

Envisioning LGBT Refugee Rights in Canada:
**The Impact of Canada's
New Immigration Regime**



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Introduction

This report is an initiative of Envisioning Global LGBT Human Rights, an international research project involving 31 community partners in 12 countries, working to advance social justice, equality and global human rights for lesbian, gay, bisexual and transgender (LGBT) people. Envisioning is focused on research and analysis of the criminalization of LGBT people in Commonwealth countries and resistance to criminalization, one aspect of which is to seek asylum elsewhere. The project also confronts legal barriers and strictures to the advancement of human rights for LGBT individuals and communities. Envisioning emphasizes the involvement of community partners in defining and developing research goals and the co-production of knowledge. Envisioning is housed at the Centre for Feminist Research, York University, Toronto, Ontario, Canada and is supported by a Community University Research Alliance grant from the Social Sciences and Humanities Research Council of Canada and through the generous support of partners. This report is also jointly funded by the Ontario Council of Agencies Serving Immigrants and Rainbow Health Ontario, who are community partners of Envisioning.

This report focuses on the impact on LGBT asylum seekers in Canada of Bill C-31, which took effect in December 2012, now in force as the *Protecting Canada's Immigration System Act* ("the Act"). The analysis is based on research gathered between October 2013 and June 2014, as well as information from interviews with key informants, including lawyers, academics and service providers who specialize in LGBT asylum issues. This report follows Envisioning's June 2012 preliminary report entitled "Envisioning LGBT Refugee Rights in Canada: Exploring Asylum Issues," written by Nick Mulé and Erika Gates-Gasse. (Envisioning Global LGBT Human Rights, 2012). That report was based on a roundtable with a diverse group of Toronto-based

agencies serving LGBT refugees. It discussed the experiences of clients and the challenges they face with the refugee determination process and accessing services. One "Action Item" arising from the roundtable called for a better understanding of the impact of changes to Canada's immigration and refugee policy (Envisioning Global LGBT Human Rights, p. 12-13). The present report attempts to address this "Action Item". The 2012 document anticipated the legislative changes in the Act, while the present document examines and responds to them.

The report begins with an examination of Canada's international obligations, regarding both asylum seekers and LGBT persons. International standards bear particularly heavily on this issue due to the nature of refugee law, as it pertains to inter-state forced migration, and the polarization regarding the rights of non-traditional sexual and gender expressions around the world. Second, the report examines Canadian refugee jurisprudence and standards regarding LGBT asylum seekers. These claims have a history of relying on certain notions of sexuality and gender identity, notions that animate and underpin many of the latent issues in this area of law and policy. Third, the report examines the changes to Canada's refugee laws under the new Act, and the particular impact of these changes on LGBT asylum seekers. This analysis understands the new regime as decidedly anti-immigrant and anti-refugee on the whole. Moreover, certain mechanisms within it pose particular problems for LGBT asylum seekers owing to their unique cultural position, identity processes including erasure, and widespread marginalization. Fourth, the report examines resettlement and sponsorship of refugees who are unable to reach Canada without support. This examination reveals the ability of government sponsorship, but not private sponsorship, to provide certain benefits, such as mental health coverage; this

ability should inform government sponsorship grants. It also exposes the present Conservative government's disingenuous use of the resettlement program to off-load governmental responsibility to provide international protection onto civil society. Finally, the report examines refugee health care and the recent cuts to the Interim Federal Health Program. There are serious human rights implications of these cuts, including maternal and child health rights. The cuts are one manifestation of the Conservative government's anti-refugee attitude. Through an examination of LGBT asylum seekers as a population of increased mental health risk, this section also underscores the interconnectedness of human rights, specifically the right to health, upon which the realization of all other rights is dependent.

Several important themes emerge. First of all, the changes under the Act contain a spate of questions relating to, and outright violations of, human rights law: both domestically, as guaranteed by the Canadian *Charter of Rights and Freedoms* and internationally under multiple ratified instruments and established principles. Secondly, the changes indicate that Canada's Conservative federal government has taken the country from a leader in protecting the rights of asylum seekers to a nation that is decidedly unwelcoming. While refugee numbers globally continue to climb, Canada's claim and grant rates have sharply declined relative to other host similarly situated receiving states (UNHCR, 2014). Canada is failing in its obligations to all refugees. Thirdly, the particular narratives of sexual and gender minorities continue to challenge refugee adjudication in both official and unofficial policies and patterns. While refugee law remains one of the very few instances in which the state officially considers an individual's sexual or gender identity in the granting of rights, there remains a gap among decision makers regarding certain truths and experiences of LGBT people. This gap has very real effects for LGBT asylum seekers, including in relation to credibility assessment, evidentiary burdens and designations of so-called "safe" countries of origin.

Terminology with regard to sexual orientation or gender identity is complex, with historical, regional, cultural, class and activist implications. This report, in line with the Envisioning project and many activists and human rights workers internationally, uses the terms lesbian, gay, bisexual and transgender (LGBT). "Queer" and "sexual and gender minorities" also appear as umbrella words. The use of LGBT/sexual and gender minorities is meant to be neither all-embracing or exclusive. As Envisioning's research encompasses many regions and communities, we acknowledge that terminology may differ from place to place or topic to topic.

This report also uses the terms "refugee," "refugee claimant" and "asylum seeker". For the purposes of this report, a refugee is an individual seeking protection who has successfully obtained refugee status from either a state or the United Nations High Commissioner for Refugees ("UNHCR"). A refugee claimant is an individual seeking refugee status, but who may not have yet obtained it. An asylum seeker is a person fleeing persecution and seeking protection, regardless of their desire, eligibility or attainment of a particular status.

Canada's International Obligations

This section outlines international legal obligations regarding refugees. It should be noted that international standards bear particularly heavily on refugee law and policy, in contrast to other areas, which may have a lesser burden of compliance to international standards. Firstly, Canadian refugee law specifically draws on and recreates international standards in its refugee legislation; this indicates Parliament's intention to encode international law into Canadian law. Secondly, refugee law is, by its very nature, concerned with migration and protection between state borders, and therefore must be grounded in the standards and law promulgated by international bodies empowered to govern interstate protection processes, specifically the UNHCR.

1951 Convention and 1967 Protocol Relating to the Status of Refugees

The 1951 *Convention Relating to the Status of Refugees* is the main international instrument governing state obligations to refugees and asylum seekers. It is a multilateral treaty that sets out who is a refugee, what rights accompany refugee status, and the obligations of nations that grant asylum. Although its original scope was limited to European refugees and events prior to 1951, the 1967 *Protocol Relating to the Status of Refugees* removed both the geographical and temporal limitations. Article 1 of the Convention, as amended by the *Protocol*, provides the following definition of a refugee:

“Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country

of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Canada is party to both the 1951 *Convention* and the 1967 *Protocol*, having acceded to both on June 4, 1969. In accordance with international law, the *Convention* and *Protocol* are therefore binding on Canada and carry certain obligations. For example:

- Article 35 of the *Convention* (Article 2 of the *Protocol*) obliges state parties to assist the UNHCR, the UN agency charged with supervising the implementation of the 1951 *Convention*, in carrying out its functions.
- Article 31 of the *Convention* shields refugees from penalties related to the illegality of their entry and residence in the country of asylum.
- Article 33(1) of the *Convention* captures the customary international law principle of “non-refoulement” which protects refugees from forcible return to their country of origin.

These are only a handful of Canada's obligations related to refugees under international law. The 1951 *Convention* and 1967 *Protocol* form the legal basis for international refugee protection. They have heavily influenced Canada's own legislation and policies regarding refugees over the past 60 years, and rightfully so.

The *Convention* and *Protocol* do not make specific mention of LGBT persons; however, LGBT protection has been successfully incorporated into international refugee law over the past 25 years, as well as into Canadian jurisprudence. The appropriateness of including persecution based on sexual orientation or gender identity as a ground for refugee protection is now settled law in Canada, and continues to gain traction globally, bolstered by numerous “soft-law” instruments, principles and standards.

2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

Born out of an international seminar of legal and human rights experts in Yogyakarta, Indonesia in November 2006, the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* synthesize existing binding international legal standards to which all states must comply, and apply them to issues of sexual orientation and gender identity. These include immigration and refugee issues, extrajudicial executions, violence and torture, access to justice, privacy, non-discrimination, rights to freedom of expression and assembly, employment, health, education, public participation, and a variety of other rights.

The *Yogyakarta Principles* codified state obligations towards LGBT asylum seekers in Principle 23, The Right to Seek Asylum, which reads:

“Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity. States shall:

- a) *Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;*
- b) *Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;*
- c) *Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or*

punishment, on the basis of that person’s sexual orientation or gender identity.”

The explicit mention of LGBT asylum seekers was a watershed moment in international human rights law for this specifically and brutally marginalized group. Although not an international treaty, the *Yogyakarta Principles* have been hugely influential in shaping international human rights jurisprudence and policy in relation to sexual and gender minorities.

2008 United Nations General Assembly Declaration supporting LGBT Rights

In 2008, the United Nations General Assembly discussed LGBT rights for the first time since its inception in 1945. A Dutch/French delegation, backed by the European Union, presented a declaration to the General Assembly, intending it to become a Resolution. The *Declaration supporting LGBT Rights* includes a condemnation of violence, harassment, discrimination, exclusion, stigmatization and prejudice that undermine personal integrity and dignity based on sexual orientation and gender identity. It also included a condemnation of killings, executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights based on sexual and gender minority status.

The *Declaration* remains open to signatures today, with 97 countries having signed. However, an Arab-League backed statement opposing the Declaration also stands open for signatures, with 54 signatories. This divide represents the polarization of LGBT rights issues, the hostility still faced by sexual and gender minorities worldwide, and the urgency of Canada and other nations providing asylum to LGBT people suffering persecution.

2011 United Nations Human Rights Council Resolution

In 2011, South Africa submitted a Resolution to the United Nations Human Rights Council requesting

a study on the global state of human rights for sexual and gender minorities. The Resolution passed 23 to 19 with 3 abstentions, marking the first time that any UN body passed a Resolution supporting the rights of sexual and gender minorities. The resulting High Commissioner's report painted a grim picture, citing widespread state-sponsored violence and discrimination against sexual and gender minorities. The subsequent panel discussion in the Council in March 2012 was predictably divisive, with several states refusing to participate and several more objecting on cultural or religious grounds. If the Resolution is to be taken seriously in the face of such polarization and risk, it is incumbent on states that support LGBT rights to provide asylum for those fleeing persecution and violence.

UNHCR 2008 Guidance Note leading to 2012 Guideline on International Protection No. 9

In 2008, UNHCR issued a Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity. The Note refers to the *Yogyakarta Principles*, as well as the *International Convention on Economic, Social and Cultural Rights* ("ICESCR") and the *International Convention on Civil and Political Rights* ("ICCPR"), which form the bedrock of international human rights law. It provides agencies and governments with guidance regarding LGBT asylum claims and argues for a wide interpretation of international instruments to provide protection from human rights abuses. This is in keeping with the spirit and ambit of international human rights law. The note details the appropriateness of including the experiences of oppressed LGBT populations in the Convention definition of "well-founded fear of persecution" and consequently advocates for LGBT protection through international refugee law.

