of non-conjugal families in Canadian law and policy more generally. Second, I examine several policy initiatives — Tasmania's *Caring Relationships Act*, Hawaii's *Reciprocal Beneficiaries Act*, and Alberta's *Adult Interdependent Relationships Act* — to provide examples of the LCC's proposed framework in action. Finally, I explore several tensions in need of being addressed should such a framework be applied to immigration policy in Canada. While my intention is not to develop my own framework, as I am neither a legal scholar nor a policy practitioner, this chapter aspires to establish a space for

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\(^{144}\) Curry-Sumner uses this label to identify those states who recognize both marriage and non-married registered partnerships (known as common-law in the Canadian context) for same-sex and opposite-sex couples (2005).
discussing the potential for an immigration system in which conjugality no longer holds
primacy.

**Beyond Conjugality: The LCC and Non-Conjugal Relationships**

The passing of the *Law Commission of Canada Act* on July 1st, 1997, established the
Law Commission of Canada (LCC), an independent law reform body. The 1997 LCC replaced
the Commission that was dissolved by the Mulroney Government in 1993. The *Act*
recognized that as a structure, the LCC was part of the public service of Canada but that the
relationship was one of independence, as the LCC had the freedom to develop their agenda
(Interview A, 2010). Compared to the previous Commission, the LCC established under the
*Act* was smaller in size and adopted a neo-liberal mandate focused on “striking
partnerships, engaging in public forums, etc.” (Interview A, 2010). Potential topics of
inquiry were generated through a general call for proposals and then presented to the
Commission’s advisory board. Once a proposal was given the green light, the Commission
would undertake an extensive research campaign including data collection; public
consultations; developing partnerships with government ministries, the judiciary,
legislative assembly, legal academics and other related organizations; academic
conferences; and the construction of special advisory groups. Accumulated information was
then compiled into a report and then tabled in Parliament through the Minister of Justice.
During its tenure from 1997-2006, the LCC initiated thirteen research projects under four
strategic themes:

1) Personal Relationships — *Beyond Conjugality, Does Age Matter?: Law and
Relationships Between Generations*;
2) Social Relationships — *Order and Security, From Restorative Justice to
Transformative Justice, Communities Project*;
3) Economic Relationships — *The Vulnerable Worker, Federal Security Interests*;
4) Governance Relationships — *Indigenous Legal Traditions, Governance Beyond
Borders, What is a Crime?, Electoral Reform, The Governance of Health Research
Involving Human Subjects, International Abuse of Children*.
Former members of the LCC believed that the revitalized vision of the LCC was exciting, as it focused on the law in action rather than focusing solely on the coherence of law as written (Interview A, 2010; Interview B, 2010).

In 2001, same-sex marriage debates in Canada inspired the LCC to conduct a study focused on the state of legal recognition of intimate relationships. At the time, common-law status was available to both same-sex and opposite-sex couples; however, marriage remained a heterosexual privilege. Critical of the pro-marriage movement’s limited focus on marriage as well as state treatment of relationship recognition more generally, the LCC saw these debates as an opportunity for a broader debate about why the law uses personal relationships as a criteria for the distribution of rights, benefits and burdens in the first place. As explained by a legal scholar who acted as a consultant on the Beyond Conjugality project:

Those debates about spouse invariably opened up debate about what the purpose of these challenges was and the poor fit between the definition of spouse and the purposes of those laws. While that was implicitly part of the litigation, it was not being explored with the same rigor we felt it should be. So while we were certainly not unsupportive of the fight for same-sex marriage, those of us involved with the LCC report felt it was important to not let the broader question of the state’s role in personal relationships slip away. It seemed to us to be a good moment to ask those broader questions because they were getting asked here and there in the court rulings and the public debates, but they were not being pursued. So that was the driving force... the sense that the conversation had been opened up but not in a way that would allow for sustained conversation (Interview B, 2010).

This was echoed by then-President of the LCC commenting, "It was at a time where the question of gay rights was prevalent and there was a sense that there was still some ambivalence and ambiguity about how the law would respond to non-traditional sexual relationships. More widely, the big question was why?" (Interview A, 2010). In *Beyond Conjugality*, the LCC advocated for a more “comprehensive and principled approach” with respect to recognizing and supporting a wider range of personal relationships, necessitating a re-evaluation of understanding what constitutes an intimate relationship in the first place.
Moreover, the LCC took issue with the state’s ambiguous definition of conjugality despite the fact that conjugality was so heavily relied on in policy and legal circles — “Conjugality lacks clarity, it is under-inclusive of the range of personal adult relationships that deserve recognition and it is at least potentially unduly intrusive of individual privacy” (Law Commission of Canada 2001, 34).

On the LCC’s online message board, Canadians were encouraged to share their thoughts on state treatment of intimate relationships; responses were posted by citizens, religious leaders, women’s organizations, activists, academics and lawyers (Law Commission of Canada 2006). Opinions ranged from those in favour of upholding the traditional heterosexual definition of marriage, to those advocating for the legalization of same-sex marriage, to those claiming that any type of relationship unit built around the “couple” was too restrictive. Several of the comments endorsed the LCC’s challenge for a broader discussion concerning the state’s privileging of conjugal relationships:

In the long term, I agree with the Law Commission’s discussion paper that we need to re-think the whole rationale for recognizing relationships. As it stands, spousal relationships have become more emotional and sexual than economic, over the course of the 20th century. And so the old practice of favouring spousal relationships, for instance through granting widow’s benefits, has lost much of its basis. I think that in the long run the state ought to recognize everyone’s needs without making automatic distinctions between citizens who are in spousal relationships and those who are not. Whether someone is in a monogamous and/or live-in relationship with a partner should not affect access to health benefits, pensions and tax benefits. People who are single or have non-monogamous relationships should not be treated as second-class citizens. – Mariana Valverde Toronto, ON

We are thirty-six-year-old sisters who have never been married or had children, and who live together. Our lives are inextricably linked: aside from being related and having known each other all our lives, we have co-habited continuously for the last seventeen years (since leaving our parental home), rely on each other for emotional support, and are entirely dependent on each other financially — we co-own all of our possessions and share all of our living expenses. A more stable relationship cannot be found. Yet, because we are sisters, rather than husband and wife, and because we are not a couple in a presumably sexual relationship, we are denied tax benefits, “family” health coverage, and a multitude of other advantages constructed upon sexist and heterosexist ideas about what constitutes meaningful relationships. Should
the possibility of sexual relations between two co-habiting adults, whether heterosexual or homosexual, romantic or not, really be the yardstick by which the government, the law, and the corporation measure a citizen’s entitlement to social and economic rights?¹⁴⁵ —Names withheld, ON

There is still a strong emphasis on the couple paradigm, and much of the debate surrounds how one defines a “couple” (same-sex, common-law, etc.). Little recognition is given to adults who create relationships that go outside the couple, involving three or more. Sometimes these relationships are conjugal, while others are not. I personally know of a single parent living with a couple, with the three adults sharing the responsibility for their four children. While this arrangement will probably always be relatively rare, there is currently no way existing to get a third adult person recognized in any kind of kinship union. There is also a strong emphasis on sexual relations. Current legal definitions assume that if there is no sex, then the relationship is not important, and again, there is no mechanism in law to have a non-conjugal relationship recognized. —Kristina Makkay Ottawa, ON

For these respondents, the state’s privileging of a particular family unit has implications for those families that exist outside of this definition. The LCC used this commentary to show that non-conjugal relationships of interdependency exist in Canada. These testimonies were complemented by statistical data acquired from the British Columbia Law Reform Commission and the Vanier Institute of the Family, and research conducted by LCC-appointed advisory groups assigned a particular section of law (e.g. Canada Labour Code, Immigration Act, Canada Evidence Act, Bankruptcy and Insolvency Act, etc.) (Interview A, 2010).

