



Excluded Family Members: Brief on R. 117(9)(d)

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1. Overview

The CCR welcomes the new government's commitment to make family reunification one of Canada's core immigration priorities.¹ This commitment reflects Canada's history as a humanitarian country and is enshrined today in the objectives of the *Immigration and Refugee Protection Act (IRPA)*.²

Despite this, a significant barrier to this commitment is found in Canada's own legislation. Section 117(9)(d) of the *Immigration and Refugee Protection Regulations* imposes a lifelong sponsorship ban on family members who were not examined at the time of the sponsor's immigration to Canada. Although R.117(9)(d) affects all categories of immigrants, it has a disproportionately negative effect on refugees and vulnerable migrants who fail to disclose a family member. Their reasons for doing so include fear of endangering the family member, gender-based oppression, lack of information, and unexpected life events. The regime set out in R.117(9)(d) is overbroad, excessive, and inflicts devastating harm on vulnerable people, especially children.

For those who had legitimate reasons for not disclosing a family member, the only remedy possible is to request an exemption from R.117(9)(d) on humanitarian and compassionate grounds. However, this process is expensive, lengthy, and inconsistent – very often putting it beyond the reach of the Regulation's most vulnerable victims.

The CCR believes R.117(9)(d) violates Canada's international human rights commitments and recommends its elimination as a simple and effective way to address the problems it has created.³

2. Background

Regulation 117(9)(d) was introduced in 2002 to combat fraud and misrepresentation based on the presumption that non-disclosure is motivated by the deliberate intention to deceive.⁴ As a means of deterring "fraudulent abuse", it imposes a permanent ban on Family Class sponsorships of family members who were not examined at the time of the sponsor's immigration to Canada. As the only regulation in the immigration regime that imposes a lifetime ban against family reunification, R.117(9)(d) is unnecessary and excessive in light of the other proven means available to protect the system's integrity, such as the misrepresentation provisions.⁵

¹ www.liberal.ca/realchange/a-new-plan-for-canadian-immigration-and-economic-opportunity/?shownew=1

² *IRPA*, s.3(1)(d), s.3(1)(e), s.3(2)(f)

³ The CCR has raising concerns about the impacts of R.117(9)(d) for many years. In 2008 the CCR published, "Families Never to be United: Excluded family members", a backgrounder and series of case profiles, ccrweb.ca/en/families-never-be-united-excluded-family-members-profiles

⁴ In the context of amendments introduced in 2004, the Regulatory Impact Analysis Statement stated the following with regards to subsection 117(9)(d):

"Under IRPA all family members of an applicant must be examined, whether they are accompanying or not. Paragraph 117(9)(d) is a necessary component of this requirement in order to *prevent fraudulent abuse*." [Emphasis added] Regulatory Impact Analysis Statement (2002) Canada Gazette II, Vol 138, No 16 at 1100.

⁵ *IRPA*, s. 40 and s.126.

R.117(9)(d) imposes a lifetime ban on family reunification without considering the underlying reasons for non-disclosure. It acts as a strict liability regime because it applies whether or not the person was at fault or negligent. This stands in stark contrast to the immigration scheme's primary objective of "see[ing] that families are reunited in Canada."⁶

Of particular concern is the fact that the ban also applies to children. In most cases, children affected had no input as to whether or not they were disclosed on the application. They are in no way at fault, and yet they suffer the consequences of being rendered inadmissible. In fact, children suffer the worst harms as a result of the Regulation: they are separated from family members at an age when being with family is crucial, and in many cases they are left behind in situations where they are exposed to abuse and neglect.

This is contrary to Canada's obligations under the *Convention on the Rights of the Child*. Article 3 of that *Convention* requires that children's best interests be considered in all matters affecting them, while Article 10 guarantees the right to family reunification and to maintain direct contact with both parents on a regular basis.

Depriving refugees and immigrants of family unity also undermines the *Immigration and Refugee Protection Act's* objectives of promoting the successful integration of permanent residents and the self-sufficiency and social and economic well-being of refugees.⁷

Many of the families affected by R. 117(9)(d) have no viable option for family reunification outside of Canada. Refugees cannot return to the country of origin because this would mean returning to the country of persecution, nor do they have a right of residence in the third country from which they were resettled to Canada. Even for immigrants, returning to the home country is often not a sensible option. For example, it may mean telling a person, who was brought to Canada to fill gaps in the labour market, to leave Canada if they want to live with family members left behind. Not only is this harsh, it makes no economic sense.

