

**Canadian Refugee Policy &
Sexual Orientation:
An Analysis of an Innovative yet
Implicit Guardian of Freedom**

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Web Reports 48

Institute of Migration

2009



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ABSTRACT:

In many countries around the world, homosexuality continues to be labeled a mental disease, penalized as a crime by the law, condemned as a sin by religious institutions, and even punishable by torture and execution by state authorities. As such, refugee claims based on sexual orientation have begun to rise in such 'Western' states as Canada that protect sexual minorities. While there is no country in the world where sexual minorities are entirely free from harassment and oppression, thousands of claims have been filed with the belief that Canada is a beacon of hope and freedom. Through a comprehensive analysis of the five stages of the policy process, this research will prove that while Canada must establish clearer, more equitable guidelines than those previously developed in the landmark case of Canada v. Ward for assessing a refugee claim based on sexual orientation, the country has upheld its signatory duty to the international community to protect asylum-seekers with a 'well-founded' fear of persecution.

CONTENTS

Introduction	3
I. Background	5
<i>Global Context</i>	5
<i>Canadian Context</i>	6
II. Methodology	7
III. Policy Analysis & Findings	8
<i>Agenda-Setting</i>	8
<i>Design</i>	10
<i>Decision-Making</i>	10
<i>Implementation</i>	12
<i>Evaluation</i>	13
A. <i>Policy Effectiveness</i>	14
B. <i>Structural Effectiveness</i>	16
Conclusion	17
References	18
Appendix	20
Appendix I – Environmental Scan	20
Appendix II – IRB Training Manual Questions	22

INTRODUCTION

Refugees are people “with an identity, a past, a history, a cultural heritage. They are people who have been forced out of their countries by political turmoil, ethnic wars, religious, social and gender persecution.”¹ Over the past decade, both the capacity and diversity of refugee claims based on the grounds of belonging to a ‘particular social group’ (PSG), as set out in the 1951 Geneva Convention Relating to the Status of Refugees (Geneva Convention), have dramatically increased in the ‘developed’ world. These social group cases have been pushing the boundaries of refugee policy in many signatory states, “raising issues such as domestic abuse, coercive family planning policies, female genital mutilation, discrimination against the disabled and homosexuality.”² Despite this increase in refugee claims relating to this ground for application, questions have been raised regarding the effectiveness of this open-ended category, most specifically relating to those claims based on sexual orientation.

In 1969 Canada ratified both the 1951 Geneva Convention and 1967 Protocol Relating to the Status of Refugees.³ Interestingly, it was not until 1976 that gay men and lesbians were allowed to even immigrate to Canada, prior to which point they were considered “members of an inadmissible class.”⁴ Two decades later, Canada was one of the first countries to interpret the UN Convention to allow refugee claims to be made based on sexual orientation, recognizing the extreme human rights violations against sexual minorities around the world.⁵

Each and every day, throughout the world, lesbian, gay, bisexual, transgendered (LGBT) and heterosexual people face harassment, discrimination, physical and sexual abuse, arbitrary arrest and detention, imprisonment, and the ultimate penalty – death – simply because of their

¹ Marie Lacroix. “Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeeness,” *Journal of Refugee Studies*. 17 (2); 2004. 147.

² Alexander Aleinikoff. “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group,’” *UNHCR’s Global Consultations on International Protection*. (2001): 264.

³ European Council on Refugees and Exiles, “Sexual Orientation as a Ground for Recognition of Refugee Status,” ELENA Research Paper. June 1997: 15.

⁴ John Fisher, Robert Hughes et al. “Gay and Lesbian Legal Issues and HIV/AIDS: Final Report,” Canadian HIV/AIDS Legal Network and Canadian AIDS Society. Montreal (1998): 129.

⁵ David Graham. “Fearless in Canada – a Beacon of Tolerance and Human Dignity,” *Toronto Star*. 25 June 2006.

Refugee Claims Based on Sexual Orientation

actual or perceived sexual orientation. It is for such basic and often horrific violations of human rights that sexual minorities seek asylum in a number of 'Western' states, who over the last two decades have begun to discretely alter their refugee policies to recognize sexual orientation as grounds for refugee-status approval.

While Canada is a signatory country to the UN Convention on Refugees it has an international obligation to provide asylum to those with a 'well-founded' fear of persecution. As such, according to the Immigration and Refugee Protection Act (IRPA), a 'Convention refugee' is defined as "a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion" and who cannot obtain the protection of his or her country of nationality or habitual residence.⁶

While this research primarily focuses on the first and final stages of the public policy process, agenda-setting and evaluation, it will also examine the remaining stages of public policy (design, decision-making and implementation) in order to provide a greater understanding of the development of what I would describe as an implicit policy. This paper will provide an exploratory, historical account of the causes behind the Government of Canada's 1993 amendment to the definition of a refugee, as stated in the IRPA, to recognize refugee claims on the grounds of sexual orientation. Through a comprehensive analysis of the five stages of the policy process, this research will prove that while Canada must establish clearer, more equitable guidelines for assessing a refugee claim based on sexual orientation, the country has upheld its signatory duty to the international community to protect asylum-seekers who face a 'well-founded' fear of persecution.