Grounding its report in liberal conceptions of autonomy and equality, the LCC contended that the government should focus on addressing differences in legal treatment of

¹⁴⁵ Burden and Burden v. United Kingdom (2006) 1 F.C.R. 69 involved a similar claim. The Burden sisters claimed that inheritance tax exemption laws in the United Kingdom were discriminatory in nature, as they solely benefit conjugal couples. Having lived together their entire lives, the sisters were concerned that the other would have to sell the home (which they both left to each other in their wills) in order to cover the forty percent inheritance tax, a tax that those in marriages or domestic partnerships are exempt from. Despite their relationship being unquestionably interdependent, the court refused any level of recognition and accepted the government’s justification that the aim of this exemption was to promote stable, committed relationships through the provision of financial security.
conjugal and non-conjugal cohabitants, and to provide citizens with the freedom to choose whether and with whom to form close personal relationships:

The value of autonomy requires that governments put in place the conditions in which people can freely choose their close personal relationships. The state must also avoid direct or indirect forms of coercive interference with adults’ freedom to choose whether or not to form, or remain in, close personal relationships. While governments should do everything in their power to provide information and education and otherwise minimize the conditions that lead to the formation and continuation of abusive relationships, they should not create financial or other kinds of pressure to discourage relationships without reference to their qualitative attributes (Law Commission of Canada 2001, 18).

The assumption is this — by privileging certain adult personal relationships over others, the principles of autonomy and equality are compromised. As outlined in Beyond Conjugality, true autonomy requires that governments establish conditions for citizens to freely develop their personal relationships; true equality requires that governments must promote equality between different types of relationships as well as within relationships. In addition to governments needing to account for autonomy and equality when framing policy intended to acknowledge personal relationships, the LCC prescribed developing policy that seeks to improve personal security (e.g. economic, psychological, emotional and physical), privacy (e.g. freedom from unwarranted state intrusion), religious freedom (e.g. recognizing the evolving understanding of religion, particularly with respect to marriage), and coherency/efficiency in the development of policies (2001, 19–25).

The report proposed a new methodology for assessing existing/proposed laws dealing with close personal relationships, premised on four questions. First, does the law pursue a legitimate policy objective? If the answer is no, then the law should be repealed. Second, if we agree that the law’s objectives are sound, are the relationships that are included relevant to these objectives? If not, then unnecessary references to relationships should be removed. Third, if the relationships are relevant to these objectives and relationships do in fact matter, could the law in question allow individuals to choose which
of their own close personal relationships they want to be subjected to? If the answer to this is yes, then the law should be revised in order to allow for the self-definition of personal relationships. Finally, if relationships do matter but public policy requires that the law delineate the relevant relationships to which it applies, can the law be revised to more accurately capture the relevant range of relationships? Should this be possible, the law needs to be revised so that it embodies the appropriate combination of functional definitions and formal kinds of relationship status. In order to accomplish this, Parliament has at minimum two options — develop a uniform functional definition for ascribing partnership that makes the sexual component of a relationship obsolete or take a more contextual approach and tailor definitions for particular statutes. Favouring the latter, the LCC recognized that the appropriate level of relationship recognition varies across legal domains. Echoing arguments by other legal scholars, the position of the LCC was that should the state favour conjugality, then homosexuals must have access to this privileged status; however, the legalization of same-sex marriage should not result in future complacency towards relationship recognition (Boyd and Young 2003; Barker 2006; Polikoff 2008).

How does re-envisioning the relevancy of relationships in Canadian law translate to changes in immigration policy? In Beyond Conjugality, the LCC identifies family reunification as the primary objective of immigration legislation in Canada and takes the position that the concept of family itself is not the issue so long as we interpret family to be “deeply rooted relationships of interdependence” (Law Commission of Canada 2001, 43). Where the LCC takes issue is the exclusionary nature of the familial unit, as currently dictated by law. In the report, the LCC examined the possibility for familial self-definition within the current immigration system, proposing three broader categories for family class applicants. The first category included kinship through marital and offspring ties, recognizing spouses and dependent children as applicants. Second, kinship is expanded further so that applicants can
apply as fiancé(e)s, parents and grandparents. Finally, kinship becomes self-defined and sponsors have the capacity to determine "who is the most important to them, and who is part of what they consider family in the broadest sense" (Law Commission of Canada 2001, 43). This category could include anyone ranging from extended family to caregivers to close friends. In this light, family becomes less about composition and more about the recognition of interdependency. Accounting for potential abuse of this third category, the LCC stipulated that sponsors would continue to be financially responsible for those they choose to sponsor. Moreover, the sponsor must demonstrate that the sponsored individual is emotionally important to them. For the LCC, the application process itself does not have to be altered — applicants would still have to prove that their relationship with their sponsor is genuine. What changes is the allowance of self-selection; individuals would have the capacity to dictate who composes their kinship network. Ultimately, the state would relinquish control over deciding who constitutes the legitimate “sponsorable” family member. These policy prescriptions are not meant to suggest that non-conjugal relationships can be easily assimilated into policy made for conjugal relationships (Cossman and Ryder 2001, 319).

Regardless, the LCC contends that an understanding of how “personal relationships are negotiated and performed” through family reunification processes should not be shied away from due to a fear of logistical headaches (2001, 44).

*Beyond Conjugality* was met with resistance from several sides. Religious groups and right-wing organizations like REAL Women took issue with the LCC supporting something besides the traditional nuclear family. While the Chrétien government was not vocally opposed to the policy prescriptions outlined in the report, the response was nevertheless underwhelming (Interview A, 2010). This was the LCC’s second finished report; the first one that examined legal retribution for victims of Canada’s residential school system resulted in
the creation of a government task force. *Beyond Conjugality* failed to receive a similar response as then-President of the LCC explains:

> It [the report] was tabled and the government . . . well I think it was too scary of a report. In my conversations with the Minister of Justice at the time, they liked the report. This report was not designed to solve immediate problems of the government; it critiqued the knee jerk approach to relationships. It was the first report that was a problem for them because they had to respond, but they responded very minimally and did not officially engage with it (Interview A, 2010).

The reaction of the Liberal government to the report was ultimately indifference. In addition to the nature of the report itself, interviewed former members of the LCC attribute this unresponsiveness to timing. While the LCC saw the same-sex marriage debates in Canada as an opportune time to address state treatment of personal relationships more generally, interviewees recognized the challenge of getting both the government and the public discussing these broader questions with same-sex marriage topping the agenda. As a legal consultant on *Beyond Conjugality* commented, "The Liberal government was still consumed with the same-sex marriage debate and spent a lot of political capital on getting that passed" (Interview B, 2010). Pro-same-sex marriage activists were fearful that multiple relationship categories would scare away public support. Furthermore, same-sex rights organizations such as EGALE felt that the incorporation of non-conjugal relationships into Canadian law and policy prior to the legalization of same-sex marriage would result in same-sex relationships being subsumed within the category of friends, caregivers, etc. — "The report was about giving rights to tennis partners" (Interview V, 2011). These groups felt that in their supporting non-conjugal relationships, the LCC had chosen not to support same-sex marriage. For then-President of the LCC, this accusation ignored the fact that “This project was bigger than gay rights. The question was whether social policy should continue to be defined around conjugality as a proxy for interdependence” (Interview A, 2010). These
organizations assured the LCC that a discussion of alternative relationships would follow once same-sex marriage was legalized (Interview A, 2010; Interview B, 2010).

