

## Challenges to Assessing Same-Sex Relationships under Refugee Law in Canada

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Résumé de l'article

Cet article fait valoir qu'il y a des raisons de questionner la façon dont l'historique des relations affecte l'évaluation de crédibilité pour les demandes d'asile fondées sur l'orientation sexuelle. Les évaluations écrites démontrent souvent une prise en considération insuffisante des obstacles psychosociaux susceptibles de porter atteinte à la capacité des réfugiés membres de minorités sexuelles à témoigner sur leurs relations. L'environnement multinational et multiculturel des procédures pour la désignation du statut de réfugié pose des défis uniques pour les demandeurs d'asile de faire reconnaître leur appartenance à un groupe social particulier. Comprendre et exprimer une identité sexuelle transcendent les divisions culturelles : l'identité exprimée par un demandeur pourrait donc ne pas correspondre aux attentes du décideur. Les notions d'amour et d'intimité peuvent aussi s'exprimer de façon culturelle. Les attentes en ce qui a trait à la manifestation de ces notions peuvent donc être inappropriées dans le contexte de la détermination du statut de réfugié.

Cet article souligne que les déterminations d'invariabilité concernant les relations des demandeurs doivent se faire avec prudence. Les décideurs ne doivent pas présumer que les minorités sexuelles dans les pays où l'homosexualité est criminalisée ou stigmatisée sont dépourvues de la volonté d'avoir des partenaires du même sexe. Ils ne doivent pas non plus présumer que les réfugiés membres de minorités sexuelles sont nécessairement prêts à adopter des relations homosexuelles peu après leur arrivée au Canada. Évaluer les relations homosexuelles selon le modèle d'identité Cass peut conduire à des doutes persistants quant à la crédibilité des demandeurs d'asile.

En somme, cet article tente de prospecter les pièges potentiels des méthodes canadiennes de décisions en matière de demandes d'asile par des réfugiés membres de minorités sexuelles et de proposer des recommandations pour l'évaluation de témoignages concernant ces relations et de preuves à leur effet.

## CHALLENGES TO ASSESSING SAME-SEX RELATIONSHIPS UNDER REFUGEE LAW IN CANADA

*Nicholas Hersh\**

This article suggests that there are reasons to be concerned about the way relationship history impacts credibility assessments for refugee claims based on sexual orientation. Decision makers' written assessments often reveal insufficient consideration of the psychosocial barriers that may impinge on sexual minority refugees' ability to testify on their relationships. The multinational and multicultural setting of refugee-status proceedings poses unique challenges for sexual minority refugee claimants in having their membership in a particular social group established. Understanding and expressing sexual identity spans cultural divides, and therefore, a claimant's expressed identity may not match the decision maker's expectations. Notions of love and intimacy may also be culturally construed, and therefore expectations of how these notions manifest in long-term relationships may be inappropriate in the context of refugee status determination.

This article emphasizes that implausibility findings concerning claimants' relationships should be made cautiously. Decision makers should not assume that sexual minorities in countries in which homosexuality is stigmatized or criminalized are devoid of the volition to have same-sex partners. Nor should they assume that sexual minority refugees are necessarily willing to embrace same-sex relationships soon after arriving in Canada. Evaluating same-sex relationships according to the Cass Staged-Identity model can lead to persistent doubts about claimants' credibility.

In sum, this article attempts to canvass the potential pitfalls of Canadian adjudication methods in cases of sexual minority refugee claimants, and to propose recommendations for evaluating testimony and evidence of these relationships.

Cet article fait valoir qu'il y a des raisons de questionner la façon dont l'historique des relations affecte l'évaluation de crédibilité pour les demandes d'asile fondées sur l'orientation sexuelle. Les évaluations écrites démontrent souvent une prise en considération insuffisante des obstacles psychosociaux susceptibles de porter atteinte à la capacité des réfugiés membres de minorités sexuelles à témoigner sur leurs relations. L'environnement multinational et multiculturel des procédures pour la désignation du statut de réfugié pose des défis uniques pour les demandeurs d'asile de faire reconnaître leur appartenance à un groupe social particulier. Comprendre et exprimer une identité sexuelle transcendent les divisions culturelles : l'identité exprimée par un demandeur pourrait donc ne pas correspondre aux attentes du décideur. Les notions d'amour et d'intimité peuvent aussi s'exprimer de façon culturelle. Les attentes en ce qui a trait à la manifestation de ces notions peuvent donc être inappropriées dans le contexte de la détermination du statut de réfugié.

Cet article souligne que les déterminations d'invéraisemblance concernant les relations des demandeurs doivent se faire avec prudence. Les décideurs ne doivent pas présumer que les minorités sexuelles dans les pays où l'homosexualité est criminalisée ou stigmatisée sont dépourvues de la volonté d'avoir des partenaires du même sexe. Ils ne doivent pas non plus présumer que les réfugiés membres de minorités sexuelles sont nécessairement prêts à adopter des relations homosexuelles peu après leur arrivée au Canada. Évaluer les relations homosexuelles selon le modèle d'identité Cass peut conduire à des doutes persistants quant à la crédibilité des demandeurs d'asile.

En somme, cet article tente de prospecter les pièges potentiels des méthodes canadiennes de décisions en matière de demandes d'asile par des réfugiés membres de minorités sexuelles et de proposer des recommandations pour l'évaluation de témoignages concernant ces relations et de preuves à leur effet.

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## Introduction

In 1993, Canada became one of the first countries to accept sexual orientation as a ground on which a person could claim refugee protection. This was a commendable and groundbreaking development in Canadian refugee law. However, challenges remain in securing a fair and equitable refugee determination process for lesbian, gay, and bisexual (LGB) claimants arriving to Canada.<sup>1</sup> Some scholars have asserted, for instance, that adjudicators sometimes impose burdensome and unfair expectations on claimants to prove their sexual orientation when soliciting refugee status. For example, one consistent criticism has been that adjudicators have a propensity to evaluate the credibility of sexual minority claimants according to Western notions of gay and lesbian appearances or lifestyles.<sup>2</sup> Other adjudicators have concluded that claimants are not sexual minorities based on the fact that they demonstrated hesitancy or an unwillingness to fully embrace their sexual orientation.<sup>3</sup>

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- <sup>1</sup> While lesbian, gay, and bisexual are provisional terms used in this article, they may not accurately reflect the lives of those who identify or are perceived to be someone other than heterosexual. Thus, this article generally uses the term “sexual minorities” which refers to people whose minority status is based on their sexual orientation, sexual identity, same-sex sexual and intimate conduct, or their roles and behaviors at odds with societal expectations attributed to their gender. Transgender refugee claimants also face persecution in many parts of the world due to their refusal to espouse societal expectations on gender. The Federal Court has recognized that the Board must analyze claimants’ risks on account of their nonconforming gender identity (see e.g. *Contreras Hernandez v Canada (Citizenship and Immigration)*, 2007 FC 1297 at para 39, 163 ACWS (3d) 443). However, it is beyond the scope of this article to provide an in-depth analysis on assessing credibility of transgender refugee claimants. Rather, this article proposes that evidence of same-sex relationships is sometimes essential in establishing sexual orientation, and that challenges may arise in considering this evidence.
  - <sup>2</sup> See e.g. Nicole LaViolette, “Gender Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19:2 Intl J Refugee L 169 at 192–96 [LaViolette, “Gender Guidelines”]; Zsolt Bobis, “You Are Not What You Ought to Be: Credibility Assessment in Sexuality-Based Asylum Cases” (2012) Central European University 1 at 43–45; Sabine Jansen & Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (Amsterdam: COC Nederland & Vrije Universiteit, 2011) at 47.
  - <sup>3</sup> For example, Millbank contends that adjudicators partly focus their assessments on how claimants have expressed their same-sex sexuality in countries of asylum. This adjudicative approach to probing credibility demonstrates that “if you have come from a place of oppression/ covert experience of your sexuality, then the inevitable outcome of relocating should be enthusiastic engagement in cultural manifestations of gayness, because that is how ‘freedom’ is expressed.” Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 211 Intl J Refugee L 1 at 19 [Millbank, “The Ring of Truth”]. See also Laurie Berg & Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay, and Bisexual Asylum Claimants” (2009) 22:2 J of Refugee Studies 195 at 203–204. Berg &

This article suggests that relationship history is a significant component of determination hearings because it might greatly affect the credibility findings of refugee decision makers in relation to sexual orientation. In making the case that they are members in a “particular social group” as required under refugee law, sexual minority claimants will be asked to testify about their same-sex intimate and sexual relationship history. Of interest is the way in which relationship evidence is perceived and evaluated by refugee adjudicators when deciding whether a claimant is a member of an LGB social group.

Part I of this article begins with an empirical analysis of adjudication trends gleaned from publicly accessible case law. In spite of methodological limitations, these trends suggest that credible evidence of past or current same-sex relationships may be instrumental in establishing membership in a particular social group. The challenges outlined in this article therefore warrant serious consideration.

Following this empirical analysis, Part II of this article focuses on challenges in properly assessing evidence and testimony of same-sex relationships in refugee-status determination proceedings. Part II is divided into four subparts. First, sexual minority claimants may face mental health barriers in delivering testimony on their relationships. For instance, decision makers sometimes fail to adequately consider that claimants may be struggling with post-traumatic stress disorder and internalized homophobia. However, such considerations could be essential to understanding why a claimant may struggle to effectively articulate experiences related to same-sex partners during a refugee status determination hearing.

Second, decision makers might rely on a heteronormative framework to conceptualize sexuality, which can also prove detrimental to the evaluation of refugees’ sexual and intimate relationships. This issue has arisen in the Canadian and Australian immigration contexts more generally, where the definition of conjugality does not always extend to the type of relationships developed and sustained by same-sex couples. In the refugee context, adjudicators have emphasized the longevity of claimants’ partnerships as a key reason to expect testimony and evidence demonstrating bona fide same-sex relationships.

Third, decision makers might also have a restrictive cross-cultural understanding of sexuality. The importance of claimants’ cultural back-

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Millbank (explaining why LGB claimants might struggle with speaking frankly of their past because of *inter alia* memory limitations or self-stigmatization and how LGB claimants whose inability to articulately explain themselves may have their refugee claims refused).

ground in understanding their same-sex experiences is therefore examined. Through research and jurisprudence, this subpart questions whether commonly defined values related to relationships such as love, intimacy, and sexuality are culturally construed. If such is the case, then determining the credibility of a refugee's testimony based on Western assumptions of relationship development is an inappropriate adjudicative practice, which may yield unjust results.

Directing attention to these three key challenges in assessing claimants supports the argument that there are reasons to be concerned about the way decision makers approach narratives involving same-sex relationships. The fourth section of Part II of this article refers to the Cass Staged-Identity model (the Cass model) of sexual identity development to illustrate the potential challenges in determining credibility of claimants who speak of volition to engage in same-sex relationships in their countries of origin yet appear reticent to enter into same-sex relationships in Canada. Adjudicators who view relationships similarly to the stages of the Cass model may overlook considerations of mental health, culture, and heteronormativity, resulting in a flawed and biased assessment of claimants' relationships.

The article concludes by setting out practical recommendations for not only decision makers who are handling evidence and testimony of same-sex relationships in refugee claims based on sexual orientation, but also legal practitioners who represent sexual minority refugees in refugee status-determination proceedings. While the recommendations provided are based on published case law and academic research, this article will hopefully serve as a base for further examining the interconnection of law and sexual orientation.

## I. Sexual Minority Refugee Claimants and Their Relationships: An Empirical Study

### *A. Overview of Canadian Refugee Law and Claims Based on Sexual Orientation*

Applications for refugee protection in Canada are handled by the Refugee Protection Division<sup>4</sup> (RPD), which constitutes a section of the Immigration and Refugee Board (IRB or Board). The adjudicator, known as the Board member, determines whether claimants are refugees following the definition provided by the *United Nations Geneva Convention Relating to*

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<sup>4</sup> Previously named the Convention Refugee Determination Division (CRDD).

*the Status of Refugees (Convention)*,<sup>5</sup> reproduced in section 96 of the *Immigration and Refugee Protection Act (IRPA)*<sup>6</sup> According to the *Convention*, a refugee is a person who is outside of his or her country of nationality or habitual residence; who has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group; and who is unable or unwilling to seek state protection in his or her country of nationality or habitual residence.<sup>7</sup> Rejected claimants may appeal to the recently established Refugee Appeals Division (RAD) of the IRB pending certain conditions. However, those who *inter alia* are designated foreign nationals, whose claims were manifestly unfounded, or who come from countries designated by the Minister as safe, may not file an appeal with the RAD.<sup>8</sup> Beyond an appeal, a claimant may submit an application to the Federal Court to judicially review the RPD's or RAD's decision.<sup>9</sup> In many cases, including ones referred to in this article, the Federal Court granted the judicial review; this may demonstrate a degree of efficacy to the system's checks and balances. However, the analysis presented here focuses on the decision-making norms of initial refugee protection decisions.

The notion of persecution is a central component of the definition of a refugee. Though left undefined in the *IRPA* and the *Convention*, persecution is considered to be a sufficiently serious harm that is inflicted in a persistent, repetitive, and systemic manner.<sup>10</sup> Discrimination may also amount to persecution if the measures of discrimination “lead to consequences of a substantially prejudicial nature for the person concerned.”<sup>11</sup>

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<sup>5</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 (entered into force 22 April 1954) [*Refugee Convention*].

<sup>6</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96 [*IRPA*].

<sup>7</sup> *Refugee Convention*, *supra* note 5, s 1(a)(2).

<sup>8</sup> *IRPA*, *supra* note 6, s 110(2).

<sup>9</sup> *Ibid*, s 72.