As such, Part I of this paper will provide both a global and Canadian contextual background on the issue, Part II will describe the methodology used in this study and Part III will include the policy analysis and findings of this research. Before moving forward it is important to take note of the language used within this report. Throughout this research the terms "sexual minorities," "gays," and "homosexuals" are used interchangeably and is done so in order to include lesbian, gay, bisexual, and transgendered (LGBT) people as a whole. While each group faces different forms of discrimination, whether through the public or private spheres, its roots

⁶ Immigration and Refugee Protection Act (2001, c.27) sec. 96.

lie in that fact that each of these groups challenge traditionally defined gender roles and are essentially “gender outlaws.”⁷

I. BACKGROUND

GLOBAL CONTEXT

The International Lesbian and Gay Association, which tracks intolerance around the world, recognizes that sexual relations between women is illegal in 51 nations, while sex between men is illegal in 76.⁸ While one cannot deny that clear progress has been made over the past decade in such countries as South Africa, where the government was the first to explicitly include the barring of discrimination based on sexual orientation in their Constitution (1996), the human rights situation for sexual minorities around the world remains bleak. Due to human rights abuses made in many countries around the world against these groups, claims for Convention refugee status based on sexual orientation under the PSG category “emerged at the beginning of the 1980s and still represent a small part of the total claims under ‘membership of a particular social group’ as a whole...[and are] growing exponentially”⁹ However, claims made to signatory countries of the Geneva Convention must not be confused as safe havens – only safer. According to Professor LaViolette, “[t]here is no country where a gay man or lesbian can grow up free of discrimination, persecution or repression.”¹⁰

In order to put this issue into perspective it is important to understand the extent to which opposing countries will go to victimize homosexuals. In many countries, homosexuality is labeled a mental disease, penalized as a crime by the law, condemned as a sin by religious institutions, and subjected to torture and execution by the authorities. For instance, in the mid-1990s an exiled Iranian gay-rights group, ‘Homan,’ estimated that 4,000 homosexuals had been

⁷ James D. Wilets. “Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective,” *Albany Law Review* (2006): 6.

⁸ David Graham. “Fearless in Canada – a Beacon of Tolerance and Human Dignity,” *Toronto Star*. 25 June 2006.

⁹ European Council on Refugees and Exiles, “Sexual Orientation as a Ground for Recognition of Refugee Status,” ELENA Research Paper. June 1997: 2.

¹⁰ LaViolette, Nicole. “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group.” Training Program for Immigration and Refugee Board (IRB) Members. Last updated: May 2004; 5.

Refugee Claims Based on Sexual Orientation

executed by the government since 1979.¹¹ Iran is one of a number of countries which continue to sentence homosexuals with the death penalty. According to a recent study by Stockholm's Sodertorn University, similar laws exist in such countries as Pakistan, Saudi Arabia, Sudan, the United Arab Emirates, Yemen and parts of Nigeria and Somalia.¹² It is clearly understandable from this level of abhorrent discrimination why refugee claims based on sexual orientation continue to rise in Canada.

CANADIAN CONTEXT

Canada holds an "international reputation for the fairness of its inland refugee determination system," one that is particularly true in its treatment of sexual orientation based refugee claims when compared with other countries.¹³ Canada was also one of the first countries to interpret the UN Convention to allow refugee claims to be made based on sexual orientation, recognizing the extreme human rights violations against sexual minorities around the world.¹⁴ However, this was not always the case. Prior to 1952, homosexuals were ignored by immigration policy and from 1952 to 1976, Canada's immigration policies were "blatantly homophobic and stigmatized gay men and lesbians as members of an inadmissible class."¹⁵ Immigration has always been an integral focus of Canadian policy circles as it has always been regarded as a source of 'nation-building' and has been thought to historically approach the area through a "gatekeeper mentality."¹⁶ With a growing focus on the importance of immigration on the national economy and Canada's humanitarian role, there have been continuous changes made to immigration and refugee policy since the late 1980s onwards.

For instance, according to Michael Battista, a Toronto-based immigration lawyer, once here in Canada, sexual minority claimants must now first prove that they are indeed homosexual and that they cannot return home due to a fear of persecution.¹⁷ Battista, who has spent the past

¹¹ David Graham. "Fearless in Canada – a Beacon of Tolerance and Human Dignity," *Toronto Star*. 25 June 2006.

¹² Ibid.

¹³ Robert Hughes. "Refugee Claims Based on Sexual Orientation, Gender Identity, or HIV Status. Sept. 2007; 6. Available Online: http://www.smith-hughes.com/papers/pdf_bin/refugees.pdf

¹⁴ David Graham. "Fearless in Canada – a Beacon of Tolerance and Human Dignity," *Toronto Star*. 25 June 2006.

¹⁵ John Fisher, Robert Hughes et al. "Gay and Lesbian Legal Issues and HIV/AIDS: Final Report," Canadian HIV/AIDS Legal Network and Canadian AIDS Society. Montreal (1998): 129.

¹⁶ Marie Lacroix. "Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeeness," *Journal of Refugee Studies*. 17 (2); 2004. 150.

¹⁷ Ibid.

14 years assisting these groups with their refugee claims, has seen the incline in applications over time and now leads about 40 homosexual refugee applicants through the process each year.¹⁸ It is important to note that out of a total of 40,408 refugee claims decided at the Immigration and Refugee Board (IRB) of Canada in 2004, 1,351 claims were made on the basis of sexual orientation.¹⁹ While only filling approximately 3.3 per cent of the total number of applications received in Canada (2004), the actual grant rate for sexual minority claimants exceeds the average grant rate for all refugee claims overall.²⁰ This will be discussed further in Section III, but first it is important to briefly identify the research methodology used in this analysis.

II. METHODOLOGY

The purpose of this research has been to be both exploratory and explanatory in nature and has taken the shape of a flexible research design, following the case study typology. While this examination's original research question posed a risk of being too open-ended in its approach to measuring the effectiveness of the policy, the current research will evaluate the policy's success based on the Government of Canada's ability to uphold its international obligation as a signatory country of the Geneva Convention to "not return any individual to a territory where his or her life or freedom will be threatened."²¹ This evaluation will be supported by both qualitative and quantitative data. This analysis has also used specific research tools in order to fully understand the policy process involved, a selection of which are included in the Appendix.

