Paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations:* Exclusion from the Family Class

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I Introduction

Under the former *Immigration Act*[2] (the "former Act") Citizenship and Immigration Canada (CIC) would on occasion discover that when a sponsor was landed they had not disclosed the family member now being sponsored as a member of the family class. When that happened, the ability of CIC to refuse the sponsorship application based on the non-disclosure was very limited. Under paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations* ("IRP Regulations")[3] made under the *Immigration and Refugee Protection Act* ("IRPA"),[4] the playing field has radically changed.

The purpose of this paper is to provide a review of the case law related to paragraph 117(9)(d) with respect to sponsorship appeals at the Immigration Appeal Division ("IAD")[5] of the Immigration and Refugee Board of Canada (the "Board"), at the Federal Court and at the Federal Court of Appeal. The paper will also provide a review of the relevant provisions of IRPA and the IRP Regulations.

The Board is Canada's largest independent administrative tribunal. Its mission is to resolve immigration and refugee cases, efficiently, fairly, and in accordance with the law.

The IAD, one of the Board's Divisions, is a court of record. It hears appeals of family class applications for permanent resident visas refused by officials of CIC, appeals from certain removal orders made against permanent residents, refugees and other protected persons, and holders of permanent resident visas; and appeals by permanent residents who have been found outside of Canada not to have fulfilled their residency obligation. The IAD also hears appeals by the Minister of Public Safety from decisions of the Immigration Division of the Board at admissibility hearings.

The IAD operates under the authority of IRPA, which came into effect on June 28, 2002; prior to that date the provisions of the former Act and the former *Immigration Regulations, 1978*[6] (the "former Regulations") applied to the IAD.

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[2] R.S.C. 1985, c. I-2
[3] SOR/2002-227 as amended
[4] S.C. 2001, c. 27
[5] Digests for most of the IAD decisions referred to in this paper can be found in *RefLex*, which is a Legal Services' publication of digests of recent immigration and refugee protection decisions of the Board. *RefLex* is available on the Board's website: www.irb-cisr.gc.ca. In addition, reasons for decision for digests contained in *RefLex* can be obtained via the Board's website within a short period after the issue of a *RefLex* edition and they are also available in the Board's documentation centres. IAD decisions can also be found on CanLII and Quicklaw.
[6] SOR/78-172

II Statutory Provisions

Paragraph 117(9)(d), and subsections 117(10), 117(11) and 117(12) read as follows:[7]

> Excluded relationships
> (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if …
>
> (*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.
>
> Exception
> (10) Subject to subsection (11), paragraph (9)(*d*) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.
>
> Application of par. (9)(*d*)
> (11) Paragraph (9)(*d*) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,
>
> (*a*) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or
> (*b*) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.
>
> Definition of "former Act"
> (12) In subsection (10), "former Act" has the same meaning as in section 187 of the Act. SOR/2004-59, s. 4; SOR/2004-167, s. 41; SOR/2005-61, s. 3.

Paragraph 117(9)(d) excludes from the family class a foreign national where the foreign national was a non-accompanying family member of the sponsor (spouse, common-law

[7] SOR/2004-59, s. 4; SOR/2004-167, s. 41; SOR/2005-61, s. 3. Paragraph 117(9)(d) was amended in 2004 (and subsections 117(10) to (12) were added) to better reflect the objectives of the provision and to clarify its application. This paper discusses these provisions as amended in 2004.

partner[8] or dependent child and dependent grandchild)[9] and was not examined when the sponsor obtained their landing as a permanent resident.

Subsection 117(10) provides an exception to the application of paragraph 117(9)(d), as paragraph 117(9)(d) will not apply to a sponsored foreign national "who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined."