<sup>10</sup> See *Rajudeen v Canada (Minister of Employment and Immigration)*, (1984), [1985] 55 NR 129 at para 14, [1984] FCJ No 601 (QL) (FCA); *Sagharichi v Canada (Minister of Employment and Immigration)* (1993), [1995] 182 NR 398 at para 2, FCJ No 796 (QL) (FCA). See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/Rev.1, January 1992 at paras 51–53, online: Refworld <[www.unhcr.org/refworld/docid/3ae6b3314.html](http://www.unhcr.org/refworld/docid/3ae6b3314.html)> [UNHCR Handbook].

<sup>11</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/12/09, 23 October 2012 at para 17, online: Refworld <[www.refworld.org/docid/50348afc2.html](http://www.refworld.org/docid/50348afc2.html)> [UNHCR SOGI Guidelines]. Guidelines are a soft law tool used by the UNHCR to provide legal interpretations and offers adjudicative practices for states, decision makers, practitioners, and the UNHCR for the purposes of refugee status deter-

Persecution may be characterized by assault, rape, honor killings, or forced medical treatment—all of which exemplify experiences that sexual minority refugee claimants have related.<sup>12</sup>

Under Canadian refugee law, claimants must prove that their subjective fear of persecution, were they to be sent back to their country of origin, is well-founded, meaning that the likelihood of harm feared is more than a mere possibility.<sup>13</sup> The objective foundation of the claimants' fear typically depends on probative, independent documentation.<sup>14</sup> Additionally, refugee claimants must provide clear and convincing evidence that they are unable or unwilling to seek protection from their state, unless the persecutors in question are acting on behalf of it.<sup>15</sup> Because refugee protection is a subsidiary form of protection, states retain the primary responsibility for the security of their nationals. International refugee protection, therefore, will only be provided when the claimant's state abdicates this responsibility. Human rights documentation outlining how a state enforces laws proscribing homosexual conduct would be evidence of a state's unwillingness to protect sexual minority refugee claimants.<sup>16</sup>

Finally, the *Convention* requires that a claimant establish a well-founded fear of persecution owing to at least one of five grounds enumerated in the *Convention*: race, nationality, religion, political opinion, or membership in a particular social group. These grounds confer protection to individuals from persecution and from discrimination prohibited by human rights law,<sup>17</sup> and serve to limit the ambits of the *Convention*.<sup>18</sup>

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mination. The UNHCR SOGI Guidelines replace the UNHCR, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, online: Refworld <[www.refworld.org/docid/48abd5660.html](http://www.refworld.org/docid/48abd5660.html)>.

<sup>12</sup> Timothy J Randazzo, "Social and Legal Barriers: Sexual Orientation and Asylum in the United States" in Eithne Luibhéid & Lionel Cantú Jr, eds, *Queer Migrations: Sexuality, US Citizenship, and Border Crossings* (Minneapolis: The University of Minneapolis Press, 2005) 30 at 36 [Randazzo]. See also UNHCR SOGI Guidelines, *supra* note 11 at paras 20–25.

<sup>13</sup> See *Ponniah v Canada (Minister of Employment and Immigration)* (1991), [1992] 132 NR 32 at para 5, [1991] FCJ No 359 (QL) (FCA).

<sup>14</sup> This has been a reoccurring challenge for sexual minority refugees. Human rights abuses toward sexual minorities remain undocumented in many countries due to the prevailing stigma surrounding sexual orientation. When reports on living conditions for sexual minorities are unavailable, some adjudicators have relied on inappropriate sources, including gay travel guides, to determine if refugees have an objective fear of homophobic persecution in their countries of origin. See Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13:2/3 Intl JHR 437 at 449.

<sup>15</sup> See *Canada (AG) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) [Ward].

<sup>16</sup> UNHCR SOGI Guidelines, *supra* note 11 at para 36.

<sup>17</sup> Bobis, *supra* note 2 at 13.



Some sexual minority refugees have made claims on religious grounds where homosexuality is deemed a crime against religion in their country of origin.<sup>19</sup> Political opinion has also been raised as a ground for sexual minority applicants. In these cases, claimants argue that their refusal to comply with societal expectations regarding gender roles—by refusing to get married or raise children for instance—constitutes an imputed political opinion.<sup>20</sup>

Claims for refugee status based on sexual orientation have been most commonly recognized within the category of membership in a particular social group.<sup>21</sup> Under Canadian refugee law, this may be a group defined by an innate or immutable characteristic. This encompasses groups whose members voluntarily associate themselves for reasons so essential to their human dignity that they should not be forced to renounce their association and groups associated with a voluntary status that is unchangeable due to its historic importance.<sup>22</sup> The 1993 Supreme Court decision in *Canada (A.G.) v. Ward* confirmed in *obiter dictum* that sexual minorities constitute a particular social group because sexual orientation is an innate and unchangeable characteristic.<sup>23</sup>

The *Ward* decision was a seminal one in that it clarified that sexual orientation is a ground of protection under the *Convention*.<sup>24</sup> Decision makers are now required to determine if sexual minority claimants meet all of the requirements of the definition before being granted refugee status. In relation to membership in a particular social group, claimants have often been compelled to bring forward evidence that they are in fact

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<sup>18</sup> See *Ward*, *supra* note 15 at 731–32.

<sup>19</sup> See *Re CXS*, [1995] CRDD No 134 (QL) (IRB); *Re PLZ*, [2000] CRDD no 97 (QL) at para 12 (IRB); *Osagie v Canada (Minister of Citizenship and Immigration)*, 2007 FC 852, 63 Imm LR (3d) 146. See also LaViolette, “Gender Guidelines”, *supra* note 2 at 202.

<sup>20</sup> See e.g. UNHCR SOGI Guidelines, *supra* note 11 at para 50. Political opinion may include an “opinion as to gender roles expected in the family or as regards education, work or other aspects of life”; sexual orientation was also considered a political opinion in a claim from Cuba as it exemplified a “non-adherence to Communist Revolution”: *Re VOZ*, [1993] CRDD No 164 (QL) (IRB).

<sup>21</sup> See e.g. UNHCR SOGI Guidelines, *supra* note 11 at para 46.

<sup>22</sup> See *Ward*, *supra* note 15 at 744.

<sup>23</sup> *Ibid* at 739.

<sup>24</sup> Although viewing sexual minorities as members of a particular social membership was no longer problematic, some academic scholars argue that sexual orientation should be recognized as fundamental to human dignity rather than an innate, immutable characteristic. See e.g. Sean Rehaag, “Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada” (2008) 53:1 McGill LJ 59 at 97–98. See also Nicole LaViolette, “The Immutable Refugees: Sexual Orientation in *Canada (AG) v Ward*” (1997) 55 UT Fac L Rev 1”].

gay, lesbian or bisexual. Decision makers then evaluate this evidence to determine its credibility. Decision makers who do not believe claimants are LGB will conclude that they are not part of a particular social group and, as a result, will deny the claim.<sup>25</sup> The credibility of LGB claimant's sexual orientation is therefore a crucial element for establishing their claims in Canada.<sup>26</sup> The emphasis on credibility in decision making has also been documented in the United States, the United Kingdom, and Australia.<sup>27</sup>

While there is a presumption that claimants' statements are truthful unless there is a valid reason to doubt their truthfulness,<sup>28</sup> claimants still bear the onus of proving their membership in a particular social group.<sup>29</sup> Adjudicators must judge whether this onus has been met by virtue of a claimant's testimony, witnesses, and documentary evidence, such as affidavits or police and medical reports. These assessments should be conducted "in the light of what is generally known about conditions and the laws in the claimant's country of origin, as well as the experiences of similarly situated persons in that country."<sup>30</sup> Decision makers should therefore refer to country of origin information on the social and legal realities of sexual minorities before making credibility assessments.

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<sup>25</sup> See Millbank, "The Ring of Truth", *supra* note 3 at 4.

<sup>26</sup> *Ibid.* See also UNHCR SOGI Guidelines, *supra* note 11 at para 62.

<sup>27</sup> Jansen & Spijkerboer, *supra* note 2 at 47; Millbank, *supra* note 3 at 4.

<sup>28</sup> See *Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302 at 305, [1980] 31 NR 34 (FCA) [*Maldonado*]. Further, the Refugee Appeal Board clarified that "lack of corroborating evidence of one's sexual orientation in and of itself, absent negative, rational credibility or plausibility findings related to that issue [sexual orientation], would not be enough to rebut this presumption of truthfulness" (*RAD File No MB3-04744*, [2014] RADD No 13 (QL) at para 56 (IRB) [emphasis in original]).

<sup>29</sup> See *Zamanibakhsh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1137, FCJ No 1525 (QL) at paras 15–16 (FCTD). See also Nicole LaViolette, "Sexual Orientation, Gender Identity, and the Refugee Status Determination Process in Canada" (2013) Immigration and Refugee Board: Refugee Protection Division Working Paper at 21, online: Social Science Research Network <[ssrn.com/abstract=2276049](http://ssrn.com/abstract=2276049)> [LaViolette, "RPD Process in Canada"].

<sup>30</sup> See Immigration and Refugee Board, Refugee Protection Division, Legal Services, *Assessment of Credibility in Claims for Refugee Protection* (31 January 2004) at para 1.2, online: IRB <[www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx](http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx)> [*Assessment of Credibility in Claims for Refugee Protection*]. See also LaViolette, "RPD Process in Canada", *supra* note 29 at 21.

### *B. The Significance of Same-Sex Relationships in Refugee Claims*

This subpart explores how testimony of same-sex relationships may play an important role in the credibility assessments relating to a claimant's membership in an LGB social group. Claimants who allege fear of persecution because they are sexual minorities may relate past experiences of: possessing erotic pictures of gay men;<sup>31</sup> frequenting gay bars;<sup>32</sup> changing their physical appearance to avoid being perceived as LGB;<sup>33</sup> advocating for LGB rights;<sup>34</sup> being fearful of familial or societal disapproval if they revealed their sexual identity;<sup>35</sup> as well as knowledge of the difference between living conditions for sexual minorities in their country of origin compared to Canada.<sup>36</sup>

To determine how claimants' sexual and intimate relationships are assessed in credibility determinations on sexual orientation, I review 458 reported cases in Canada spanning from 1999 to 2014 from the RPD and appeals to the RAD, in which claimants alleged a well-founded fear of persecution on account of their sexual orientation. Additionally, I examine judicial reviews of RPD decisions made by the Federal Court of Canada. After exploring these cases, I attempt to trace adjudication trends pertaining to relationships of sexual minority refugee claimants.

For each reviewed decision, I track whether the adjudicator casts doubt on or disbelieves two pieces of information: first, claimants' claims about their same-sex relationships and, second, their alleged sexual orientation. Unless otherwise indicated in the decision makers' written judgments, credibility of relationships and sexual orientation is assumed to be unproblematic. I also discuss the link between sexual orientation credibility and a claimant's silence on possible personal same-sex relationships.

In reviewing refugee cases in Canada, certain methodological limitations were unavoidable. First, I was limited to decisions of the RPD, appeals from the RAD, and judicial reviews from the Federal Court available through online legal databases, including CanLII, Westlaw, and Quicklaw. Any conclusions drawn, therefore, are based on a fraction of all

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<sup>31</sup> *RPD File No MA9-12938*, [2010] RPDD 583 (QL) at para 10 (IRB) [*RPD File No MA9-12938*].

<sup>32</sup> *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 860, [2012] 1 Imm LR (4th) 67 at para 3 [*Guerrero*].

<sup>33</sup> *RPD File No MA7-06315*, [2009] RPDD 468 (QL) at para 13 (IRB).

<sup>34</sup> See *Villicana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205, [2010] 86 Imm LR (3d) 191 at paras 3–4 [*Villicana*].

<sup>35</sup> *RPD File No MA9-12938*, *supra* note 31 at para 3.

<sup>36</sup> *Odetoyinbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 501, FCJ No 614 (QL) at para 5 [*Odetoyinbo*].

sexual minority refugee claims assessed each year.<sup>37</sup> Second, the dataset gathered is heavily biased toward negative decisions in which refugee protection was denied, due to difficulties in obtaining information about positive decisions.<sup>38</sup> The dearth of accessible positive decisions is partly explained by the fact that the RPD generally only provides written reasons for negative decisions—normally, only upon a claimant’s request will the RPD publish the reasons of an accepted case.<sup>39</sup> In the mid and late 1990s, the RPD did publish more positive decisions in cases where sexual orientation and gender identity were at issue, in order to establish jurisprudential guidelines. However, following the legislative changes to the *IRPA* which came into effect in December 2012, the law requires that only reasons for rejecting refugee protection be provided to claimants in writing.<sup>40</sup>

It follows that ascertaining why adjudicators reject a claim is more feasible than understanding why a claimant is deemed credible and granted refugee status. The evidence related to the personal, sexual, and romantic relationships studied pertains to cases where claimants were deemed not credible. The exploration of decision making is therefore largely limited to the context of adjudication in negative decisions. Consequently, the inferences drawn in this section of the article cannot comprehensively reflect the credibility considerations of Canadian adjudicators in LGB cases.

I have also considered decisions made on appeal in spousal sponsorship applications submitted under Canadian immigration law to enhance the analysis. These decisions were not included in the statistical collation because these applications are outside the arena of refugee protection. However, adjudicators who assess the merits of spousal sponsorships are also members of the IRB who are expected to assess the conjugal nature of personal relationships. The immigration sponsorship cases explored thus provide greater insight into how IRB adjudicators perceive same-sex partnerships.

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<sup>37</sup> According to Debora Eisl of IRB-Ottawa, there had already been 989 cases made so far in the year on the grounds of sexual orientation, though only 69 could be found on Internet legal databases at the time (Debora Eisl, e-mail message to author, 20 November 2012). Further, in their article on the challenges faced by LGBT claimants when developing their narratives, Berg and Millbank estimated that the published cases in Canada reflected only 5% of the all cases made on sexual orientation. See Berg & Millbank, *supra* note 3 at 219.