For instance, policy interviews were conducted through the use of a semi-structured questionnaire, with a majority of the questions being open-ended to facilitate further information exchange. The population selection of the interviewees was based on prior research of the policy network involved in immigration and refugee policy in Canada. Therefore, the selection included

¹⁸ Ibid.

¹⁹ Sean Rehaag. "Patrolling the Borders of Sexual Orientation: Bisexual refugee claims in Canada." Forthcoming – (2008) 53 *McGill Law Journal*.; 11-12.

²⁰ Ibid.

²¹ Nicole LaViolette. "The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward." *University of Toronto Faculty of Law Review*. 55(1), Winter 1997; 7.

Refugee Claims Based on Sexual Orientation

representatives from Citizenship and Immigration Canada (CIC), the IRB, immigration lawyers and academics, all of which are highlighted throughout these findings. An environmental scan (Appendix I) was also completed in order to “understand the external environment and the interconnections of its various sectors”²² as well as to appreciate Canada’s reputation revolving successful refugee claims. The employment of these research tools has provided a strong foundation for the following comprehensive analysis of the policy process involved in successfully recognizing refugee claims based on sexual orientation.

III. POLICY ANALYSIS & FINDINGS

Policy analysis can be defined as “a process of multidisciplinary inquiry designed to create, critically assess, and communicate information that is useful in understanding and improving policies.”²³ This section of research will trace each stage of the policy process involved in recognizing sexual minority refugee claims with specific focus on agenda-setting and evaluation in order to address what caused this shift as well as how it has been evaluated and whether or not it has been effective in achieving its signatory goal. It is important to note that this area of policy research is rather limited, is a growing area of research, and as such some of the findings herein will be reflective of this.

AGENDA-SETTING

The introduction of the *Canadian Charter of Rights and Freedoms* (1982) would prove to be a momentous occasion for sexual minorities across the country, as sexual minorities had gained constitutional grounds to challenge the status quo. In December 1991, the national lobby group called the Lesbian and Gay Immigration Task Force (“LEGIT”) was formed to advocate for the recognition of same-sex partner claims for immigration under the grounds of family reunification.²⁴ Soon after, individual Canadians began to file many claims before the courts, demonstrating that this concern would not disappear. Such cases helped to draw greater attention to further ‘errors’ in Canadian immigration and refugee policy.

²² Ted Glenn, “Environmental Scanning.” Humber College, PAPD 204. 30 Jan. 2008.

²³ Leslie Pal. *Beyond Policy Analysis*. 3rd Canadian Edition. Carleton University. Thomson Nelson (2006); 14.

²⁴ Nicole LaViolette. “Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act,” *McGill Law Journal*. Vol. 49 (2004): 974.

Refugee claims based on sexual orientation began to be received in Canada in the early 1990s. The IRB's first written decisions on claims based on sexual orientation began in 1991. For instance, in a 1991 case, Nicolas Acevedo was denied his request to stay in Canada because the "enumerated grounds of persecution in the Convention, including 'particular social group,' do not specifically include homosexuals."²⁵ Acevedo's claim was denounced by immigration officials on humanitarian and compassionate grounds, stating that the Convention does not extend protection to homosexuals.²⁶ A year later, the first recorded successful refugee claim based on sexual orientation was the IRB decision on a gay Argentinean man, Jorge Inaudi. In this case both panel members believed that homosexuals in Argentina formed a particular social group for the purposes of identifying refugee status and one member stated that if she accepts "that homosexuality is an immutable characteristic, that alone, in [her] opinion, suffices to place homosexuals in a particular social group."²⁷

While some Board members were beginning to recognize the idea that homosexuality was beyond the control of the individual, to support the claims of membership of a PSG, this process remained unwritten, highly subjective and ambiguous. While some felt that homosexuality should not be recognized as a ground for being granted asylum, (including IRB panel members), relying on religious and moral considerations, others including gay advocacy groups advocated for clear, written guidelines to ensure continued support of such claims. This divide can be clearly illustrated in a 1991 case involving a gay male from Uruguay. While one panel member qualified the claimant's sexual orientation as "a person's right of conscience and human dignity," the other rejected this approach on a number of grounds including the moral and historic rationale that the failure of the Universal Declaration of Human Rights to mention sexual orientation was "evidence that homosexuality should not be afforded protection as a fundamental human right."²⁸ This conflicting public stance was increasingly becoming a reoccurring issue that demanded a solution as the current procedures were not reflecting well on either CIC or the

²⁵ Nicole LaViolette. "The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward." *University of Toronto Faculty of Law Review*. 55(1), Winter 1997; 18.

²⁶ Ibid.

²⁷ Ibid, 16.

²⁸ Ibid, 17.

Refugee Claims Based on Sexual Orientation

IRB. Due to this internal predicament, inside initiation would be the optimal solution but the identification of the matter remains indistinguishable.

DESIGN

According to Leslie Pal, policy design is “about choosing the most appropriate instrument to deal with the policy problem as it has been defined in order to achieve a given policy goal.”²⁹ In the case of refugee policy, it is clear that the prime vehicle for designing the policy to the issue, as described above, would be through indirect, regulatory action. Such regulatory action was taken by the courts through a quasi-legislative instrument. Quasi-legislation can be defined as “a wide spectrum of rules whose only common factor is that they are not directly enforceable through criminal or civil proceedings.”³⁰ Pal notes that the main reasons for the use of this instrument are always the same – flexibility and lack of technicality.³¹

DECISION-MAKING

The decision-making stage of the policy process is one of the most important steps. This action of the decision-makers is the first ‘physical’ step made in the process to bring a policy into fruition. Ironically enough, the precedent-setting decision involved in shaping this implicit policy, and therefore deciding whether sexual orientation constitutes a membership in a PSG can be found in the 1993 Supreme Court of Canada decision, where the claimant was not even a homosexual, in the case of *Canada (Attorney General) v. Ward*.³² The claimant, Patrick Francis Ward, was a former member of the Irish National Liberation Army (INLA) who feared that the INLA would persecute him for assisting with the escape of an INLA hostage.³³ Ward’s claim for asylum was based on his political opinion and on his membership in a PSG. While the court found that the INLA was not a PSG within the meaning of the Convention’s definition, the ruling judge’s - Justice La Forest - interpretive approach revealed a ground-breaking standard of ‘tests’

²⁹ Leslie Pal. *Beyond Policy Analysis*. 3rd Canadian Edition. Carleton University. Thomson Nelson (2006); 138.