In 2012, the Guidance Note was expanded and strengthened into *Guideline on International Protection No. 9*. A Guideline is the UNHCR's ultimate, most authoritative document for interpreting a treaty. Guideline No. 9 refers extensively to the Yogyakarta Principles, as well as human dignity as defined in the *Universal*

Declaration of Human Rights ("UDHR"), the foundation of international human rights law. Several sections within the *Guideline* bear directly on Canada's current refugee regime.

The *Guideline* indicates numerous ways that states can persecute sexual and gender minorities, or ways that states may fail to provide adequate protection from persecution (UNHCR, 2012 para. 20-37). It specifically includes sexual and gender minorities in three convention grounds for protection: religion (UNHCR, 2012 para. 42-43), membership of a particular social group (UNHCR, 2012 para. 44-49) and political opinion (UNHCR, 2012 para. 50). The *Guideline* unequivocally and substantively positions the protection of sexual and gender minorities within international refugee law.

Regarding evidentiary matters, the *Guideline* indicates that the applicant's testimony will often be the primary or only source of evidence (UNHCR, 2012 para. 64). This presents certain challenges for adjudication, which the *Guideline* asserts must never be surmounted through further infringements on the fundamental human rights of the applicant – for example, through documentary evidence of intimate relationships or medical testing. Furthermore, information on the situation of sexual and gender minorities in countries of origin is often unavailable (UNHCR, 2012 para. 66). There is inherent danger in generalizing the situation of sexual and gender minorities in any given country because of the divergence between areas and experiences based on geography, culture and socio-economic class. For marginalized groups such as LGBT persons, whose situations are often unreported, undocumented and heavily stigmatized, a case-by-case evaluation is crucial.

Tied to evidentiary matters are evaluations of the applicant's credibility. Although the *Guideline* offers guidance in this extremely difficult area of the asylum process (UNHCR, 2012 para. 63) it also cautions adjudicators against excessive reliance on credibility criteria. The process must be guided by "individualized and sensitive" modes of inquiry (UNHCR, 2012 para. 62) which are particularly important when dealing with

LGBT claimants who have likely spent most of their lives hiding the very aspect of their identity that the asylum process investigates.

The *Guideline* also specifically cautions against the use of stereotyping in evaluating LGBT claims, based on its unreliability and potentially damaging effects. Preconceived notions about appearances or behaviours should be strictly avoided. *“There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country”* (UNHCR, 2012 para. 60(ii)).

The *Guideline* also discusses *sur place* claims, which are claims made after arrival in the country of asylum, as opposed to beforehand. *Sur place* claims can be more common among LGBT claimants, who may have been unable to reveal their sexual or gender identity until reaching a safe harbour. *“Their fear of persecution may thus arise or find expression whilst they are in the country of asylum giving rise to a refugee claim sur place,”* (UNHCR, 2012 para. 57).

The *Guideline* is the major instrument for interpreting the 1951 Convention for LGBT asylum seekers in light of international human rights law. State parties, including Canada, should at all times adhere to its recommendations in legislation, policy and adjudication of claims.

General Principles and Jurisprudence Relating to LGBT Asylum Seekers in Canada

Canadian LGBT Refugee Jurisprudence

A body of Canadian jurisprudence addressing refugee claims for LGBT persons emerged in the early 1990s. Before this time, sexual and gender minorities were not sufficiently accepted in Canadian society for the judiciary to entertain such claims, nor could claimants openly make them. With the decriminalization of homosexual acts in Canada in 1969, a gay liberation movement emerged publicly in Canada. Over the next forty years, bolstered by wider civil rights, women's rights and HIV activist movements, the LGBT movement successfully advanced LGBT human rights and social recognition, including relationship recognition. Importantly, this movement also advanced the recognition of LGBT free expression as a human right warranting protection, including asylum.

On December 30, 1991, the Immigration and Refugee Board of Canada granted asylum to a Bengali man who testified that he feared persecution in Bangladesh because he was homosexual (*Re N. (K.U.)*, 1991). After authorities caught him having sex with another man, he managed to escape arrest by bribing law enforcement officials. He continued to receive threats, however, and fled his home country for Canada in 1990. This anonymous man is considered the first successful refugee in Canada whose claim was based on sexual orientation.

Shortly afterwards on January 6, 1992, Jorge Alberto Inaudi was granted refugee status after fleeing Argentina (*Re Inaudi (Re N. (L.X.))*, 1992). In March 1990, Inaudi was arrested outside a gay bar and subsequently beaten, raped and tortured by police officers. He was also evicted from his home and fired from his job. Inaudi is often credited for being the first LGBT claimant

to achieve asylum in Canada, as his case was widely publicized, however the abovementioned Bengali claimant rightfully deserves this title (LaViolette, 2007 p. 555). Claims continued over the next two years, with varying degrees of success (LaViolette 1997, p. 15). Transgender jurisprudence emerged shortly afterwards around 1994 (*Re J.(H.A.)*, 1994) although with less frequency – while official numbers are not publicized by the IRB, at least 7 transgendered claimants raised sexual identity as an issue before the Board between 1994 and 2007 (LaViolette, 2007 p. 26). Bisexuality as an explicit ground of a claim did not emerge until 2000 (*Re B.(D.K.)*, 2000) and continues to be one of the most difficult grounds for decision makers to grapple with (see below).

The Supreme Court of Canada's 1993 decision in *Canada v. Ward* definitively included persecution based on sexual orientation as a ground for refugee protection. Although the facts in *Ward* did not involve a queer claimant, but rather an alleged Irish terrorist, the Court included sexual orientation in *obiter* as an example of an “innate or unchangeable” personal characteristic warranting protection through asylum. The decision became the touchstone for LGBT refugee claims, which have continued to increase in number to the present day. *Ward* is problematic in its understanding of sexual orientation and identity (see below) but it did create jurisprudential authority that has facilitated asylum for thousands of LGBT people. Furthermore, Canadian jurisprudence from the 1990s influenced LGBT asylum decision making in the United States (*Tenorio*, 1993; *Pitcherskaia*, 1997), New Zealand, Australia, Belgium, Denmark, Finland, Germany, the Netherlands and Sweden (LaViolette, 2007 p. 557).

Legal Test: Well-Founded Fear on the Basis of an Enumerated Ground

In order to receive protection under international law, claimants have to satisfy the definition of a refugee under the 1951 *Convention* (see above). The test for refugee protection in Canada, pursuant to section 95 and 96 of the 2001 *Immigration and Refugee Protection Act* (“IRPA”) essentially recreates the international standard; so much so, in fact, that Canada terms asylum seekers who satisfy these sections “Convention refugees,” replicating the terminology under international law. It is a two-part test: first, claimants must demonstrate a well-founded fear of persecution and second, they must substantiate that the persecution they fear is on account of their race, religion, nationality, political opinion, or membership in a particular social group.

The majority of claims in the early 1990s brought sexual minorities (and later gender minorities) into the scope of international refugee protection through the “particular social group” category. In *Re N. (K.U.)*, decision makers relied on the UNHCR handbook definition of “particular social group” as normally comprising “persons of a similar background, habits or social status,” (UNHCR, 1992). However, as the jurisprudence developed, the reasoning for defining sexual minorities as a particular social group varied widely. Some decision makers indicated that “immutability” was an indicator of a social group. (LaViolette 1997, p. 16). Others based membership on a personal characteristic that, whether changeable or not, related to a person’s fundamental human dignity (*Inaudi, 1992 inter alia*). Still others based membership in a particular social group not merely on internal characteristics of individuals, but also the perception of the wider population, external to the group (Rotman in *Re. R. (U.W.)*, 1991; *Re. E. (Q.R.)*, 1993). At the same time, some decision makers refused to include sexual orientation in the definition of a particular social group, defining divergent sexualities as “asocial” (*Re X.(J.K.)*, 1992) or citing sexual orientation’s absence from international human rights

instruments (Leistra in *Re. R. (U.W.)*, 1991). This was before the advent of the numerous international instruments protecting LGBT people, described above.

The *Ward* decision, therefore, brought cohesion in the sense of solidifying sexual orientation as an acceptable ground for an asylum claim based on membership in a particular social group. However, the decision did not address the divergence of legal reasoning in LGBT decisions – divergence based largely not in law, but in differing conceptions of sex and gender in a social, moral or cultural sense. Furthermore, the reasoning in *Ward* is inherently problematic.

The Effect of “Particular Social Group” as the Predominant Established Ground for LGBT Asylum Claims

Legal scholars have criticized the *Ward* decision for several reasons. First, it inappropriately imports a specific Canadian *Charter of Rights and Freedoms* section 15 discrimination analysis, namely the consideration of commonalities between enumerated grounds of discrimination to infer protection for analogous grounds, into refugee decision-making (LaViolette, 1997 p. 20-24). While refugee decision making must at all times comply with the guarantees of rights in the *Charter*, this importation is inappropriate because grounds for refugee protection under the 1951 Convention and the IRPA are enumerated and exhaustive, while *Charter* grounds of discrimination are enumerated and non-exhaustive (LaViolette, 1997 p. 24). As a result, the importation of the *Charter* skewed refugee determination towards a consideration of the shared qualities of the various grounds of refugee protection. Second, and by virtue of the aforementioned importation, the Court in *Ward* classified sexual orientation as an immutable personal characteristic, which is an assertion that cannot be proven (LaViolette, 1997) and which inappropriately positions the queer individual’s inability to change their sexual or gender identity as the cause of their persecution, rather than the persecutor (Rehaag, 2008). Third, the *Ward*

decision fails to incorporate external factors into the definition of a particular social group – most importantly, the fact that a social group may be defined not only by the common identity characteristics its constituents may hold, but also by its perception by those outside the group, which is particularly salient when these external actors are also the agents of persecution. The decision therefore neglects the reality of LGBT persecution, which can be exacted upon those who may or may not themselves identify as LGBT (LaViolette, 1997). Fourth, by focusing exclusively on sexual minorities as a particular social group, *Ward* effectively and dramatically reduced LGBT asylum claims based on other grounds, for example religion and political opinion – grounds which may have offered not only greater chances for successful claims, but also a more nuanced understanding of the persecution of sexual and gender minorities in response to their perceived transgression of political and religious mores. There is both a tactical and conceptual advantage to bringing claims and leading evidence on other grounds, but *Ward* in some ways obviated such multi-pronged strategies (Rehaag, 2008).

The criticisms of *Ward* may strike some as academic, and indeed they do stem from scholarly discourse. However, they have very real consequences for contemporary Canadian asylum seekers. Moreover, they are exacerbated by the new immigration regime that came into effect in 2012 pursuant to Bill C-31. The misconceptions about sexual and gender minority behaviours and identities, which are exposed by *Ward* and which remain its unintentional legacy, animate discourses around the protection of LGBT newcomers in Canada.