<sup>38</sup> The last published decision in which protection based on sexual orientation in Canada was granted was in 2007.

<sup>39</sup> LaViolette, “Gender Guidelines”, *supra* note 2 at 184.

<sup>40</sup> *IRPA*, *supra* note 6, s 169(d).

Aside from methodological limitations, resource constraints limited the scope of the analysis. Obtaining testimony of refugee claimants involves ordering transcripts from RPD hearings—a process requiring significant time and financial resources. Instead, the accounts of claimants' relationships are drawn from the written assessments of the adjudicator hearing their case. It is therefore important to underline that claimants' evidence of their personal relationships exists in the form of the account given by the adjudicator in his or her reasons for denying or granting refugee status.

Finally, for the purposes of this article, all relationships were counted regardless of their level of intimacy, exclusivity, or duration. As discussed, because the sample size is small and biased toward negative RPD decisions, the problems in adjudication practices expressed in this article may not be wholly representational of the state of Canadian decision making in LGB cases. Despite methodological limitations, the trends revealed support for the argument that that relationships can play an important role in refugee determinations based on sexual orientation. The cases reviewed are also used to illustrate potential pitfalls in assessing same-sex relationships. This article will, I hope, serve as a point of departure for broader discussions regarding the interconnection between refugee law and sexual orientation.

### *C. Disclosure of Same-Sex Relationships and Establishing Membership in an LGB Social Group*

This section explores the link between providing evidence of same-sex relationships and establishing a claimant's membership in an LGB social group. Essentially, it examines how a decision maker's written decision relating evidence of a same-sex relationship may be deemed important evidence of a claimant's sexual orientation. Of the 458 decisions explored, 275 contained testimony of claimants' same-sex relationships in their countries of origin, in Canada, or in both.

A credible testimony of same-sex relationships may constitute key evidence when the central issue of the claim is membership in an LGB social group. For claimants whose relationships were deemed credible, 92 per cent of them did not face suspicion when attempting to prove their sexual orientation to the decision maker. Conversely, for claimants' whose same-sex relationships did pose a credibility issue, 93 per cent of the cases had the testimony about their sexual orientation discredited. See the following tables:

Number of cases where the written decision contained testimony of the claimant's same-sex relationships and the credibility of those relationships was not discredited in written decision	174
Of these cases, the number of ones where the adjudicator did not raise concerns about claimant's sexual orientation in the written assessment	160
Percentage (160/174)	91.95 %

Number of cases where the written decision contained testimony of the claimant's same-sex relationships and the credibility of those relationships was discredited in written decision	97
Of these cases, the number of ones where the adjudicator raised concerns about the claimant's sexual orientation in the written assessment	90
Percentage (90/97)	93%

These initial trends would appear to highlight the relevance of relationships in establishing claimants' membership in a particular social group based on sexual orientation. The United Nations High Commissioner for Refugees' Guidelines on Sexual Orientation and Gender Identity (UNHCR SOGI Guidelines) uses the adjective "gay" to describe a "man whose enduring physical, romantic and/or emotional attraction is to other men," with similar language used to characterize "lesbian" and "bisexual".<sup>41</sup> Thus, the percentages presented may unsurprisingly support the claim that claimants' testimonies on same-sex partners are salient because they can most clearly demonstrate same-sex physical, romantic, and emotional attractions. It follows that providing evidence of "enduring" attractions to the satisfaction of a decision maker helps establish membership in an LGB social group as required by the *Convention*.

The critical importance given to testimony and evidence related to same-sex relationships may also be unsurprising given that sexual minorities remain targets of violence, harassment, and discrimination for eschewing social norms dictating their gender.<sup>42</sup> In describing sexual cul-

<sup>41</sup> UNHCR SOGI Guidelines, *supra* note 11 at para 10.

<sup>42</sup> See Nicole LaViolette, "Les identités multiples et le droit des réfugiés : catégories juridiques fixes et rigides ?" (2003) 15:3 Canadian Ethnic Studies/Études ethniques au Canada 39 at 42-43; LaViolette, "Gender Guidelines", *supra* note 2 at 182; Amnesty In-

tures, Herdt states that, “in many traditions around the world it is not the gender of the sexual partner that matters so much as the sexual behavior that occurs between individuals.”<sup>43</sup> For example, a gay male claimant from Mexico alleged that his classmates in primary school insulted him and even beat him “to make a man of him” once his sexual orientation became apparent to them.<sup>44</sup> In a large majority of the cases reviewed, sexual minorities recounted having endured troubling experiences including: deprivation of family support,<sup>45</sup> vandalism,<sup>46</sup> harassment from police,<sup>47</sup> arrest,<sup>48</sup> death threats,<sup>49</sup> unemployment,<sup>50</sup> dismissal from university,<sup>51</sup> and physi-

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ternational, “Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity” (2001) Amnesty International at 6 <[www.amnesty.org/en/library/asset/ACT40/016/2001/en/dom-ACT400162001en.pdf](http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/dom-ACT400162001en.pdf)>. Accounts of persecution due to gender non-conformity is not always limited to sexual minorities. The Huffington Post reported that recently in Jamaica, a teenage boy was chopped, stabbed, and shot to death for attending a party dressed as a woman. His attackers were motivated not by his sexual orientation, which is not raised in the article, but by his female impersonation (Cavan Sieczkowski, “Dwayne Jones, ‘Cross-Dressing’ Jamaican Teen, Allegedly ‘Chopped and Stabbed’ to Death by Mob”, *The Huffington Post* (25 July 2013), online: <[www.huffingtonpost.com/2013/07/25/dwayne-jones-cross-dressing-jamaican-stabbed\\_n\\_3652665.html](http://www.huffingtonpost.com/2013/07/25/dwayne-jones-cross-dressing-jamaican-stabbed_n_3652665.html)>.

- <sup>43</sup> Gilbert Herdt, *Same Sex, Different Cultures: Exploring Gay and Lesbian Lives* (Colorado: Westview Press, 1997) at 50.
- <sup>44</sup> *Garibay Aguilar v Canada (Minister of Citizenship and Immigration)* (5 January 2004), [2004] RPDD No 79 at para 3 (QL), No MA3-05042, Immigration and Refugee Board of Canada, Refugee Protection Division; Similarly, in *Guerrero*, *supra* note 32 at para 5, the Peruvian claimant alleged that four men tried to rape her as a way to “teach her how to be a woman”; A lesbian applicant from Mexico also testified that she and her partner were sexually assaulted by three police officers, one of which who stated that he would “teach them how to become real women” (*Parrales v Canada (Minister of Citizenship and Immigration)*, 2006 FC 504 at para 5, 54 Imm LR (3d) 120).
- <sup>45</sup> See *RPD File No TA8-19538*, [2010] RPDD 539 (QL) at para 2 (IRB) [*RPD File No TA8-19538*]; *RPD File No MA6-02138*, [2007] RPDD 444 (QL) at para 4 (IRB); *RPD File No TA6-08893*, *TA6-08894*, [2007] RPDD 330 (QL) at para 3 (IRB); *Awoh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 945 at para 3 (available on QL).
- <sup>46</sup> See *Fosu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1135 at para 3, 172 ACWS (3d) 1018; *RPD File No MA6-00969*, [2006] RPDD 343 (QL) at para 2 (IRB).
- <sup>47</sup> See *Quinatzin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 937 at para 5, 170 ACWS (3d) 610 [Quinatzin]; *RPD File No MA3-03139*, [2006] RPDD 375 (QL) at para 7 (IRB) [*RPD File No MA3-03139*].
- <sup>48</sup> See *Re LIE*, *RPD File No TA6-10702*, [2008] RPDD 165 (QL) at para 3 (IRB).
- <sup>49</sup> *Lawal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 861 at para 3, 173 CRR (2d) 309.
- <sup>50</sup> See *Re WIY*, *RPD File No MA6-01555*, [2007] RPDD 2 (QL) at para 4 (IRB); *Herrera v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1272 at para 6 (available on QL); *RPD File No MA3-03139*, *supra* note 47 at para 6.

cal assaults.<sup>52</sup> The alleged accounts of violence and discrimination, in many cases, did not occur following disclosure of their LGB identity, but simply after their same-sex relationships came to the attention of their persecutors. For example, in *Quinatzin v. Canada (Citizenship and Immigration)*,<sup>53</sup> the father of the claimant's boyfriend caught them kissing. The father, who was a police officer, berated the claimant. In the following days, police cars began parking in front of the claimant's house. He was eventually beaten unconscious and found himself naked in the back of a police car. In this case, the claimant also recounted that he was bullied in school for being perceived as gay. However, it was once his relationship became known that serious threats to his life and security arose. Sexual minorities often become victims of homophobic persecution when they deviate from socially constructed norms based on gender. It may, therefore, not be surprising that accounts of same-sex relationships are salient evidence when demonstrating membership in an LGB social group. Relationships, however, were not always the only evidence presented to prove sexual orientation. In the cases reviewed, claimants also testify about possessing erotic pictures of gay men;<sup>54</sup> frequenting gay bars;<sup>55</sup> changing their physical appearance;<sup>56</sup> advocating for LGB rights;<sup>57</sup> being fearful of familial or societal disapproval if they revealed their sexual identity;<sup>58</sup> as well as knowledge of the living conditions for sexual minorities in their country of origin compared to Canada.<sup>59</sup> Yet, in 29 per cent of the cases where the decision maker took issue with both the claimant's sexual orientation and their same-sex relationships, the claimant's same-sex relationship history was the only evidence referred to by decision makers in their written assessments of the claimant's sexual orientation. See table below:

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<sup>51</sup> See *Tsyhanko v Canada (Minister of Citizenship and Immigration)*, 2008 FC 819 at para 4, 168 ACWS (3d) 1041; *RPD File No TA3-11540*, [2006] RPDD 417 (QL) at para 3 (IRB).

<sup>52</sup> See *RPD File No TA6-07289*, [2008] RPDD 232 (QL) at para 4 (IRB); *Re YMQ*, *RPD File No MA6-02355*, [2007] RPDD 221 (QL) at para 3 (IRB); *RPD File No MA5-06177*, [2006] RPDD 386 (QL) at para 3 (IRB).

<sup>53</sup> See *Quinatzin*, *supra* note 47; *RPD File No MA3-03139*, *supra* note 47.

<sup>54</sup> *RPD File No MA9-12938*, *supra* note 31 at para 10.

<sup>55</sup> *Guerrero*, *supra* note 32 at para 3.

<sup>56</sup> *RPD File No MA7-06315*, [2009] RPDD 468 (QL) at para 13 (IRB).

<sup>57</sup> *Villicana*, *supra* note 34 at para 3.

<sup>58</sup> *RPD File No MA9-12938*, *supra* note 31 at para 3.

<sup>59</sup> *Odetoyinbo*, *supra* note 36 at para 5.



Number of cases where the written decision contained testimony of the claimant's same-sex relationships and the credibility of those relationships was discredited in written decision	97
Of these cases, the number of ones where the claimant's same-sex relationships were the only piece of evidence raised in the written decision to discredit the claimant's sexual orientation	28
Percentage (28/97)	28.86%

While the decision maker may have actually disbelieved other pieces of evidence in relation to the claimant's membership in an LGB social group, only credibility concerns for the claimant's same-sex relationships were raised in the written assessments. Indeed, sexual orientation credibility determination may turn on relationship patterns in a significant number of cases.

***D. No Disclosure of Same-Sex Relationships and Establishing Membership in an LGB Social Group***

Thus far, findings tend to support the claim that adjudicators may focus on same-sex relationships when they are disclosed. However, in 78 per cent of the cases where the written decision did not contain testimony of the claimant's same-sex relationships—whether in the claimants' countries of origin or in Canada—decision makers did not doubt that the claimants were LGB

Number of cases where the written decision did not contain testimony of the claimant's same-sex relationships	162
Of these cases, the number of ones where the adjudicator did not raise concerns about claimant's sexual orientation in the written assessment	126
Percentage (126/162)	77.78%

This outcome was perplexing at first: if negative credibility findings are made when adjudicators discredit relationship evidence, how can it be true that no evidence of relationships may lead to comparatively lower rates of adverse credibility findings? It is possible that the claimant raised same-sex relationships at the RPD hearing and, though the relationships were disbelieved, the decision maker did not find credibility to be an issue serious enough to analyze in the written assessment. Alternatively, decision makers may have opted to exclude testimony about claimants' credi-

ble same-sex relationships in the written decisions if the claimants' membership in an LGB social group was not an issue. The written decision in such cases would have focused on other criteria issues such as state protection or credibility of alleged events of past persecution. The trends gleaned from the cases reviewed suggest that there is a correlation between claimants' evidence of same-sex relationships when they have such a relationship history, and proving their sexual orientation to an adjudicator's satisfaction. As the Board stated in a 2010 decision:

I find it not reasonable not to find it necessary to mention any form of gay or bisexual relationship, regardless how casual they were, to bolster his claim of sexual orientation. It is not an easy task for this panel to determine whether the claimant is a gay person or not, as this is something emotional and imbedded in his inner feelings. The panel can only go by the evidence adduced in the hearing and the reasonable inferences derived therefrom.<sup>60</sup>

The statement above supports the argument that adjudicators would turn toward claimants' relationships as a necessary component of their credibility analysis in cases where no other evidence to prove sexual orientation is provided. If such is the case, adjudicators should be mindful of issues specific to sexual minorities when hearing the testimony of same-sex relationships. These issues can seriously impact claimants' capacity to recount their life stories, as well as decision makers' approach to determining credibility of same-sex relationships.