³⁰ *Ibid*, 155.

³¹ *Ibid*.

³² Alexander Aleinikoff. “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group,’” *UNHCR’s Global Consultations on International Protection*. (2001): 268.

³³ Krista Daley & Ninette Kelley. “Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence,” *International Journal of Refugee Law*. 12(2); 2000, 150.

which is still used by the courts, by CIC and by the IRB today. For instance, CIC's actual policy manual relating to "frequently-presented risk issues" reads as follows:

To qualify for protection, the persecution of which the applicant has a well-founded fear must occur for reason of race, religion, nationality, membership in a particular social group or political opinion. The Supreme Court of Canada in *Canada v. Ward (Minister of Employment & Immigration)* [1993] 2 S.C.R. 689, has noted that the meaning of "particular social group" should take into account the general underlying themes of human rights and anti-discrimination that form the basis for the international refugee protection initiative.

There are three possible categories:

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

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and **sexual orientation**, while the second would encompass, for example human rights activists. The third category is included more because of historical intentions, although it is relevant to the anti-discriminatory influences, in that one's past is an immutable part of the person.³⁴

Therefore, in this case the milestone decision made by Justice La Forest would set precedent for all future sexual minority refugee claims and act as the basis of refugee policy relating to claims made based on sexual orientation.

The fact that the courts 'dealt' with this problem was beneficial for political leaders because this policy remained implicit and ambiguous and did not require that they be directly involved in addressing the issue. While there is a lack of reasoning behind the specific factors which led to the courts making the decision, one can assume that by setting a precedent in refugee case law, there would be greater clarification in similar future case decisions and further clarify a more unified approach.

Furthermore, according to Millbank, this policy remains ambiguous today because of a lack of understanding of homosexuality by decision-makers. More specifically, "the decision-makers' understanding of what homosexuality is and how it is and ought to be expressed is therefore vital in the decision-making process."³⁵ This is evident in the entire process that sexual

³⁴ Jeffery Sum (Immigration Officer, CIC). E-mail correspondence re: Immigration and Refugee Policy in Canada. 3 Apr. 2008.

³⁵ Jenni Millbank. "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia," *Melbourne University Law Review*. Vol. 26 (2002): 145.

Refugee Claims Based on Sexual Orientation

minorities must endure in the processing of his/her claim. This will be discussed further in the 'Evaluation' section. In summary, it was the 1993 Supreme Court of Canada's decision by Justice La Forest in the case of *Canada v. Ward* that the most significant decision regarding this implicit policy was made, before it could be effectively implemented.

IMPLEMENTATION

Implementation, the fourth stage of the public policy process, "is about execution – the harnessing of personnel and other resources to give effect to a chosen policy."³⁶ The primary vehicles for giving effect to this refugee policy has been through both the use of the definition provided by Justice La Forest's standard of tests and the training which IRB members receive surrounding sexual orientation.

First, the full implementation of this policy comes when immigration officers and IRB members adhere to assessing claims through the definition of a PSG. A positive refugee claim regarding sexual orientation would fall under the definition of a Convention refugee, or a protected person under section 96 and 97 of the Immigration and Refugee Protection Act (IRPA). More specifically, on the relevant paperwork, the positive decision would read as follows: "*Positive: Risk to life, risk of cruel and unusual treatment or punishment – Sexual Orientation.*"³⁷ Interestingly, overseas immigration officers are given the following instructions "if the applicant has applied for protection in the signatory country and the application has been refused, and all meaningful avenues of appeal have been exhausted:"

The officer is required to assess the merits of the application for resettlement in Canada. The officer must consider:

- Has the refugee's protection needs been denied? Some states apply a narrow interpretation of the refugee definition, excluding persons who have a well-founded fear of persecution at the hands of non-state agents. Canada's interpretation of the Convention refugee definition which includes non-state persecution, gender guidelines and persecution based on sexual orientation must be kept in mind...³⁸

Therefore, another essential piece to the implementation of this policy has been in the proper training of claimant assessors. According to Stéphane Malépart, Senior Communications Advisor

³⁶ Ted Glenn, "Module Thirteen: Implementation." PAPD 204 (Class 12). 2 Apr. 2008. Humber College.

³⁷ Jeffery Sum (Immigration Officer, CIC). E-mail correspondence re: Immigration and Refugee Policy in Canada. 3 Apr. 2008.

³⁸ Ibid.

for the IRB, all “[M]embers receive proper training in order to make sure their decisions comply with the Immigration and Refugee Protection Act.”³⁹ The training manual, prepared by Professor Nicole LaViolette, begins by stating that “[a]ssessing the veracity of the claimant’s homosexuality is a very difficult, sensitive and complex task in the context of an administrative or quasi-judicial hearing.”⁴⁰ In particular, the very private and intimate nature of an individual’s sexual orientation “poses real challenges for decision-makers who are nonetheless required to engage with claimants about their personal lives and relationships.”⁴¹ This training manual is comprehensive in scope in that it covers stereotyping, the diversity of the lives of sexual minorities, difficulties faced by refugees when testifying about their sexuality, and legal issues. Another important piece to this implementation tool is the ‘model for questioning claimant’s about their sexual orientation’ (Appendix II) guide included in the IRB training manual. While these two implementation tools have been put into place, it is another thing to be successful at the actual implementation of the tools themselves, which the following sub-section will examine.