Recent Federal Court Jurisprudence

Over the past 10 years, the Federal Court of Appeal, the judicial body that hears appeals of asylum decisions, has done a largely commendable job in overturning decisions based on stereotypes or reasoning which fails to understand the reality of LGBT identities and experience. For example, it has challenged

effeminacy as a marker of male homosexuality (Herrera, 2005; Lekaj, 2006; Slim, 2004). It has overturned a decision which assumed that a person who was not sexually active could not be ‘truly gay’ and which cited the stereotype that gay men are promiscuous (Kormienko, 2012). It has indicated that involvement in stereotypically gay activities or diversions can be unreliable (Essa, 2011). Similarly, it has found that LGBT persons may be involved in institutions that stereotypically would be unwelcoming to them, such as the Roman Catholic church, and that this involvement does not erode the credibility of their sexual or gender identity (Trembliuk, 2003). It has found that an LGBT person’s openness about their identity should not undermine the reality of their persecution (Kamau, 2005). Also, an LGBT person’s ability to hide their identity is irrelevant to the granting of asylum (Kravchenko, 2005). While the Federal Court has made these issues jurisprudentially clear, the volume, repetition and recent timing of this jurisprudence indicate the difficulty first-level decision makers continue to have adjudicating LGBT asylum claims.

The 2012 Changes to Canada's Immigration Regime and Their Impact on LGBT Asylum Seekers

Generally Anti-Refugee for All

Bill C-31, which received Royal Assent on June 28, 2012, made significant changes to the IRPA, as well as the *Balanced Refugee Reform Act* ("BRRA"), *Marine Transportation Security Act* and *Department of Citizenship and Immigration Act*. The most important, over-arching element of the changes under Bill C-31 is that they create a refugee system that is **anti-refugee for all potential claimants**. The new regime entails a swath of measures that aim to "crack down" on those immigrants who the government has not selected as economically advantageous or desirable. The measures, including shortened timelines, the increased use of detention, draconian measures for "irregular" arrivals and boat arrivals, "safe third country" provisions which shift responsibility for refugees between states, and measures which off-load governmental responsibilities for protection onto civil society, seriously erode the protection imperative in domestic and international law. The changes aim to close the door to all asylum seekers, a distinctly conservative approach under Canada's present federal government (N. LaViolette, personal communication, February 4, 2014). This anti-immigrant, anti-refugee sentiment pervades virtually all aspects of the Act.

Several components of the new regime create particular barriers for LGBT migrants, and these barriers are the focus of this report. However, this group is not alone, and it is important to recognize that the challenges faced by LGBT asylum seekers are connected to an overall anti-refugee movement. This must inform advocacy efforts. Nicole LaViolette, Canada's leading expert on LGBT forced migration, and special consultant to UNHCR in creating the 2012 Guideline, has stressed the importance of working in partnership with existing actors, organizations and networks of refugee protection when

advocating for the protection of LGBT migrants (N. LaViolette, personal communication March 12, 2014). An approach that privileges protection of certain groups undermines fair, connected and comprehensive rights protection for all refugees.

Bill C-31's Legislative History and Impact

The Act came into effect on December 15, 2012 and had a significant impact on refugee claimants and decisions. The Canadian Bar Association called the changes "massive" (CBA, 2012 p. 9). The Bill passed as part of an omnibus package, with relatively little Parliamentary study, a move described as "inappropriate, and not in the spirit of Canada's democratic process" (CBA, 2012 p. 9). The Act created broad new ministerial powers regarding designated "safe" countries, irregular arrivals, and investigative arrest and detention, effectively removing parliamentary oversight and raising serious constitutional issues of procedural fairness and transparency (CBA, 2012 p. 10).

The Act also contains seemingly arbitrary shifts in language, the effect and purpose of which are unclear but could have serious consequences. For example, in section 48(2) of the IRPA, which deals with the enforcement of removal orders, the phrase "as soon as reasonably practicable" has been replaced with "as soon as possible". While seemingly semantic, this change removes the legal test of reasonableness as a safeguard against hasty removal enforcement. The anti-immigration, anti-refugee tenor of the Act is at times subtle, but represents a very real threat to the internationally and constitutionally protected rights of asylum seekers.

Criminality

Section 55(3) of the IRPA, which empowers officers to detain permanent residents or foreign nationals upon entry into Canada, has been expanded to include not only those “inadmissible on grounds of security, violating human rights or international rights” but also alleged criminals (“serious criminality, [mere] criminality or organized criminality”). While this section was originally envisaged as an anti-terrorism measure after 9-11, “mere criminality” under the newly expanded provisions can capture offences as banal as suspicion for shoplifting or possession of narcotics, even without an arrest or charge in the foreign jurisdiction (CBA, 2012 p. 13). Criminality has also been expanded in regard to denying refugee status: section 101(2) of the IRPA, which governs eligibility for referral to the Refugee Protection Division, no longer carries a requirement that a serious criminal must pose a danger to the public to have their referral denied.

Newcomers’ criminal history is a legitimate concern for Canadian society; however, without arrest or charge, the consideration of mere suspicion of criminality as a factor in granting asylum potentially perpetuates the persecution of asylum seekers at the hands of repressive states or law enforcement. If not based on a fair adjudication of guilt, such mechanisms may violate domestic and international human rights provisions.

Those asylum seekers suffering from persecution based on their sexual and gender identity are often subject to harassment by law enforcement in their country of origin. They may be unjustly prosecuted or detained. Often rejected by their families, they are more likely to be charged with vagrancy laws, and in some cases, may resort to survival prostitution. Mental health experts interviewed for this report cited addiction and substance abuse as significant concerns for LGBT asylum seekers. All of these activities are criminalized in many nations around the world. This may result in suspicion, allegations and possibly records of criminality for LGBT refugees attempting to gain protection in Canada, creating a barrier to their claims for protection.

“Irregular Arrivals” and Designated Foreign Arrivals

Since 2009, two cargo ships holding mass asylum seekers landed on the West Coast. Media coverage of these events, along with vitriolic government responses, has bolstered the public’s negative view of refugees (DeRosa, 2012). The Conservative government manipulated these events through its consistent use of terms such as “bogus claimants” and “queue jumpers” and allusions to potential terrorists, thereby advancing a conservative legislative response. The Act introduced provisions regarding “irregular arrivals”. These provisions were previously introduced to Parliament in 2010 as Bill C-49, the *Preventing Smugglers from Abusing Canada’s Immigration System Act*, with the stated aim of preventing smugglers and human traffickers from exploiting the desperation of asylum seekers and profiting from organizing irregular mass arrivals. Such a response was unnecessary, however, given that the old section 117 of the IRPA already provided adequate tools to address smugglers and human traffickers.

Unfortunately, the new section 117 provisions effectively target refugees more than smugglers or human traffickers. The Act defines a smuggler so widely that the definition is capable of capturing even those transporting asylum seekers for humanitarian reasons, including refugee workers and individuals helping their families. This was recently upheld in British Columbia, after the BC Court of Appeal overturned a decision of the BC Supreme Court that declared the provisions overly broad (*R v. Appulonappa*, 2014).

The Minister can designate an “irregular arrival” in nebulous situations: for example, if further examination is required to determine identity or inadmissibility, or on mere suspicion that smugglers involved in the arrival were profiting or linked to criminal or terrorist organizations. The Minister’s powers here are discretionary, with little accountability or oversight. A “group” can be as little as two people (CBA, 2012 p. 37). Furthermore, under the new section 20.1,

the Minister deems all irregular arrivals as “designated foreign nationals” regardless of whether or not a section 117 offence has actually occurred. There is no limitation as to the mode of arrival, and the designation is not appealable (except through judicial review to the Federal Court, which would only review the Minister’s consideration of certain criteria and not whether the decision was well-founded).

The consequences of an “irregular arrival” and foreign national designation can be severe. Anyone over 16 years of age is subject to mandatory detention. The Canadian Bar Association, among other established legal and human rights organizations, have criticized these provisions as violating the right to be free from arbitrary detention and the right to prompt review of detention under sections 9 and 10 of the *Canadian Charter of Rights and Freedoms*, as well as international obligations including the ICCPR and Article 31 of the 1951 Convention (CBA, 2012 p. 36). “Irregular arrivals” are denied their right to apply for permanent resident status until 5 years after a successful refugee claim, or a determination of protection pursuant to a Pre-Removal Risk Assessment (“PRRA,” see below), whichever is later. Note that in this situation, these persons have already proven that they would face risk of persecution or death upon return to their country of origin. In addition, these successful claimants are denied access to refugee travel documents for 5 years, as well as the ability to sponsor family members. “Irregular arrivals” whose refugee claims are unsuccessful are denied their right to appeal to the Refugee Appeal Division (“RAD,” see below). They are also denied access to relief based on Humanitarian & Compassionate grounds (“H&C,” see below) and temporary resident permits. They are effectively barred from applying for any legal status, including as a sponsored spouse, dependent or under an economic class, for a minimum of 5 years. The most serious consequence is that they are susceptible to cessation of their protected status during this 5-year period, upon the Minister’s discretionary declaration that “the reasons for which the person sought refugee status have ceased to exist” (IRPA, s. 108).

The foreign national designation may violate Article 31 of the 1951 *Convention*. Furthermore, barriers to naturalization violate Canada’s obligations under Article 34 and the failure to provide travel documentation violates Article 28. In addition, Article 23 of the ICCPR recognizes family reunification as a priority. These measures are clearly intended to be punitive, in an effort to deter asylum seekers from using irregular means of arrival; however, the efficacy of this approach is highly questionable, given that most asylum seekers flee under duress. Furthermore, even if their claim is meritorious and they are granted asylum, they continue to be punished for their “choice” to arrive irregularly, which further violates Article 31 of the 1951 *Convention*.

Detention is an area of concern for LGBT persons. For example, in February 2014, a British trans woman with a visa infraction was housed in a male correctional facility, after a nurse, instructed by Canadian immigration officers, determined her gender based on inspection of her genitalia. Authorities acknowledged, before transferring her to the male facility, that there was a risk of violence (CBC News, 2014). Such blunders are clear violations of personal safety and display the urgent need for further training on the needs of trans people among Canadian immigration officials.

Designated Countries of Origin

The most notorious change in the law has been the introduction of Designated Countries of Origin (“DCOs”). DCOs are nations designated by the Minister as respecting human rights and the rule of law, and being generally “safe”. Claimants from these countries are presumed to have a lesser chance at a successful refugee claim. They are therefore afforded shorter timelines, and therefore less consideration, throughout the asylum process. They are also unable to access appeals through the RAD. The logic of this strategy alone is troublesome. Claims from countries that do not usually produce refugees arguably warrant greater consideration owing to their ostensibly more complex nature. At the very least, the same consideration is owed. The only

argument that supports lesser consideration of claimants from DCOs rests on a presumption that DCO claims are more likely to be fraudulent, which is a problematic stance, and yet which animates the entire construct under the guise of efficiency.

A DCO attains this status for the entire nation, not parts of it. Designating geographic or demographic parts of a country is not possible under the new regime, even though such designation previously existed under parliament-approved provisions of the BRRRA (S. Rehaag, personal communication, January 16, 2014). This is problematic, as human rights situations can vary widely within a country. Furthermore, minority populations within a country can suffer from human rights violations that the state cannot effectively protect them from, even when that state is seemingly democratic and generally enjoys rule of law. Unfortunately, the final version of the DCO provisions has blunted the Minister's ability to make these discernments.