However, the broad saving provision in subsection 117(10) is limited by its opening words – the provision is subject to subsection 117(11), which if applicable results in the sponsored foreign national being subject to exclusion from the family class under paragraph 117(9)(d). Subsection 117(10) applies where "the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination." It also applies where "the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined." This latter provision appears to exclude all separated spouses, whether declared or not, where the separated spouse was not examined.[10]

It is also important to be aware of the transitional provisions found at sections 352 and 355 of the IRP Regulations which covers a limited group of dependent children and common-law partners.[11]

III Background

In the six years since paragraph 117(9)(d) of the IRP Regulations was enacted, the IAD has dealt with a large number of family class sponsorship refusals based on that provision. The IAD decides most of the paragraph 117(9)(d) appeals *in chambers* using a paper process in accordance with Rule 25 of the IAD Rules.[12] There have been a considerable number of Federal Court challenges to IAD decisions involving paragraph 117(9)(d) refusals. There have also been numerous challenges to decisions of the Minister under section 25 of IRPA where humanitarian and compassionate relief from the application of paragraph 117(9)(d) was requested and denied.

As can be observed from the decisions of the Federal Court of Appeal, the Federal Court and the IAD, the application of the case law requires the IAD in most cases to dismiss paragraph 117(9)(d) appeals. Under section 25 of IRPA the Minister has humanitarian and compassionate jurisdiction where paragraph 117(9)(d) applies. The IAD does not have humanitarian and compassionate jurisdiction where paragraph 117(9)(d) applies, as

[8] As the definition of "family member" does not include a conjugal partner, paragraph 117(9)(d) does not apply where the non-examined foreign national was a conjugal partner and not a common-law partner as those terms are defined in subsections 1(1), 1(2) and 2(1) of the IRP Regulations.
[9] See the definition of "family member" in subsection 1(3) of the IRP Regulations.
[10] See for example *S.V. v. M.C.I.* (IAD TA6-16854), Mills, February 4, 2009.
[11] See for example *Lee, Michael Anthony v. M.C.I.* (IAD TA5-14700), Waters, March 17, 2008.
[12] SOR/2002-230

under section 65 of IRPA special relief is only available to an IAD appellant where the sponsored foreign national is a member of the family class. Where paragraph 117(9)(d) applies to a sponsored family member, that person is not considered a member of the appellant's family class.

IV Paragraph 117(9)(d) Case Types at the IAD

IAD panels have been faced with many types of cases that raise paragraph 117(9)(d) as a ground of refusal. These cases involve appellants who obtained their permanent resident status under a number of classes such as the family class, skilled worker class, protected person from within Canada class, refugee seeking resettlement from abroad class and the live-in caregiver program. These case types include:[13]

1) the appellant failed to declare their spouse and/or dependent children as their existence was concealed in order for the appellant to have qualified as an unmarried dependent child when the appellant obtained their own permanent residence;

2) the appellant failed to declare their spouse[14] and/or dependent child as they did not understand that they were required to disclose them as non-accompanying family members,[15] or they may have included in their application for permanent residence insufficient information identifying the non-accompanying family member;[16]

3) the appellant believed that the spouse and child had died;[17]

4) the appellant did not disclose a spouse where the marriage took place between the filing of the application for permanent residence and the appellant became a permanent resident:

- the IAD has seen a number of variations including the appellant a) knew that they were supposed to declare the spouse but concealed the existence of the spouse; b) did not know they were supposed to declare the spouse; c) declared the spouse at the visa post at the last minute but did not declare at the port-of-entry; d) declared the spouse at the port-of-entry and was allowed to land without the spouse being examined after being told the spouse could be sponsored later, or no questions being asked by the officer about the spouse; e) attempted to declare the spouse at the port-of-entry but was unable to do so