EVALUATION

The final stage, evaluation, can be described as “the collective efforts to gather, analyze and interpret evidence in order to describe the effectiveness of an organization in general, or a policy/program/project pursued by that organization in particular.”⁴² An essential part of this study revolves around this stage in measuring the effectiveness of this policy by recognizing refugee claims based on sexual orientation.

As such, has Canada been successful in upholding its signatory duty to the international community to protect asylum-seekers who face a ‘well-founded’ fear of persecution by not returning any individual to a territory where his/her life or freedom would be threatened? While there is a rather limited amount of research available revolving around the actual policy process involved with the one in question, there is a sizeable amount devoted to its evaluation. This

³⁹ Stéphane Malépart (Senior Communications Advisor, IRB). E-mail correspondence re: Immigration and Refugee Board’s experience related to refugee claims based on sexual orientation. 18 March 2008.

⁴⁰ LaViolette, Nicole. “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group.” Training Manual for Immigration and Refugee Board (IRB) Members. Last updated: May 2004; 1.

⁴¹ Ibid.

⁴² Ted Glenn. “Implementation & Evaluation” PAPD 204 (Class 12). 2 Apr. 2008. Humber College.

Refugee Claims Based on Sexual Orientation

evaluation can be broken down into two separate parts – the general effectiveness of the policy and structural evaluation of the IRB itself.

A. *POLICY EFFECTIVENESS*

While most criticism regarding this policy has come from those activists and academics that support its motivations in principle, but not in implementation, some opposition has come from political leaders themselves. For instance, a successful 1994 refugee case involving a gay Polish man infected with HIV became the focus of media and parliamentary attention in early 1995 after an interview with the claimant, Artur Lasia, was aired on a CBC Radio show documentary.⁴³ Members of Parliament from the Reform Party called for Lasia's deportation on the grounds that granting refugee status to individuals with the AIDS virus would be "an unwarranted drain on our health care system."⁴⁴ Such attitudes demonstrated the overriding 'gatekeeper' approach to immigration that the opposition felt at the time, and which some would criticize as having homophobic undertones.

While Canada was the first country to seriously consider the problem of women refugees and asylum law and has exported their model around the world since, LaViolette argues that the definition of gender-based claims should be expanded to include sexual minorities.⁴⁵ More specifically, "in the case of gender persecution, the punishment or abuse is not as a result of the victim's biological sex, but rather of the way the individual expresses his or her gender identity and roles."⁴⁶ On a related note, it has been argued that lesbians are often disadvantaged and underrepresented in refugee claims based on sexual orientation as "definitions of persecution in asylum law have been based on a male model of political activity."⁴⁷ Accordingly, men (including gay men) are more likely to suffer harm in the public sphere providing them with more proof of persecution, while lesbians, like many women, are more likely to face persecution in the private sphere.⁴⁸ While sexual minorities must prove both their membership of belonging

⁴³ LaViolette, Nicole. "The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward." *University of Toronto Faculty of Law Review*. 55(1), Winter 1997. 17.

⁴⁴ Ibid.

⁴⁵ LaViolette, Nicole. "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines," *The Author* (2007). June 12, 2007. 170.

⁴⁶ Ibid, 182.

⁴⁷ Victoria Neilson. "Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims," *Stanford Law and Policy Review*. 16(2), 2005: 3.

⁴⁸ Ibid, 3-4.

to this PSG as well as their fear of homeland persecution with factual evidence⁴⁹ it is obvious then that lesbians would face an even greater challenge in proving their claim. The magnitude of this critique is demonstrated in data released by the IRB. For instance, in 2004 only 19 per cent of 1,351 sexual orientation based claims decided at the IRB involved female claimants.⁵⁰

Another criticism that has arisen and has also been raised in the national media involved concern regarding false claims based on sexual orientation. While Toronto-based immigration lawyer, Max Berger, has handled many refugee claims based on sexual orientation, he acknowledges that there are false claims. However, he notes that “the system is full of bogus refugee claimants, whether they are citing political or religious discrimination. There is a core of genuine cases and a cluster of copycat cases.”⁵¹

Further, immigration lawyer, Battista continues, “the majority of refugee decision makers are not gay or lesbian, and there are certain heterosexual biases that prevent someone from truly being able to evaluate whether or not someone is gay or lesbian.”⁵² This heteronormative approach is highly discriminatory as it relies on prejudicial stereotypes about gays and lesbians to determine the validity of one’s claim. This was demonstrated when the Federal Court held in a 2005 ruling that the Board’s requirement that a claimant be effeminate in appearance or behavior constituted a ‘thoroughly discredited stereotype which should not have any bearing on the Board’s judgment of the Applicant’s credibility.’⁵³

Furthermore, there has been further critique towards the ambiguity of the assessment process. While proving one’s sexuality is difficult, it often comes down to the decision-maker’s intuition.⁵⁴ Vancouver-based immigration lawyer, Robert Hughes, notes that one of the major

⁴⁹ LaViolette, Nicole. “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group.” Training Manual for Immigration and Refugee Board (IRB) Members. Last updated: May 2004; 9.

⁵⁰ Sean Rehaag. “Patrolling the Borders of Sexual Orientation: Bisexual refugee claims in Canada.” Forthcoming – (2008) 53 *McGill Law Journal*; 12.

⁵¹ Graham, David. “Fearless in Canada – a Beacon of Tolerance and Human Dignity,” *Toronto Star*. 25 June 2006.