## II. Identifying and Addressing Credibility Concerns

### *A. Mental Health Challenges Impacting Testimony on Same-Sex Relationships*

The adjudicative challenges stemming from a sexual minority refugee claimant's mental health are both sensitive, and significant. Mental health issues may greatly impact claimants' capacity to articulate their private experiences. For this reason, the analysis presented here is followed by a set of practical recommendations for decision makers in addressing mental health issues as they pertain to evidence and testimony of same-sex relationships presented—in both the hearing and the written assessment.

In refugee status determinations, personal narratives and testimony are often the only evidentiary sources attesting to a claimant's membership in a particular social group. Yet psychological barriers impede many sexual minority refugees from conveying their story without contradic-

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<sup>60</sup> *RPD File No TA8-14208*, [2010] RPDD 155 (QL) at para 14 (IRB).

tions, inconsistencies, omissions or implausibility,<sup>61</sup> all of which potentially undermine credibility.<sup>62</sup> For instance, violence based on one's gender and sexual orientation has been closely linked to post-traumatic stress disorder (PTSD).<sup>63</sup> According to the criteria set out in the Diagnostic and Statistical Manual of Mental Disorders, individuals may suffer from PTSD if they have "experienced, witnessed, or [been] confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others"<sup>64</sup> and that they responded to such events with "intense fear, helplessness, or horror."<sup>65</sup>

LGB refugees are not the only ones whose lives are affected by PTSD. Other groups of refugees also report past experiences of trauma, coupled with loneliness and isolation once arriving in a country of transit or resettlement. They must constantly confront social, economic, cultural, and legal barriers when settling outside their country of origin. Moreover, they suffer from feelings of guilt, mistrust, shame, and helplessness, exacerbating the harmful impact of suffered trauma on their mental health.<sup>66</sup>

Recurrent exposure to discrimination "can erode self-esteem, disrupt identity development, and increase levels of shame and emotional vulnerability, ultimately leaving the individual more susceptible to the effects of other traumatic stressors on mental health."<sup>67</sup> Any of these symptoms may diminish a claimant's capacity to effectively testify at a refugee-status determination proceeding. Moreover, unlike racial, ethnic, religious, and political groups, sexual minorities remain largely invisible in their communities because they conceal their sexual orientation as a way

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<sup>61</sup> See Berg & Millbank, *supra* note 3 at 196; Ariel Shidlo & Joanne Ahola, "Mental Health Challenges of LGBT Forced Migrants" 42 *Forced Migration Review* 9 at 9; LaViolette, "RPD Process in Canada", *supra* note 29 at 21–22.

<sup>62</sup> *Assessment of Credibility in Claims for Refugee Protection*, *supra* note 30 at paras 2.3.2, 2.3.5.

<sup>63</sup> Shidlo & Ahola, *supra* note 61 at 9.

<sup>64</sup> See Center for Substance Abuse Treatment, "Substance Abuse Treatment: Addressing the Specific Needs of Women" (2009) Treatment Improvement Protocol Series (51) Appendix E <[www.ncbi.nlm.nih.gov/books/NBK83241](http://www.ncbi.nlm.nih.gov/books/NBK83241)>; James I Martin, Edward J Alessi & Ilan H Meyer, "PTSD and Sexual Orientation: An Examination of Criterion A1 and Non-Criterion A1 Events" (2013) 5:2 *Psychological Trauma: Theory, Research, Practice, and Policy* 149 at 149.

<sup>65</sup> American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 4th ed (Washington, DC: American Psychiatric Association, 1994) at 527.

<sup>66</sup> Romy Reading & Lisa R Rubin, "Advocacy and Empowerment: Group Therapy for LGBT Asylum Seekers" (2011) 17:2 *Traumatology* 86 at 87.

<sup>67</sup> *Ibid.*

to “evade unwanted attention”, creating a “zone of shame and exclusion”.<sup>68</sup> These experiences all constitute contributing factors to PTSD.

Rubin and Reading assert that traditional diagnostic tools to evaluate mental health do not comprehensively canvass the reoccurring experiences of trauma to which sexual minority refugees have been typically exposed. Indeed, symptoms of PTSD may not manifest following a single traumatic event in a refugee’s life. Rather, repeated exposures to homophobic incidents—violent or not—may trigger cognitive, emotional, and physiological changes similar to those of PTSD victims, who have been exposed to serious threats to their life or physical integrity.<sup>69</sup>

Recounting personal and romantic experiences can prove elusive for sexual minority refugees afflicted with PTSD.<sup>70</sup> For instance, the credibility of a Ugandan man’s gay relationship was impugned under the pretext that “the claimant did not show emotional attachment such that one would expect of the alleged extended relationship” at the RPD hearing.<sup>71</sup> According to the adjudicator’s summary of facts, the claimant was being sexually intimate with his same-sex partner when seven men attacked them. He was beaten to the point of unconsciousness and then woke up to find himself in a hospital. If the decision maker considered the assault to be a credible experience, then it would have been even more essential to determine whether the claimant suffered from PTSD.

Indeed, a principal characteristic manifested by PTSD victims, including refugee claimants, is disassociation. Hathaway and Hicks state that,

[p]ersons suffering from PTSD often do not exhibit outward signs of trepidation, but rather “dissociate” themselves from their reality. It is widely recognized that dissociation is a central characteristic of PTSD, and that persons who dissociate are extremely fearful, despite their outward demeanor.<sup>72</sup>

Consequently, the claimant in the above case might not have exuded an emotional attachment to his partner at the RPD hearing if he suffered

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<sup>68</sup> Bobis, *supra* note 2 at 27.

<sup>69</sup> Martin, Alessi & Meyers *supra* note 64 at 150.

<sup>70</sup> For example, three-quarters of refugees in a 2007 study who had suffered traumatic experiences stated they first spoke of them only after arriving in the United Kingdom, where the study was based. Their reluctance was tied to feelings of shame and fear, and that, “there were things that they had not revealed because in their culture it was considered wrong to discuss them” (Berg & Millbank, *supra* note 3 at 201).

<sup>71</sup> *RPD File No TA6-10532*, [2008] RPDD 292 (QL) at para 10 (IRB) [*RPD File No TA6-10532*].

<sup>72</sup> James C Hathaway & William S Hicks, “Is There a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear?”” (2005) 26:2 *Mich J Intl L* 505 at 519.

from PTSD since the day of the malicious attack. In addition, recounting past experiences of harm and future fears in case of return to their countries of origin may trigger retraumatization.<sup>73</sup> In light of these findings, decision makers should not overlook the impacts of PTSD on sexual minority refugee claimants' testimony, but rather seriously consider the possibility of PTSD when evaluating the credibility of same-sex relationships.

Sexual minority claimants' capacity to testify may also be greatly affected by internalized homophobia. According to Gaines, internalized homophobia encompasses negative attitudes toward one's own homosexuality, others' homosexuality, and the disclosure of one's homosexuality to others.<sup>74</sup> Sexual minorities afflicted with it may intentionally disassociate themselves from gay- and lesbian-identifying individuals in an effort to repress, deny, or disavow their same-sex sexual attractions. Herek adds that internalized homophobia sufferers may devalue non-heterosexual lifestyles and accept societal stereotypes surrounding homosexuality.<sup>75</sup> Further, the Hebrew Immigrant Aid Society (HIAS) found that constant exposure to hardline homophobic attitudes reinforces internalized homophobia, exacerbating its ramifications on sexual minority refugees.<sup>76</sup> Guidelines issued by the American Psychological Association suggest that struggles with "self-esteem, depression, psychosocial and psychological distress, physical health, intimacy, social support, relationship quality, and career development" are symptomatic of internalized homophobia.<sup>77</sup>

Sufferers of internalized homophobia may denigrate themselves and their same-sex relationships. A study conducted on the gay and lesbian population of Sacramento, for instance, revealed that participants with higher levels of internalized homophobia exhibited greater demoralization and lower self-esteem.<sup>78</sup> Indeed, the UNHCR SOGI Guidelines rightly

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<sup>73</sup> See Reading & Rubin, *supra* note 66 at 88; Shidlo & Ahola, *supra* note 61 at 9.

<sup>74</sup> Stanley O Gaines Jr et al, "Cultural Value Orientations, Internalized Homophobia, and Accommodation Romantic Relationships" (2005) 50:1 J Homosexuality 97 at 102.

<sup>75</sup> Gregory M Herek et al, "Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men", 2 J Gay & Lesbian Medical Association 1 at 2 [pre-publication draft].

<sup>76</sup> See Yiftach Millo, "Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel, and Kenya" (2002) Hebrew Immigrant Aid Society Working Paper at 7, online: Hebrew Immigrant Aid Society <[www.hias.org/sites/default/files/invisible-in-the-city\\_0.pdf](http://www.hias.org/sites/default/files/invisible-in-the-city_0.pdf)> [Millo, "Invisible in the City"].

<sup>77</sup> American Psychological Association, "Practice Guidelines for LGB Clients: Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients" online: American Psychological Association <[www.apa.org/pi/lgbt/resources/guidelines.aspx?item=3](http://www.apa.org/pi/lgbt/resources/guidelines.aspx?item=3)> [APA Guidelines].

<sup>78</sup> Herek, *supra* note 75 at 5.

note that “[s]ome [sexual minority refugee claimants] may only be able to draw upon (derogatory) terms used by the persecutor.”<sup>79</sup> Accordingly, though some sexual minorities may have never been able to positively view and describe their sexual orientation, they are nevertheless expected to do so during a refugee-status determination hearing.

In some instances, adjudicators have been attuned to the issue of internalized homophobia in sexual minority refugee cases, particularly when soliciting testimony about same-sex sexual relationships. In *Gergedava v. Canada (Minister of Citizenship and Immigration)*, the Federal Court found it unreasonable for the Board to expect the gay claimant and his wife to file for divorce. The Court took into consideration that Georgia is a religiously conservative country, creating a context in which the claimant would feel ashamed to seek divorce and reveal his true sexual orientation.<sup>80</sup>

However, Board members in other cases have accorded less importance, if any, to internalized homophobia in their decisions. For example, in a 2010 RPD case, the bisexual applicant left his home country of Jamaica after receiving death threats for having sex with his male partner. Once in Canada, the claimant married a woman, began dating and cohabitating with another woman, fathered two children, and had two brief sexual encounters with another man. The claimant, out of shame and guilt, testified that he was making efforts to “overcome his homosexuality” by seeking counseling to save his heterosexual relationship.<sup>81</sup> The Board stated:

[33] We can only comment on his behaviour since his arrival in Canada, which, according to his evidence, for the most part is heterosexual.

[34] Counsel submits that, should the claimant return to Jamaica, notwithstanding what has occurred in the interim, he would be perceived as an individual who practices homosexual behaviour. This is based on the one alleged incident, which gave rise to the extortion threats and documentary evidence demonstrating homophobic attitudes.

[35] Even if the Board accepts that the claimant is bisexual, in addition to the aforementioned credibility concerns regarding the claimant’s delay in filing a refugee claim, we conclude that the claimant has not rebutted the issue of state protection.<sup>82</sup>

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<sup>79</sup> UNHCR SOGI Guidelines, *supra* note 11 at para 11.

<sup>80</sup> 2012 FC 957 at para 17, 218 ACWS (3d) 411.

<sup>81</sup> *RPD File No TA9-14244*, [2010] RPDD 198 (RPD) at para 31 (QL).

<sup>82</sup> *Ibid* at paras 33-35.

While state protection was the central issue in this case, decision makers should be alert to the issue of internalized homophobia when membership in an LGB social group is questioned. In this case, the Board member's written analysis seems to neglect the possibility that in renouncing his homosexuality, and focusing on his heterosexual relationships the claimant was attempting to downplay his same-sex attractions due to a personal sense of internalized homophobia. Berg and Millbank note that disowning one's sexual orientation is considered a mechanism to cope with the harboured feelings of shame toward one's homosexuality.<sup>83</sup> Further, sexual minorities may attempt to maintain visible heterosexual relationships in order to hide their stigmatized identity and same-sex relationships.<sup>84</sup> In the above case, the Board member should have elicited testimony regarding the reasons the claimant wanted to disavow his same-sex relationships.

Mental health issues affect not only claimants' testimony, but also their demeanor during the hearing, which may damage their credibility. Canadian guidelines on questioning techniques discourage credibility findings based on subjective demeanor such as "physical appearance" yet allow objective considerations of demeanor like "frankness and spontaneity".<sup>85</sup> Millbank posits that relying on any elements of demeanor may lead decision makers to erroneously conclude that claimants are not sexual minorities. They may struggle to answer questions about their experiences because they suffer feelings of "shame, self-hatred ... and internalized homophobia."<sup>86</sup> Therefore, sexual minority claimants may avoid bringing up their sexual acts or feelings of their own volition "because in their culture it was considered wrong to discuss them."<sup>87</sup> In a considerable number of decisions analyzed for this article, sexual minorities recounted that they experienced traumatic events once their same-sex relationships became known to private or state actors. Such experiences would undoubtedly be difficult to recount in the setting of a hearing.

In an effort to address challenges related to mental health issues in the context of refugee-status determination hearings, the UNHCR Guidelines on Gender-Related Persecution canvasses interview practices to adopt in order to effectively adjudicate a claim involving sexual and gender-based violence. Claimants should be provided the opportunity to

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<sup>83</sup> Berg & Millbank, *supra* note 3 at 199.

<sup>84</sup> Gloria Jacques, "Sexual Minorities in Africa: A Case for Social Work" (2013) 25 *J Gay & Lesbian Social Services* 158 at 167.

<sup>85</sup> *Assessment of Credibility in Claims for Refugee Protection*, *supra* note 30 at para 2.3.7.

<sup>86</sup> Millbank, "The Ring of Truth", *supra* note 3 at 7.