3. Reasons for non-disclosure

Non-disclosure is often rooted in good faith, miscommunication, or a power imbalance, especially in terms of gender. In a study of 105 cases, 92% of challenges to sponsorship refusals under R.117(9)(d) involved cases with no fraudulent intent.⁸ Unlike most other provisions relating to failures to comply with immigration provisions, R.117(9)(d) is rigidly applied to all cases without any discretion to consider the legitimate and often heartbreaking reasons why applicants do not declare a family member. This presumption of fraud disproportionately affects the already vulnerable, such as children, refugees, and women in unequal relationships.

⁶ *IRPA*, s.3(1)(d)

⁷ *IRPA*, s.3(1)(e), s.3(2)(f)

⁸ Vivian Pitchik, a 2015 summer law student at Neighbourhood Legal Services in Toronto, undertook this research, looking for trends among 105 reported cases from the Federal Court and from the Immigration Appeal Division.

“With this rule, the government catches the good people along with the bad people.”

Nur, a Somali refugee left behind with her three children in Ethiopia

Some examples of reasons why family members are not disclosed include the following situations.⁹

A. Gender-based oppression prevents some women from declaring a marriage or baby

A.1 The shame of having a child born out of wedlock

- Sokha declared only two of her three children because her first child was born out of wedlock. In Cambodian culture, there is significant shame associated with illegitimacy.
- Parisa was raised by her brother in the Democratic Republic of Congo and got pregnant at 19 years of age. To hide the fact that she was an unwed mother, her son was taken from her to be raised by an aunt. Soon after, soldiers killed Parisa’s brother and his wife and raped her at the scene. She fled to Canada and claimed refugee status. She never disclosed her baby to either the government or her lawyer due to the stigma of having a child born out of wedlock and the continuing effects of her trauma.
- When Ziba arrived at the Canadian embassy to add her child to her file, the interpreter there refused to translate her request to speak to a visa officer. The interpreter was a man from her culture and Ziba was afraid that news of her pregnancy would spread. Given the stigma of being pregnant out of wedlock, Ziba did not want to elaborate on why she wanted to speak to the visa officer and her child was never disclosed to Canadian authorities.

A.2 Pressure from the husband to not reveal a child born out of another relationship

- At age 13, Niyat, an Eritrean, was abducted in Ethiopia where she was living, raped, and forced to marry the rapist. She had two daughters when she was 14 and 15 years old and tried many times to escape with both children. Fearing that her “husband” would kill her, she finally fled by herself when she was 19 years old. She crossed into Kenya, where she met and married another man. She came to Canada as his spouse when he was privately sponsored. He did not allow her to disclose her daughters, saying his family would reject her if they knew she had children. She had no other choice because staying alone in Kenya or returning to Ethiopia or Eritrea were not viable options.
- Halima’s husband was a Convention refugee in Canada who waited seven years for the Nairobi visa office to process his wife Halima and their daughter. During that long and difficult period of family separation, Halima had a brief affair out of loneliness and conceived a child. Her husband told her to leave the baby behind and get to Canada quickly for the sake of their own daughter, since they had already waited so long.

⁹ Fictitious names are used throughout in order to protect individuals’ privacy.

B. The applicants were in danger and needed to leave as soon as possible for their safety, especially in light of the long processing times by Canadian visa offices

- Fadia and her family were at risk from militants who kidnapped women and girls for sexual slavery. They had been asking about her, making her feel targeted and unsafe, particularly as a single mother with a daughter. For her daughter's safety, Fadia pretended that her baby was her mother's and fled to Canada. She left her daughter with her parents, believing she would be able to sponsor her later. Fearing her daughter would be at risk if anyone knew that she was the real mother and not trusting anyone, Fadia did not disclose her daughter's existence in her refugee claim or permanent residence application in Canada.
- Malak is a Somali Convention refugee who fled to Saudi Arabia, where she married and had five daughters. She and her husband then divorced over a disagreement about where to live. Malak took all five daughters to Syria, where they were accepted to come to Canada as refugees, while her former husband returned to Somalia to look after his mother. However, he later went to Syria after elders convinced the family to get back together. By that time, the situation in Syria was rapidly deteriorating and they decided that, for their daughters' safety, they could not risk amending Malak's Canadian immigration application which would further delay processing. Instead, they decided she would sponsor him after she arrived in Canada. She declared him immediately on arrival at the Canadian border but the relationship is still caught by R. 117(9)(d).