Fast-forward ten years, same-sex marriage is now legal in Canada; however, this dialogue of alternative relationships has yet to materialize and Canada remains a country that only recognizes and protects conjugal relationships. This is due in large part to the Harper government’s cessation of funding to the LCC in 2006. More importantly however, the Canadian state is comfortable with a status quo in which conjugality is no longer discriminatory — marriage is now available to both homosexual and heterosexual couples — yet remains a privileged status. As a legal consultant on *Beyond Conjugalilty* explains:

My sense in Canada is that now that same-sex marriage has been legalized and most of the discrimination against gay and lesbian couples has been removed, that attention in the area has shifted. When it comes to the category of conjugality, it seems like the debate has moved on. I don’t think that is true globally and I don’t think it is likely to remain that way indefinitely because the issues keep coming up and jurisdictions that are currently grappling with the debate about same-sex marriage are inevitably having a discussion about why marriage matters and why conjugality matters. They are still in the thick of it so to speak. I think it opens up space for a range of critical understandings of conjugality (Interview B, 2010).

As previous chapters suggest, there remains a need for revisiting the theoretical questions posited in *Beyond Conjugalilty*, and to explore the role conjugality plays in the creation of families and inadvertently, the construction of citizens through our immigration policy.

*Beyond Conjugalilty in Action*

This discussion about non-conjugal relationships is not limited to the LCC; while *Beyond Conjugalilty* drew attention to state treatment of personal relationships within the context of Canada, academics and governments have addressed the issue of conjugality beyond Canadian borders as well. With the passing of the *Civil Partnership Act (1994)* in the United Kingdom — awarding civil unions to same-sex couples — legal scholars called for a

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146 While funding to the LCC was stopped, the *Law Commission of Canada Act* was never repealed.
conversation focused on distinguishing between the purpose and function of relationship recognition and the romantic ideology surrounding family. Similar to Canada, the extension of conjugal benefits to same-sex couples was viewed as an opportunity to expand recognition to non-conjugal relationships:

In the structure of the CPA (Civil Partnership Act), the omission of an express requirement for a sexual and monogamous relationship could, despite the partnership being otherwise almost identical to marriage overall, be said to provide some evidence of a shift from recognition of relationships based on their similarity to a conjugal, marital relationship, towards much more functional criteria and pragmatic concerns for legally recognizing relationships (Barker 2006, 244).

Despite this possibility, Barker warns that while the framing of these debates appear promising for those advocating for state recognition of non-conjugal relationships, debates on the legalization of same-sex relationships remain transfixed on conjugality. Echoing the LCC, Barker attributes this to the fact that the objectives of legalizing civil unions remain in line with those of marriage (2006, 242). Scholars in the United States have used these discussions in Canada and the United Kingdom to advocate for the deconstruction of state recognition of conjugality in lieu of same-sex marriage altogether (Fineman 2006; Polikoff 2008). As Fineman contends, “We do not need marriage and we should abolish it as a legal category, transferring the social and economic subsidies and privilege it now receives to a new family core connection — that of the caretaker-dependent” (2006, 30). Similarly, Polikoff cautions that while extending legal rights and obligations to same-sex couples is a start, ceasing the extension of rights there is insufficient, as it continues to rely on the couple as the only type of family worthy of recognition (2008, 4). Another proposal was to have a non-conjugal relationship regime only for non-financial policy areas (ex. medical visits, immigration, etc.) in which the individual would have the capacity to assess the importance of their personal relationships (Walker 2001, 750). For these scholars, establishing a progressive regime of legally recognized relationships goes beyond same-sex
marriage; rather, a progressive regime of legally recognized relationships is contingent on the realization that family is not synonymous with conjugality.

Scholars outside of legal studies have also taken up this debate, questioning the absence of friendship in discussions of care and social policy. As discussed in chapter two, an ever-increasing body of scholarship has emerged, focused on the changing nature of family. While the nuclear family has traditionally been viewed as the primary source of support, individuals often look for care outside of these networks (Finch 1989; Smart and Neale 1999; Smart 2000; Roseneil and Budgeon 2004; Pahl and Spencer 2004). These scholars argue that if we are to account for the reality of personal relationships and care, we must shift away from the conjugal couple as the foundation of family. Realistic accounts of what constitutes family should be based on function rather than form, as made evident by Roseneil and Budgeon’s study of alternative personal relationships: “There was a high degree of reliance on friends, as opposed to biological kin and sexual partners, particularly for the provision of care and support in everyday life” (2004, 146). The function of family is therefore interdependency, something that is not solely achievable by the conjugal twosome. While these discussions have been largely normative, they highlight the attention being paid towards the privileging of conjugal status.

In addition to academics undertaking these debates, several governments have developed policies aimed at recognizing non-conjugal relationships. While the motivations behind these policy initiatives vary, an examination of them demonstrates that recommendations like those made in Beyond Conjugality can in fact be realized.\footnote{I recognize the institutional and constitutional differences between these three policy initiatives and am therefore not suggesting that they could easily be implemented at the Canadian federal level. The purpose of examining these initiatives is two-fold: to demonstrate that state accommodation of non-conjugal relationships is possible and to examine the challenges of this type of recognition.}

\footnote{147}
Tasmania’s Relationships Act

In 2003 the Tasmanian government passed the *Relationships Act*, providing registration and recognition for two categories of relationships. The first category is significant relationships, recognizing unmarried same-sex and opposite-sex couples. The second category, caring relationships, extends rights to two adults (related or not) if one provides the other with domestic support and personal care. Individuals can only be in one state recognized caring relationship at a time and cannot be receiving financial compensation for the care provided. Registered significant and caring relationships are privy to rights with respect to pension and retirement benefits, taxation, insurance benefits, healthcare, hospital visitation, wills, division of property and employment conditions. Since 2009, these relationships have been recognized at the federal level, extending almost all federal conjugal benefits to both categories of relationships. The Tasmanian Department of Justice announced in August 2012 that they would be proposing new laws legalizing same-sex marriage while maintaining the *Relationships Act* for unmarried conjugal couples and non-conjugal relationships.\(^{148}\)

Hawaii’s Act Relating to Unmarried Couples

Hawaii’s Supreme Court ruling in *Baehr v. Lewin* (1993) that the refusal of conjugal rights to same-sex couples was a violation of sexual equality rights resulted in the establishment of a registration system for any two adults who are legally unable to marry.\(^{149}\) This includes same-sex partners and family members; unlike Tasmania’s *Relationships Act*, unmarried opposite-sex couples, friends and other types of care relationships were not included, as these pairs are technically not prohibited from getting married. Hawaii’s *Act Relating to Unmarried Couples* was the first piece of legislation in

\(^{148}\) This information was obtained from Tasmania’s Department of Justice website: [http://www.justice.tas.gov.au/](http://www.justice.tas.gov.au/).

North America that recognized non-conjugal relationships. The Act was a compromise, extending state benefits to same-sex couples without altering the traditional definition of marriage. The intent of this legislation remained contested even after its passing; some argued that the Act should be limited to same-sex couples while others argued that the law “was never designed to be marriage for those who are not married” (Coolidge 2000, 70). Resistance towards the legalization of same-sex marriage was bolstered by the Clinton administration’s passing of the Defence of Marriage Act (DOMA) in 1996. Under the Act Relating to Unmarried Couples, parties who register as reciprocal beneficiaries are entitled to some of the rights and benefits reserved for married couples including inheritance rights, workers’ compensation, the right to sue for wrongful death, health insurance and pension benefits for state employees, hospital visitation and healthcare decision-making. Today, same-sex marriage continues to be banned by Hawaiian state law and legal marriages performed out of state are considered civil unions.