Once a Minister has made a DCO designation, claimants from that country will bear heavy burdens in gaining protection. Their claims before the Refugee Protection Division ("RPD") – the division of the Immigration and Refugee Board ("IRB") that hears refugee claims in Canada – occur within shorter time frames: 30 days for inland claims (compared to 45 days for non-DCO claims) or 45 days for claims made at the port of entry (compared to 60 days for non-DCO claims). Also, they will have no access to the RAD.

The DCO construct is based on "safe country" models in other countries – models that the UNHCR has considered not inherently problematic (UNHCR, 1991). However, the UNHCR has made clear that appeal provisions are vital to safe country frameworks in states' refugee laws, specifically because of the generalized nature of safe country designations (UNHCR, 1991). Without access to the RAD, the DCO mechanism becomes unfair, if not unconstitutional. Refugee determination must be an individual assessment, because well-founded claims can occur even in countries that the Minister may consider democratic.

Furthermore, the Act has considerably widened the Minister's discretion to designate. Under the previous BRRRA drafts, the Minister could only make a designation if the number of claims from a country and the rate of acceptance by the RPD exceeded certain thresholds explicitly set out in regulations. S/he was also required to consult an expert panel before making a designation, as well as to consider the human rights record of the country. This required consideration of specific international instruments, the factors in sections 96 and 97 of the IRPA and the availability of state protection within the country. Under the new section 109.1(3) of the IRPA, the numbers, periods and percentages required to trigger DCO consideration are set not by regulation, but by Ministerial discretion. Even if the thresholds are not met, the Minister can still designate a country based solely on her/his opinion regarding the existence of an independent judiciary, democratic institutions and active civil society organizations. The Minister is not required to consult with experts. S/he is also no longer required to consider sections 96 and 97, international instruments, or availability of state protection. Furthermore, there appears to be no mechanism for removing a country from the DCO list if human rights protection in a given country deteriorates.

The UNHCR has made clear the necessity of certain safeguards in designating safe countries. The removal of the ability to designate subgroups or regions within a given country and the expansion of Ministerial discretion to list countries based solely on opinion seriously erode the legitimacy of the DCO mechanism. Furthermore, DCO designation based solely on Ministerial discretion raises serious concerns about political influence over the list. Canadian Association of Refugee Lawyers President Lorne Waldman states:

"The DCO scheme is unfair, and violates basic rights contained in the Canadian Charter of Rights and Freedoms. Unlike the requirements in its previous legislation, the Minister can designate countries as "safe" without consulting experts on human rights. Worse yet, the criteria for the designation are vague and arbitrary. They do not provide objective assurances that

individual citizens can be adequately protected from persecution.” (CARL, 2012)

The DCO construct's effect on LGBT migrants is particularly problematic. Since there is no mechanism for designation of certain groups within countries, groups with a history of oppression, even within states with good human rights records, are vulnerable to unwarranted expedition of their claims and higher evidentiary burdens. LGBT asylum seekers are precisely such a group. There are significant human rights abuses against sexual and gender minorities in several countries currently on the DCO list (CIC, 2014). For example, Mexico, which is currently on the DCO list, reports high levels of anti-LGBT violence, particularly in Mexico City (del Collado, 2007). It is estimated that 3 LGBT persons are murdered every month in Mexico (del Collado, 2007). These statistics are not meant to deride or ignore human rights advancements and positive protections for LGBT persons enacted by Mexico and other states all over the world. However, at the present moment in history, LGBT persons' cultural position, even where state protection exists, is still marginalized in every country on earth. To designate any country as “safe” for sexual and gender minorities is problematic.

The DCO construct in its final version is a blunt instrument and leaves LGBT asylum seekers vulnerable. It raises serious constitutional and human rights questions. Combined with increased evidentiary burdens and extreme demands on performing a new identity (see below), a DCO designation can be fatal to a legitimate LGBT protection claim.

Shorter Timelines and Proving Identity

Time limits in the refugee determination process have been shortened under the new regime. Previously, claimants had 28 days from making a claim at a port of entry to find a lawyer, secure legal aid if necessary, start to prepare their case and submit their initial claim to determine eligibility. Refugees and support agencies found this timeframe difficult to meet. Under the new

provisions, claimants have only 15 days to do this. For those claimants making inland claims (i.e. at a CIC office after already entering Canada), this timeframe can vary, but is generally less than 15 days.

Previously, after submitting their initial claim, refugees could wait up to 2 years for their refugee hearing. This is unreasonably long, but the delays were due to inefficiencies and backlogs caused in large part by the government's decision not to appoint a full roster of adjudicators. Instead of addressing this and other institutional issues, the new laws have shifted the burden onto claimants and imposed drastically short timelines between claim and hearing: 45 days for DCO claimants and 60 days for non-DCO claimants for port-of-entry claims, and 30 days for DCO claimants and 45 days for non-DCO claimants for inland claims.

Rather than producing efficient and timely adjudication, the new timelines are likely to impede the ability of claimants to produce a comprehensive case at their hearing. Finding a lawyer and attaining legal aid certificates, particularly for new arrivals in Canada with cultural and language barriers, will take longer than 15 days. 30-60 days to obtain evidence and documentation of sufficient weight, quality, quantity and precision to satisfy an adjudicator is excessively burdensome. Again, under the guise of producing an efficient system, the new measures create significant additional barriers for forced migrants in Canada, using tactics of questionable compliance with international law and the *Charter*. Addressing the excessive wait times under the old system – caused by institutional inefficiencies and lack of resources – by punishing claimants is illogical and patently unfair.

The shorter timelines are particularly burdensome for LGBT claimants in light of the experience of sexual and gender identity. Several mental health experts who deal extensively with LGBT newcomers indicate the extreme psychological burden in this context. LGBT refugees have often spent their entire lives hiding their sexual identity. Upon making a claim, however, they have a tiny window of time in which to assert this identity to the satisfaction

of the decision-maker. The Federal Court has emphasized this particular burden for sexual orientation claims in overturning RPD rulings (*Buwu*, 2013). Under the previous regime, LGBT claimants had several months or years to transition into an environment where living out of the closet was possible. They were therefore in a better position to prove their identity when called upon to do so. The new regime throws newcomers grappling with identity issues into situations where their identity must be performed. Their identity therefore may not easily be discoverable in a manner or degree satisfactory to their adjudicator, particularly those adjudicators who rely on stereotypical, uninformed or culturally biased conceptions of LGBT identity.

Shorter timelines mean less opportunity to present a narrative to support a claim. Jenni Millbank (2009) describes the increased reliance on personal narratives:

“While many claims to refugee status rest largely, or entirely, upon the personal narrative of the applicant, this is more likely in claims which are based on sexual orientation. Refugee claims based upon political opinion, nationality, race or religion will more commonly have some form of independent verification of group membership, whereas a claim to a particular social group on the basis of sexual orientation depends upon the presentation of a very internal form of identity... Furthermore, while claimants on all grounds often face the difficulty of speaking about experiences of torture and trauma, including sexual assault, in recounting past persecution, sexual orientation claims are unique in the sense that extremely private experiences infuse all aspects of the claim.” (pg. 2)

Millbank describes several barriers to creating a convincing personal narrative related privacy, including reluctance to be named within their diaspora group due to homophobia, internalization of homophobia and negative stereotypes, and the reticence to divulge details of sexual behaviour, all of which can be deeply rooted in a claimant’s cultural identity. (Millbank, 2009 p. 10-11) Lawyers interviewed

for this Report have indicated that getting past these barriers takes months or years, and is near impossible under the current timeframes (M. Battista, personal communication, May 30, 2014). Some board members disbelieve or misunderstand certain aspects of LGBT experience and identity, such as past heterosexual relationships or the protracted nature of the coming-out process, simply because they have no experience to relate. (Battista, 2014)

Because of the difficulty in eliciting personal narratives, decision makers often rely heavily on asylum seekers’ LGBT community involvement once arriving in Canada (Battista, 2014). This can be a problematic, because involvement in a community organization is a poor measure of one’s sexual or gender identity. This has been determined in the Federal Court (*Charles*, 2004). Many LGBT individuals feel little or no connection to the LGBT community and its formal organizations. Community involvement stands even further from actual persecution, which may occur based on external perception of the victim, rather than their personal sexual or gender identity or expression. Unfortunately, because of the shorter timelines, many adjudicators are relying even more heavily on letters from community organizations, which in turn places increased pressures on these organizations to produce documentation. (M. Battista, personal communication, May 30, 2014) This is just one example of the government off-loading its responsibility onto civil society.

New Refugee Appeals Division

One of the positive advancements for refugee rights under the new provisions has been the creation of the new Refugee Appeals Division (RAD). This body ensures a written review of IRB decisions and will admit new evidence arising subsequent to, or not reasonably available before, a decision at the IRB. It also allows a new hearing under certain circumstances. The RAD arose out of the *Balanced Refugee Reform Act*, although it was never implemented before Bill C-31. Unfortunately, the RAD as described in the new Act, and therefore present Canadian law,

significantly reduces the scope and efficacy of the RAD as originally contemplated.

Firstly, a significant number of refugees do not have access to the RAD following a negative decision. The original version of the RAD prohibited only refugee protection claims that had been withdrawn or abandoned, but this has been substantially widened. Under the new section 110(2), decisions by the RPD disallowing refugee protection of a claimant from a DCO or a designated foreign national are not appealable to the RAD. RPD decisions allowing a cessation application by the Minister, or allowing an application by the Minister to vacate a refugee protection decision, are similarly disallowed. Claimants who came to Canada via the United States, but have an RPD hearing by virtue of fitting into an exception to ineligibility, do not have access to the RAD, nor do claims found to be manifestly unfounded or have no credible basis. H&C decisions are not appealable. Finally, refugee claims referred to the RPD before the RAD was established do not have access to it, even if subject to redetermination by order of the Federal Court. In fact, all of the above categories have no recourse in case of an unfavourable decision, other than applying for judicial review in the Federal Court. This is a lengthy, complicated process, which does not allow new evidence to be brought, nor the review of issues of fact. It can only evaluate the process for fairness, making it a costly and inadequate alternative for claimants to wield in the face of an unfair decision. The result is that the RAD provides a modicum of recourse for certain unsuccessful claimants, but also creates new procedural inequities.

Secondly, while the RAD offers access to both claimants and the Minister, it places different evidentiary burdens on each. The requirement under section 2.1 and the corresponding RAD Regulations for certain documents (transcripts, books of authority) in the appellant's record do not apply to the Minister; in fact, the Minister may perfect an appeal (a legal process during which all necessary documents are served on all parties and filed with the court) merely by filing a Notice of Appeal and unspecified "supporting documents" (s. 110(1.1)). As a result,

the evidentiary burden on the Minister is lower than on claimants. Furthermore, the Minister may intervene at any point before the RAD issues a decision, creating an unfair bias in the appeal process, as claimants must abide by strict timelines (see below). It should be noted that the Minister under the old system intervened in approximately 10% of refugee cases; under the new system, ministerial intervention occurs in nearly 40% of all cases (Manning, 2013).