<sup>87</sup> Berg & Millbank, *supra* note 3 at 201.

choose the gender of the adjudicator conducting the hearing. Adjudicators should “remain neutral, compassionate and objective” throughout the hearing, and should “avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate.”<sup>88</sup> It is fundamental to underline that these recommendations should be rigorously applied to both men and women claimants who have faced sexual violence due to their sexual and social nonconformity.<sup>89</sup> The practical approach proposed by the UNHCR Guidelines on Gender-Related Persecution would allow claimants to speak honestly and comfortably on their same-sex relationships during a hearing or interview for refugee protection.

### ***B. How “Hetero” Are Refugees’ Same-Sex Relationships?***

Decision makers sometimes fail to recognize the specific challenges of same-sex couples in continuing their partnerships because they conceptualize relationship formation within a heteronormative paradigm. Heteronormativity is defined as “the correctness of heterosexual dogmas and traditional family forms while at the same time censuring, punishing, ‘medicalizing,’ and rendering homosexuality invisible in all of its manifestations.”<sup>90</sup> In heteronormative societies, “it is taken for granted by most people that heterosexuality is ‘right, natural and universal.’”<sup>91</sup> Heterosexism, which is intrinsically linked to heteronormativity, is “the ideological system that denies, denigrates, and stigmatizes any non-heterosexual form of behavior, identity, relationship, or community.”<sup>92</sup> It is “the chauvinistic assumption that “heterosexuality” as a system of social relations and practices, such as marriage, is the only and only normal and natural way to be human.”<sup>93</sup> Essentially, both heteronormativity and heterosexism depict a society in which heterosexual relationships are largely privileged and normalized while visible displays of same-sex sexuality remain shrouded by social opprobrium, legal condemnation or both.

Millbank illustrates the impact of heteronormativity to assess refugee status using the case *Gui v. Minister for Immigration and Multicultural Affairs*, in which a gay Chinese man’s asylum claim in Australia was re-

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<sup>88</sup> *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UNHCR, UN Doc HCR/GIP/02/01 (2002) at para 36.

<sup>89</sup> See LaViolette, “Gender Guidelines”, *supra* note 2 at 214.

<sup>90</sup> Jacques, *supra* note 84 at 160.

<sup>91</sup> *Ibid.*

<sup>92</sup> APA Guidelines, *supra* note 77.

<sup>93</sup> Herdt, *supra* note 43 at 37.



fused on the grounds that being kicked and bashed by the police for having kissed and cuddled with his male partner in a public park did not amount to *Convention*-related persecution.<sup>94</sup> In response to the tribunal's reasons, Millbank reaches the following conclusion:

The hegemonic nature of heterosexuality renders cuddling and kissing not just non-sexual but indeed almost invisible when done by heterosexual people. This is the opposite when done by a gay or lesbian couple: it is glaringly visible and sexualised. The words cuddling and kissing are in quotation marks in the decisions and the behaviour is treated as though it were, in fact, sex. The decision makers accepted that sex in private was not an option for Mr Gui and his partner because of neighbourhood surveillance. Nonetheless having romantic physical contact in a park was clearly not an alternative the decision makers could countenance.<sup>95</sup>

In other words, the adjudicators in the *Gui* case took the position that the applicant and his partner could have prevented the police violence by refraining from romantic behaviour, an expectation that, arguably, would not apply to opposite-sex couples in a public space.

Millbank's critique of *Gui* is important in that same-sex sexual and romantic expression continue to be viewed with prejudice—as socially repugnant or legally reprehensible compared to heterosexual ones. However, even in heteronormative communities, not all forms heterosexual relationships are equally legitimate. As stated by Eldis:

The debilitating impact of heteronormativity is not confined to those within the lesbian, gay, bisexual and transgender (LGBT) community. . . . Single people experience enormous social pressure to marry in many, if not all, societies. Living alone and pursuing non-cohabitating sexual relationships, enjoying sex with themselves or being asexual is not a viable option for people in many contexts. In some countries extra-marital sex, or adultery, is punishable by death. In many others those that do not conform can be ostracised.<sup>96</sup>

The oppression and vilification of certain forms of opposite-sex relationships surface in many cultural regimes. In India, where marriage normativity resonates, women engaging in extramarital sex can be fined

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<sup>94</sup> [1998] FCA 1592 cited in Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26:1 Melbourne UL Rev 144 at 146 [Millbank, "Imagining"].

<sup>95</sup> *Ibid* at 147.

<sup>96</sup> Eldis, "Why Does Heteronormativity Matter?" online: Eldis <[www.eldis.org/go/topics/resource-guides/gender/key-issues/heteronormativity/why-does-heteronormativity-matter](http://www.eldis.org/go/topics/resource-guides/gender/key-issues/heteronormativity/why-does-heteronormativity-matter)>.

or punished by death.<sup>97</sup> In Morocco, two adolescents were found guilty of public indecency after posting pictures of themselves kissing on Facebook.<sup>98</sup> It is clear that the significance attributed to relationships, heterosexual or not, depends on the social and cultural reality in which they are placed.

Many societies tend to elevate the importance of opposite-sex relationships that are long-term, monogamous, and grounded in cohabitation and love. This has been made particularly apparent by relatively recent advocacy for marriage equality in many parts of the world, where activists argue that same-sex couples will continue to be viewed as second-class citizens if they do not have the legal right to wed. These campaigns are based on the premise that same-sex couples exhibit the same qualities as opposite-sex couples and are thus entitled to the same legal rights as the latter. Adjudicators whose views of relationships are partly influenced by such affirmations may limit the range of relationships they deem credible.

Millbank suggests that many societies emphasize a good and virtuous image of long-term same-sex relationships in order to downplay the fact that sexual minorities may engage in sexual activity in public places. As she explains, “[t]he existence of public sex as an expression of gay male sexuality has often been used to deride and vilify gay men — as promiscuous, predatory, unable to form lasting relationships or relate ‘normally’, ie monogamously, in a sexual sense.”<sup>99</sup> This position may dissuade refugees from comfortably speaking about their sexual encounters to adjudicators due to the stigma attached to these experiences. Indeed, they might feel pressured to recount their relationship experiences in a way that conforms to what they perceive to be the decision makers’ expectations. In doing so, they may struggle to articulate the genuineness of their sexual orientation. A case in point is this testimony from a gay Kenyan seeking refugee protection in the United States:

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<sup>97</sup> Even the forms of marital relationships may be strictly regulated. “Honour crimes may occur as a result of: inter-caste marriages, inter-religious marriages, marrying within the same gotra, ... pre-marital affairs, extra-marital affairs, same-sex relationships, inter-class marriages (between rich and poor), marriages against parents’ wishes [and] issues related to land” (Immigration and Refugee Board Canada, “India: Honour Crimes, Including their Prevalence in both Rural and Urban Areas: Government Protection and Services Offered to Victims of Honour Crimes (2009-April 2013)” (9 May 2013) online: Refworld <[www.refworld.org/docid/51ab3f114.html](http://www.refworld.org/docid/51ab3f114.html)>).

<sup>98</sup> See Lauren O’Neil, “Teens Arrested for Kissing in Morocco Spark #NadorKiss Tweetstorm”, *CBC News* (20 November 2013), online: <[www.cbc.ca/newsblogs/yourcommunity/2013/11/teens-arrested-for-kissing-in-morocco-spark-nadorkiss-tweetstorm.html](http://www.cbc.ca/newsblogs/yourcommunity/2013/11/teens-arrested-for-kissing-in-morocco-spark-nadorkiss-tweetstorm.html)>.

<sup>99</sup> Millbank, “Imagining”, *supra* note 94 at 164.

“Do you have a lover?” The asylum case officer probed tactlessly. If by that he meant whether I had a live-in boyfriend with whom I slept every night, then I didn’t. On the other hand, how could I explain more casual relationships to the stiff, unsympathetic interrogator sitting in front of me? ... Was I less of a gay man, by implication, if I did not have a long-term relationship? If I could be a single (read closeted) gay man in the United States, couldn’t I be the same in Kenya? If I didn’t have a long-term boyfriend was I really out?<sup>100</sup>

Clearly, some claimants, like this Kenyan man, may worry about how adjudicators will perceive their relationships, especially if they are fleeting. The challenge for refugee status decision makers is to engage with claimants in a way that does not convey expectations that refugees’ relationships have to conform to a rigid, heteronormative model. Decision makers in Western countries might hold certain expectations regarding sexual expression, such as having “a lover”, which may differ from that of refugees’ understanding of their own lived experience of sexual expression.

John Hart explores the pressure on sexual minorities to portray their relationships in a way that conforms to, or resembles the dominant heteronormative model.<sup>101</sup> He has conducted extensive interviews with Australian nationals and their same-sex partners who were applying to immigrate to Australia under spousal sponsorship programs. In such applications, immigration officials may put the bona fide quality of the relationship into question. While different than a refugee hearing, this aspect of an immigration sponsorship application raises similar credibility issues, since immigration officers may be given the duty of probing the authenticity of same-sex relationships. Hart explores how the process pressured applicants to present their relationships in conformity with heteronormative forms and values.

For instance, an Australian woman applying to sponsor her same-sex partner expressed her frustration with adhering to heterosexual norms. “I feel I’ve been expected to be involved in a relationship likened to marriage whereas I’d like to break that mold for a better sort of relationship that has room for growth and individuality.”<sup>102</sup> Her partner also felt unfairly compelled to tailor their relationship to the expectations of the adjudicators:

I feel that the expectations of the Department of Immigration are basing the elements of a relationship on heterosexual standards and are trying to validate and contain lesbian and gay relationships in

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<sup>100</sup> Randazzo, *supra* note 12 at 46.

<sup>101</sup> See John Hart, *Stories of Gay and Lesbian Immigration: Together Forever?* (New York: Harrington Park Press, 2002).

<sup>102</sup> *Ibid* at 86.

the same pattern, e.g., living together, lifelong commitment. Sharing bank accounts, etc., loss of individuality. Does it have to be like this to be genuine?<sup>103</sup>

Another participant expressed difficulty in demonstrating interdependence in his same-sex relationship. “The models [relationships] that we were forced into by the department [of Immigration] caused a lot of stress. Joint bank accounts, cohabitation, etc. There are other ways to have a relationship! It feeds off and enforces dependency.”<sup>104</sup> Indeed, the Australian sponsor does seem to have an obligation to portray her same-sex relationship as mirroring marriage, where partners intertwine most aspects of their lives. According to Hart, “the institution of marriage is heaven sent” because married couples are assumed to demonstrate the ideal relationship for spousal sponsorships.<sup>105</sup> While conducted in the context of immigration sponsorship applications, Hart’s work suggests that heterosexist models may also be present in the refugee hearing room.

The same concerns can be raised in the context of the Canadian immigration system. In Canada, legally married applicants are able to sponsor their partners by demonstrating the existence of a bona fide relationship. But couples without a legally recognized marriage must additionally establish twelve months of conjugal cohabitation to benefit from the same sponsorship provisions under the “common law partner” category.<sup>106</sup> Since same-sex marriages remain scantily recognized around the world,<sup>107</sup> sexual minorities are often compelled to demonstrate this threshold of conjugality in order to access the same sponsorship benefits as legally wed couples.

The Supreme Court of Canada set out seven characteristics in *Molodowich v. Penttinen* to assess whether conjugal relationships mirror marriage-like ones: cohabitation; sexual and personal behavior; division of family-type responsibilities; shared social activities; financial interdependence; children; and societal perception.<sup>108</sup> These factors were adopted to assess conjugality for same-sex couples in *M. v. H.*,<sup>109</sup> and have been

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid* at 85–86.

<sup>105</sup> *Ibid* at 8.

<sup>106</sup> See *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 1(1).

<sup>107</sup> Seventeen countries fully recognize same-sex marriage (Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, Brazil, Uruguay, New Zealand, Britain, and Luxembourg, while two partially do (Mexico and the United States): Freedom to Marry, “The Freedom to Marry Internationally” (November 2014), online: <[www.freedomtomarry.org/landscape/entry/c/international](http://www.freedomtomarry.org/landscape/entry/c/international)>.

<sup>108</sup> *Molodowich v Penttinen* (1980), 17 RFL (2d) 376, 2 ACWS (2d) 486 (Ont Dist Ct).

<sup>109</sup> [1999] 2 SCR 3 at para 59, 171 DLR (4th) 577 [*M v H*].

cited in appeals of spousal sponsorship applications for binational couples.<sup>110</sup>

The justices in *M. v. H.* adopted the *Molodowich* factors to argue that LGB couples can establish the same level of spousal codependence as heterosexual married couples. However, LGB refugees living in persecutory environments cannot reasonably maintain relationships that match the *Molodowich* factors. For instance, cohabitation with a person of the same sex will simply not be possible in many countries for fear of discrimination. Moreover, relationships are likely to be clandestine rather than conducted in a way that is visible to others. To conceal a relationship, LGB couples may in fact deliberately avoid sharing family-type responsibilities or creating financial interdependence. Admittedly, Canadian courts have supported a flexible interpretation of the concept of “conjuality”, giving particular consideration to the cultural context of the relationship.<sup>111</sup> Nonetheless, the underlying concern in spousal sponsorships determinations remains unchanged; courts still question whether the relationship between the sponsor and sponsored person resembles a marriage.<sup>112</sup> Canadian immigration officials expect that “the [conjugal] couple has come to a similar point as that of a married couple.”<sup>113</sup>

Unlike the Canadian spousal sponsorship immigration context, refugee case law does not explicitly state that claimants’ relationships are credible only if they are marriage-like. Nonetheless, adjudicators who hear appeals in spousal sponsorship applications are also members of the RPD.<sup>114</sup> This overlap raises the question of the extent to which the notion of conjuality in immigration law may influence credibility assessments in refugee hearings where LGB claimants must describe their personal and intimate relationships.