*Alberta’s Adult Interdependent Relationships Act*

In light of the same-sex marriage debates and the Supreme Court’s ruling in *M. v. H* (1999) that the omission of same-sex couples from the Ontario Family Law Act was a violation of their s.15 equality rights, the provincial government of Alberta passed the *Adult Interdependent Relationships Act (AIRA)* in 2003. According to the Alberta Ministry of

150 DOMA consists of two provisions. First, states are allowed to decide for themselves whether to recognize same-sex marriage. This means that even if a same-sex couple was legally married in another state, states that do not recognize same-sex marriages are not obligated to acknowledge these conjugal unions. Second, for all purposes under federal law, marriage is defined as a conjugal relationship between a man and a woman. Unlike Canada, jurisdiction over who can marry in the United States is allocated to the state law. As a result, numerous state initiated DOMAs have been enacted. In 2011, the Obama administration announced that section 3 of DOMA — the federal definition of marriage — was unconstitutional, and declared that while the administration would continue to enforce the law, it would no longer be defended in court (United States Department of Justice: [http://www.justice.gov/](http://www.justice.gov/)).

151 This information was obtained from Hawaii’s Department of Health Website: [http://hawaii.gov/health/](http://hawaii.gov/health/).
Justice, the AIRA covers “a range of personal relationships that fall outside of marriage, including committed platonic relationships where two people agree to share emotional and economic responsibilities.”¹⁵² Relationships recognized by the AIRA involve two key elements: parties must be in an economically and emotionally interdependent relationship, and must be cohabiting in this interdependent relationship for a minimum of three years. Unlike the previous two acts, the AIRA is a personal agreement between the two individuals; there is no central registry process. Furthermore, there are situations where the status of adult interdependent partners is ascribed after three years regardless of whether a formal agreement was made between the parties involved. Under the AIRA, partners are entitled to financial support from each other, to register together for coverage under the Alberta Health Care Insurance Plan, insurance coverage available to spouses, access to the deceased partner’s estate, the right to sue for wrongful death and healthcare decision-making. While it is possible to opt out of some of these statutes, it is not possible to opt out of all of these statutes. The AIRA remains intact; however, same-sex marriage is now provincially recognized as well following the passing of the federal Civil Marriage Act in 2005.

Similarly to Hawaii’s Act Relating to Unmarried Couples, the AIRA was criticized for its conservative intentions to continue the reservation of marriage for heterosexual couples. Glennon contends that these initiatives were taken in response to the extension of some conjugal rights to same-sex couples, the reaction being to give these rights to all relationships in order to avoid giving “special recognition” to same-sex relationships (2005, 157). For Glennon, this reinforces the heteronormativity of marriage by limiting the use of “spouse” to married couples and ascribing spousal rights to a range of conjugal and platonic relationships. Ultimately, by recognizing everyone, these governments were able to

¹⁵² This information was obtained from the Alberta Ministry of Justice Website: [http://justice.alberta.ca/Pages/home.aspx](http://justice.alberta.ca/Pages/home.aspx).
recognize no one. While the motivations behind the passing of this legislation are undoubtedly strategy to sidestep legalizing same-sex marriage, it is important that we recognize the possibilities these acts present for state recognition of non-conjugal relationships. From this viewpoint, one could argue that these acts present “a radical (if less threatening because less sexual) challenge to the presumed naturalness and ensuring privilege of the heteronormative married family” (Harder 2009b, 634). This is particularly possible in the context of the AIRA, as same-sex marriage is now legal, rendering initial motivations behind the AIRA irrelevant. The AIRA provides a starting point for state recognition of non-conjugal relationships — “Canada will achieve even greater justice for families if the law embraces the principles of the Beyond Conjugality report and considers the Alberta Adult Interdependent Relationships Act a model from which to build other projections for non-conjugal relationships” (Polikoff 2008, 115).

These policy initiatives highlight the ability of the state to recognize adult personal relationships beyond the realm of the conjugal couple. In addition to their recognition of non-conjugal relationships, these pieces of legislation — Tasmania’s Relationships Act, Hawaii’s Act Relating to Unmarried Couples and Alberta’s Adult Interdependent Relationships Act — embody an additional parallel. In all three examples, the legislation was enacted at the subnational level; provincial and state governments initiated these policy responses. As a result, these non-conjugal policy initiatives have not been applied to immigration policy. Applying only to those living within provincial or state borders, individuals are unable to sponsor someone whom their relationship with would qualify as interdependent but lives in another country. Parties recognized by these governments are not entitled to immigration
rights enjoyed by conjugal couples.\textsuperscript{153} It is therefore difficult to look at these policies and fully comprehend the consequences should these policies be enacted at the national level and incorporate immigration rights. This begs the question: if we were to consider the LCC’s recommendations for family reunification and establish the possibility for non-conjugal sponsorship, what are the implications?

\textbf{Implications of Beyond Conjugality}

The remainder of this chapter is dedicated to exploring three major tensions encapsulated within discussions of relationship recognition and the reconceptualization of family reunification to include non-conjugal adult personal relationships. First, the politics of state-based relationship recognition highlight the complexity of these discussions, including the fundamental debate concerning the connection between recognition through ascription (the automatic attribution of a particular status to a relationship) versus recognition through registration (the act of individuals applying for relationship status). Deliberations about who controls admission complicate the provision of status. The second tension focuses on the potential insurgence of new migrants and state capacity to accommodate this potential influx. The third and final tension addresses attachments (both state and social) to the nuclear family; the implementation of these policy recommendations not only has implications for non-conjugal relationships, but conjugal relationships as well. Ultimately, if we are to take these policy initiatives seriously and re-evaluate what constitutes family in our immigration processes, it is imperative that we recognize these challenges.

\textit{The Politics of Relationship Recognition}

A common argument for state recognition of non-conjugal relationships is that with sexual intimacy increasingly irrelevant in the legal assessment of conjugality, it has become

\textsuperscript{153} In the United States and Australia, the right to spousal sponsorship is reserved for married, opposite-sex couples.
rather difficult to distinguish between conjugal and non-conjugal relationships (Cossman and Ryder 2001). Advocates for non-conjugal relationship recognition therefore claim that due to the supportive, interdependent nature of these relationships, extending state recognition would ultimately not change the substance of these relationships. This is misleading, as it neglects the reality that with state recognition, comes responsibility. Halley contends, "a movement that seeks public recognition of its personal relationships concedes that the power to bestow value on them lies in the public . . . and a movement that seeks state recognition of its personal relationships concedes that the power to evaluate and rank them lies in the state" (2001, 99). Recognition gives the state power by placing non-conjugal relationships under the same microscope already used to appraise the legitimacy of conjugal relationships. Furthermore, one could argue that state recognition of non-conjugal relationships undermines the most important issue critics have with respect to state privileging of conjugality — the idea that the state should have no place in one’s personal relationships (Stevens 1999; Lyndon-Shanley 2004; Fineman 2006). If the issue is state intrusion into the private details of our lives, then enhancing state power through a policy framework that recognizes non-conjugal relationships is contradictory. Therefore, what would change with recognition is that non-conjugal relationships would no longer be free from the gaze of the state.

Further, the LCC is not proposing that all relationships merit state acknowledgement, leaving the state to determine criteria for assessment. As previously mentioned, a stipulation of Beyond Conjugality was that parties must prove that their relationship is genuinely interdependent. In doing so, the state is not only responsible for establishing what constitutes a legitimate relationship, and a new hierarchy of relationship
recognition is established and ultimately new forms of exclusion. Cossman’s work on sexual citizenship suggests that if we look towards the “processes of becoming” that turn the non-citizen into a Canadian citizen, we must recognize that citizenship “becomes part of the present” (2007, 9). The fact that citizenship is in constant flux means that extending state discretion to the assessment of non-conjugal relationships will result in the redrawing of the boundaries of citizenship in line with the state’s view of legitimate and illegitimate non-conjugal unions. Is it therefore desirable to have this type of arrangement for all of our personal relationships? One could argue that the state is already present. By establishing a hierarchy of legitimate relationships through immigration policy, the state regulates familial make-up through negotiations of citizenship. In doing so, those whose relationships fall outside the current framework are denied access; their relationships are illegitimate. Non-conjugal relationships are therefore already politicized. In this light, so long as the state has a role in assessing our personal relationships, there will always be relationship inequality (M. Warner 1999; Stevens 1999; Metz 2010).