⁵² Ibid.

⁵³ Nicole LaViolette. “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines,” *The Author* (2007). June 12, 2007. 197.

⁵⁴ Graham, David. “Fearless in Canada – a Beacon of Tolerance and Human Dignity,” *Toronto Star*. 25 June 2006.

Refugee Claims Based on Sexual Orientation

problems associated with this policy is the lack of consistency in the analysis and calls for the need of written guidelines to avoid incongruence and confusion.⁵⁵

B. STRUCTURAL EFFECTIVENESS

While there have been many points of evaluation raised regarding the policy itself, there are a number of issues that have also been raised regarding the structure and expertise of the IRB. For example, IRB hearings are now conducted by a single board member, rather than two, under the IRPA of 2002, as passed by the Chretien government. The previous two member panels served as a check and balance against possible biases of homophobic notions that might exist, leaving asylum-seekers more vulnerable to one individual under the new system. Under the Chretien government's system, people who feel wronged by their cases decision can "only make a claim based on legal mistakes, not on the factual merits of the case."⁵⁶ With the lack of a court of appeal for refugees, the UN's High Commission on Refugees issued a disapproving statement which read:

UNHCR has long urged Canada to introduce a review process – which is a vital part of determining refugee status – in its asylum procedure. We hope that the Refugee Appeal Division will be implemented in the near future. Canada is one of just a few industrialized countries that do not have an appeal on the merits in their refugee determination systems.⁵⁷

Furthermore, a number of McGill academics have described the IRB as holding many appointees which lack experience in immigration or refugee issues, call for a growing overall need for better cultural communication and sensitivity on the part of IRB Members, while also describing the Board as having not only problems in assessing evidence but in conducting a hearing as well.⁵⁸

In contrast, it can be said that Canada's refugee system does work well for most refugees and that the IRB is a big part of that, though improvements still need to be made. LaViolette best summarizes the evaluation stage by further recognizing the IRB in stating that "[t]hey're a fairly

⁵⁵ Hughes, Rob. Phone Interview. 4 Apr. 2008.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Francois Crepeau and Patricia Foxen et al. "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board," *Journal of Refugee Studies*. 15(1), 2002: 47.

good quasi-judicial body. They're certainly way ahead of other countries when it comes to sexual minorities, but that's not to say the system's perfect."⁵⁹

CONCLUSION

Canada is known internationally for having one of the fairest refugee determination systems, including a remarkable reputation involving refugee claims based on sexual orientation.⁶⁰ Through this comprehensive analysis of the five stages of the policy process, this research has illustrated that while Canada must establish clearer, more equitable guidelines for assessing a refugee claim based on sexual orientation, overall the country has upheld its signatory duty to the international community to protect asylum-seekers who face a well-founded fear of persecution. For instance, while only filling approximately 3.3 per cent of the total number of applications received in Canada (2004), the actual grant rate for sexual minority claimants exceeds the average grant rate for all refugee claims overall.⁶¹

We cannot forget that there is “no country in the world where a gay man or lesbian can grow up free of discrimination, persecution or repression.”⁶² Due to the ongoing human rights abuses made against sexual minorities around the world, research within this area must continue to grow. This reality demands that we, as Canadians, must continue to act as a global leader of diversity, democracy and humanitarianism.

⁵⁹ Nicole LaViolette. “Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines,” *The Author* (2007). June 12, 2007.

⁶⁰ Graham, David. “Fearless in Canada – a Beacon of Tolerance and Human Dignity,” *Toronto Star*. 25 June 2006.

⁶¹ Sean Rehaag. “Patrolling the Borders of Sexual Orientation: Bisexual refugee claims in Canada.” Forthcoming – (2008) 53 *McGill Law Journal*.; 11-12.

⁶² LaViolette, Nicole. “Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group.” Training Manual for Immigration and Refugee Board (IRB) Members. Last updated: May 2004; 9.

Refugee Claims Based on Sexual Orientation

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APPENDIX

APPENDIX I – ENVIRONMENTAL SCAN

Evaluating International Refugee Policies Based on Sexual Orientation: An Environmental Scan

The purpose of this environmental scan is to provide a generalized and brief overview of the evaluation process of refugee policy based on sexual orientation in the United States, Australia, the Netherlands, and South Africa. This scan will note the evaluation process made by both academics and human rights groups. While often difficult to qualify, this evaluation is primarily completed through a comparative measure of success.

This assessment is intended to provide a global context for the significance of the regulatory amendment of 1993 in the case of Canada (Attorney-General) v. Ward and act as a comparative tool to monitor Canada's recognition of sexual minority rights.

United States

- In the U.S., the Immigration Act of 1990 eliminated sections of the Immigration and Nationality Act of 1952 which was used to preclude homosexuals on medical grounds as “mental defectives or afflicted with a constitutional psychopathic therapy.” Since the Act, homosexual claims for asylum have been gathering momentum.
- Only a relatively small number of such asylum applications have been positively evaluated, while it is also ‘not particularly well-known’ that this country will recognize sexual orientation-based asylum claims.
- In recent years, it has also become more difficult to exercise this application option because the filing deadline has been altered, requiring claimants to apply for asylum within one year of arriving in the United States. This essentially means that the foreign national needs to recognize that the US recognizes sexual orientation as grounds for asylum very early in their stay.
- Furthermore, it remains commonplace in sexual orientation-based asylum cases for US assessors to assume that if the applicant does not ‘flaunt’ his or her sexual orientation, he or she can avoid harm in his/her home country.

Australia

- Academics note that the Australian immigration system – more specifically the refugee declaration process - lags ‘behind’ Canada's for a number of reasons. For instance, the Australian system fails to recognize the interrelationship of sexuality with gender norms.
- Their system also fails lesbian claimants to a large degree because their country information about homosexuality is based solely on the treatment of gay men. This denies the fact that most persecution of lesbians occurs in private rather than in public (and more political) spaces as they typically do with gay men. This information is utilised as if it were universal for all sexual minorities.