The procedural fairness of the RAD is questionable. In tandem with the numerous other reductions in time limits under the new law, the RAD is hampered by time constraints. Claimants have 30 days from the time they receive a decision from the RPD to file and perfect their appeal (*Immigration and Refugee Protection Regulations*, 2002 s.159.91(1)(b)). The time limit is the same for responding to an intervention initiated by the Minister (IRPR, s. 5(5)). The Canadian Bar Association has called these timelines "unworkably short"; they also arguably exceed the power given to the Governor in Council by the IRPA (CBA, 2012 Annex I). The RAD suffers from other erosions of procedural fairness. There are restrictions on oral hearings (IRPR, s. 110(6)). The RPD and RAD are both barred from reopening cases, even when there have been violations of natural justice (IRPR, s. 170.2 and 171.1), in violation of Supreme Court of Canada jurisprudence (*Chandler*, 1989). Refugee law is unique in these strictures in Canadian law, resulting in an appeal process that does little to ensure principles of fundamental justice in life-or-death decisions.

Appeal mechanisms are vital to a fair determination process for all asylum seekers. However, those groups whose claims are particularly difficult for first-line decision makers to grapple with, or those whose negative claims have been disproportionately overturned by higher courts, will be particularly affected by inadequate appeal procedures. LGBT refugee jurisprudence since the early 1990s, and the volume and breadth of LGBT claims overturned in the Federal Court, makes clear that first-line decision makers often make mistakes regarding the adjudication of sexual and gender identity.

A lack of appeal options will take an especially drastic toll on them. Furthermore, the evidentiary limitations of the new appeals provisions are problematic. LGBT claimants already have a particular set of difficulties procuring evidence, as well as an identity narrative that may change over time. For example, if a gay person from a DCO fails to prove their claim before the RPD based on a lack of evidence and new evidence subsequently becomes available, they will not have the opportunity to raise this new evidence at their only option for appeal: judicial review. The same will hold true for any LGBT “irregular arrival”. In the time between receiving a negative decision and their judicial review decision, DCO claimants and “irregular arrivals” will be vulnerable to removal orders. This is particularly problematic in light of the realities of the coming out process, compounded by the additional stressors related to identity faced by asylum seekers. The appeals provisions are structurally discriminatory. To meet its human rights obligations under international and domestic law, and to take the protection of LGBT asylum seekers seriously, the refugee system’s appeals provisions need to take into account the realities of LGBT identity and experience. The present provisions are inadequate in this regard.

Finally, if review and appeal opportunities disappear, it becomes crucial that initial decisions are done correctly and asylum seekers have adequate time to present a thorough case. Unfortunately, under the new regime both appeals and initial decisions suffer from new restrictions and expeditions, compounding the risk of error.

Humanitarian and Compassionate grounds and Pre-Removal Risk Assessments

The new laws place restrictions on the availability of asylum on Humanitarian and Compassionate (H&C) grounds, a feature that allows for permanent residency status for individuals who may not meet the strict definition of a refugee, but who would face undue hardship if returned to their country of origin. The Act has disallowed

individuals from seeking refugee protection and H&C protection at the same time. Furthermore, rejected refugee claimants are barred from making an H&C claim for 1 year after their negative refugee decision. The ban also applies to “irregular arrivals”, beginning on the date they are designated. The exclusion period for H&C protection raises serious constitutional questions, as well as potential violations of Canada’s obligations under international law. Individuals are disallowed from applying for H&C protection from overseas, which effectively forces rejected claimants to go underground to avoid deportation until they can apply for H&C.

Pre-Removal Risk Assessments (PRRAs) exist for individuals facing removal from Canada, but who would face persecution, torture, risk to life or cruel and unusual punishment upon removal to their country of origin. There is a temporal ban on PRRAs: 1 year for non-DCO claimants and 3 years for DCO claimants. PRRA is also unavailable for those who arrived in Canada via the USA, or those who were found to be Convention refugees in another country. Similar to H&C restrictions, PRRA restriction create periods during which rejected claimants may be forced to go underground.

H&C and PRRA were crucial elements for Canada to satisfy its obligations for *non-refoulement* (which forbids the rendering of a true victim of persecution to their persecutor) under international law. The new limitations on these mechanisms seriously undermine this satisfaction. The logic behind the limitations was that asylum seekers should not be claiming as refugees if they are rightfully H&C candidates, and vice versa. However, the line between hardship and risk of persecution is rarely distinct. Furthermore, the provisions were designed to fill a gap for those who may not be refugees in the fullest sense, but whose removal would still put them at risk. Allowing both processes to advance at the same time is more efficient, and the current delay is arbitrary. The new provisions effectively close the door on asylum seekers who may legitimately fall into both categories, or those whose circumstances change during the process.

The H&C and PRRA were particularly important for LGBT asylum seekers. These individuals face evidentiary obstacles that other claimants will not face (see above). As a result, they may not satisfy the definition of a refugee in a pure sense. However, the dangers they face upon return to the country of origin are very real.

Decision Makers, Stereotyping and Credibility Assessment

Bill C-31 initially included a clause providing for the prioritized appointment of public servants to the Refugee Appeal Division, drawing criticism from several legal entities (Bill C-31, Clause 48; CBA, 2012 p. 19). While this provision has since been repealed, the independence of new RPD officers, many who came into their position with the new legislation, remains an area of disagreement. A significant majority of these decision makers come from public service backgrounds, including a disproportionate number with a background in a removal context (Manning, 2013). Their experience in removal may be reflected in their adjudicative attitude toward claimants.

The new system came in December 2012, so it is early to make definitive evaluations of the new officers. However, academics, lawyers and settlement professionals who deal daily with the process have observed that questioning is more extensive and intensive than under the old regime, often going on for several hours. Under the old regime, questioning during hearings would sometimes wrap up early, but this rarely happens any more; officers consistently use the full time allotted for questioning (Manning, 2013).

Decision makers are at the heart of all issues facing refugees, because they are the frontline of the determination process, and therefore protection. However, the nature of sexual identity and its intrinsic inability to conform to certain methods of evidentiary inquiry create particular challenges for decision makers in this context.

As LGBT refugee jurisprudence has developed in Canada since the early 1990s, the preconceived

notions of decision-makers have been front and center in the debate. Some decisions exhibit marked stereotyping regarding sexual and gender minorities. There is extensive Federal Court jurisprudence overturning IRB decisions based on stereotyping, but it persists. The root of stereotypical decision-making is partly based on a lack of comprehensive training on sexual identity itself. The bare truth is that there are no dependable “markers” of sexual orientation, and any attempt to ascertain such markers is the very essence of stereotyping. The experience of transsexual and transgender claimants may diverge here, as their minority status relies, at least partly, on physical or social (i.e. visible) markers of gender, but as a group they still represent transgressive identities, which may pose a threat, or may simply be misunderstood. Jenni Millbank, paraphrasing Gregor Noll, argues that “*the power dynamics of refugee determination procedures dictate that the applicant’s life story cannot challenge foundational tenets of the decision maker’s understanding of the world*” (Millbank, 2009 p. 3). This unfortunate conundrum sits at the very crux of LGBT forced migration adjudication.

Yet it is incumbent upon state actors, by virtue of their task in adjudicating and attributing sexual identity in an official context, to understand the essence of sexual identity as one that is simultaneously performative and essential, internally and externally influenced, and marginalized based on the threat it represents to the abuser. These intricacies of queer theory should inform practical training resources to build a deeper understanding of sexual and gender identity among decision makers. Numerous experts offer a focus on human rights protection and dignity as an alternative to delving into queer theory (Rehaag, 2008; Millbank, 2009), which is appealing because it foregoes the academic complexity and focuses determination away from identity and towards persecution. However the two approaches can work together: a fuller understanding of sexual and gender identity will elucidate markers of LGBT identity as unreliable, but it will also reveal truths relating to the nature of persecution on the basis of LGBT status, thereby meaningfully

supporting protection based on human rights protection and dignity.

Credibility assessment is expounded as a crucial aspect of the refugee determination process, although the 1951 Convention makes no mention of it. Perhaps this is because, relative to other adjudicative processes, asylum determinations deal with geographically, culturally and linguistically distant places and contexts, and therefore the range of verifiable, available evidence is much more limited. (Gyulai, 2013 p. 10). Credibility is particularly problematized in the context of LGBT claimants. Because there are no reliable features which can definitively prove LGBT identity and there is a tendency for LGBT claims to lack documentary evidence, a decision maker's credibility finding will be crucial to a LGBT claim. Credibility is increasingly the basis for negative decisions and is increasingly important in the context of shortened timelines and review restrictions. (Millbank, 2009) It is connected to the attitudes of officers, as decisions consistently cite the "ring of truth" and demeanour: subjective and immeasurable aspects of claimant's narratives. There are more objective metrics of credibility, including internal and external consistency and plausibility, but even these have been criticized as suffering from partiality and prejudice when applied in practice. First line decision-makers in Canada appear increasingly likely to disbelieve that an applicant is gay, lesbian or bisexual on the basis that her or his claimed identity is not plausible. (Millbank, 2009) For example, multiple IRB decisions have been overturned in the Federal Court on the basis that the first decision makers erred in determining claimants could not be homosexual because they had children (*Leke*, 2007) or previous heterosexual relationships or marriages (*Eringo*, 2006; *Santana*, 2007).

Bisexual asylum seekers face particular challenges in challenges in Canada. These challenges relate closely to credibility. A study in 2008 revealed that no explicitly bisexual claimant was granted refugee status in Canadian refugee decisions between 2001 and 2004 (it should be noted that only 11 reported decisions involved bisexuals, and only a small fraction of Canadian

refugee decisions are published) (Rehaag, 2009). A study of 2006 IRB determinations showed bisexual claimants made up approximately 8% of LGBT decisions before the IRB (44 out of 577 decisions). The success rate for bisexual claimants (39%) was significantly lower than the average LGBT rate (58%) (Rehaag 2009, p. 7). Grant rates for bisexual claimants were found to be significantly lower than overall LGBT claims in the USA and Australia as well (Rehaag, 2009 p. 8-9). Bisexual claimants may challenge the essentialist account of human sexuality (Rehaag, 2009 p. 11) thereby potentially challenging foundational tenets of the decision maker's understanding of the world (Millbank, 2009). The troubling reasoning behind rejected bisexual asylum claims often rests on disbelief or a lack of claimant credibility regarding their sexual or intimate behaviour patterns (Rehaag, 2009 p. 13-15). Yet the perceived lack of credibility of the claimant is actually a manifestation of the preconceived notions held by the decision maker regarding sexual behaviour, trajectories of identity and external cultural pressures (Rehaag, 2009 p. 13-16).

There are no easy answers to the problems of credibility assessment. However, there are measures that can limit credibility assessment's notoriously problematic effects, including training as discussed above. However, the most crucial measure is access to substantive appeal. International experts praised Canada's previous regime for limiting arbitrary exercises of discretion and preserving access to review from first-level decision making, which inevitably suffers from lesser expertise (Millbank, 2009). These features have been undercut in the new regime, as numerous categories of asylum seekers lose access to appeal, including those from DCOs. The result is a system that leaves vulnerable those groups for whom credibility is an especially important aspect of their claim, and whose credibility remains a difficult issue for decision makers to measure. LGBT persons are precisely such a group.