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<sup>110</sup> See e.g. *Dalumay v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1179 at para 29, 221 ACWS (3d) 972. See also *Keo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456 at para 20, 215 ACWS (3d) 493.

<sup>111</sup> *M v H*, *supra* note 109 at para 60.

<sup>112</sup> See *Canada (Minister of Citizenship and Immigration) v Morel*, 2012 FC 1404 at para 13, 422 FTR.288.

<sup>113</sup> Citizenship and Immigration Canada, *Overseas Processing Manual (OP)*, Chapter OP 2, Processing Members of the Family Class (14 November 2006) at 20, online: <[www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf](http://www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf)>.

<sup>114</sup> Before the enactment of the *Balanced Refugee Reform Act (BRRA)* in 2012, RPD board members were Governor-in-Council appointees and could therefore transfer to or be transferred from other divisions of the IRB such as the IAD. Since the *BRRA*’s coming into force, RPD decision makers are appointed under the Public Service Employment Act, and therefore work strictly in the RPD. Nevertheless, the extent to which RPD decision makers have previous experience working with the IAD, as well as exposure to casework in other divisions, might certainly influence their credibility assessments. See Immigration and Refugee Board of Canada, “Part III – Reports on Plans and Priorities 2012-2013 Estimates” at 6, online: <[www.tbs-sct.gc.ca/rpp/2012-2013/inst/irb/irb-eng.pdf](http://www.tbs-sct.gc.ca/rpp/2012-2013/inst/irb/irb-eng.pdf)>.

For example, in the 2008 RPD case previously mentioned, the adjudicator raised plausibility concerns regarding the applicant's relationship with his gay lover in Uganda. The claimant testified that their relationship lasted from 1987 until 2006, when a group of men assaulted them after they were discovered being intimate on a beach. Since the assault, the applicant stated that he had only tried to phone his partner once, in order to see if he was alive. The analysis states that "he was fearful that his calls might be used to track 'me down.'"<sup>115</sup> The Board found the gay applicant's personal story dubious because once in Canada, where he was safe, he did not persist in trying to locate his partner. The Board concluded:

In this panel's mind, an individual who was involved in a long term relationship of this nature, if it actually existed, would have been concerned for the safety and welfare of their partner. In this case, the claimant did not show emotional attachment such that one would expect of the alleged extended relationship. Nor was he able to provide physical proof of the existence of the relationship. Thus, the Panel is not persuaded that the claimant was engaged in a long term sexual relationship with XXXXX, in Uganda.<sup>116</sup>

The Federal Court, in assessing the merits of the RPD's decision, ruled:

I am not at all convinced that the basic human emotions of love and compassion for another are widely different in Canada than in Uganda. In my view, it is reasonable for the Board to question whether this 20 year relationship existed when the applicant showed so little concern for his lover. The applicant's evidence was that he made only one attempt to contact his lover of 20 years after a beating that had left him unconscious. In those circumstances it is possible that Godfrey was severely injured or dead, yet the applicant made no efforts to find out his condition or even whether his long term lover was alive. I find that this lack of concern raises serious issues as to the credibility of the applicant and the Board's finding that there was no such relationship was reasonable.<sup>117</sup>

In this decision, the RPD and Federal Court rooted their findings in the assumption that had the applicant felt a sincere emotional bond toward his partner he would have overcome his fear of danger and made efforts to contact him. This assumption obscures the reality that the development of such attachments—regardless of the longevity of their partnerships—may not be possible in countries such as Uganda, where state and societal homophobia are endemic. Moreover, basic human emotions of love and

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<sup>115</sup> *RPD File No TA6-10532*, *supra* note 71 at para 10.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Kyambadde v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1307 at para 10, 337 FTR 93.

compassion may not be as universal as the Federal Court's decision suggests.

While refugee claimants may perceive their long-term relationships to be legitimate expressions of love for and commitment to their partners, they do not usually enjoy societal and legal recognition of their relationships in their countries of origin. Consequently, they cannot characterize their relationships using traditional milestones such as engagements and marriage.<sup>118</sup> Couples may consequently counter these limitations by creating personal, and unique forms of relationship markers. This conduct has been described as “ambiguous commitment”, seeing as many same-sex relationships are not defined by concrete start and end points, reciprocal obligations, or by acknowledgement from family and community members.<sup>119</sup> Therefore, adjudicators must critically assess their personal views—and potential prejudices—regarding relationship development, in order to appreciate refugees' diverse experiences of being in same-sex relationships.

Focusing on relationship length could result in the presumption that longstanding same-sex couples ultimately desire to have their relationships mirror opposite-sex ones. This belief could lead an adjudicator to question the credibility of sexual minorities who have not exhibited a marriage-like relationship with their long-term partners. If adjudicators do not adapt the indicators used to assess partnerships, refugee claimants' long-term relationships might be discredited simply because they do not reflect the level of commitment and compassion presumed to be ideal for married couples.

### *C. Cross-Cultural Considerations of Same-Sex Relationships*

This section contemplates whether claimants' cultural background is intrinsically linked to their understanding of relationship development. Case law is presented to illustrate potential scenarios where cross-cultural considerations of relationships should be addressed in the adjudicator's questioning and written assessment.

Gill Valentine contends that in the face of weakening social ties, and the decoupling of behaviors associated with marriage and family, traditional forms of close, personal relations in Western societies are being replaced. Increasingly, people are seeking “pure relationships”, in which

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<sup>118</sup> Wen-Yi Shieh, “Gay and Lesbian Couple Relationship Commitment in Taiwan: A Preliminary Study” (2010) 57:10 *J Homosexuality* 1334 at 1336.

<sup>119</sup> Gilbert Herdt & Robert Kertzner, “I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States” (2006) 3:1 *Sexuality Research & Social Policy* 33 at 40.

people maintain relationships solely on the basis of happiness and voluntary commitment, rather than societal or religious pressure. The discourse around relationships has a greater focus on love and intimacy, which means that individuals who feel unsatisfied by this aspect of their relationship may be less willing to sustain them.<sup>120</sup>

However, this viewpoint should not be applied ubiquitously. Herdt states that “the traits of biological innateness, sexual exclusivity of erotic behavior, lifelong adherence to same-gender relations ... are very difficult to identify outside of the western tradition.”<sup>121</sup> In some cultures, relationship longevity may not be a reliable indicator of emotional commitment. For instance, a survey taken by Taiwanese gays and lesbians reveals that there is an indirect correlation between the sense of love or care that respondents felt they were receiving from their partners and their level of commitment to their relationship. The authors of this study pointed to specific cultural values that could explain this finding: Taiwanese society generally upholds maxims such as “no gain without pain” or “tolerance is a virtue”.<sup>122</sup> In other words, intimate partners do not necessarily need to gain love, care, or social status from partners to feel satisfied with their relationships.

Collectivism and individualism can greatly shape cultural conceptualizations of love and intimacy in the context of opposite-sex and same-sex couples. According to Dion and Dion, long-term relationships in individualistic societies such as the United States and Canada, where “personal autonomy, self-realization, individual initiative, and decision making” prevail, romantic love plays a salient role in partners’ satisfaction.<sup>123</sup> By contrast, collectivistic societies such as China and Japan are characterized principally by “a sense of personal identity based on one’s place in one’s group, a belief in the superiority of group compared to individual decisions.”<sup>124</sup>

Moreover, the wishes of others, notably one’s parents, strongly influence one’s choice of marital partner in collectivist societies. The authors go as far as to suggest that adopting romantic love as the ground for mar-

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<sup>120</sup> Gill Valentine, “Globalizing Intimacy: The Role of Information and Communication” (2006) 34:1/2 *Women’s Studies Quarterly* 365 at 366.

<sup>121</sup> Herdt, *supra* note 43 at 46.

<sup>122</sup> Wen-Yi, *supra* note 118 at 1346.

<sup>123</sup> Karen K Dion & Kenneth L Dion, “Individualistic and Collectivistic Perspectives on Gender and the Cultural Context of Love and Intimacy” (1993) 49:3 *J Social Issues* 53 at 55, 58.

<sup>124</sup> *Ibid* at 55.



riage would create dysfunction in Eastern societies.<sup>125</sup> For instance, in some Hindu communities of India, “families tend to be suspicious of, and resist love marriages of all kinds not just cross-caste, cross-class, cross-religion or international marriages, but even eminently ‘suitable’ marriages that they themselves might have arranged.”<sup>126</sup> In this respect, family approval may factor more heavily in forming marital unions than the love that partners show for each other.

Senegal provides another example of a country where partners may not necessarily express romantic affection in order to further their relationships. In Senegal, homosexual men will call themselves either *yauss* or *oubi*, depending on their sexual role. *Yauss* may give money to the *oubi* after having sex, as a way to underscore the seriousness of their relationship. This monetary proposal is a cornerstone in Senegalese traditions; a man offers money or gifts to a woman to show that their relationship is progressing far enough to possibly become marital. In this case, same-sex relationships may mirror gender normative ones.<sup>127</sup>

Additionally, South African customary law recognizes women who enter into marriages with other women, and who in turn, engage in sexual intercourse with men to bear children. In such a case, the widow’s defunct husband would be recognized as the father of these children.<sup>128</sup> Customary same-sex marriages may also include female traditional healers, known as *sangoma*, who take wives for the purpose of healing ceremonies, as well as possible sexual activity.<sup>129</sup> In these cases, romance and happiness are not pivotal to maintain relationships.

Identities based on sexuality can also be culturally construed. Interviews conducted by the HIAS illustrate the diversity of sexuality among sexual minority refugee populations in Ghana and Kenya. It reports the following:

During interviews [with sexual minority refugees] in Ghana, the terms gay or homosexual were almost never mentioned. In Nairobi, four participants presenting as males referred to themselves as females in the questionnaire, three participants referred to themselves as female and gay, and one stated his sexual orientation a lesbian,

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<sup>125</sup> *Ibid* at 59.

<sup>126</sup> Ruth Vanita, “Same-sex weddings, Hindu traditions and modern India” (2009) 91 *Feminist Review* 47 at 48.

<sup>127</sup> Herdt, *supra* note 43 at 224.

<sup>128</sup> Elsje Bonthuys, “Possibilities Forelosed: The Civil Union Act and Gay and Lesbian Identity in South Africa” (2008) 11:6 *Sexualities* 726 at 730.

<sup>129</sup> *Ibid* at 731.

although he has been in a relationship with a male partner for many years, and identifies himself as male.<sup>130</sup>

This citation demonstrates that in non-Western cultures, sexual minorities may not always adopt a gay, lesbian, or bisexual identity, despite their same-sex sexual behaviour. However, this disjunction between sexual behavior and identity does not lessen their need for protection as refugees fearing persecution. Avoiding preconceived notions of sexual identity is paramount in multicultural and multinational settings such as the refugee status determination hearing, because claimants may not intuitively link their same-sex relationships to an LGB identity.<sup>131</sup>

Indeed, Canadian adjudicators may become confused when claimants refer to themselves or their partners with epithets unfamiliar to the adjudicator's personal understanding of sexual identity. In *Ndowku v. Canada (Minister of Citizenship and Immigration)*, the Federal Court agreed that the Board should disbelieve that the claimant had a same-sex partner in Nigeria named Kenneth. After the claimant testified that his "girlfriend" told him of his father's death, his counsel asked him to clarify whether he was referring to his "gay friend or girlfriend"; the claimant responded the latter. The Board concluded that the claimant's assertion that his "girlfriend" and not "gay friend" had reported his father's death to him meant that his gay lover did not exist.<sup>132</sup> Since the Board gave the claimant several opportunities to clarify to whom he was referring to by "girlfriend," and without objection of interpretation by counsel, the Federal Court found no breach in procedural fairness.<sup>133</sup>

Partner identity in Nigeria may be more nuanced than either the RPD or Federal Court imagine. According to Pierce, the development of an identity based on sexuality stems from more than sexual orientation and gender, but also relies heavily on one's education, age, and economic status.<sup>134</sup> *Yan daudu*—effeminate, poor, and relatively uneducated men—

<sup>130</sup> Millo, "Invisible in the City", *supra* note 76 at 19.

<sup>131</sup> Even in Western societies, sexual activity may be incongruous with sexual identity. A study cited by Rehaag reported that two-thirds of the female respondents who had sex with other women within a five-year period also stated having had sex with men. A similar proportion of straight male participants declared having engaged in same-sex sexual activity. See Rehaag, *supra* note 24 at 84–85 citing Lisa M Diamond, "Was It a Phase? Young Women's Relinquishment of Lesbian/Bisexual Identities over a 5-Year Period" (2003) 84 *Journal of Personality and Social Psychology* 352 at 353.

<sup>132</sup> *Ndowku v Canada (Minister of Citizenship and Immigration)*, 2013 FC 22, FCJ No 40 (QL) at para 35.

<sup>133</sup> *Ibid* at para 42.

<sup>134</sup> Steven Pierce, "Identity Performance and Secrecy: Gendered Life and the "Modern" in Northern Nigeria" (2007) 33:3 *Feminist Studies* 539 at 548.

may refer to themselves and other *yan daudu* as women.<sup>135</sup> In a romantic relationship, they would refer to their partners as *kawa* (girlfriend) rather than *aboki* (male friend).<sup>136</sup> In the *Ndowku* decision, the region from which the applicant arrived is not stated, so the research conducted by Pierce might not be entirely applicable. Nonetheless, *Ndowku* makes it clear that claimants' cultural frame of reference for their partners may not match with the decision makers'. Adjudicators must be conscious of how cultural constructions of identity can easily lead to misunderstandings when confronted with non-Western norms. The UNHCR SOGI Guidelines state that "[n]ot all applicants will self-identify with the LGBTI [lesbian, gay, bisexual, transgender, intersex] terminology and constructs as presented above or may be unaware of these labels."<sup>137</sup> This consideration should be extended to terminology and constructed related to partner identity.

