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Implications of the Pilot Project on R117(9)d

Regardless of the outcome of the Federal elections, we will most likely see further changes to Canada's immigration policies in the months and years ahead. Among others, we hope that these changes will include further reforms that will facilitate family reunification and remove unjust laws such as section 117(9)d of the Immigration and Refugee Protection Regulations.

For those who do not already know what section 117(9)d of the IRPA Regulations is all about, this law provides that if a person failed to declare an immediate family member or qualified dependent in their own permanent residence application, the undeclared family member can never be sponsored for permanent residence under the family class by the non-declarant.

Many prospective sponsors have been shocked to learn of the harsh impact of section 117(9)d, especially if the non-disclosure was inadvertent or was based on erroneous advice. Since this provision had resulted in countless families being unable to reunite in Canada, there had long been a clamor for the repeal of section 117(9)d.

Instead of repealing the controversial provision however, the government launched a two-year pilot project that began on 9 September 2019 (and will end on 9 September 2021), which will exempt two classes of immigrants from this law hence will be allowed to sponsor their previously undeclared dependents. These two exempt classes are those who became permanent residents as refugees/protected persons and as sponsored family members.

Therefore, the pilot project still excludes the undeclared family members of those who became permanent residents under the economic classes, which traditionally comprise the majority of Canada's annual immigration intake.

Moreover, the pilot project announcement itself warns that, "As with all public policies, this public policy may be cancelled at any time." So despite the fact that the pilot project was meant to be in effect for two years, this may even be shortened if the policy is cancelled prior to the expiry of the two-year period on 9 September 2021.

While the pilot project did not go far enough to include all classes of permanent residents, it is a significant first step that will hopefully lead to a more encompassing repeal of section 117(9)d and other similarly harsh provisions in the IRPA and its Regulations.

For now, what are the possible remedies for those who are caught by R117(9)d but who were not granted an exemption under this pilot project?

The most obvious remedy is for the undeclared family members to apply for permanent residence independently (if they qualify) instead of being sponsored under the family class. Alternatively, they can initially try the temporary residence routes either as a temporary foreign worker or international student before eventually applying for permanent residence under one of the economic classes once they meet the relevant qualifications.

If all else fails, there is also the option of requesting an exemption from R117(9)d on humanitarian and compassionate (H&C) grounds. Although this is a highly-discretionary remedy, it may be worth pursuing if there are strong enough H&C factors that may justify the grant of an exemption.

However, before pursuing any of these alternative routes of applying for temporary or permanent residency, the parties must also be made aware of the possible risks involved.

That is, the permanent resident family member who failed to disclose a qualified dependent in their own permanent residence application may still be charged with misrepresentation and eventually removed from Canada if found guilty of this particularly serious offence in Canada's immigration law.

Fortunately, all permanent residents have a right of appeal and in most cases, are entitled to invoke H&C factors in requesting special relief from the harsh consequences of being issued a removal order. Due to its highly discretionary nature, an H&C request can become rather arbitrary as the final decision may vary from one decision-maker to another. These decision makers are board members of the Immigration Appeal Division of the Immigration and Refugee Board who can differ widely in their views and interpretation of their H&C discretion.

Hence, due to the limited reach of the recent pilot project that seeks to exempt sponsors from the harsh impact of R117(9)d, it is extremely important that affected sponsors and their family members are able to obtain accurate and competent legal advice before pursuing any further action. Otherwise, they may be risking not just permanent separation from close family members, but also the possible loss of permanent resident status for the sponsoring family member.

If the government leadership and ensuing political climate shifts after this election season, then we can expect further significant changes in this highly volatile field of immigration law and policy.

This article is meant for information purposes only and not as specific legal advice. Each case is unique and is best discussed in detail with a qualified, experienced and trusted immigration legal professional to increase the chances of success.

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