The Chairperson of the IRB provides official Guidelines for adjudication, including those related to children, gender-related persecution

and other vulnerable person with specific needs and histories (IRB, 2014). Such a Guideline is sorely needed for LGBT asylum claimants, particularly in light of Federal Court jurisprudence (Battista, 2014). Despite offers from experts, however, the Chairperson to date has declined accept consultation on the development of such a Guideline (M. Battista, personal communication, May 30, 2014).

Legal Aid

The government's attack on asylum seekers is multi-faceted. A major aspect of the assault is changes in legal aid, which undermine access to justice for asylum seekers. This section focuses on Legal Aid Ontario, but similar developments are occurring throughout Canada.

Legal representation is crucial to success for refugee claims. In 2011, refugee claimants who had legal counsel saw a grant rate of 57%, compared with 15.2% for those without counsel (Rehaag, 2011). Furthermore, 62.9% of refugees

without counsel withdrew or abandoned their claim, compared with merely 12.7% among claimants with counsel (Rehaag, 2011). Access to counsel is imperative for just adjudication of refugee claims. Principles of fundamental justice are guaranteed by Section 7 of the *Charter*, and have been found to encompass "every human being who is physically present in Canada" (Singh, 1985). The availability of a comprehensive and accessible legal aid regime is therefore essential for Canada to satisfy its obligations for international protection, as well as its own constitutional requirements. Erosions in access to justice will affect all asylum seekers and are therefore a concern for LGBT asylum seekers.

Significant changes to Legal Aid Ontario came into effect in September 2012, which undermine its ability to provide adequate protection to Canada's asylum seekers. The consequences of the 2012 changes remain to be fully seen, but there has been a sharp decline in the provision of legal aid for asylum seekers, which can only erode access to justice.

Resettlement and Sponsorship

“Resettlement” is a common term in migration literature. It can mean several things, including the process of new arrivals integrating into their new country of residence. However, this section uses the term “resettlement” to describe a specific avenue for Convention refugees (as determined by UNHCR and/or a foreign state) who have not yet reached Canadian borders to gain asylum. The process involves refugees receiving private sponsorship from Canadian groups, or whole or partial sponsorship from the Canadian government. Sponsorship entails providing financial and social support to new arrivals upon their entry into Canada, generally for one year, including money for everyday expenses, as well as help accessing employment, education, healthcare and other services. There are three main types of private groups that can provide resettlement assistance: Sponsorship Agreement Holders (SAHs), Groups of Five (G5) and Community Sponsors. Refugees sponsored by the government alone are termed Government-Assisted Refugees (GARs).

Resettlement is a crucial aspect of LGBT asylum in Canada for several reasons. Firstly, only a very small portion of the world’s refugees has the resources to arrive at Canada’s borders to make a claim. Of the 10.5 million refugees worldwide in 2012, approximately 20,000 sought asylum in Canada in 2012, or roughly 0.2%. The majority, from states like Afghanistan, Somalia, Iraq, Syria and Sudan, sought asylum in neighbouring states – Pakistan, Iran, Turkey, Kenya and Ethiopia, for example (UNHCR, 2013). Resettlement represents the avenue available to the disadvantaged majority. Secondly, LGBT refugees may not be as safe as their sexual/gender conforming counterparts in countries of first asylum – refugee camps, for example, can provide a modicum of safety for those fleeing political or ethnic persecution, but many remain intolerable, violent and dangerous for LGBT individuals, as well as other disenfranchised groups such

as women and girls. Thirdly, LGBT asylum seekers can be ostracized from their diaspora communities in Canada, or feel alienated from them; they may be in greater need of support from sponsors outside of their diaspora community. To truly affect change and provide protection on a global scale, resettlement and sponsorship are crucial. Additionally, the government has used the resettlement framework to off-load its responsibility to asylum seekers onto community organizations. This tactic has effectively reduced grants of asylum and government sponsorship. The resettlement system’s failures reveal the government’s disingenuous public relations campaign regarding refugees.

Resettlement and sponsorship have, until recently, received relatively little attention in Canadian LGBT refugee policy, law and academia. Since the early 1990s, the focus of criticism among LGBT rights advocates has been flawed refugee status determinations by Canadian officials. This is an important issue to address. However, it should be noted that lesbian and gay asylum seekers in Canada (although not bisexual claimants, with scant statistics regarding trans claimants) generally fare as well or slightly better in the refugee determination process than claimants from other marginalized groups. (Rehaag, 2009 p. 7). It is conceptually easier, but unfair, to blame a few uninformed and heterosexist decision makers for the full ambit of challenges faced by LGBT asylum seekers. Interrogating the structural barriers to the resettlement process is challenging but vital, in that it reveals systemic anti-refugee and anti-immigration biases, which may also be stacked against LGBT claimants.

Jason Kenney, former Minister of Citizenship, Immigration and Multiculturalism, as well as the architect of Bill C-31, made numerous statements at LGBT community events in Canada between 2010 and 2012, asking for increased support for

the resettlement program (LaViolette, 2012). Several organizations across the country have heeded this call. Unfortunately, the reality of the system hinders effective and efficient protection, thereby stymying the efforts of LGBT community groups. The spirit of the system is commendable, but in its current form it is cumbersome, convoluted, inaccessible and marred by unreasonable delay.

It is against this backdrop that the importance of addressing resettlement mechanisms can be fully appreciated – it is central to fully realizing our (Canada’s and the Canadian LGBT community’s) obligations to the international LGBT community. Interrogating the system also reveals the present Conservative government’s attitude towards refugees.

Types of Resettlement Sponsorship

Sponsorship Agreement Holders (SAH) and their Constituent Groups (CGs)

“Sponsorship Agreement Holders are incorporated organizations that have signed a formal sponsorship agreement with Citizenship and Immigration Canada,” (CIC, 2012 p. 4). All currently approved SAHs have some religious affiliation (CIC, 2014). SAHs receive a quota of refugees to sponsor in a given year. They then assign these refugees among their Constituent Groups (CGs). Each SAH sets its own criteria for recognizing CGs. A CG will prepare an application for a refugee. Then the SAH must approve the CG’s application before it can be sent for processing to the Centralized Processing Office located in Winnipeg (CPO-W), the agency that issues resettlement decisions (CIC, 2012 p. 4).

Groups of Five (G5)

“Groups of Five (G5) are five or more Canadian citizens or permanent residents, who are at least 18 years of age, live in the expected community of settlement and have collectively arranged for the sponsorship of a refugee living abroad,” (CIC, 2012 p. 5). The CPO-W assesses G5 applications

directly and determines, based on financial and non-financial aspects, whether the group can act as guarantors for the new arrival. G5 sponsorship lasts for up to one year, or until the sponsored refugee becomes self-sufficient, whichever comes first (CIC, 2014).

Community Sponsors

“Any organization (for-profit/not-for-profit, incorporated/non-incorporated) located in the community where the refugees are expected to settle can make an organizational commitment to sponsor,” (CIC, 2012 p. 5). Community Sponsors are limited to two sponsorship undertakings a year, and face a similar assessment as G5s regarding their capacity to act as guarantors. The CPO-W makes this assessment. Community sponsorships last for up to one year, or until the sponsored refugee becomes self-sufficient, whichever comes first (CIC, 2014).

After a group gains approval through CPO-W, the claimant has to apply and be approved by a Canadian visa office abroad. This is true for any of the group sponsorship types above.

Government-Assisted Refugees

“Government-assisted refugees are Convention Refugees Abroad whose initial resettlement in Canada is entirely supported by the Government of Canada or Quebec. This support is delivered by CIC-supported non-governmental agencies.” Government sponsorship lasts for up to one year, or until the sponsored refugee becomes self-sufficient, whichever comes first (CIC, 2014). Canada sets an overall number of individuals it is willing to receive for resettlement, as well as regional numbers. The UNHCR refers Convention refugees to Canadian visa offices in their respective regions, who then undergo interviews to see if they meet certain criteria, including medical, criminal and security screening.

Resettlement Barriers for LGBT Asylum Seekers

In 2011, then-Minister Kenney pledged \$100,000 to launch a pilot project with the Rainbow Refugee Committee (RRC) in Vancouver (Keung, 2011). The funds were to be matched by RRC, creating a unique joint government/community funding model (this is a special fund for LGBT asylum seekers, separate from VOR sponsorship, described below). While the pledge is a positive show of government support for LGBT asylum seekers, and more money has been re-pledged this year, the fund is accessible only through SAHs. This creates several problems and barriers.

The fact that all SAHs in Canada are currently faith-based means those funds earmarked for LGBT refugees are now subject to the approval of faith-based organizations. No ideological criticism of faith-based groups is intended here; indeed, many such groups have been champions of LGBT rights. Historically, the humanitarian community supporting refugees in Canada sprung almost entirely from community churches and other religious institutions. However, the necessity for faith-based approval, imposed surreptitiously or unwittingly through the SAH construct, sits uncomfortably with a fund designated for LGBT refugees, particularly when the vast majority of the violence and persecution faced by LGBT people worldwide bears at least a partial religious motivation. Furthermore, SAHs have a limited amount of refugees they can allow to be sponsored within their quotas. If a SAH wants to designate one of their spots to a LGBT refugee to be sponsored by an external LGBT-rights group, they may face considerable internal resistance, simply because quotas are low and spaces are scarce. There are numerous community groups vying for SAH approval, which creates a barrier that is skewed in favour of refugees aligned with a religious affiliation.

G5 sponsorship and Community Sponsorship may better suit LGBT groups and individuals, because they do not require approval through a SAH. They are more flexible mechanisms, focused on grass-roots community organizing, which aligns with

the history of LGBT community development. However, only individuals recognized as refugees by the UNHCR are eligible for sponsorship, a restriction that also applies to SAHs. This creates a major barrier. For the most part, the UNHCR has exhibited difficulty in identifying refugees who are fleeing due to persecution on the basis of their sexual orientation or gender identity (ORAM, 2013 p. 19). The UNHCR generally operates in contexts of low-resources and high-volume, making it unlikely those front-line workers will be able to identify (sexual) minorities within (mass migration) minorities. Some countries only allow the UNHCR to work in refugee camps, which disadvantages LGBT refugees, who may be better served and protected in urban areas (ORAM 2013, p. 11). Further, LGBT asylum seekers' safety may be put at risk should they reveal their sexual identity in a refugee camp.

Even once an individual has been recognized as a refugee by the UNHCR, the timelines for resettlement are excruciatingly long. Group approval through CPO-W entails an 8-month wait before application packages are even opened (LaViolette, personal communication, March 12, 2014). After this, waiting times at Canadian visa offices are extremely long. Kenya, for example, which has recently enacted new laws against consensual adult homosexual acts and whose politicians have called homosexuality "as bad as terrorism" (Macharia, 2014), has an approximate processing time of over 4 years. No country on earth has a wait time less than 1 year (CIC, 2014). With all types of resettlement, even after both the group and the refugee are approved, there is a final interview to satisfy the Canadian government that the person is in fact a refugee, even if they already have Convention status through the UNHCR or another state. For LGBT asylum seekers, many of who may be in a country of refuge no safer than their country of origin and who may be under constant danger of their identity being exposed, 2 to 5 years may as well be an eternity.