Recognition also changes the substance of relationships from within, particularly at the point of dissolution. Individuals are participants in a variety of relationships from which they can walk away without consequence. State recognition of non-conjugal relationships would complicate this. Conjugal relationships resemble business deals; participants agree to certain terms and conditions pre-merger and then are legally obliged to see the agreement through should the deal fail. State recognition of non-conjugal relationships would submit

\footnote{This is reminiscent of the “effective care” criterion in Dutch immigration law. In order for parents who have immigrated to the Netherlands to sponsor their children, the parent needs to prove that they have been involved in the upbringing of the child (financially and emotionally), regardless of geographical distance. The “effective care” criterion was added to Dutch immigration law in order to account for the reality that care for children extends beyond biological ties (e.g. adoptive parents, blended families). Examining this from a feminist perspective, van Walsum (2009) contends that while this criterion provides the potential for a broader conception of care, it has been used in immigration law to penalize women as mothers, particularly those who come to the Netherlands seeking work and then apply to sponsor their children at a later time.}
the parties involved to similar accountabilities. Take for example two college roommates. While this type of relationship involves cohabitation (often for up to four years) and economic interdependency (roommates rely on each other to cover the rent), roommates would not necessarily want to be legally obliged to follow state terms of dissolution upon graduation. If these roommates were living in Alberta, they would already be considered participants in an adult interdependent relationship, providing them with a set of rights and entitlements to each other that they did not necessarily agree to. Moreover, while all benefits wrapped up in relationship recognition are perceived as positive, this is arguably not the case (Boyd and Young 2003). One’s relationship status impacts access to state provided social security programs including welfare, student loans and child assistance. This is not to suggest that roommates would not choose to be recognized by the state; however, this example demonstrates how the extension of state recognition to non-conjugal relationships has implications with respect to how we develop and foster our personal relationships, an action made increasingly difficult with state interference.

This poses the question: do people want their non-conjugal relationships recognized? As stated above, relationship recognition provides both incentives and disincentives; ultimately, recognition comes at a cost (Smart and Neale 1999; Smart 2000; Halley 2001). With state recognition comes symbolic value and access to rights, however, the relationship is then open to state intrusion. Private lives are made increasingly public and assessed in terms of their legitimacy as dictated by the state. Officially extending recognition to non-conjugal relationships allows the state to further privatize dependency while simultaneously regulating the operation of these relationships in terms of defining which relationships are legitimate and consequently, which ones are not. For many queer theorists, state interference in one’s non-conjugal relationships is undesirable — “Many couples who choose to live their lives in different and non-conformist ways do not want to
be the ‘conventional’ couple the law tries to make them be” (Phelan 2001, 158). There are however those who desire recognition and feel that the current state treatment suggests that their relationships are less important and interdependent than conjugal relationships, as made evident in the comments posted on the LCC’s online message board. Answering whether or not individuals want their non-conjugal relationships recognized by the state is not an easy feat. Collectively, these discussions highlight the complexity of recognition and reinforce the point that it is impossible to understand one's personal relationships in black and white terms. It is important however, that when it comes to the politics of relationship recognition, ambiguity should not lead to complacency.

If we are to agree that the state should recognize non-conjugal relationships and that for the most part, individuals desire that recognition, a more logistical discussion about whether recognition should be ascribed (the automatic designation of recognition) or registered (individuals seeking formal acknowledgement from the state) must transpire. As discussed in chapter five, the federal government assigns the label “common-law partner” to couples living in a conjugal, cohabiting relationship for one year. The majority of provincial governments ascribe this label after a longer cohabitation period; in Quebec, couples can obtain recognition earlier through registration. Through ascription, Canadian governments are “able to convey benefits and duties on couples regardless of whether the parties to a relationship are willing to take on these obligations” (Harder 2007, 162). This reliance on ascription stems from the Supreme Court's approach towards recognition of common-law relationships as a way to protect vulnerable and dependent partners at the point of dissolution, concluding that the state's interest is to “facilitate stability and certainty in relationships . . . [by] providing citizens with mechanisms to . . . meet their needs should they suffer a sudden deprivation of emotional and economic support resulting from death, illness, injury or the breakdown of their relationships” (Law Commission of Canada 2001,
In *Molodowich v. Penttinen* (1980), the Court recognized that relationships of interdependency do not necessarily develop by choice. Individuals enter into relationships for a variety of reasons, not least of which is economic or emotional vulnerability. The ascription of common-law status to unmarried, cohabiting couples therefore provides for the “equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down” (Law Commission of Canada 2001, 14). One could therefore argue that ascription would be desirable in order to avoid one party benefitting from the dissolution of the relationship at the expense of the other party involved.

While the ascription of recognition to non-conjugal relationships would arguably accomplish similar objectives — that being the protection of vulnerable parties — the automatic ascription of relationship status to all non-conjugal relationships is undesirable in certain situations. Returning to the example of college roommates, this relationship could potentially be labelled a state recognized non-conjugal relationship, regardless of whether it is preferred or not. Another situation where ascription could be unwanted involves the provision of welfare benefits. The “spouse in the house” rule in the Harris government’s welfare legislation redefined “spouse” to include persons of the opposite sex living together who had “a mutual agreement or arrangement regarding their financial affairs”, meaning that once two people of the opposite sex were living together, their relationship was assumed to be conjugal unless they provided evidence to the contrary. Critiqued for its discriminatory nature on the basis of sex and its reinforcement of stereotypes of single mothers on social assistance, the “spouse in the house” rule captured numerous relationships not considered conjugal, causing a lot of single mothers to lose their eligibility for social assistance as the “sole support parent”. Ascribing recognition to non-conjugal relationships could potentially have a similar impact; by broadening the range of state
recognized relationships to include non-conjugal partnerships, the state acknowledges relationships individuals do not necessarily want recognized. Moreover, as made evident by the “spouse in the house” rule, recognition has the potential to target certain individuals marked by race, class, and gender.

When it comes to immigration, the debate between ascription and registration is different, as parties vying for sponsorship would need to prove to immigration officers that their non-conjugal relationship is in fact genuine. This is due primarily to the fact that these relationships will not be formally recognized in their home countries, a problem experienced by many common-law couples as discussed in chapter five. When common-law couples apply for spousal sponsorship without formal recognition of their relationship from their home country, they are evaluated according to the Canadian state’s understanding of what constitutes a legitimate adult interdependent relationship. The implications of extending recognition to non-conjugal relationships — whether ascribed or registered — are therefore similar to those experienced by common-law couples. A lack of recognition in one’s home country would put the Canadian state in a position of power to assess the genuineness of their non-conjugal relationship that the individual wants recognized for the purpose of family reunification. In applying for sponsorship, the Canadian model of relationship recognition is ascribed to the involved parties; non-conjugal relationships would be assessed according to a list of characteristics defined by the Canadian state for relationships within Canadian borders. Should non-conjugal relationships be formally recognized, it is imperative that these power imbalances be addressed. The politics of relationship recognition are complex; with recognition comes a bundle of rights and responsibilities, some wanted and some unwanted. Collectively, this discussion highlights the difficulties in determining how a new category of relationship recognition could be established, let alone implemented.
Increased Immigration and the Numbers Game