C. Declaring the child would expose the family to political persecution

- A Chinese couple was afraid the Chinese government would find out they had contravened the one-child policy if the child was declared in their own application. The immigration consultant further assured them that they did not have to declare their second child in order to sponsor her later.

D. The applicant was unaware that the dependent existed or was alive at the time of application

- Karim believed that his son had been killed in a genocide and did not declare him when he applied for permanent residence. It was only after he arrived in Canada that his son was located by the International Committee of the Red Cross.
- Following the dissolution of her first marriage, Mouna's husband took their son, as was his customary right. During the ensuing war in Burundi, she heard that her son and ex-husband had both been killed. She came to Canada as a refugee with the four children from her second marriage. Only then did she find out that her son was still alive.
- Murad fled the unrest in Eritrea to Sudan and then to Italy, where he had an affair with a young woman from his home area. The young woman was pregnant when she returned to Eritrea but Murad did not learn of this until after he was resettled to Canada.

E. Misinformation led to non-disclosure

- While waiting for his application to be processed, Basil married and had a child. He understood that after his interview he should not contact the Embassy about his file because it would prolong the process. Thinking that he was following the advice of the Canadian Embassy, his wife and child were not disclosed.

4. H&C: the flawed remedy for R.117(9)(d)

The only “remedy” to R.117(9)(d) is an exemption based on humanitarian and compassionate (H&C) considerations under section 25 of the *Immigration and Refugee Protection Act*. The applicant has the burden of convincing the visa officer making the decision that the failure to disclose the family member is outweighed by humanitarian and compassionate considerations thus giving rise to this discretionary remedy.

This approach does not overcome the harsh effects of R.117(9)(d). R.117(9)(d) continues to act as an obstacle and communicates that the sponsor has done something “bad” that can only be forgiven by visa officers exercising discretion on compassionate grounds.

H&C decisions

The decisions made by visa officers are too often of poor quality. For example, officers have a legal obligation to consider the best interests of the child but this is often not done in a meaningful way, if at all. The following are some examples of H&C decisions made by visa officers:

- Huang, a divorced father, sponsored his daughter but not his son because he did not have custody of him at the time. He later gained custody of his son due to the mother’s economic difficulties. In refusing the sponsorship application, the visa officer provided no reasons why the H&C considerations were rejected, did not refer to the best interests of the child, and did not consider all of the evidence submitted.
- It took Anwar multiple sponsorship applications and a judicial review, spread over 8 years, to bring his previously undisclosed wife and children to Canada. Having fled Somalia as refugees, Anwar’s family was living without legal status in the slums of Addis Ababa. Anwar’s mental health deteriorated as a direct result of the stress of trying to reunite with his family and his worry for their well-being. Anwar had a large extended family willing to provide emotional and practical support to his wife and children after they arrived in Canada. Conversely, in Addis Ababa his children had no access to schooling or medical care and his wife was sick. In considering H&C factors, a visa officer concluded that it was not in the best interests of the children to reunite with a father who had been diagnosed with a mental health disorder. Rather, according to the visa officer, it would be better for the children to remain, without legal status, in the slums in Addis because they were familiar with that environment.
- When Wenbin and his family immigrated to Canada, he did not disclose his second child out of fear that the Chinese authorities would see his application and impose severe sanctions once they discovered that he had violated the one-child policy. After coming to Canada, Wenbin managed to raise the money to pay the \$15,000 fine to legally register his son in China, a necessary step in order to sponsor him to Canada. The H&C application highlighted that the boy was living with aging grandparents who were in poor health, with no prospect of long-term care. Nevertheless the visa officer rejected the application, saying that any hardship suffered was a direct result of Wenbin’s omission in his application for permanent residence. On judicial review, the Federal Court found that the officer’s best interest of the child analysis was “no more

than a generalized statement of the law” and that the officer “could only have reached the conclusions he did by ignoring the evidence in this case and being wilfully blind to the facts before him that support this H&C application.”¹⁰

Applicants whose request for an H&C exemption is refused do not have appeal rights like other Family Class sponsors. The Immigration Appeal Division does not have jurisdiction to consider the case because the excluded family member is not a member of the Family Class. The only recourse is to apply to the Federal Court for judicial review. However, the Federal Court does not offer an appeal on the merits and can only overturn a decision it finds to have been unreasonable, or to have contained an error of law. Moreover, under administrative law principles, courts usually grant generous deference to the officer’s decisions, even though the officer is often not a lawyer or an expert.