[13] The case types are drawn from the large number of paragraph 117(9)(d) appeals that have been heard by the IAD. Other than 4(d), 9 and 11 the fact situations set out will likely result in a dismissed appeal.
[14] In *Ebrahimi, Hasina v. M.C.I.* (IAD TA7-11674), MacLean, June 12, 2008, the IAD held that an appellant could not avoid the application of paragraph 117(9)(d) by remarrying his spouse, as at issue was whether the sponsored spouse had been examined when the appellant became a permanent resident.
[15] The IAD has found that the fact that the applicant was declared on the appellant's Personal Information Form when he made his refugee claim was not sufficient where the spouse was not disclosed in the application for permanent residence. *Adjei, Anthony Boachie v. M.C.I.* (IAD TA4-04817), Néron, May 27, 2004.
[16] Paragraph 117(9)(d) applied where an appellant indicated that they were separated without providing the name of the spouse. *Kaur, Jagjeet v. M.C.I.* (IAD TA5-01477), MacDonald, April 18, 2008. A different conclusion was reached in *S.V. v. M.C.I.* (IAD TA6-16854), Mills, February 4, 2009, however the result was the same due to the application of subsection 117(10).
[17] *Munganza, Bruno* v. *M.C.I.* (F.C., no. IMM-825-08), Blanchard, November 10, 2008; 2008 FC 1250.

due to language difficulties; and f) declared the spouse after obtaining permanent residence;

5) the appellant did not disclose a dependent child in scenarios similar to what is set out in #4 above including a child born between the filing of the application for permanent residence and the appellant becoming a permanent resident;

6) the "unknown child" – the male appellant did not know he had fathered a child born before he became a permanent resident, until after he became a permanent resident;

7) the appellant did not disclose children due to circumstances related to birth or relationship including a) children born out of wedlock; b) children born as a result of rape;[18]c) children from a prior relationship who were not revealed to a current spouse until after the appellant became a permanent resident;

8) the appellant disclosed the dependent child but the child was not examined at the request of the appellant;[19]

9) the appellant was the common-law partner of the applicant and became a permanent resident prior to June 28, 2002, with the common-law partner and/or dependent children not declared;[20]

10) the appellant was the common-law partner of the applicant, applied for a visa and obtained permanent residence on or after June 28, 2002, and the common-law partner and/or dependent children were not declared;[21]

11) the appellant was the conjugal partner of the applicant and did not disclose the applicant and dependent children as non-accompanying family members.[22]

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[18] *DLH v. M.C.I.* (IAD TA4-12206), Ahlfeld, October 9, 2007.

[19] At the time of her own application, the appellant told the visa officer that her sons were in the custody of her former spouse, and signed opting-out forms in respect of each son. *Li, Guo Mei v. M.C.I.* (IAD TA5-04501), MacDonald, March 20, 2008. Appeal dismissed.

[20] In this situation a common-law partner is not caught by paragraph 117(9)(d) as common-law partners could not be sponsored prior to IRPA (also see sections 352 and 355 of the IRP Regulations for transitional issues). However, dependent children who cannot be sponsored on their own as members of the family class where paragraph 117(9)(d) applies to them, can be included as dependent children of the applicant as paragraph 117(9)(d) does not apply in this situation to the common-law partner and does not apply to the non-disclosed dependent children as accompanying family members. See *Kong, Wai Keung Michael v. M.C.I.* (IAD TA6-08094), Ahlfeld, January 31, 2008). See also CIC OP 2 Processing Members of the Family Class – section 5.12 – 2006-11-14.

[21] In this situation the common-law partner and/or dependent children are caught by paragraph 117(9)(d). See *Esma Tunc v. M.C.I.* (IAD MA6-07469), Paquette, February 29, 2008. In *Gara*, the IAD dismissed an appeal where the appellant referred to her partner as a fiancée in her application for permanent residence because she feared that it would bring disgrace to her family to disclose that she had been in a common-law relationship. The appellant must look to relief from the Minister under section 25. *Gara, Mary v. M.C.I.* (IAD WA5-00086), Workun, March 30, 2006.