In light of these findings, adjudicators should avoid conflating culturally defined values like love and commitment when assessing the genuineness of refugees' same-sex or opposite-sex relationships. This is especially important when research on cultural interpretations of sexual identity and relationship development is unavailable to decision makers. Inferences on what values emanate from the disposition of refugee claimants' partnerships should be made with caution.

#### *D. Implausibility Findings Regarding Existence or Absence of Same-Sex Relationships*

##### 1. Implausibility of Same-Sex Relationships in Countries of Origin

This section examines the challenges of providing testimony and aducing evidence of same-sex relationships that Board members will deem plausible. It begins with a brief explanation of plausibility under Canadian Refugee law, followed by an introduction of the Cass model of identity, which may support decision makers' mindsets on relationship formation. While this section focuses on plausibility, claimants' mental health, culture, and personal sense of relationship development, provide sound reasons for limiting adverse plausibility findings.

Board members of the Refugee Protection Division are "entitled to make reasonable findings based on implausibility, common sense and rationality, and may reject evidence if it is not consistent with the probabili-

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<sup>135</sup> *Ibid* at 549.

<sup>136</sup> *Ibid* at 547.

<sup>137</sup> UNHCR SOGI Guidelines, *supra* note 11 at para 11.

ties affecting the case as a whole.”<sup>138</sup> While these conclusions on plausibility are allowed, decision makers might infer that in a heavily homophobic society, LGB individuals are less likely to associate and form emotional, intimate bonds. In *Dosmakova v. Canada (Minister of Immigration and Citizenship)*, the lesbian applicant from Kazakhstan was asked how she felt about her same-sex attractions and lesbian relationship; she testified that she felt “happiness and sexually satisfied, that she was happy about it and had no regrets.”<sup>139</sup> The Board reasoned that given the negative attitudes toward homosexuality in her home country, if she were moving from a heterosexual to a homosexual relationship, it would be “reasonable to expect that she would express some misgiving with respect to her initial feelings.”<sup>140</sup> The Federal Court of Canada overruled the decision based on a complete lack of evidence to defend the Board member’s speculation.

More commonly, Canadian tribunals have made inferences regarding sexual minorities’ behavior rather than feelings toward their relationships. In *Jackson v. Canada (Minister of Citizenship and Immigration)*, the Board found it implausible that the applicant would hug his same-sex partner in public when he was aware of the social stigmas and laws proscribing homosexuality in Nigeria.<sup>141</sup> In a 2006 RPD case, the Board doubted that the Ukrainian lesbian applicant would have shared her romantic feelings toward a female friend at a public event, their graduation dance, despite widespread repression of homosexuality.<sup>142</sup> Furthermore, the Board disbelieved that she would have subsequently attempted to date two other women in light of the intense homophobia in Ukraine.<sup>143</sup> As Millbank puts it, this finding—that bisexuals would only attempt three or less same-sex relationships in their countries of origin—is based purely on speculation and holds no objective foundation.<sup>144</sup>

The Staged-Identity Model, first developed by Australian psychologist Viviane Cass in 1979, may in part explain the ways in which adjudicators think about sexuality and evaluate evidence of same-sex relationships—such as feelings related to sexual identity development, as in *Dosmakova*, or interactions with other sexual minorities, such as those discussed in

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<sup>138</sup> *Assessment of Credibility in Claims for Refugee Protection*, *supra* note 30 at para 2.3.5.

<sup>139</sup> *Dosmakova v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1357 at para 11, 68 Imm LR (3d) 89.

<sup>140</sup> *Ibid.*

<sup>141</sup> See *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098 at para 15, 45 Admin LR (5th) 27. See also *RPD File No TB1-01931* (12 April 2012) (RPD) (QL) at para 8.

<sup>142</sup> *Re ERY* [2006] RPDD 270 (QL) at para 5 (IRB).

<sup>143</sup> *Ibid.*

<sup>144</sup> Millbank, “The Ring of Truth,” *supra* note 3 at 21.

*Jackson*. The model outlines six phases which sexual minorities go through in developing their non-heterosexual identity.<sup>145</sup> These stages are Identity Confusion, Identity Comparison, Identity Tolerance, Identity Acceptance, Identity Pride, and Identity Synthesis.

In the initial stage, Identity Confusion, an individual becomes aware for the first time that homosexuality may define his or her thoughts, feelings, or behaviors, and may begin to question heterosexuality.<sup>146</sup> Inner turmoil, self-loathing, and personal alienation are common characteristics of Identity Confusion,<sup>147</sup> so individuals may show reluctance to engage in romantic physical contact with others of the same gender.<sup>148</sup> For example, in the case of *Dosmakova*, described above, the Board Member may have believed that sexual minorities who come to realize their sexual orientation will initially react as someone described in the Identity Confusion stage would. In the claimant's case, she expressed positive feelings about first realizing her same-sex attractions, which falls outside the scope the Cass model's first stage.

Moreover, sexual minorities' willingness to associate and develop relationships may not be as linear and sequential as the Cass model suggests. Following Identity Confusion, is stage two, Identity Comparison, during which individuals may accept an LGB identity and begin to confront feelings of otherness and social alienation.<sup>149</sup> Some individuals view their sexual identity positively and are therefore further inclined to embrace it. Others may reject their LGB identity, claiming that homosexual thoughts and behaviors are only temporary and can be altered.<sup>150</sup> At this stage, individuals questioning their sexuality may seek out contact with sexual minorities to feel less alienated.<sup>151</sup> Some may have even had their first same-sex sexual experience, but may consider it an isolated incident and

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<sup>145</sup> See Berg & Millbank, *supra* note 3 at 206–207; Suzanne Degges-White, Barbara Rice & Jane E Myers, “Revisiting Cass’ Theory of Sexual Identity Formation: A Study of Lesbian Development” (2000) 22:4 J Mental Health Counseling 318 at 318; Vivienne C Cass, “Homosexual Identity Formation: Testing a Theoretical Model” (1984) 20:2 J Sex Research 143 at 147.

<sup>146</sup> *Ibid.*

<sup>147</sup> See Sean A Halpin & Michael W Allen, “Changes in Psychosocial Well-Being during Stages of Gay Identity Development” (2004) 47:2 J Homosexuality 109 at 111; Degges-White, Rice & Myers, *supra* note 145 at 319.

<sup>148</sup> See Eric M Dubé, “The Role of Sexual Behavior in Gay and Bisexual Men” (2000) 37:2 The Journal of Sex Research 123 at 126.

<sup>149</sup> Cass, *supra* note 145 at 151.

<sup>150</sup> Degges-White, Rice & Myers, *supra* note 145 at 319.

<sup>151</sup> Cass, *supra* note 145 at 151.

continue to label themselves as heterosexual.<sup>152</sup> This cohort may therefore continue to pursue opposite-sex relationships as a way to repress or conceal their attractions to people of the same gender.<sup>153</sup> In *Jackson*, the decision maker may have made an adverse credibility finding on the claimant's relationship because the claimant did not attempt to conceal it, as would be expected of someone in the early stages of the Cass identity model.

If decision makers continue to rely on rigid interpretations of sexual identity like the Cass model, as was the case in *Dosmakova* and *Jackson*, it is of critical importance to recognize that the model cannot canvass the development and expression of sexuality of all sexual minorities. In a structured interview case study using the Cass model to explain identity development among lesbians, Degges states that some respondents went directly from Identity Comparison to Identity Acceptance.<sup>154</sup> In other words, the women who first identified as lesbian at a young age did so out of a self-perception of being different, rather than out of sexual feelings toward other women. These women may have justified their need for self-acceptance as a sexual minority before reaching out for community support. Similar results in studies on gay and bisexual men have found that some will adopt a non-heterosexual identity without having had previous same-sex sexual relationships.<sup>155</sup> It is therefore quite possible that just as that of participants in Degges' study, LGB refugees' identity development will diverge from the linear model proposed by Cass.

## 2. Implausibility of No Same-Sex Relationships in Canada

Plausibility concerns regarding relationship formation is not restrained to the context of refugees' countries of nationality—the analysis extends to refugees' behavior in Canada. Sexual minorities are assumed to be at ease in embracing and expressing their sexual identity once arrived in Canada. In cases, therefore, where applicants appear well settled, adjudicators might question their knowledge and activities surrounding LGB lifestyles in Canada, which can involve frequenting bars and nightclubs, joining community groups, and reading magazines geared toward gays, lesbians, and bisexuals.<sup>156</sup> Furthermore, sexual adjudicators may investigate whether same-sex relationships have been developed in Canada. Failure to have current or former sexual partners in Canada provide an

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<sup>152</sup> Degges-White, Rice & Myers, *supra* note 145 at 319.

<sup>153</sup> See Dubé, *supra* note 148 at 126.

<sup>154</sup> Degges-White, Rice & Myers, *supra* note 145 at 328.

<sup>155</sup> See Dubé, *supra* note 148 at 123–24.

<sup>156</sup> See Millbank, "The Ring of Truth", *supra* note 3 at 18; Rehaag, *supra* note 24 at 72–73.

affidavit or viva voce testimony has contributed, in some cases, to a negative finding on the issue of membership in an LGB social group.<sup>157</sup>

The latter phases of the Cass model may help illuminate to the decision makers' mindsets when assessing refugees' same-sex relationships in Canada. According to the third stage of development, Identity Tolerance, individuals will seek out contact with other gays and lesbians to fulfill social, emotional, and sexual desires.<sup>158</sup> However, they may differentiate between bonds with sexual minorities that they view as necessary, rather than cherished.<sup>159</sup> Positive or negative contact with sexual minorities may further promote or hinder the development of their non-heterosexual identity.

In the fourth stage, Identity Acceptance, individuals will seek opportunities to be in contact with other sexual minorities. "Gay culture" becomes more important to individuals as they create friendships with other sexual minorities,<sup>160</sup> and deepen their understanding of both their personal and perceived identity.<sup>161</sup> Lastly, individuals will begin to strongly contemplate adopting and expressing a sexual minority identity in the public sphere.<sup>162</sup>

In the next stage, Identity Pride, individuals will begin to view their sexual minority identity positively, deepen their understanding of their sexuality, and harmonize their private and public identities. Therefore, individuals at this stage will not only feel comfortable revealing to others that they are sexual minorities,<sup>163</sup> but also, may openly confront issues of social recognition and equality for LGB communities.<sup>164</sup> One's sense of group identity—that is, his or her voluntary association with other sexual minorities, is very strong.<sup>165</sup>

In the final stage, Identity Synthesis, sexual minorities may regard their sexual orientation as only one facet of their overall identity. At this

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<sup>157</sup> See *Mbirimujo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 553 at para 6, 433 FTR 145; *Kamburona v Canada (Minister of Citizenship and Immigration)*, 2013 FC 701 at para 14, 435 FTR 132.

<sup>158</sup> Cass, *supra* note 145 at 151.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> Degges-White, Rice & Myers, *supra* note 145 at 320.

<sup>162</sup> See Heather Adams & Layli Phillips, "Ethnic Related Variations from the Cass Model of Homosexual Identity Formation: The Experiences of Two-Spirit, Lesbian and Gay Native Americans" (2009) 56:7 *Journal of Homosexuality* 959 at 961.

<sup>163</sup> Berg & Millbank, *supra* note 3 at 207.

<sup>164</sup> Cass, *supra* note 145 at 152.

<sup>165</sup> Degges-White, Rice & Myers, *supra* note 145 at 320.

stage, sexual minorities will find ways to integrate their private and public sexual aspects of self.<sup>166</sup> It is in the final stages of identity development that sexual minorities overcome societal stigmatization of non-heterosexual intimacy and may thus develop romantic relationships with the same gender, according to the Cass model.<sup>167</sup>

Decision makers appear willing to recognize that not all sexual minorities will make their sexuality public after arriving in Canada. In *Menaj v. Canada (Minister of Citizenship and Immigration)*, the Board concluded that the applicant was not gay because he was too shy to engage in consensual sex with other men.<sup>168</sup> Justice Mandamin of the Federal Court, rejecting the RPD's reasoning, stated that:

The Board appears to have applied, for lack of a better term, the North American perspective to assessing the Applicant's behaviour when the Board speaks of going to a "gay club" and engaging in "sexual relations with any man." The Board does not... take into consideration the difference in how homosexuality may be viewed in Albania as opposed to Canada.<sup>169</sup>

Similarly, the Board member in *Essa v. Canada (Citizenship and Immigration)* found that the applicant, who had already been living in Canada for 15 years, could not be gay because he did not go out in Montreal's gay district.<sup>170</sup> The applicant explained that he was a "private individual who was discreet about his sexuality," even though the applicant testified that he had had a gay relationship in Jordan.<sup>171</sup> The Federal Court overturned the decision, stating that the Board relied on assumptions about homosexual behavior when reaching its conclusion. Likewise, in *Latsabidze v. Canada*<sup>172</sup> and *Kornienko v. Canada*,<sup>173</sup> Justice Barnes of the Federal Court overruled two decisions by the same Board member for inappropriately stereotyping gay men as invariably sexually promiscuous.<sup>174</sup> The

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<sup>166</sup> Cass, *supra* note 145 at 152–53.

<sup>167</sup> See Dubé, *supra* note 148 at 125.

<sup>168</sup> 2008 FC 611, 72 Imm LR (3d) 293.

<sup>169</sup> *Ibid* at para 17.

<sup>170</sup> *Essa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1493, 3 Imm LR (4th) 162.

<sup>171</sup> *Ibid* at para 18.

<sup>172</sup> *Latsabidze v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1429, 422 FTR 157 [*Latsabidze*].

<sup>173</sup> *Kornienko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1419, 223 ACWS (3d) 856 [*Kornienko*].