Another tension inherent in this discussion of non-conjugal relationship recognition involves perceived threats such recognition would present for immigration itself. These concerns often take the shape of a slippery slope argument both in terms of what expanding family reunification would mean from the outside (those who want to get into Canada) and from the inside (the impact this expansion would have on Canadian society at large). Liberal theorists contend there is little justification for states to maintain restrictive borders — “Borders should generally be open and people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country” (Carens 1987, 251). Consistent with liberal theories of citizenship discussed in chapter two, this position is grounded in the belief that if social institutions are to remain neutral with respect to conceptions of the good life, then it becomes difficult to rationalize restricting one’s movement from one country to another. Recognizing that immigration controls are at times necessary, qualifications have been added. Restrictions are therefore consistent with liberal principles so long as international controls are absent (Heath 1997), or when control is necessary for the protection of cultural groups against external pressures (Kymlicka 1989). On the other hand, communitarian theorists take issue with the claim that states have a moral obligation to make their borders universally accessible; the assumption being that if the cultural integrity of a community is considered an intrinsic good, immigration controls are acceptable if the goal is to secure this shared conception of the good (Walzer 1984). From a theoretical standpoint, this debate highlights the difficulty in establishing a starting point when it comes to discussing the further opening of state borders, as liberal and communitarian theorists justify minimal and maximum limits respectively.
This is not to suggest that the extension of immigration rights to non-conjugal relationships means abolishing all immigration controls; the LCC’s framework attempts to work within the Canadian immigration system, not eliminate it altogether. Nor will expanding the current understanding of family to include non-conjugal relationships inevitably lead to the deconstruction of immigration controls altogether. There are however parallels between general fears of unrestricted immigration and the expansion of family reunification to include non-conjugal relationships — if we extend family reunification rights to non-traditional family arrangements, then what next? While the current guidelines for family reunification establish distinctions between those who have a legitimate claim to Canadian citizenship and consequently, those who do not, the allowance of non-conjugal sponsorship would perceivably disrupt these boundaries. The critique here is that a legitimate claim for sponsorship would no longer be as easily identifiable, as the relationship in question lacks a clear starting point present in conjugal relationships (Interview C, 2010). What is misleading about this argument is its suggestion that when it comes to conjugal relationships, legitimacy relies solely on a clearly identified moment when the relationship is formally recognized by the state either through the provision of a marriage certificate or the declaration of common-law status. As demonstrated in chapter five, discretion used by immigration authorities to assess the genuineness of a conjugal relationship highlights that a clear starting point does not necessarily translate to a successful application. Moreover, common-law couples often face the challenge of proving that a legitimate conjugal relationship exists, as they do not have formal state recognition at the time of application. The assumption that the current process of spousal sponsorship is unambiguous is therefore flawed. In Beyond Conjugality, the LCC attempts to rectify this ambiguity by proposing to use cohabitation as a starting point for the assessment of relationship legitimacy in lieu of formal state recognition; however, one could argue that
this presents challenges for those unable to live together for reasons discussed throughout this dissertation (e.g. geographical location, sexual orientation, race, religion, etc.). The argument that the extension of family reunification to include non-conjugal relationships would challenge the clear-cut nature of current policy is therefore misinformed, as it ignores the reality that current policy is anything but unambiguous.

Public support for changes in immigration policy typically wanes when the proposed changes are perceived to open the system up to abuse (Interview D, 2011). The issue of abuse is misleading, as it suggests that the current system — with conjugality used as a type of immigration control — is immune from abuse. This is compounded by government initiatives like the government's crackdown on marriages of convenience; the panic surrounding marriage fraud is being used to bolster the argument that the assessment of conjugal needs to be even more restrictive in order to prevent system abuse. In my interviews with policy analysts, interviewees discussed how the extension of family reunification to non-conjugal relationships would mean that individuals could bring in whomever they wish. This expressed concern had racial undertones — the question was not how many Canadian citizens would take advantage of non-conjugal sponsorship, but rather which Canadian citizens would take advantage of non-conjugal sponsorship. In an interview with a former policy analyst from Citizenship and Immigration Canada, the interviewee commented:

Immigrants from the United States and Western Europe would not be sponsoring a ton of people because they [those living in the aforementioned countries] probably do not want to immigrate, and if they did, they probably would not need non-conjugal sponsorship to do so. The people who would use the system would be those from developing countries who would try to sponsor anyone they possibly could. With conjugal sponsorship, you know you are only getting one [immigrant], but with non-conjugal sponsorship, the number is unknown (Interview D, 2011).

This comment reinforces two primary themes of this project. First, changes to immigration policy in Canada, as well as resistance towards those changes are not racially neutral.
Critiques on the extension of recognition to non-conjugal relationships are premised on the fear that the weakening of immigration controls will result in the flooding of sponsorship applications from “undesirable” applicants. Second, uneasiness with proposals like *Beyond Conjugality* stem from the fear that if non-conjugal relationships are recognized, the state will have less control over who has access to our borders — the assumption being that a decrease in state control has negative consequences for both the state (in terms of providing services) and its citizens (in terms of access to services). Apprehension is therefore not grounded in concerns for what this would mean for the state, it is about protecting the Canadian nation from unwanted outsiders. It is important that when discussing, and ultimately dispelling, the challenges of system abuse, we account for the racial undertones that structure this debate.

*Implications for Conjugal Relationships*

A final tension in need of being addressed is the impact that state recognition of non-conjugal relationships would have on the current recognition of conjugal relationships. As discussed in chapter two, social conservatives in Canada have been vocally opposed to the extension of state recognition to any relationship that differs from the heterosexual definition of marriage. This resistance was evident post-release of *Beyond Conjugality*; right-wing organizations like REAL Women accused the LCC of devaluing marriage (Interview A, 2010). From this standpoint, the extension of state recognition to non-conjugal relationships further undermines the traditional nuclear family model. Critiques of non-heteronormative relationship recognition rely on a romanticized understanding of family life, ignorant of the reality that a single traditional family unit is a myth (Coontz 1992). In actuality, the familial unit is in constant flux. This was the LCC’s response to conservative critics, that families in all their forms are already recognized by the state in some way; therefore, there is a need to develop policy that facilitates equal and just recognition —
“Speaking about under-inclusiveness or over-inclusiveness of the law is an important aspect of the institution of law reform. That is the job. The job is to look at whether the job we think we're doing is the job we're actually doing” (Interview A, 2010). For the LCC, the main objective of Beyond Conjugality is not to undercut marriage; rather, it is to advocate for equal treatment of all relationships under the law.

As previously mentioned, proposals for the recognition of non-conjugal relationships during the same-sex marriage movement were criticized for reducing same-sex conjugal relationships to friendships (Lahey 1999; Boyd and Young 2003; Glennon 2005). In this light, state recognition of non-conjugal relationships would arguably devalue the work of those involved in the legalization of same-sex marriage. While same-sex marriage is now legal, same-sex couples remain disadvantaged in certain respects. An example is economic inequality — lesbian couples tend to be economically disadvantaged due to wage disparity between genders (Lahey 2001). Additionally, same-sex couples remain unable to enjoy social recognition to the same extent opposite-sex couples in many parts of the country, despite the fact that same-sex marriage has now been legal for over seven years. The inclusion of sexual orientation in s.15 of the Charter, provincial Human Rights Acts, and the establishment of Hate Crime laws have assured gay and lesbian citizens serious and much needed protections (T. Warner 2002); however, formal rights and protections fail to fully address, target or extinguish many forms of daily, systematic social oppression and discrimination (Janoff 2005; Sears 2007). Relational equality among conjugal relationships therefore remains an ongoing project. As a result, it becomes difficult to focus on substantive equality when formal equality has yet to be fully achieved.

These challenges for gays and lesbians are evident in current immigration processes. As examined in chapter four, relationships play an influential role in the assessment of sexual minority refugee claimants; one's relationship history is used to
evaluate one’s claim as a sexual minority. Chapter five investigated how reliance on the heteronormative nuclear family model has made it difficult for same-sex common-law couples to prove that their relationships are legitimate. Finally, the rhetoric used in government’s anti-marriage of convenience campaign — as discussed in chapter six — unfairly targets same-sex couples as potential perpetrators of marriage fraud. In all three cases, distinctions were made between opposite-sex conjugal couples and same-sex conjugal couples, suggesting that even from within, conjugality remains an unevenly applied status. For gay and lesbian rights advocates who are critical of policy recommendations like those made in Beyond Conjugality, the extension of recognition to non-conjugal relationships would further reinforce these distinctions. Moreover, it would eliminate any difference between non-conjugal relationships and their conjugal counterparts (Interview V, 2011).