[22] The applicant is not excluded from the family class by paragraph 117(9)(d) as a conjugal partner is not within the definition of "family member" so paragraph 117(9)(d) does not apply to a non-disclosed

V Federal Court decisions

The Federal Court and Federal Court of Appeal has ruled has follows:

1. There is an obligation to disclose any change in family composition from the date of filing the application for permanent residence up to and including the day of becoming a permanent resident. The failure to disclose and to have the person examined will result in the application of paragraph 117(9)(d). Accordingly, paragraph 117(9)(d) applies to marriages entered into, common-law partnerships in existence and children born post-application and pre-landing.[23]

2. The Federal Court of Appeal in *De Guzman* held that paragraph 117(9)(d) was authorized by IRPA, did not violate section 7 of the Charter and taking into consideration other provisions of IRPA, particularly section 25, was not inconsistent with international human rights instruments to which Canada is a signatory.[24]

3. The Federal Court has made a number of statements that have interpreted paragraph 117(9)(d) very strictly. It is generally not relevant why the applicant was not disclosed and not examined as:

   - an applicant must be truthful as to all material facts;[25]
   - it does not matter that the non-disclosure was an innocent error;[26]
   - there is no need to look to see if there was a conscious decision not to disclose;[27]
   - the provision applies to both deliberate and innocent non-disclosure;[28]
   - deliberate non-disclosure is not a requirement for a finding under paragraph 117(9)(*d*);[29]
   - there does not need to be an intent to defraud;[30]
   - paragraph 117(9)(d) applies irrespective of fault as the integrity of the system is important;[31]

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conjugal partner. The dependent children of the conjugal partner are in the same position as in case type #9.

[23] *M.C.I. v. Fuente, Cleotilde Dela* (F.C.A., no. A-446-05), Noël, Sharlow, Malone, May 18, 2006; 2006 FCA 186.

[24] *De Guzman, Josephine Soliven v. M.C.I.* (F.C.A., no. A-558-04), Evans, Desjardins, Malone, December 20, 2005; 2005 FCA 436.

[25] *Niedziela, Andrzej v. M.C.I.* (F.C., no. IMM-3087-07), Phelan, March 28, 2008; 2008 FC 402.

[26] *Hamedi, Marzia v. M.C.I.* (F.C., no. IMM-6293-05), O'Reilly, October 2, 2006; 2006 FC 1166.

[27] *Dave, Rashmikant Bhalchandra v. M.C.I.* (F.C., no. IMM-3386-04), Layden-Stevenson, April 15, 2005; 2005 FC 510.

[28] *Chen, Hong Mei v. M.C.I.* (F.C., no. IMM-8979-04), Mosley, May 12, 2005; 2005 FC 678.

[29] *Jean-Jacques, Jean-Edouard v. M.C.I.* (F.C., no. IMM-3639-04), Shore, January 25, 2005; 2005 FC 104.

[30] *Dumornay, Jean-Bernard v. M.C.I.* (F.C., no. IMM-2596-05), Pinard, May 11, 2006; 2006 FC 541.

[31] *Yen, Hang Thi v. M.C.I.* (F.C., no. IMM-1814-05), Beaudry, September 14, 2005; 2005 FC 1236.

- while there may be section 25 relief available, paragraph 117(9)(d) was found to apply where the applicant thought that his spouse and children had died in a civil war and did not disclose them in his application for permanent residence;[32]
- paragraph 117(9)(d) was held to apply where the applicant disclosed her marriage only to the agents of the United Nations High Commission for Refugees who were responsible for informing the Canadian embassy, but sent the information to the wrong location. Also she did not disclose her marriage to CIC until two days after obtaining permanent resident status;[33]
- the Federal Court did not accept the excuse that an applicant believed he did not have to disclose his son as a family member as his ex-spouse had custody of the son at the time the applicant was applying for permanent residence.[34]

4. In *Azizi*, the Federal Court of Appeal answered in the affirmative the certified question: "Does s. 117(9)(d) of the Regulations apply to exclude Convention refugees abroad, or Convention refugees seeking resettlement, as members of the family class by virtue of their relationship to a sponsor who previously became a permanent resident and at that time failed to declare them as non-accompanying family members?"[35] Of interest, the Federal Court recently granted leave where the IAD held that paragraph 117(9)(d) applied where the appellant failed to disclose a child when he obtained landing within Canada after being found to be a refugee by the Board.[36] If the Court follows *Azizi*, the application should be dismissed.