A discretionary remedy for painful family separation is not only arbitrary and insufficient, but it is also expensive and separates families for long periods of time.

H&C is an expensive remedy because it is a complicated process that generally requires hiring a lawyer. R.117(9)(d) disproportionately affects low-income people who cannot afford expert help for the initial H&C application, much less for the judicial review in Federal Court if the application is refused. A minority are fortunate to get help from legal aid clinics. In many parts of Canada, this option is unavailable and applicants are forced to do the complicated sponsorship applications on their own or with help from people with no legal training, significantly decreasing their chances of success.

“I have been working with resettled refugees for over 8 years, and I probably see about 5–6 cases a year. These are always heartbreaking cases. It is continually so difficult to tell people that there is nothing to be done if the family member was not declared. With no legal aid in Nova Scotia for refugees and immigrants, there are few resources to help these families as they cannot afford to hire a private lawyer.”

– Marie Kettle, Private Refugee Sponsorship Coordinator,
The Anglican Diocese of Nova Scotia and PEI

The process of applying for an H&C exemption usually takes years. It takes even longer for those who do not know about the H&C remedy or how to ask for it: they often waste months or years before learning that they should make an H&C request. Some send in H&C applications without a lawyer or other expert to help them and the request is refused because the submissions are not sufficiently detailed. In other cases, the application is refused due to questionable decision-making by the visa officer. In these cases, the process to reapply or to pursue judicial review separates families even longer, causing irreparable harm. For example:

- Inas was told for years that if she attempted to sponsor her non-disclosed son, she would be sent back to her war-torn country for misrepresentation. She therefore waited until she was a citizen to sponsor him, at

¹⁰ *Lu v MCI*, 2016 FC 175.

which point her son was 9 years old. She did the application by herself because she could not afford a lawyer and did not know she had to request an H&C exemption. After 4 years of waiting, the application was refused on the basis of R.117(9)(d). The visa officer did not consider any of the H&C factors or the best interests of the child. The visa office advised her to appeal to the Immigration Appeal Division (IAD) and she waited a year for that hearing, only to be told that the IAD had no jurisdiction to hear her case. They told her that she should apply again and include arguments for H&C considerations.

The following demonstrates how long some families were separated as a result of R.117(9)(d):

Applicant	Years separated	Additional notes
Halima	1+	A newborn child was separated from her mother.
Nadia	5	Nadia landed in Canada in 2001. Her daughter, Ruba, arrived 5 years later, in mid-2006.
Fatima	6	Fatima's child was conceived from rape and left behind in the Democratic Republic of Congo.
Hani	7	When Hani arrived in Canada in 2009, she was told that she could not make an application under the one-year window because she did not declare her son. It took almost 7 years for her to reunite with her son in Canada.
Anwar	8	Anwar applied to sponsor his family soon after he arrived in Canada. His application was refused twice. After judicial review of the second refusal, it was sent back for redetermination.
Fadia	11	Fadia waited until she was a citizen before initiating the sponsorship proceedings for her daughter because she was told by many different sources that disclosing a non-declared child would make her lose her status in Canada.
Inas	11	Inas also waited until she was a citizen before making a sponsorship application because she believed that disclosing her son could jeopardize her status in Canada. She did the sponsorship application by herself and did not know to use H&C terminology. She was also misled into wasting time appealing before the Immigration Appeal Division.

5. Impact of separation

A. Impact on children left behind

R.117(9)(d) disproportionately affects the children left behind. In the case of refugee families, the children often remain in the same precarious and dangerous situations that forced their parents to seek protection. The CCR has learned, through an *Access to Information Request*, that 55% of the approximately 1,150 sponsorships refused between 2010 and 2014 due to R.117(9)(d) were applications to sponsor children.

The family in the home country often cannot support another child. Some of these children are passed from one caregiver to another. In other cases, children of refugees are in a third country where they have no status or only insecure status. The lack of stable parental and familial support has a permanent effect on a child's emotional and mental development. The effects of R.117(9)(d) and the presumption of deception is ultimately paid for by the innocent children left behind.