For supporters of Beyond Conjugality, the uneven application of conjugality is precisely the issue. The aim of the report was to question the role of conjugality in legal process and to challenge the role of conjugality in shaping the state’s approach towards differentiating between legitimate and illegitimate relationships. Cossman and Ryder contend that the majority of recent relationship rights case law focuses on cohabitation and financial interdependence, suggesting that the once important sexual component of a conjugal relationship is becoming increasingly irrelevant (2001, 273). What then constitutes conjugality and furthermore, what distinguishes conjugal and non-conjugal relationships? In this light, the aim of non-conjugal relationship recognition is not to minimize same-sex or opposite-sex conjugal relationships; rather, it is to minimize inequalities generated by current state recognition between non-conjugal and conjugal relationships, as well as among conjugal relationships. Therefore, another option would be that instead of providing recognition to the non-conjugal side of this relationship binary,
state recognition of relationships could be eliminated altogether. Supporters of this position claim that “marriage drags along with it certain historical assumptions about the institution and its members that limit the coherent development of family policy” (Fineman 2006, 30). Furthermore, they take issue with the fact that while Western states promote the developing and maintaining of a diverse, secular society, only one family unit is considered worthy of state protection. When it comes to state recognition of familial relationships, family should not be synonymous with marriage; relationships of care do not necessarily dictate a specific family form (Finch 1989; Smart and Neale 1999; Smart 2000). Similar to the LCC’s proposed methodology, the proposal to abolish marriage as a legal category questions the state’s primary objective for privileging conjugality. This is not to suggest that the symbolic dimension of marriage would disappear, it would simply no longer exist as a legal category. If the objective is to protect relationships of interdependency and vulnerable parties within those relationships, solely privileging conjugal relationships does not allow the state to fully realize this goal. The focus should therefore be on the caretaker-dependent relationship instead of the conjugal family unit (Fineman 2006, 40). This could be realized through a contract approach in which individuals apply for recognition, similar to policy regimes in Tasmania and Hawaii. Of course, returning to the first tension discussed, registration regimes ignore the reality that not everyone involved in an interdependent relationship is able to register that relationship. Either way, state objectives behind relationship recognition need to be re-evaluated and state privilege of conjugality needs to be addressed.

The problem lies not necessarily with marriage, but with conjugality being the sole focus of relationship recognition in Canada. Furthermore, how are we to understand the gap between the state’s reliance on conjugality as a marker of legitimacy in immigration processes and the realities of family formation? These tensions — the politics of
relationship recognition; concerns about increased immigration; and the implications for conjugal relationships — highlight two things. First, state privileging of conjugal relationships runs deeper than the protection of interdependent relationships. This privilege is driven by the desire to (re-)produce a particular version of family; policy is developed according to a single idealized family model. Resistance towards extending family reunification rights to non-conjugal relationships is therefore not solely about logistical concerns, it is rooted in an affective attachment to conjugality and it is that attachment that acts as a point of access for citizenship. Second, changes in immigration law have implications for many areas of law and policy. The adoption of a new legal framework capable of recognizing non-conjugal relationships is admittedly not an easy task. Future discussions concerning relationship recognition depend on careful consideration of how adult interdependent relationships, specifically conjugal relationships, steer policy development.

**Conclusion**

This examination of both the LCC’s proposed framework in *Beyond Conjugality* and actual policy initiatives in Tasmania, Hawaii and Alberta demonstrate that not only is it possible to rethink state recognition of relationships, but that there is no one-size-fits-all framework. Focusing on the true quality of adult interdependent relationships, that being care, these frameworks exhibit the need to evaluate the Canadian state’s current approach towards understanding relationship recognition in Canadian immigration law and policy. Cooper proposes an “equality of power” approach, advocating for a legal framework of recognition that “looks two ways — on the one hand to individuals; on the other, to the social inequalities and asymmetries that pattern and organize our society” (2001, 77). State privileging of conjugality is one such process that shapes and organizes society in an unequal and inconsistent manner, as made evident in this project's investigation of
Canadian immigration policy. While the recommendations made in *Beyond Conjugalilty* were dismissed in 2001, immigration policy remains reliant on conjugality as the primary marker for a legitimate familial relationship. It is time to re-visit the theoretical questions posited by the report and to explore the state’s objectives for trusting conjugality as the primary organizing principle of families and inadvertently, of citizens through immigration.

Simply adopting the LCC’s recommendations — or any of these policy frameworks — is insufficient however, full assessment of the influential role conjugality plays in policy development requires recognizing the tensions inherent in this debate. These tensions include the politics of relationship recognition and the impact state recognition has on our personal relationships; concerns about the opening up of state borders and the impact this has on the state’s ability to accommodate its citizens; and the implications restricting relationship recognition would have on conjugal relationships. Re-evaluating the work of governing conjugality performs necessitates an exploration of these tensions, recognizing the implications the extension of recognition has not only for immigration processes, but Canadian law and policy more generally. We are now in a position to go beyond conjugalilty, to recognize that as is the case within Canadian borders, immigration policy should be more flexible with respect to family composition for those outside Canadian borders seeking access as well.
Conclusions

My dissertation commenced with a proposal to reconsider the Canadian Conversation so as to identify and examine the ways in which the conjugal family unit acts as a point of access for immigrants and refugees. This, I have contended, requires reconceptualizing our understanding of family, recognizing that conjugality does not necessarily dictate the development of relationships of care and interdependency. State privileging of the conjugal family unit in our immigration policy and practice not only narrows the scope of what constitutes family, but also constructs the non-citizen in a way where conjugality continues to define the parameters of permissibility. Moreover, the inconsistent and ambiguous treatment of the conjugal family unit calls into question its effectiveness in distinguishing between legitimate and illegitimate families. By contrast, my approach shifts the focus from the individual — the core of the Canadian Conversation — to family and its role in the provision of citizenship and consequently, identity formation. As I have argued in the previous chapters, the provision of citizenship to legitimate conjugal citizens (as discussed in chapter four) and families (as discussed in chapters five and six) goes beyond protecting the state and its citizens from system abusers; the integrity of the Canadian immigration system depends on the state limiting entry while simultaneously reinforcing a specific understanding of family, marriage and conjugality.

In my final chapter, I examined the possibilities for rethinking conjugality in Canadian law and policy. I focused in particular on the implications state recognition of personal relationships — conjugal or non-conjugal — holds both for the state and its citizens. While the state claims to have no place in the bedrooms of our nation, the politicization of conjugality reinforces a hierarchy of legitimate relationships deserving of state recognition; extending recognition to non-conjugal relationships runs the risk of establishing new hierarchies. Policy reform therefore requires stepping back from this
conjugal/non-conjugal dichotomy and re-evaluating the state’s role in the regulation of one’s personal relationships. As Martha Fineman contends, “The theoretical availability of marriage interferes with the development of other solutions to social problems” (2006, 30). The Canadian state’s reliance on the conjugal family unit ignores the reality that quite often, it is the root of social issues governments are continuously attempting to rectify (e.g. poverty, elder and child care). Instead of focusing on relationships of care more generally, the state’s reliance on the conjugal family unit has impeded our understanding of the ever-changing dynamics of family, and of citizenship.