5. In *Adjani*, the Federal Court upheld an IAD decision finding paragraph 117(9)(d) applied where the applicant was not aware he had a child at the time he obtained permanent residence. The Court also dismissed the applicant's argument that applying the regulation to him breached his section 15 Charter right to equal treatment under the law. The Court quoted from the Federal Court's decision in *De Guzman*[37] (upheld by the Federal Court of Appeal[38]) that the objective of family reunification does not override, outweigh, supersede, or trump the basic requirement that the immigration law must be respected, and administered in an orderly and fair manner.[39]

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[32] *Munganza, Bruno* v. *M.C.I.* (F.C., no. IMM-825-08), Blanchard, November 10, 2008; 2008 FC 1250.
[33] *M.C.I.* v. *Yanknga, Mfuri Unielle* (F.C., no. IMM-700-08), Tannenbaum, September 9, 2008; 2008 FC 1008.
[34] *Aranguren, Manuel Antonio Asuaje* v. *M.C.I.* (F.C., no. IMM-1476-08), Lagacé, December 2, 2008; 2008 FC 1315.
[35] *Azizi, Ahmed v. M.C.I.* (F.C.A., no. A-151-05), Linden, Rothstein, Pelletier, December 5, 2005; 2005 FCA 406.
[36] See IMM-5000-08.
[37] *De Guzman, Josephine Soliven v. M.C.I.* (F.C., no. IMM-8447-03), Kelen, September 20, 2004; 2004 FC 1276.
[38] *De Guzman, Josephine Soliven v. M.C.I.* (F.C.A., no. A-558-04), Evans, Desjardins, Malone, December 20, 2005; 2005 FCA 436.
[39] *Adjani, Joshua Taiwo v. M.C.I.* (F.C., no. IMM-2033-07), Blanchard, January 10, 2008; 2008 FC 32.

6. The *Adjani* decision can be contrasted with the prior Federal Court's decision in *Woldeselassie.*[40] In that case the Court overturned the decision of the IAD that did not correct a visa officer's error that the applicant had not included a child in the application for permanent residence who was born after the application was filed but before the applicant was landed. The IAD in a number of decisions has interpreted the decision as looking at the error made by the visa officer and not the broader question of the requirement to have an unknown child examined. For example see the IAD's decision in the *Woldeselassie* rehearing which again dismissed the appeal.[41] *In Lombos,*[42] the IAD considered both *Adjani* and *Woldeselassie* and followed *Adjani.* Recent Federal Court decisions support the *Adjani* line of reasoning.[43]

7. In *Hamedi*, the Federal Court held that the IAD did not err when it made its decision in a paragraph 117(9)(d) appeal based solely on written submissions following the IAD early review procedure.[44]

8. A child who is a dependent child due to a medical disability must be examined when the applicant is landed, because if not disclosed at the time the applicant became a permanent resident the child if subsequently sponsored as a dependent child will be caught by paragraph 117(9)(d).[45]

9. An outstanding issue for the IAD is whether paragraph 117(9)(d) applies when an appellant alleges that they informed the immigration officer at the port-of entry of a previously undisclosed family member. The Federal Court of Appeal has held that where the IAD does not find that the appellant disclosed the non-accompanying family member and dismisses the appeal, a reviewing Court should not reweigh the evidence that was before the IAD.[46] In *Linares* the Court held that where the applicant was unsuccessful in advising the officer due to language difficulties – the applicant did not speak English or French – the IAD was not in error in dismissing the appeal as the inability to speak one of the official languages and to inform the authorities of the existence of a child at the port-of-entry does not constitute an administrative error that justifies not complying with paragraph 117(9)(d).[47] In *Gearlen*, declaring a family member