- In many tribunal decisions on refugee claims in Australia deny the application of asylum noting that through being ‘discreet’ they would avoid persecution in their home country. In fact, this ‘discretion’ approach was a theme in 33% of Australian cases (prior to 2002) and required in 21% of those claims. In contrast, it arose in 8% of Canadian cases and only required in 4% of claims made to Canada. (Millbank, 2002)

The Netherlands

- In 1979 the Secretary of State agreed to consider homosexual persons’ claims for asylum following a parliamentary resolution recognising persecution on the basis of sexual orientation as grounds for asylum. The resolution was adopted following lobbying on the behalf of three homosexuals applying for asylum.
- While the Netherlands has also acted as a pioneer in this policy area, many of the refugee claims based on sexual orientation are still not accepted as such and are granted instead on the basis of humanitarian grounds.

South Africa

- In keeping with the principles of equality outlined in the South African constitution, the country’s Refugees Act also defines “particular social group” quite inclusively; including sexual orientation.
- However, the nation’s immigration system, most specifically the refugee status determination process faces many problems, including the difficulty in accessing the refugee reception office itself, corrupt practices, lack of official interpreters, delays in the determination process and a growing backlog of appeals.
- Although this definition includes sexual minorities, according to such human rights watchdog as Human Rights Watch, asylum claims based on sexual orientation have not generally been successful in South Africa.

This environmental scan demonstrates that Canada is a global leader with respect to refugee policy regarding claims based on sexual orientation. However, this brief scan also demonstrates the significance of acting as one of the pioneers in international immigration law and the necessity to continue this role by continually improving Canada’s national immigration and refugee protection policies.

APPENDIX II – IRB TRAINING MANUAL QUESTIONS

The following four pages regarding the model of questioning claimants surrounding their sexual orientation are so essential to the implementation and evaluation stages of this policy that it is imperative that they be included in this report. This information is directly extracted from the IRB's training manual for asylum claims based on sexual orientation and was obtained through an e-mail interview process (18 Mar. 2008) with Stéphane Malépart, Senior Communications Advisor for the IRB. Please see the end of the document for proper citation.

Membership in the Particular Social Group: A Proposed Model of Questioning Claimant's About Their Sexual Orientation

Few lesbian and gay claimants are able to provide conclusive documentary or witness evidence to confirm their membership in the particular social group. Therefore, one element in particular will be most determinative in establishing whether the claimant is a member of the particular social group: the claimant's credibility.

The claimant's answers to inquiries regarding their sexual orientation will help members of the RPD in assessing the veracity of their claim. But it is important to remember that how people experience sexuality, and persecution, may differ markedly from one claimant to another, even if they are from the same country. Moreover, the basis upon which the agents of persecution believe that an individual is a gay man or lesbian may also be difficult to comprehend because of cultural differences. The subject matters and questions identified below should assist members of the RPD and RPOs in discussing with a claimant the issue of their sexual orientation **when the question of membership in the particular social group is an issue.**

It cannot be stressed enough, however, that there are no true answers to these questions. The questions suggest areas of inquiry that may elicit evidence from the claimant that will assist in determining credibility. It is not so much the accuracy of the actual answers that is important, as answers to these types of questions can differ from one individual to the next, but rather the fact that the evidence elicited through this questioning will assist in evaluating the consistency and plausibility of the testimony as well as the overall demeanour of the claimant.

1. Subjects of Inquiry

The suggested subjects of inquiry are grouped into three areas:

- a. **Personal & Family**
- b. **Lesbian and Gay Contacts in the Country of Origin and Canada**
- c. **Experience/Knowledge of Discrimination and Persecution**

a. Personal & Family

- **At what point in their lives did they come to realize their homosexual or bisexual sexual orientation?**
- **How did they feel about themselves when they came to that realization?**
- **What kind of life did they believe they would have as a homosexual living in their country of origin?**
- **What were they told by their family, school and society in general about homosexuality?**
- **What did they personally believe about homosexuality at the time they came to realize that they were lesbian or gay?**

Past or current relationships: The claimant could be questioned about current or past relationships, if they have been involved in a same-sex relationship. It must be remembered to be sensitive with regard to this kind of questioning since it involves personal information that the claimant may be reluctant to discuss in a quasi-judicial hearing. Claimants should not be questioned regarding their actual sexual practices but rather on more general aspects of their personal relationships. In some cases, claimants have asked their current partner to testify or submit an affidavit attesting to their relationship. It would be inappropriate however to expect a couple to be physically demonstrative at a hearing as a way to establish their sexual orientation. Finally, it is important to note that many gay men and particularly lesbians may have been married in the past, or may still be married.

- **Are they currently in a relationship?**
- **Do they have a partner in their home country they hope one day to be reunited with?**
- **Have they been involved in relationships with someone of the same sex in the past?**
- **Have they socialized as a gay or lesbian couple in their country of origin or in Canada?**

Family & Friends: Some people may or may not disclose their sexual orientation to their family and friends. Such disclosures are often difficult and may have led to hostile and violent reactions by family members.

- **Have they told anyone in their family about their sexual orientation? How did those family members react?**
- **If they haven't told anyone in their family, what reasons have stopped them from doing so? How would their family react to a disclosure about homosexuality?**
- **If they were accepted as a refugee in Canada, do they think they would then be able to tell any family members about their homosexuality?**
- **Have they disclosed their sexual orientation to any friends in their country of origin? How did they react?**
- **Have they told any friends or family in Canada? If not, what reasons are stopping them from doing so? If yes, how have they reacted?**

b. Lesbian and Gay Contacts and Activities in the Country of Origin and Canada

This is a topic where information about lesbians and gay men in the country of origin is useful. If one knows about the social and political aspects of a lesbian and gay “community”, one may be able to better assess how the credibility of a claimant. For instance, a gay man may know about the areas where men meet, like a park or the gay beach on the river. There are other social activities of lesbians and gay men that are more secretive, but may be known to the claimant if they were ever in contact with other lesbians and gay men.