One final avenue, which offers a shorter wait time, is the Blended Visa-Office Referred (VOR) program, which began in 2013. The goal of the program is to engage in a three-way partnership

between the Government of Canada, the UNHCR and private sponsors. The advantage of this mechanism is that individuals on the list are already government-approved and ready to emigrate immediately. However, private sponsors must be SAHs, and therefore carry the same restrictions mentioned above. Furthermore, the VOR list is extremely restricted and opaque; neither documents nor interviews for the present report were able to shed any light on exactly how the government creates the VOR list. In 2013, the only LGBT persons on the VOR list were Iranians living in Turkey, mostly gay men (LaViolette, personal communication, March 12, 2014). Two couples on that list were offered sponsorship by a faith-based resettlement group in Ottawa, but both turned down the offer, indicating a preference for Toronto (LaViolette, personal communication, March 12, 2014). In light of the level of personal autonomy that would permit an asylum seeker to elect to turn down an offer of sponsorship, these refusals raise questions about the VOR list. The lack of diversity of LGBT refugees on the VOR list, given the extreme violence and persecution faced by LGBT people in many nations around the world, makes it clear that the Canadian government has yet to develop a real capacity to locate LGBT asylum claimants most in need of resettlement (LaViolette, personal communication, March 12, 2014). The VOR list is supposed to take referrals from the UNHCR, and this agency has taken some steps to improve their capacity to identify and refer LGBT refugees, but this has not yet translated into a significant number of LGBT people on the list. It would be helpful if LGBT resettlement groups in Canada could suggest refugees for the list (especially if they have been recognized as refugees by the UNHCR). Unfortunately, the government will not accept such referrals (LaViolette, personal communication, March 12, 2014).

Sponsorship has ramifications beyond granting asylum. Private sponsors are not required to provide healthcare (including medication, vision and dental care), while only GARs have access to full health care coverage under the IFHP (see below). Furthermore, GARs are the only refugees (other than human trafficking victims) who may be covered to receive mental health services.

The opaqueness and length of the resettlement processes seriously undermine the important objective of providing care to those with the greatest mental health needs.

LGBT Resettlement, Community and Wider Asylum Advocacy

There are organization and individuals within Canadian LGBT communities who are taking up the cause of refugee sponsorship. Unfortunately, the mechanism provided by the government is too cumbersome and opaque to create meaningful results and foment continued support. If it is to be taken seriously, the government needs to back up their words with action and create feasible avenues for private sponsorship while maintaining their commitment to government and joint sponsorship. Otherwise, the resettlement regime is nothing more than a charade by the government to off-load their responsibility for refugee protection onto civil society. This attitude becomes even more obvious in light of Jason Kenney's 2011 broken promise to increase the number of refugees resettled to Canada by 20%, made in Geneva at a meeting commemorating the 60th anniversary of the 1951 Convention. In fact, 26% fewer refugees were resettled in 2012 than 2011 (CCR, 2013).

Despite the government's systemic barriers, community groups such as the Rainbow Refugee Committee have found the hard-won successes within the resettlement process to be hugely rewarding. As human rights for sexual and gender minorities become larger and more diffuse, refugee resettlement provides the Canadian LGBT community with a positive, tangible goal, and offers opportunities for international collaboration. It is not just about bringing an individual to Canada; it is about building LGBT communities, both in Canada and internationally.

The system needs reform, but not complete upheaval. Leading advocate Nicole LaViolette stresses the importance of building on existing models, such as faith-based SAHs, and developing them with a queer focus (LaViolette, personal communication, March 12, 2014). This

effort should not be myopic; the LGBT refugee movement must partner with other refugee groups to draw on their expertise and resources, and reciprocate that support. The LGBT asylum movement, in Canada and internationally, has a legal, academic and activist history to offer. LaViolette counsels against a focus exclusively on LGBT refugees; LGBT communities must understand that policies that restrict protection to all refugees will also hurt LGBT refugees. To be an effective movement in favour of refugee protection, queer communities cannot argue that LGBT refugees should given priority over other vulnerable groups (LaViolette, personal communication, March 12, 2014). This kind of privileged thinking is, in itself, a form of anti-immigration nationalism, which drives so much bad policy.

Refugee Health Care

2012 Interim Federal Health Program Cuts

Racialized communities, which largely intersect with refugee populations, already suffer from inequities regarding access to health care in Ontario. (Patyckuk, 2011; Levy 2013) In 2012, Canada's federal government exacerbated this inequity by announcing a series of cuts to the Interim Federal Health Program ("IFHP"), which provides health coverage to Canada's asylum seekers. Before these cuts, the IFHP provided coverage to all asylum seekers in Canada. The coverage was very similar to provincial health care, as well as extended coverage for vision care, dental care and medication, similar to provincial social assistance. The 2012 cuts removed vision, dental and medication coverage for all refugees (with the exception of those very few who may receive government sponsorship for resettlement). Furthermore, the DCO construct had a massive impact on refugee healthcare: DCO claimants have no access to healthcare through the IFHP including essential and emergency care, except where such conditions could pose a threat to public health or safety. The new IFHP regime essentially has the following consequences:

- Privately sponsored refugees have access to medical care through provincial health coverage, but no longer have government-financed access to medication, vision care or dental care. They also have no access to counselling or mental health services. The costs of these medications and services must now be covered by their sponsors.
- Un-sponsored refugee claimants from DCOs have no access to medical care, even in cases of emergencies, pregnancy or ill children, unless their condition poses a threat to public health or safety. If they are on provincial social assistance, they may have access to medication, vision care and dental care, but they lose this benefit if they are employed. They also have no access to counselling or mental health services.

- Un-sponsored refugee claimants from non-DCOs have access to medical care through the IFHP. If they are on provincial social assistance, they may have access to medication, vision care and dental care, but they lose this benefit if they are employed. They also have no access to counselling or mental health services.
- Rejected refugee claimants have no access to medical care, even in cases of emergencies, pregnancy or ill children, unless their condition poses a threat to public health or safety. They have no access to medication, dental or vision care, nor do they have access to counselling or mental health services.

Provincial Coverage in 2013

In late 2013, Ontario's provincial government, along with five other Canadian provinces, decided to step in and fill the gap left by the 2012 IFHP cuts. The Ontario Temporary Health Program (OTHP) for refugee claimants came into effect on January 1, 2014. The program seeks to provide short-term essential and urgent health coverage including most services provided by hospitals, primary and specialist health care providers, as well as laboratory and diagnostic services. In addition, some medications are available. Services are covered through a third-party provider (in Ontario, Medavie Blue Cross) and claims require significant documentation, including consent forms from the service provider and documentation from IFHP refusing coverage.

Where the provincial government has not initiated programs to fill the gap left by the IFHP, the cost of healthcare will fall on refugees themselves or on their sponsors, which raises serious concerns. In the end, however, the province foots the bill when refugees with serious conditions, many of which could have been avoided at lower cost, show up in emergency rooms across the country.

The OTHP and similar provincial programs are positive developments, but the Conservative federal government is bureaucratically blocking their success. The program's complexity is a major barrier for refugees to begin with, who often have communication difficulties and for whom language is an almost universal challenge. Canadian Doctors for Refugee Care (2014) describe this frustrating situation:

“Under the current process, Ontario hospitals and doctors must submit billing claims for refugee patients to Blue Cross, the government’s health insurance company to determine eligibility under the IFHP and receive payment. This process usually takes at least four weeks. If the claim is rejected, it is sent back to the billing hospital or doctor who must then resubmit the same billing claim, to the same insurance company, for the same service but directed to the OTHP branch of Blue Cross. The Conservative Government has prohibited Blue Cross staff from walking down the hall and transferring the rejected claim to the OTHP. More work is created for hospital and administrative staff, more taxpayer funds are being spent on federal Government mandated Blue Cross inefficiency, and confidence in OTHP is being eroded by the federal Government’s interference in a provincial program.”

Early reports indicate that some health care providers are simply declining to accept OTHP, due to the cumbersome, confusing process and lack of confidence in ever being paid for their services. The process's complexity also leaves refugees themselves feeling discouraged from seeking out services.

The Right to Health

According to Ontario health officials, the 2012 cuts left one-third of refugee claimants without any health coverage in case of emergency. (Keung, 2013) This is a major erosion of the human rights of refugees, particularly the right to health.

The IFHP cuts are arguably unconstitutional. There is no explicit mention of a right to health in the *Charter*. However, section 7 protects the rights to life and security of the person, of which health

is a major component. Furthermore, the IFHP cuts may amount to cruel and unusual punishment contrary to section 12 of the *Charter*, and discriminate against certain refugees in violation of section 15 of the *Charter*. At the time of writing, a legal challenge against the IFHP cuts on these grounds is before the Federal Court of Canada. The challenge was brought by the Canadian Association of Refugee Lawyers, Canadian Doctors for Refugee Care and two individual patients who were severely harmed by the cuts.

The right to health has a long history in international law, beginning with the Constitution of the World Health Organization in 1946. Canada's obligations under numerous international instruments, including Article 25 of the UDHR and Article 12 of ICESCR (more fully expounded in General Comment 12 from 2000) include the right to health. It is essential to understand that the interconnectedness of rights is vital to the meaningful, sustainable realization of human rights, a crucial concept to which the right to health especially applies. The assertion, protection and realization of any right are impossible without health.

The sentiment that refugees should not have access to care that the average Canadian does not have access to smacks of nationalist privilege, and has been bolstered by government anti-refugee rhetoric related to standards of healthcare (Tyndall, 2014). More importantly, it is not reflected in reality. The IFHP cuts have relegated refugees to a standard of healthcare below that of Canadians, which violates their right to be free from discrimination based on nationality as protected by section 15 of the *Charter* and the 1969 *International Convention on the Elimination of All Forms of Racial Discrimination*. In particular, removal of emergency care for children and pregnant women raises serious human rights concerns – not just from a moral perspective, but from the additional international protections for maternal and child health under Article 12 of the *Convention on the Rights of the Child* and Article 12 of the *Convention of the Elimination of All Forms of Discrimination Against Women*. Finally, even if the DCO mechanism were to be reformed to be transparent, objective and independent of political influence, DCO designation should not result in reduced access to health care services.

Mental Health

The right to health is not only physical. Mental health is increasingly part of the conversation around holistic health. If individuals in Canada are entitled to a certain standard of health, mental health must be a part of the equation. This is especially true for asylum seekers, who disproportionately suffer from psychological trauma including torture and sexual violence. Mental health professionals interviewed for this report indicated heightened levels of depression and anxiety disorders among LGBT asylum seekers. These were caused not only by the trauma of persecution in countries of origin, but also from isolation and marginalization once in Canada. Furthermore, mental health experts repeatedly cited the asylum claim process itself as a major stressor.

Sexual minorities are at a higher risk of mental health disorder than heterosexuals (Meyer, 2003). LGBT youth in particular are at higher risk of mental health problems, including anxiety, depression, addiction, suicide ideation and suicide attempts than their cisgender and heterosexual counterparts. These data come from studies in high-income countries, where such studies are even possible. It is likely that the rates are higher in other countries, where LGBT individuals may have less protection against persecution, marginalization and pressures to hide their sexual or gender identity. The mental health concerns for youth can often be related to the coming out process. Many asylum seekers, regardless of age, are undergoing the “coming-out” process at the same time as negotiating a new home and culture. Mapping LGBT identity on top of asylum seekers reveals a group that represents intensified mental health risk.