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[40] *Woldeselassie, Tesfalem Mekonen v. M.C.I.* (F.C., no. IMM-3084-06), Beaudry, December 21, 2006; 2006 FC 1540.
[41] *Woldeselassie, Tesfalem Mekonen v. M.C.I.* (IAD WA5-00078), Lamont, December 31, 2007.
[42] *Lombos, Rogelio v. M.C.I.* (IAD VA7-00265), Workun, April 29, 2008.
[43] See for example *Munganza, Bruno* v. *M.C.I.* (F.C., no. IMM-825-08), Blanchard, November 10, 2008; 2008 FC 1250.
[44] *Hamedi, Marzia v. M.C.I.* (F.C., no. IMM-6293-05), O'Reilly, October 2, 2006; 2006 FC 1166. The IAD paper process was also upheld in *Xu, Gui Ying v. M.C.I.* (F. C., no. IMM-2784-05), Snider, November 21, 2005; 2005 FC 1575, *Raymond, Patricia v. M.C.I.* (F.C. no. IMM-2019-05), Shore, October 3, 2005; 2005 FC 1350 and *Munganza, Bruno* v. *M.C.I.* (F.C., no. IMM-825-08), Blanchard, November 10, 2008; 2008 FC 1250.
[45] *Huang, Tien Yu v. M.C.I.* (F.C., no. IMM-9808-04), Heneghan, September 22, 2005; 2005 FC 1302.
[46] *M.C.I. v. Abdo, Elie* (F.C.A., no. A-216-06), Evans, Létourneau, Sexton, February 13, 2007; 2007 FCA 64.
[47] *Linares, Franc Castor v. M.C.I.* (F.C., no. IMM-1896-07), Blais, November 26, 2007; 2007 FC 1241.

at an overseas embassy just before coming to Canada was found not to be sufficient to avoid the application of paragraph 117(9)(d).[48] However, the IAD has allowed paragraph 117(9)(d) appeals using subsection 117(10) where the panel was satisfied based on the evidence that the appellant disclosed the non-accompanying family member to an officer, and the officer by their action was considered to have decided not to have the family member examined.[49]

10. An issue that sometimes arises is the impact on the IAD of the Minister's policy positions in CIC/CBSA Operation Manuals. In *Linares* the Court held that the IAD did not have to take into account the published policy of the Minister, which states that an immigration officer must inform a permanent residence applicant of the consequences of not having non-accompanying dependent children examined. The Court noted that if such an obligation exists, it would not come into play until the child's existence has been declared.[50]

11. In *Jankovic*, a decision made under the former Act, the Court found there was no legal obligation for a visa officer to advise an applicant about the legal consequences of not having a family member examined.[51] In *Niedziela*, a decision under IRPA, the Court concluded that there was no breach of procedural fairness where a visa officer did not at the time of application to come to Canada ask the applicant about his son. The applicant had a general obligation to be truthful about material facts. There was no breach of procedural fairness even if the events occurred 20 years ago [52] The Court in *Yanknga* also found that visa officers were not obligated to inform an applicant for permanent residence of the serious consequences of non-disclosure given that her spouse had not been examined.[53]

12. In *Yen*, the Federal Court found that the IAD did not err in holding that pursuant to section 65 of IRPA the IAD does not have humanitarian and compassionate jurisdiction in paragraph 117(9)(d) appeals.[54] The appropriate remedy in respect of the Minister's humanitarian and compassionate decision under section 25 of IRPA is to seek judicial review of that decision as the IAD has no jurisdiction to review that decision.[55]

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[48] *Gearlen, Lesley Ann v. M.C.I.* (F.C., no. IMM-8488-04), Blanchard, June 20, 2005; 2005 FC 874.
[49] See *Khadim, Mohammad Azam v. M.C.I.* (IAD WA4-00002), Wiebe, February 23, 2005 where the appellant raised the issue of his marriage at an orientation session in Pakistan, prior to his departure from Canada, and was advised by an embassy official to deal with the issue in Canada in the sponsorship of his wife. The panel found that the officer's advice to deal with the issue in Canada was tantamount to a determination that there was no need to examine the applicant in connection with the appellant's application. See also, *Marcado, Juliana v. M.C.I.* (IAD TA4-13311), Waters, August 30, 2005.
[50] *Linares, Franc Castor v. M.C.I.* (F.C., no. IMM-1896-07), Blais, November 26, 2007; 2007 FC 1241.
[51] *Jankovic, Milos v. M.C.I.* (F.C., no. IMM-567-02), Russell, December 17, 2003, 2003 FC 1482.
[52] *Niedziela, Andrzej v. M.C.I.* (F.C., no. IMM-3087-07), Phelan, March 28, 2008; 2008 FC 402.
[53] *M.C.I.* v. *Yanknga, Mfuri Unielle* (F.C., no. IMM-700-08), Tannenbaum, September 9, 2008; 2008 FC 1008.
[54] *Yen, Hang Thi v. M.C.I.* (F.C., no. IMM-1814-05), Beaudry, September 14, 2005; 2005 FC 1236.
[55] *Huang, Tien Yu v. M.C.I.* (F.C., no. IMM-9808-04), Heneghan, September 22, 2005; 2005 FC 1302. See also *Tse, Stephen v. M.C.I.* (F.C., no. IMM-685-05), Teitelbaum, April 17, 2007; 2007 FC 393 and