- **Did they know any gay people in their country of origin? If they did not meet any other gay person, what are the reasons that could explain the difficulty in meeting other gay men and lesbians?**
- **If they know lesbian and gay men in their country of origin, how did they meet them? Do they primarily know gay men? Lesbians? Or both?**
- **What kind of lives did other lesbians and gay men lead? Did they have difficulties with their families or employers regarding their homosexuality?**
- **Where do gay men and lesbians go to socialize? How do they meet each other?**
- **Are all lesbians and gay men secretive about their lives or are some more open?**
- **Are there slang terms for homosexuals in their language? What words do lesbians and gay men use to refer to themselves?**

Contacts or Knowledge about Lesbian and Gay Groups: Some countries have fledgling lesbian and gay rights groups.

- **Does the claimant know of any lesbian and gay groups in their country of origin?**
- **If not, do they think any exist now, or existed in the past?**
- **If they know of some organizations, what are their names and what kind of activities are they involved in?**
- **In what parts of the country do they operate? Is it easier to operate in certain regions of the country ?**
- **Do any gay groups do work in the area of HIV/AIDS? Do any lesbians groups work with other women's groups?**
- **Do they do any political work like lobbying governments to provide human rights protection to sexual minorities?**
- **Do gay women and gay men share the same social and political spaces?**
- **Do they know any members of these groups personally?**
- **Have they gone to any activities or meetings? If not, are there any specific reasons why they choose not to get involved in any activities? If yes, which activities have they attended?**

Contacts with Lesbians and Gay Men in Canada: Many lesbians and gay men find it easier in Canada to meet other gay people or to get involved in social activities, to go to bars or access gay and lesbian culture (newspapers, magazines, books). Some claimants who have been in contact with a lesbian and gay group have obtained a letter of support/attestation from that organization.

- **Are they in touch with any gay men and lesbians in Canada?**
- **What do they know about the gay and lesbian communities here in Canada? Are they aware of any social or political activities that some gay men and lesbians are involved in here in Canada?**
- **Have they read any gay or lesbian magazines, books? If so, what have they read?**
- **Do they socialize with friends in any gay or lesbian social venues? Which bars, cafes,**

- **restaurants do they like to go out to?**
- **How different are the lives of lesbians and gay men in Canada as opposed to lesbians and gay men in their country?**

c. Discrimination, Repression & Persecution in the Country of Origin and Canada

Again, this is an area where a panel member should be as informed as possible. For instance, if a lesbian from Russia says she fears that she will be forced into a psychiatric institution if she returns to Russia, there exists documentation to support her belief. The International Gay and Lesbian Human Rights Commission has documented cases where lesbians underwent forcible psychiatric treatment in Russia.⁶³ If a Hungarian gay man says he believes that law enforcement officials have his name on a list of homosexuals, there is reason to believe this is the case in Hungary.⁶⁴ A gay person from Colombia may express a fear of being victimized in 'social cleansing' campaigns conducted by police, military and paramilitary forces. This kind of allegation is supported by documentation from human rights groups.⁶⁵

- **What does the claimant fear will happen to them if they return to their country of origin?**
- **What leads them to believe they will be persecuted?**
- **If their beliefs about persecution are based on personal experience, can they describe what happened to them?**

Discrimination & Repression in the Country of Origin: The claimant may have acquired knowledge about the treatment of lesbians and gay men in their country of origin through available documentation, their own experiences or through information gathered through friends and contacts.

- **What kind of barriers prevent lesbians and gay men in their country from being full and equal members of society?**
- **What kind of discrimination exists against lesbians and gay men?**
- **What are the official laws on homosexuality in their country?**
- **Who is responsible for acts of violence against lesbians and gay men? Who is responsible for discrimination against lesbians and gay men?**

Knowledge of the Canadian Situation: The claimant may have acquired some knowledge of the status of lesbians and gay men in Canada, either through their contacts with the lesbian and gay community, or through their own experience or research.

- **Do they know what the legal status of lesbians and gay men in Canada?**

⁶³ Masha Gessen, *The Rights of Lesbians and Gay Men in the Russian Federation* (San Francisco: International Gay and Lesbian Human Rights Commission, 1994) pp. 17-18.

⁶⁴ Sandor Borsos, "Hungarian Gays Stand Up to Police" *The Advocate* (5 mai 1992) 44.

⁶⁵ Juan Pablo Ordonez, *Ho Human Being is Disposable: Social Cleansing, Human Rights, and Sexual Orientation in Colombia* (Colombia Human Rights Committee, International Gay and Lesbian Human Rights Commission and Proyecto Dignidad por los Derechos Humanos en Colombia, 1995).

Refugee Claims Based on Sexual Orientation

- **Are they aware of social and political problems faced by lesbians and gay men in this country?**
- **Have they encountered discrimination in Canada?**
- **Do they fear people finding out about their sexual orientation in Canada?**
- **If so, what do they fear would happen if people in Canada knew of their sexual orientation?**
- **Do they think it will be easier for them to be gay in Canada than in their home country?**
- **Do Canadians seem more accepting of homosexuality? On what do they base their answer?**

LaViolette, Nicole. "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group." Training Program for Immigration and Refugee Board (IRB) Members. Last updated: May 2004. E-mail to IRB Member. 18 March 2008; 12-21.