- Niyat fled to Canada following an abusive relationship but was unable to bring her children. The children continued to be emotionally abused by their father, were not allowed to go to school, and were passed around between different family members. After their first sponsorship application was refused, the youngest daughter tried to get to Europe on her own but was kidnapped in Libya. The mother and sister have had no contact with her in two years and she is presumed dead.
- Following a negative H&C determination, Hani's son faced constant discrimination as a Somali teenager in Kenya. The situation deteriorated in the aftermath of the Westgate Mall shooting and he was rounded up and kept in a stadium for three days by Kenyan authorities, watching others get beaten and deprived of food and water. He also faced the constant threat from Al-Shabaab, the Islamic extremist group that was steadily gaining control over the region.
- When Ruba was returned to her mother's custody at 5 years old, Nadia immediately began the sponsorship process based on H&C grounds with the help of a legal aid lawyer. During the three years it took to make the discretionary decision, Ruba became depressed and sick. At 7 years of age, she weighed only 8kg. Ruba continues to resent her mother, falsely believing that her mother would have tried harder to sponsor her to Canada had she been a boy. Today, more than 10 years later, Nadia is still unable to get her daughter to fully open up and trust her.
- When Mouna and Eric divorced, Eric had custody of their son Alain. War in Burundi broke out soon after and Mouna and her new husband fled to Tanzania, where she heard that both Eric and Alain were dead. In reality, only Eric had been killed. Mouna did not declare Alain in her immigration forms, learning that he was alive only after she had resettled as a refugee in Canada. The sponsorship process was unduly lengthened due to R.117(9)(d) and during that time Alain was severely mistreated by a family member. Mouna and Alain are now reunited and trying to rebuild a relationship but they can never get those lost years back. He continues to be angry that he was left behind for so long.
- Fadia was repeatedly told that the Canadian government would deport her for misrepresentation if it learned that she had excluded her daughter, Rana, in her application for permanent residence. As a result, she began sponsorship proceedings only after she became a Canadian citizen. With the help of a lawyer, Fadia and Rana were finally reunited. However, the 11 years of separation caused by R.117(9)(d) has permanently

damaged this family. Rana continues to suffer from medical and psychiatric conditions directly related to the long separation and still feels abandoned and unloved.

“If you have children, you would understand. Children never leave your heart, even when they are older and have moved out. But especially when they are young, the child and the parent need each other. Separating a child from her parents is one of the worst punishments imaginable for both parties, and this is what R.117(9)(d) did to us. It caused so much damage for our family and we don’t know how long it will stay in our lives. Ruba was separated from us for three years and now, ten years later, I know that she still does not fully see or trust me as a mother.”

- Nadia, a refugee who came with her son but left her daughter behind in Afghanistan

B. Impact on the parents and families in Canada

When sponsors first come to Canada, they are frantic to bring the rest of the family. At the cost of their own physical and mental health, sponsors struggle with the effect of separation, the stress of the immigration process, and the effort of supporting the family on their own. In several cases, parents have been suicidal. Some examples include the following:

- Hazele did not disclose Miguel on her application for permanent residence because she was unaware that city hall had mistakenly registered their “agreement of commitment” as a marriage. While they did marry later and had a child, the request for an exemption from R. 117(9)(d) was refused twice, even though the immigration officer recognized that the 2003 ceremony was *inadvertently* registered as a marriage. Throughout the long years of separation, Hazele and Miguel worked hard to maintain their relationship and to parent their daughter, Lucia, despite the distance. Lucia spent time both in Canada and abroad. As a result of the long years of separation, Hazele suffered from suicidal thoughts. After eight long years, with the Federal Court twice granting their applications for judicial review, the family has finally been able to be reunited in Canada. However, the impact on their family has been immeasurable. In addition to litigation expenses of over \$10,000, the separation took a significant toll on the emotional well-being of each member of the family and cost nearly a decade of their lives as a family.
- Anika fled to Canada as a refugee, leaving her two children in the care of her mother. After she was accepted as a refugee, she learned that her older son, born during her first marriage, was an Excluded Family Member: he had not been disclosed due to poor legal advice. Anika turned in deepening distress to numerous individuals and agencies seeking help. No one explained to her how she could reunite with her older son. Finally, in despair, she called a suicide support line and was at last referred to an organization that helped her make an H&C application on behalf of her son.
- Malak’s husband, Jamil, is a Somali refugee stranded in Damascus. In Canada, Malak is a single mother struggling to keep her family of five daughters afloat, all of whom are deeply affected by the uncertainty of Jamil’s safety. To stay off social assistance and remain eligible as a sponsor, she has worked 8-hour night shifts as a cleaner while returning home to take care of her daughters during the day. As a result of the stress, uncertainty, and the lack of sleep, Malak is losing weight, has trouble sleeping, and suffers from

headaches and dizzy spells. A stranger stopped Malak from jumping off a bridge and she continues to be on suicide watch. Malak is now on disability benefits.