This is particularly evident in the state’s handling of the family class. In the name of maintaining the integrity of our immigration system, sexual minority refugee claimants are assessed according to their relationship history, using past relationships to evaluate both their identification as a sexual minority and persecution experienced as a result of that identity; common-law conjugality is defined as synonymous with marital conjugality, establishing unfair expectations for sponsorship-seeking common-law couples; and marriage fraud is currently being used by the government to eradicate foreign threat to the institution of marriage. In all three cases, the state has responded to weaknesses in our immigration system by further restrictions on the family class. As a result, those families seeking access to the Canadian state (outside families) are expected to develop their familial relationships in a way that is consistent with the state’s version of legitimate conjugality, a version that those families living within Canadian borders (inside families) are generally not expected to abide by. In this light, family composition plays a key role in the provision of citizenship.

Moreover, state reliance on the conjugal family unit ignores the reality that interdependency takes on many forms. While Canadian legal treatment of conjugality suggests the adoption of a framework that accounts for the interdependent nature of
personal relationships, conjugality continues to define relationship recognition. Conjugality's stronghold on state recognition has become increasingly flexible for inside families; however, it continues to define access for outside families. This suggests that the state's understanding of the family class is informed by family form, not family function. The integrity of the Canadian immigration system is therefore reliant on more than simply addressing and remedying weaknesses; it depends on the state limiting entry by refusing access to deviant families that challenge traditional notions of family and marriage.

Interactions between conjugality and policy highlight why we need to reject the notion that family is apolitical. Instead, we should turn our attention to understanding the role the conjugal family unit has been assigned and its effectiveness in that role. This is contingent on the realization that conjugality is not a necessary condition for interdependency. As Solot and Miller explain:

> Although marriage proponents often speak of marriage as the fabric of society, this fabric is actually woven of caretaking relationships of all kinds, with strands held by parents and children, siblings, spouses, partners, friends, and neighbours. These human relationships — some simple and easy to understand, others "messy" and non-traditional — are what truly matter when it comes to ensuring that individuals, families, and communities are healthy and strong and receive the support they need (2006, 100).

If family is about interdependency and care, then we must recognize that what constitutes family is broader than we admit. The complexity of care and the translation of this complexity to the development of our personal relationships warrant attention in citizenship discourse.

Ultimately, a family-based lens broadens and enriches our understanding of Canadian citizenship. It highlights how the conjugal family unit acts as a point of access for immigrant families; moreover, it demystifies the perceived naturalness of the conjugal family unit, examining how this particular type of family is used to further political agendas. Additionally, it opens up avenues for discussions concerning the substance of citizenship,
particularly the ways in which the so-called neutrality of citizenship impacts identity formation. In doing so, the Canadian Conversation becomes more robust, accounting for the reality that the provision of citizenship is not solely dependent on the individual. Not only does a family-based lens therefore theoretically enhance our understanding of citizenship, it also provides a starting point for navigating the lived experiences of families both inside and outside Canadian borders.
Bibliography


Cases Cited

Aujla v. Canada (Citizenship and Immigration) (2008), TA7-03154.
Begum v. Canada (Citizenship and Immigration), MA8-00393.
Brobbey v. Canada (Citizenship and Immigration), TA4-01703.
Chen v. Canada (Citizenship and Immigration) (2010), TA6-14852.
Christopher v. Canada (Minister of Citizenship and Immigration) (2008) FC 964.
Huayra v. Canada (Citizenship and Immigration) (2010), MA8-16540.
Hung v. Canada (Citizenship and Immigration) (2009), TA7-09697.
Mansro v. Canada (Citizenship and Immigration) (2008), VA6-01540.
Rathod v. Canada (Citizenship and Immigration) (2008), TA7-02205.
Rodriguez v. Canada (Minister of Citizenship and Immigration) (2001) 22124 FC.
Tadessa v. Canada (Citizenship and Immigration) (2009), TA7-12352.
Towne Cinema Theatres Ltd. v. the Queen (1985) 1 S.C.R. 494.

**Interviews**

A – Interview with former President of the Law Commission of Canada, Ottawa, ON, October 8, 2010

B – Interview with legal consultant to Law Commission of Canada, Toronto, ON, October 22, 2010

C – Interview with former immigration officer, Citizenship and Immigration Canada, Ottawa, ON, November 24, 2010

D – Interview with former policy analyst, Citizenship and Immigration Canada, Ottawa, ON, February 10, 2011

E – Interview with common-law, opposite-sex couple, Ottawa, ON, January 23, 2011

F – Interview with common-law, opposite-sex couple, Kingston, ON, January 22, 2011

G – Interview with common-law, opposite-sex couple, Toronto, ON, November 18, 2010

H – Interview with common-law, same-sex couple, Toronto, ON, March 14, 2011

I – Interview with common-law, same-sex couple, Toronto, ON, March 16, 2011

J – Interview with common-law, opposite-sex couple, Ottawa, ON, January 21, 2011

K – Interview with common-law, opposite-sex couple, Ottawa, ON, January 21, 2011

L – Interview with common-law, opposite-sex couple, Ottawa, ON, January 22, 2011

M – Interview with common-law, opposite-sex couple, Ottawa, ON, January 22, 2011

N – Interview with married, opposite-sex couple, Kingston, ON, September 22, 2011

O – Interview with married, opposite-sex couple, Mississauga, ON, March 4, 2011

P – Interview with married, opposite-sex couple, Toronto, ON, November 18, 2010

Q – Interview with married, opposite-sex couple, Mississauga, ON, March 21, 2011
R – Interview with married, opposite-sex couple, Toronto, ON, December 16, 2010

S – Interview with married, same-sex couple, Toronto, ON, March 4, 2011

T – Interview with married, same-sex couple, Toronto, ON, March 3, 2011

U – Interview with married, same-sex couple, Toronto, ON, March 4, 2011

V – Interview with former member of EGALE, Kingston, ON, March 2, 2011

W – Interview with former policy analyst, Citizenship and Immigration Canada, Ottawa, ON, February 11, 2011

X – Interview with policy analyst, Citizenship and Immigration and Canada, November 26, 2010

Y – Interview with immigration officer, Citizenship and Immigration Canada, December 4, 2010

Z – Interview with former immigration officer, Citizenship and Immigration Canada, December 4, 2010

AA – Interview with immigration officer, Citizenship and Immigration Canada, Ottawa, ON, February 11, 2011

BB – Interview with immigration lawyer/former IRB member, Ottawa, ON, February 12, 2011

CC – Interview with immigration lawyer/former IRB member, Toronto, ON, November 17, 2010
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GREB Romeo #: 6003243  
Title: “GPIST-062-10 - Defining Family: A Study of the Canadian Family Class Immigration Program”

Dear Ms. Gaucher:

The General Research Ethics Board (GREB) has reviewed and approved your request for renewal of ethics clearance for the above-named study. This renewal is valid for one year from June 22, 2012. Prior to the next renewal date you will be sent a reminder memo and the link to ROMEO to renew for another year.

You are reminded of your obligation to advise the GREB of any adverse event(s) that occur during this one year period. An adverse event includes, but is not limited to, a complaint, a change or unexpected event that alters the level of risk for the researcher or participants or situation that requires a substantial change in approach to a participant(s). You are also advised that all adverse events must be reported to the GREB within 48 hours. Report to GREB through either ROMEO Event Report or Adverse Event Report Form at http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html.

You are also reminded that all changes that might affect human participants must be cleared by the GREB. For example you must report changes in study procedures or implementations of new aspects into the study procedures. Your request for protocol changes will be forwarded to the appropriate GREB reviewers and/or the GREB Chair. Please report changes to GREB through either ROMEO Event Reports or the Ethics Change Form at http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html.

On behalf of the General Research Ethics Board, I wish you continued success in your research.

Yours sincerely,

[Signature]

Joan Stevenson, Ph.D.  
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General Research Ethics Board

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Dr. Andrew Lister, Chair, Unit REB  
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