13. The Federal Court has discussed the transitional provisions - sections 352 and 355 of the IRP Regulations - in the *Le*[56] and *Collier*[57] decisions.

14. In *Dan,* the Court in allowing the application for judicial review noted that the IAD in dismissing the sponsorship application based on paragraph 117(9)(d) held that the factual situation was a particularly compelling case. This finding was based on cultural differences (the appellant did not realize his relationship was considered a common-law partnership), yet the visa officer failed to adequately address this issue in the decision rejecting the section 25 application.[58]

15. There are a number of Federal Court cases where section 25 decisions of immigration officers were challenged and the issue in most of them was whether or not the officer has provided a sufficient analysis for the rejection of the section 25 application.[59] It also appears from recent Federal Court decisions that there may be a different test to be applied for a humanitarian and compassionate application to remain in Canada and for one seeking to enter Canada to be reunited with family.[60] The Federal Court of Appeal will be hearing on March 11, 2009 an appeal from a section 25 refusal related to the application of paragraph 117(9)(d) to non-declared eighteen year-old children in which the Court will be asked to answer the following certified question: "Does fairness require that an officer conducting an interview and assessment of an application by a child for landing in Canada to join her parents be under a duty to obtain further information concerning the best interests of the child if the officer believes that the evidence presented is insufficient?"[61]

VI Conclusion

As I stated at the beginning of my paper, paragraph 117(9)(d) has radically changed the playing field. Most appellants who come within the ambit of the provision have a very limited chance to reverse the decision in an appeal to the IAD. The case law is evolving on section 25 applications used to overcome a paragraph 117(9)(d) refusal. Due to the limited scope of an IAD appeal, it appears that a section 25 application may be the approach preferred by appellants' counsel in most situations.

Bistayan, Lilia v. M.C.I. (F.C., no. IMM-1076-07), Shore, February 5, 2008; 2008 FC 139 and *Munganza, Bruno* v. *M.C.I.* (F.C., no. IMM-825-08), Blanchard, November 10, 2008; 2008 FC 1250.

[56] *Le, Van Dung v. M.C.I.* (F.C., no. IMM-8951-04), Blanchard, May 2, 2005; 2005 FC 600.

[57] *Collier, Amelia v. M.C.I.* (F.C., no. IMM-8635-03), Snider, September 2, 2004; 2004 FC 1209.

[58] *Dan, Zhang v. M.C.I.* (F.C., no. IMM-2469-08), Teitelbaum, January 30, 2009; 2009 FC 103.

[59] For example see *Lao, Jeanie Lynn v. M.C.I.* (F.C., no. IMM-1538-07), Frenette, February 20, 2008; 2008 FC 219.

[60] *Glushanytsya, Artem v. M.C.I.* (F.C., no. IMM-4008-07), Lutfy, June 10, 2008; 2008 FC 725 and *Gill, Gurpreet Singh v. M.C.I. (*F.C., no. IMM-458-07), Campbell, May 15, 2008; 2008 FC 613.

[61] *Kisana, Sushil v. M.C.I.* (F.C., no. IMM-1092-07), Mosley, March 6, 2008; 2008 FC 307. See Federal Court of Appeal files A-199-08 and A-200-08.