“Mothers and fathers do not adapt well in Canada when their families are separated. It causes mental health problems that can make it difficult for them to work and integrate successfully into Canadian society. Bringing the rest of the family to Canada becomes a consuming preoccupation that adversely affects the children who are here.”

Rukia Warsame, Somali Family Services, Ottawa

C. Impact on the children in Canada

- Malak’s children are also suffering. Her eldest daughter is preoccupied with the fear that her father will be killed in Damascus. She would watch news clips of ISIS beheading their victims while imagining her father is next. This child has become aggressive and violent at home with the police being called on numerous occasions. She has been hospitalized twice for suicide risk. Malak’s two eldest daughters are now drinking and staying out all night, which is especially devastating for her as a practising Muslim.
- Ziba sent over one-third of her pay cheque to support her daughter and husband left behind as Iranian refugees in Pakistan. As a result of her distraction and depression, she could not adequately care for the son who came with her to Canada. This affected his emotional and social development, causing difficulties at school.
- Nadia’s daughter’s caregivers in Afghanistan would make monetary demands that far exceeded her daughter’s needs. Having no choice but to pay, Nadia was working 16-17 hour days. This meant that her son, Hussein, was left largely in the care of her neighbours from the ages of 5 to 8. When her daughter arrived in Canada, Nadia immediately started working less in order to spend more time with her two children. However, she remains unable to undo the harm that Hussein felt during those years when she was so preoccupied. They currently have a tense relationship and he has dropped out of university even though he was always a good student. Medical professionals remain unable to pinpoint an exact diagnosis.

6. Do we need R.117(9)(d)?

R.117(9)(d) is not necessary because s.40 and s.126 of the *Immigration and Refugee Protection Act* have already proven themselves effective in addressing misrepresentation. Following a finding of misrepresentation under s.40(1), a person is inadmissible for a period of 5 years. If the misrepresentation was motivated by an intention to deceive, s.126 provides for fines of up to \$100,000 and imprisonment of up to 5 years.

S.40 and R.117(9)(d) both address unintentional misrepresentation and their differences highlight the latter’s inflexibility, harshness and disproportionality.

1) *The defense of materiality*: The sanctions under s.40 can only be invoked if the officer would have made a different decision had she or he been fully aware of the facts (i.e. the misrepresentation had a material effect on the decision). For example, if an applicant fails to disclose an inadmissible family member, the non-disclosure may or may not be material (i.e. affect whether the applicant is also inadmissible).¹¹ Once a finding of non-disclosure is made, s.40(1) allows applicants to demonstrate that it would not have led the officer to a different decision.

On the other hand, R.117(9)(d) is applied automatically and indiscriminately if a family member was not disclosed in the sponsor's immigration forms. There is no opportunity to demonstrate that the omission would not have had a material impact on the officer's decision. The lack of a recourse under R.117(9)(d) is especially troubling because in many cases, the misrepresentation was unintentional.

In addition, since refugees are exempt from some of the inadmissibility grounds that apply to immigrants (notably health grounds¹²), any "misrepresentation" with respect to an undisclosed family member is less likely to be material.

Indeed, in most R. 117(9)(d) cases, there is no issue of inadmissibility of the non-disclosed family member and the non-disclosure was not at all material to the original decision to grant the sponsor permanent residence. Yet R. 117(9)(d) still applies.

2) *Consequences*: A finding of misrepresentation under s.40 results in a 5 year bar from applying for permanent resident status. On the other hand, R.117(9)(d) results in a lifetime ban to sponsor the family member. This harsh consequence paints non-disclosure as an egregious crime and is disproportionate, especially given evidence showing that it is often rooted in gendered power imbalances, mistakes or misinformation.

7. Canada's international human rights obligations

The existence of R.117(9)(d) and the lack of an effective recourse violate Canada's international human rights obligations. Having ratified the *Convention on the Rights of the Child* in December 1991, Canada must respect and promote the rights of all children.