<sup>174</sup> See *Latsabidze*, *supra* note 172 at para 2.



Board had reasoned that the claimants could not be gay because they had not actively sought same-sex sexual encounters in Canada.<sup>175</sup>

In *Houshan v. Canada (Minister of Citizenship and Immigration)*, however, testimony of the Syrian claimant's sexual lifestyle in Canada was key to establishing his sexual identity—largely because he had testified wanting to come to Canada to live as an openly gay man in the Personal Information Form (PIF) submitted upon arrival. However, he had not had any same-sex relationships or joined any gay organizations since. The Federal Court upheld the Board's adverse credibility finding:

In short, there was no evidence that he was living in an openly gay lifestyle as he had claimed he wanted to do in his PIF, despite having been in Canada for several years. This was a serious contradiction and given the deference owed to the Board on findings of fact, this was sufficient to justify the Board's negative credibility finding. Given the applicant's statements, I do not find that the Board imposed any stereotypical views of gay lifestyle on the applicant.<sup>176</sup>

The opinion held in *Houshan* also appeared in an RPD case of the same year involving a bisexual man from Mali:

[T]he panel asked how the claimant acts on this attraction. He answered that he does not act on it. The panel is of the opinion that the claimant's behaviour is inconsistent and implausible if he is truly bisexual in a country (Canada or the United States, as applicable) where he is free to live as such. As a result, his credibility is undermined.<sup>177</sup>

The decision makers' reasoning in *Houshan* and the Malian case raises two issues. First, the court opines that an openly gay lifestyle necessarily involves having gay relationships, joining gay organizations, and attending gay establishments. Yet for the claimant in *Houshan*, an openly gay lifestyle may be experienced differently. Second, it seems that to the court, expressing a desire to pursue an openly gay lifestyle in Canada means that the claimant should have reached a state of self-pride and confidence, seeing as he had lived in Canada for several years by the hearing date. While this conclusion is supported by the Cass model, it is clear to see how this may be an unfair expectation.

The case of an Albanian gay claimant also offers a persuasive example of how a lack of same-sex relationship history in Canada can contribute to

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<sup>175</sup> See *ibid*; *Kornienko supra* note 173 at para 3.

<sup>176</sup> 2010 FC 650 at para 17, 190 ACWS (3d) 239. See also *Magradze v Canada (Minister of Citizenship and Immigration)*, 2006 FC 20 at para 7, 145 ACWS (3d) 899 (in which the Federal Court found it reasonable that the Board concluded it was implausible that the claimant would not "take more active steps to pursue his lifestyle" once in Canada).

<sup>177</sup> *RPD File No TA8-19538, supra* note 45 at para 6.

negative plausibility determinations. The Board stated that, “The claimant’s claim is based on his alleged sexual orientation. The onus is on the claimant to satisfy the panel that he has and was following his desires in that type of lifestyle. The panel finds that he has not done so.”<sup>178</sup> The claimant’s legal representative pointed out to the Board that heterosexual claimants would not be compelled to submit evidence of opposite-sex relationships for a claim. The Board responded by stating:

[t]he panel finds that the claim is not based on sexual orientation and in this case, the integral issue is whether the claimant has met his onus in establishing his identity and persecution suffered due to that in his country and has acted accordingly to fulfill those desires in an open society in Canada.<sup>179</sup>

It appears that for the Board, the decision turned on whether the claimant pursued “that type of lifestyle” in Albania and Canada, and not necessarily whether the claimant was a sexual minority. Similar to the analysis in *Houshan*, the decision maker refers to a homosexual lifestyle. However, unlike *Houshan*, the Albanian claimant did participate in gay organizations and pride parades, yet the Board member concluded that since he did not “explore having a relationship in the community in a country, which is open to the concept,” he did not carry out a bona fide homosexual lifestyle.<sup>180</sup>

Canada has earned a reputation of guaranteeing core human rights for sexual minorities. Direct and indirect discrimination against sexual minorities is prohibited based on Canada’s human rights legislation.<sup>181</sup> Therefore, it may not be surprising that decision makers in refugee-status determination expect that bona fide LGB refugees, once in Canada, would have experiences of same-sex relationships resembling the final stages of the Cass model. However, the considerations previously outlined must be taken into account when judging refugees’ volition to seek same-sex relationships after arrival to Canada. Refugee claimants may not openly express their sexuality nor desire same-sex partners as they may continue

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<sup>178</sup> *Re NVJ* [2007] RPDD 125 (QL) at para 12 (IRB).

<sup>179</sup> *Ibid* at para 15.

<sup>180</sup> *Ibid* at para 23.

<sup>181</sup> See e.g. Charter of human rights and freedoms, CQLR c C-12, s 10. See also *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609, judgments of Cory J, Iacobucci J, L’Heureux-Dubé J, and McLachlin J; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 (declaring sexual orientation a prohibited ground in Alberta’s human rights legislation); *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 (holding that anti-gay speech in flyers distributed by a Christian activist is not protected by the Charter, violating the purpose of preventing discrimination embedded in Saskatchewan’s human rights legislation).

to suffer from PTSD<sup>182</sup> or major depression due to the traumatic experiences faced in their home countries due to their sexual orientation. Becoming comfortable enough to accept and express same-sex sexuality may take several years or more after arriving in an asylum country.<sup>183</sup> Though in Canada, refugees may have little to no community support to help them overcome mental health challenges. Reoccurring accounts of societal, religious, and state discrimination negatively impact sexual minorities' adaptive coping skills, self-esteem, and identity development.<sup>184</sup>

The intersection of claimants' gender, sexual orientation, and socioeconomic status, among other factors, plays a critical role in defining their experience once arrived in Canada. Immigrants and refugees tend to gravitate toward communities sharing their ethnic, cultural, linguistic, and religious backgrounds. Such communities in Canada may be just as disapproving of openly-identifying LGB refugees as the communities in their countries of origin. Sexual minorities living in these areas, therefore, may continue to hide their sexual orientation in order to be afforded community acceptance.<sup>185</sup> Significantly, many sexual minority refugees arrive in receiving countries alone, and may not have been able or willing to seek out other sexual minorities who share a similar background. Moreover, refugees often come with limited finances, making socializing in gay-frequented venues unlikely. Naturally, some refugees may not enjoy going out to bars and clubs.<sup>186</sup> There is no doubt that many refugees confront the hardships of poverty and racial exclusion after arriving to Canada.<sup>187</sup> Therefore, when adjudicators form expectations on the lifestyles of sexual minority refugees, they must take into consideration the intersections of gender, sexual orientation, socioeconomic status, and linguistic background, among other considerations. Failing to do so will likely produce a seriously limited and obscured analysis.

Significantly, the *Protecting Canada's Immigration System Act*, which came into force in December 2012, imposes a 30 to 60 day time limit for refugee claimants to prepare for their hearing, depending on whether their claim is lodged at the Canadian border or inland and whether the

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<sup>182</sup> See Heartland Alliance, "Rainbow Response: A Practical Guide to Resettling LGBT Refugees and Asylees" at 47, online: Rainbow Welcome Initiative, <[www.rainbowwelcome.org/uploads/pdfs/Rainbow%20Response\\_Heartland%20Alliance%20Field%20Manual.pdf](http://www.rainbowwelcome.org/uploads/pdfs/Rainbow%20Response_Heartland%20Alliance%20Field%20Manual.pdf)>.

<sup>183</sup> See Shidlo & Ahola, *supra* note 61 at 9.

<sup>184</sup> See Reading & Rubin, *supra* note 66 at 87–88.

<sup>185</sup> Randazzo, *supra* note 12 at 40.

<sup>186</sup> Millbank, "The Ring of Truth", *supra* note 3 at 19.

<sup>187</sup> See e.g. Sharalyn Jordan & Chris Morrissey, "On What Grounds?" LGBT Asylum Claims in Canada" (2013) 42 *Forced Migration Review* at 14.

claimants come from a country designated by the Minister of Citizenship and Immigration as “safe”.<sup>188</sup> Various stakeholders in civil society have strongly criticized this legislation for a number of reasons that go beyond the scope of this article. For sexual minority claimants who have not yet overcome the psychosocial barriers to accepting their sexual identity, the truncated time limit poses the impossible challenge of preparing a coherent verbal testimony in an extremely limited time frame.<sup>189</sup> It is therefore imperative to take a closer look at adjudication practices, and to ensure that decision makers refrain from relying on Western narratives of sexual minority lifestyles—including evidence of same-sex relationships—when determining refugee status.

### III. Recommendations

Sexual and intimate relationships, while being important elements of a credibility assessment for refugee claims based sexual orientation, must be analyzed with diligence and sensitivity. The following recommendations are relevant to adjudicating claims based on sexual orientation because, as Part I of this article suggests, there may be a strong correlation between credibility of same-sex relationships and credibility of sexual orientation.

LGB individuals may suffer from mental health conditions like PTSD and internalized homophobia, which in turn, explains why they may struggle to convey their relationships as loving and compassionate to adjudicators at the RPD hearing. Decision makers should make efforts to avoid triggering trauma and feelings of shame in the claimant. Reference to useful adjudicative tools like the UNHCR Guidelines on Gender-Related Persecution should be considered.

Decision makers should also be cognizant that there is no global model illustrating the complex relationship between sexual identity and sexual behavior. Without societal recognition of the love shared with their partners, sexual minorities have resorted to their own, personal ways of elucidating their relationship’s bonds and milestones. As LaViolette maintains, individuals’ sexual orientation and gender identity are characterized based “on their country of origin, gender, culture, social class, education, religion, family background and socialization.”<sup>190</sup> As such, refugees may not articulate their identities and same-sex relationships in terms matching decision makers’ personal notions of sexuality.

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<sup>188</sup> *IRPA*, *supra* note 6, s 111.1(1); *Immigration and Refugee Protection Regulations*, SOR 2002-227 s 159(1).

<sup>189</sup> Jordan & Morrissey, *supra* note 187 at 13.

<sup>190</sup> LaViolette, “RPD Process in Canada”, *supra* note 29 at 24.

Unfortunately, not enough research is available on the various ways by which same-sex relationships develop across cultures. Many of the specific examples I have cited relating to sexual minorities and their relationships, were based on studies derived from Western countries, which may fall short of providing a comprehensive depiction of non-Western cultural norms. Sexual minorities in countries with harsh living conditions for them may not feel comfortable or safe enough to speak about their relationships to researchers. At the very least, decision makers must remain sensitive to cultural interpretations of relationships, and be conscious of the tendency to assess them based on personal beliefs on what constitutes genuine relationships.

Millbank makes several recommendations to improve credibility assessments of refugee claims made by sexual minorities. She notes that credibility guides in most countries focus on reaching negative credibility assessments, rather than highlighting factors that support positive credibility. She advises against “fast-tracking” adjudication and instead recommends adopting the UNHCR’s “benefit of doubt standard”<sup>191</sup> as well as the presumption of truthfulness in Canadian jurisprudence.<sup>192</sup> These standards for credibility assessments are an appropriate response to the issues outlined in this article because they embrace the diversity of forms same-sex relationships can take.

Plausibility findings concerning claimants’ relationships should be made cautiously. This article has referred to case law and academic literature to assert that the perceived level of societal acceptance of sexual minorities should not influence the assessment of how likely it is that claimants will enter into same-sex partnerships. Decision makers should not assume that sexual minorities in homophobic countries are totally devoid of the volition to have same-sex sexual and intimate partners. Nor should they assume that they are willing to have them after arriving in Canada. The Stage-Identity Model by Viviane Cass might accurately reflect the experiences of many sexual minorities in accepting their sexual identity and being in relationships. Evaluating same-sex relationships in accordance with the Cass model, however, can lead to persistent doubts as to

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<sup>191</sup> Millbank, “The Ring of Truth”, *supra* note 3 at 24. See also UNHCR Handbook, *supra* note 10 at para 203:

After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements ... it is hardly possible for a refugee to ‘prove’ every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

<sup>192</sup> See *Maldonado*, *supra* note 28.

whether those who are genuinely in need of refugee protection are indeed sexual minorities.

Decision makers would benefit from resorting to open-ended questions when soliciting testimony about claimants' relationships. This approach canvasses a wider spectrum of experiences of sexuality, allowing claimants to testify about their experiences with their partners without pressure to conform to decision makers' potentially prejudiced expectations. It follows that closed-ended questions on personal and partner identity as well as sexual conduct should be avoided. Adjudicators should reflect on their own assumptions of how relationships grow, recognizing that same-sex couples might construe their relationships differently than those of opposite-sex couples due to their sexual orientation as well as their cultural background.

Finally, claimants should be asked what type of lifestyle they ultimately desire to lead. By repositioning sexual minority claims as gender claims—focusing on persecution on account of noncompliance to traditional gender roles rather than pigeonholing sexual identities and relationships—adjudicators can unravel deeply-held beliefs related to heteronormative and culturally constructed understandings of sexuality. This broadened approach would create a sounder, fairer adjudication process and refugee protection system.

## Conclusion

This article has explored the significance of testimony of same-sex relationships raised by sexual minorities, for the purpose of having the refugee definition apply to them. In spite of certain methodological limitations, the trends presented in this article reveal a strong link between claimants' credibility of same-sex sexual and romantic experiences, and their membership in an LGB social group. Based on these findings, the challenges pertaining to testifying about same-sex relationships and assessing their veracity have been raised and explored. This exploration has illustrated how decision-makers' knowledge and cultural framework of sexual orientation may pose significant obstacles for refugee claimants required to demonstrate believable testimony of same-sex relationships. The challenge for decision makers is to overcome mutable inferences related to sexual minorities' lifestyles. This could allow and empower claimants to better articulate their personal narratives and experiences, drawing from their emotional, sexual, and romantic attractions for people of the same gender.

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