This group also represents an imposed, compound identity shift, both sexual/gender and national. Arguably the most intrinsic factor of human identity is where one calls home. Indeed, in antiquity, exile was a sentence worse than death. Combine this with the intimate nature of one’s gender or sexual identity, and LGBT refugees exist in an unparalleled state of identity flux.

Finally, stigma (Hatzenbuehler, 2009) and minority stress (Meyer, 2003) are major drivers of mental health risk. Trans populations of colour exhibit similar patterns of stigma and discrimination, including markedly higher experiences of violence (Grant, 2011). Sexual minorities confront increased stress exposure resulting from these drivers, and this stress creates elevations in general emotion dysregulation, social/interpersonal problems, and cognitive processes conferring risk for psychopathology (Hatzenbuehler, 2009). LGBT asylum seekers may encounter stigma both within their cultural community and from the LGBT community. They also inhabit at least two minority spheres. These factors compound the risk of mental health problems.

Mental Health Trends Among LGBT Asylum Seekers

The mental health professionals interviewed for this Report observed a number of trends for LGBT asylum seekers in Ontario.

Given the very tight timeframes and restrictions on mental health coverage, it is extremely difficult to provide adequate services (J. Ramesh, personal communication, March 31, 2014). Although from one perspective, the shorter timelines actually limit the time that individuals spend in uncertainty, and therefore may limit stress (J. Ramesh, personal communication, March 31, 2014), there are significant negative consequences of the new timelines related to mental health. For example, Culturally-Competent Cognitive-Behaviour Therapy (CCBT) in advance of a refugee hearing can provide evidence of trauma and can be hugely beneficial, both for the determination of the claim and the mental health of the individual. However, this is a specialist service that is nearly impossible to obtain within the short timeframes under the new regime (J. Ramesh, personal communication, March 31, 2014). Some newcomers are reluctant to avail themselves of mental health services from visibly queer-positive providers for fear of being outed (A. Esmail, personal communication, March 31, 2014); unfortunately, the new refugee timelines and evidentiary practices require asylum seekers

to connect with queer organizations very quickly and provide proof of this. In reality, there is often no time for mental health care, or truly any health care, before an individual's hearing. By the time they get to a care provider, it is often too late to obtain mental health evidence to support a claim.

The mental health impact of the asylum process has other impacts on adjudication. In her work related to trauma, shame, depression and memory, and their impact on the asylum process, Jenni Millbank's findings indicate that mental health factors negatively affect a claimant's ability to remember details and effectively construct a narrative to the satisfaction of decision-makers (Millbank, 2007 p. 7). "*Dissociation regularly manifests as a protective mechanism in high-stress settings, and the refugee status determination environment is an obvious trigger,*" (Millbank, 2007). The uncertainty asylum seekers feel during the claim process affects many other pursuits and life goals, including education, employment and relationships (A. Esmail, personal communication, March 31, 2014). They express feelings of no longer being a person, but merely a case; they view their claim as a chance to reclaim their very personhood (A. Esmail personal communication, March 31, 2014). The trauma they may have endured is often relived and re-experienced through the asylum process and its evidential rigours (A. Esmail personal communication, March 31, 2014).

Numerous mental health issues can continue to affect LGBT asylum seekers even after a successful claim, or for those who remain in Canada without legal status. Many newcomers only avail themselves of mental health services many years after making their claim, as their issues may not surface until the stress of the claim process subsides (J. Ramesh, personal communication, March 31, 2014). Some feel shocked due to higher than expected levels of racism, homophobia and transphobia in Canada, after leaving their lives behind for the promise of something better (A. Esmail, personal communication, March 31, 2014). Many newcomers continue to hide their sexual or gender identity within their diaspora community in Canada (J. Ramesh, personal communication, March 31, 2014). Similarly, many discount or disguise their mental health problems, which

remain highly stigmatized in some cultures (J. Ramesh, personal communication, March 31, 2014). This stigma can result in a reluctance to seek out mental health services, as many newcomers' only concept of mental health services is psychiatrists and medication; sitting down and talking with a stranger can feel very unfamiliar (A. Esmail, personal communication, March 31, 2014). For those who achieve refugee status, or for those who remain in Canada illegally, the process of overcoming trauma, getting support and finding a community is extremely difficult and long.

In addition to the harmful IFHP cuts and shorter timelines for adjudication, there are significant barriers for LGBT asylum seekers in accessing mental health services. There are very few mental health services geared towards LGBT newcomers outside of Canada's major urban centres. Health care professionals are developing new professional networks and leveraging technology to try to combat this barrier (R. Raj, personal communication, March 3, 2014) but many individuals continue to go unserved. Particularly among tech-savvy youth, social media and technology are wonderful tools for disseminating information, but access can be difficult for those limited by age, disability or language (A. Esmail, personal communication, March 31, 2014). Language barriers are a perennial concern, particularly in mental health where complicated emotional concepts may require more nuanced translation than what a friend or family member can provide (J. Ramesh and A. Esmail, personal communication, March 31, 2014).

The pivotal role of mental health services in the asylum process is undermined by recent changes to IFHP and the shorter timelines as a result of Bill C-31. Bearing in mind the interconnectedness of human rights realization, the particularly crucial role of the right to health in all human rights and the particularly crucial role of mental health in overall health, the recent changes to Canada's refugee healthcare regime have seriously eroded basic human rights for LGBT asylum seekers. The mental health aspect is merely one manifestation of this erosion, but one with important connections to all other metrics of rights protection for LGBT asylum seekers.

Conclusion / Recommendations / Information Sheets

This report concludes that the recent legislative changes to Canada's refugee regime are decidedly negative from a human rights perspective. Indeed, aspects of the changes stand in direct contravention of certain human rights laws both domestically and internationally. The Conservative government's anti-refugee attitude has resulted in serious erosions of Canada's obligations in regard to international protection, as evidenced by sharp drops in refugee claims and acceptance compared to other similarly situated receiving states. After a significant drop following the Act in 2012, asylum application to Canada fell another 50% in 2013 (UNHCR, 2014). The changes negatively affect all refugees, but LGBT asylum seekers bear particular burdens as a result of their unique cultural position and marginalization. Canada is legally required to address these shortcomings of the new system. Furthermore, it should strive to reorient itself as a welcoming nation to forced migrants, honouring our history as a champion state of human rights protection and multiculturalism.

In light of the human rights issues highlighted herein, this report makes the following recommendations:

- Canada's refugee regime should be brought into compliance with international standards, particularly in regard to UNHCR Guideline No. 9 from 2012. Canada's obligations under the Guideline require changes to law and policy in regard to: evidentiary matters and claimants' testimony; case-by-case evaluation, especially where information is lacking on country conditions; excessive reliance on credibility assessment; use of stereotyping; and *sur place* claims.
- The Designated Country of Origin (DCO) construct should be abolished. However, if it is deemed necessary, the process should be modified so that an independent group of experts determines the DCO list, guided by clear, consistent criteria. The system should be transparent and objective, including the ability to designate certain groups within countries as exempt from the designation based on particular human rights challenges faced by sub-populations within designated states, such as LGBT individuals and other groups.
- DCO claimants should have access to the Refugee Appeals Division.
- Asylum decision makers in Canada should avail themselves of training and education on the specific challenges faced by LGBT asylum seekers. These endeavours should include an understanding of queer theory and should disturb prevailing notions of LGBT identity, behaviour and cultural signifiers. The government should regularly make such training available and continue to partner with LGBT rights groups in its design and delivery.
- The Chairperson of the Immigration and Refugee Board should consult with experts to develop and promulgate an official Guideline, similar to existing Guidelines, on the concerns, needs and issues faced by LGBT asylum seekers, as well as offering best practices for overcoming them during adjudication.
- LGBT community groups should prioritize Sponsorship Agreement Holder (SAH) designation, and the government should facilitate this process. Working in cooperation with existing SAHs, the LGBT community should lead the way in creating new, non faith-based SAH organizations. In addition, future funds pledged for LGBT asylum seekers should be available directly to G5s and Community Sponsors as well as SAHs.
- The redundant requirement for a final interview for sponsored refugees who already hold Convention status through UNHCR should be removed.

- The government's process regarding the Visa-Office Referred list should be made clear, and it should allow referrals from relevant civil society groups.
- The Interim Federal Health Program cuts should be reversed. In the interim, the federal government should cease bureaucratically blocking the efficacy of the Ontario Temporary Health Program and other provincial health programs serving asylum seekers. The grave vulnerability for maternal and child health among DCO claimants must be addressed immediately to restore compliance with international and domestic human rights law.

Following Envisioning's 2012 Roundtable, the present report hopes to have addressed one major "Action Item" (Envisioning Global LGBT Human Rights, 2012 p. 12) namely, the impact of changes to Canada's immigration and refugee policy. Other "Action Items and Issues for Consideration" have been touched on, including accessibility and eligibility for services, the use of letters from LGBT service providers during the refugee determination process, awareness of different cultural LGBT expressions among decision makers and other stakeholders, political aspects of the DCO construct, and isolation of LGBT asylum seekers from other members of their cultural community. (Envisioning LGBT Human Rights, 2012 p. 12-13)

In response to needs identified through its community partnerships, Envisioning Global LGBT Human Rights has produced three Information Sheets related to this report. These were synthesized from information within the report, as well as information gathered in its development and from other Envisioning research. In mid-2015, the final report in the series "Envisioning LGBT Refugee Rights in Canada" will be published. It is based on data gathered through focus groups with LGBT asylum seekers, refugees and service providers, along with additional research conducted with the assistance of community partners.

The Information Sheets and the present report can be found at: <http://envisioninglgbt.blogspot.ca/p/publicationsresources.html>

Information Sheet: Making an LGBTI Refugee Protection Claim in Canada

Contains: information and resources on what is involved in making a refugee protection claim in Canada, geared specifically toward LGBTI persons.

Primary Audience: individuals who are considering seeking asylum in Canada due to persecution, violence or threats because they are lesbian, gay, bisexual, transsexual, transgender or intersex (LGBTI), or because others perceive them to be.

Information Sheet: Mental Health Challenges for LGBT Asylum Seekers in Canada

Contains: survey of common stressors and resulting mental health challenges encountered by LGBT asylum seekers in Canada. Based on research data gathered by Envisioning Global LGBT Human Rights in India, Africa, the Caribbean, and Canada as well as a broader literature review.

Primary Audience: service providers who work with this population

Information Sheet: Lesbian and Gay Refugee Issues: A Review of Federal Court Jurisprudence

Contains: outline of Canadian Federal Court appeal decisions over the past 10 years that have overturned rejections of lesbian and gay asylum claims. Challenges unique to these asylum seekers are analyzed. (Note: Claims based on bisexuality or gender identity are not covered here, since the jurisprudence is different and specific treatment is necessary.)

Primary Audience: guidance for adjudicators of lesbian and gay claims seeking to ensure that their decisions avoid or survive judicial review; reference for asylum seekers and counsel in preparing gay and lesbian claims.

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