The *Convention on the Rights of the Child* affirms the status of all children as equal holders of human rights and it includes explicit rights to protection from all forms of violence, abuse, neglect and exploitation.

Article 3 of the *Convention* requires that the best interests of the child be a primary consideration when making decisions that affect their lives. This obligation is not respected by the terms of R. 117(9)(d) nor by some of the decisions rendered by immigration officers.

Article 10 of the *Convention on the Rights of the Child* protects the right of the child to family reunification. Therefore Canada also has an obligation to take active measures in order to facilitate family reunification.

¹¹ If the person is applying as a refugee, having an inadmissible family member does not make the person inadmissible (*IRPA*, s.42(1)).

¹² *IRPA*, s.38(2).

General Comment No. 14 issued by the United Nations Committee on the Rights of the Child further elaborates on these rights, stating in paragraph 58 that,

“...it is indispensable to carry out the assessment and determination of the child’s best interests in the context of potential separation of a child from his or her parents (arts. 9, 18 and 20)”.

And in paragraph 66,

“When the child’s relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.”¹³

Yet, the use of R.117(9)(d) to prevent fraud and misrepresentation has the effect of prolonging separation of children from their parents.

Human rights exist to ensure the universal protection of fundamental human dignity. Canada’s disregard for these rights in the context of R.117(9)(d) violates human dignity by jeopardizing the well-being of all affected parties.

Minister of Immigration, Refugees and Citizenship John McCallum has announced the government’s commitments to reuniting families and to “building a strong immigration system that is grounded in compassion and economic opportunity for all.”¹⁴

R.117(9)(d), with its blanket application and harsh consequences, is inconsistent with the values of family unity and compassion.

8. Recommendation

The CCR recommends the repeal of R.117(9)(d).

¹³ www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

¹⁴ 2016–2017 Report on Plans and Priorities for the Department of Immigration, Refugees and Citizenship Canada, www.cic.gc.ca/english/resources/publications/rpp/2016-2017/

Appendix: Relevant human rights texts

The best interests of the child must be a primary consideration in all actions where children are concerned	
Source	Protected Right
<i>Convention on the Rights of the Child</i>	<p>Article 3</p> <p>1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.</p> <p>2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.</p>
The Canadian interpretation of art.3(1) of the <i>Convention on the Rights of the Child</i>	<p>The Supreme Court of Canada has “recognized that the interests and needs of children, including non-citizen children, are important factors that must be given substantial weight as they are central humanitarian and compassionate values in Canadian society.”¹⁵</p> <p>The <i>IRPA</i> also imposes a positive obligation in that its dispositions must be “construed and applied in a manner that complies with” the <i>Convention on the Rights of the Child</i>.¹⁶</p>
The United Nations Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration	<p>Paragraph 58</p> <p>The Committee recalls that it is indispensable to carry out the assessment and determination of the child’s best interests in the context of potential separation of a child from his or her parents (arts. 9, 18 and 20). It also underscores that the elements mentioned above are concrete rights and not only elements in the determination of the best interests of the child.</p>

¹⁵ *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 464 citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 67 and 70.

¹⁶ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(3)(f).

The family unit is the fundamental unit of society and the State must undertake appropriate measures to facilitate family reunification

Article	Protected Right
<i>Convention on the Rights of the Child</i>	Article 10(1) ... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
<i>Universal Declaration of Human Rights</i>	Article 16(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
	In a paper commissioned for a roundtable discussion, the UNHCR states, “Family unity is a fundamental principle of international law.” ¹⁷ Further, in referring to article 16, “[t]he right to family reunification is derived from the basic and inalienable right to found a family” and the right to family reunification affects cases where “parents and children are residing in different countries” thereby obligating states to facilitate contacts and deal with requests for the purpose of reunification in a humane and expeditious manner. The report states that such rights are only to be restricted for reasons of national security and public order. ¹⁸
<i>International Covenant on Civil and Political Rights</i>	Article 23(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
<i>International Covenant on Economic, Social and Cultural Rights</i>	Article 10 The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

¹⁷ Kate Jastram & Kathleen Newland, “9.1 – Family unity and refugee protection” in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Online: Cambridge University Press, 2003) 555 at 555.

¹⁸ *Ibid* at 578.

<p>The United Nations Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration</p>	<p>Paragraph 66 When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.</p>
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