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Résumé de l'article

Cet article étudie les expériences des demandeurs d'asile transgenre dans le processus canadien de détermination du statut de réfugié en utilisant des méthodes variés : des analyses quantitative des données obtenues auprès de la Commission de l'immigration et du statut de réfugié du Canada (CISR), des revues des décisions publiées et non publiées, des cartables national de documentation et des lignes directrices de la CISR, ainsi que des entrevues avec des avocats spécialisés en droit des réfugiés. À l'aide de ces méthodes, nous étudions comment la crédibilité est établie dans les demandes d'asile pour les personnes transgenres, en notant les impacts de la médicalisation et des cartables national de documentation sur ces demandes, tout en établissant des parallèles entre le contrôle médical et l'évaluation de la crédibilité dans les demandes d'asiles. Nous identifions des potentielles explications pour un faible taux de demandes d'asiles enregistré pour les personnes transgenres comme étant enraciné dans des pratiques de collection de données et de prise de décision qui ne sont pas alignées avec les expériences des personnes transgenres, et nous proposons des recommandations d'actions gouvernementales pour surmonter cet incohérence. Bien que récemment les demandes d'asiles pour des personnes transgenres semblent avoir été largement acceptées, des tendances d'exclusion et d'effacement de longue date ont néanmoins conduit plusieurs de ces demandeurs à expériencer le processus de détermination du statut de réfugié comme étant traumatisant et transphobe, entraînant des complications et des défis qui ne sont pas pris en compte dans la pratique.

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Transgender Erasure: Barriers Facing Transgender Refugees in Canada

Alex Verman and Sean Rehaag *

This paper explores the experiences of transgender refugee claimants in Canada's refugee status determination system by using mixed methods: quantitative analysis of data obtained from the Immigration and Refugee Board (IRB), reviews of published and unpublished decisions, country condition documentation packages and IRB guidelines, as well as interviews with refugee lawyers. Using these methods, we explore how credibility arises in transgender refugee claims, noting the impact of medicalization and country conditions materials on transgender claims, and drawing parallels between medical gatekeeping and credibility assessments in refugee claims. We identify potential explanations for low recorded numbers of transgender claims as rooted in data-gathering and decision-making practices that are misaligned with transgender experiences, and we offer policy recommendations to overcome this mismatch. Though transgender refugee claims appear to be largely successful in recent years, longstanding patterns of exclusion and erasure as policy nevertheless lead many transgender claimants to experience the refugee determination process as traumatic and transphobic, resulting in unaccounted-for complications and challenges to practice.

Cet article étudie les expériences des demandeurs d'asile transgenre dans le processus canadien de détermination du statut de réfugié en utilisant des méthodes variés : des analyses quantitative des données obtenues auprès de la Commission de l'immigration et du statut de réfugié du Canada (CISR), des revues des décisions publiées et non publiées, des cartables national de documentation et des lignes directrices de la CISR, ainsi que des entrevues avec des avocats spécialisés en droit des réfugiés. À l'aide de ces méthodes, nous étudions comment la crédibilité est établie dans les demandes d'asile pour les personnes transgenres, en notant les impacts de la médicalisation et des cartables national de documentation sur ces demandes, tout en établissant des parallèles entre le contrôle médical et l'évaluation de la crédibilité dans les demandes d'asiles. Nous identifions des potentielles explications pour un faible taux de demandes d'asiles enregistré pour les personnes transgenres comme étant enraciné dans des pratiques de collection de données et de prise de décision qui ne sont pas alignées avec les expériences des personnes transgenres, et nous proposons des recommandations d'actions gouvernementales pour surmonter cet incohérence. Bien que récemment les demandes d'asiles pour des personnes transgenres semblent avoir été largement acceptées, des tendances d'exclusion et d'effacement de longue date ont néanmoins conduit plusieurs de ces demandeurs à expériencer le processus de détermination du statut de réfugié comme étant traumatisant et transphobe, entraînant des complications et des défis qui ne sont pas pris en compte dans la pratique.

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Introduction

Imagine that you are a refugee lawyer. You have a client who came to you as a gay man from Colombia. They arrived in Canada on a study permit that has now expired. Since then, they have been living in Toronto without status. In Colombia, their parents criticized how they walked, talked, and the people they hung around with. When they were 16, they grew their hair long and styled it in a ponytail. Once, their mother saw them like this and made them cut their hair short, *like a boy*. Still, they were not deterred; they would go out to bars with their friends. They had a few run-ins with the police, who were rough and cruel. It was hard, but tolerable, until one night they were mugged while out in drag, wearing a skirt and heels. When they tried to report it to the police, the officers laughed. One officer stuck his hand up their skirt. From that moment on, they were determined to leave Colombia, and applied for college in Canada. They have lived in Canada since they were 18 and haven't been back since. Now, they are 22.

Since that incident, the client has been afraid to grow out their hair and experiment with their clothes, but they love watching drag and they have friends who perform. It was only after talking to one of these friends that they learned they could make a refugee claim for persecution on account of sexual orientation. They contacted Legal Aid, who referred them to you.

While working with your client on the narrative of their persecution back home, you noticed that they seem reserved and uncomfortable, unable to answer questions directly. They opened up more over time, but only barely. You find out that, since arriving in Canada, they have struggled to find work and housing. Moreover, they still face criticism of how they talk and walk. They are fearful of authority figures. Sometimes after recounting a painful memory, you cannot reach them for days.

In the week before the hearing, they make an unexpected disclosure: "I'm not a man," they say, "But I don't know what I am. Maybe I'm a woman. I don't know yet. Will that change things?"

The answer is yes, and no. You have already connected them with a counsellor, from whom you now will need a letter attesting to their evolving gender identity. To integrate this new element into their claim, you will need to reach out to their supporters in Canada and Colombia, without giving them more information than your client can safely share. You will need to amend their basis of claim form. You will need to gather new information about the conditions for transgender people in Colombia. But most pressingly, you will need to work with the client to prepare them for questions you anticipate coming up at the hearing. With sexual orientation claims, decision-makers often ask about sexual history and preferences, incidents of sexual abuse, and familial trauma. It is messy and un-

comfortable, but you have been preparing your client for weeks. Now, the questions may be about their transition journey, their process of identity discovery, their aesthetic preferences and goals — things that your client may not have even considered yet. The new elements are concerning, because your client's trauma makes them shut down in the face of authority figures, and their history has made them afraid to express the kind of femininity that you know the decision-maker wants to see. Your client needs accommodations, and you have no time to request them.

By the day of the hearing, you have submitted all the new evidence and amendments. You have read the relevant Guidelines in depth. But the decision-maker is skeptical. With your client sitting beside you wearing light makeup and trying their best to stay calm, the decision-maker looks at them, at the documents before her, and then at you. "Where is the medical evidence? Where is the evidence that *he* is in fact a *she*?"

This scenario is based on a composite of stories told to us in interviews with refugee lawyers. The last comment is a quote from one lawyer's recounting of a particularly bad experience with a decision-maker. After that hearing, the lawyer's client cried all afternoon. She was scared and confused. She felt disrespected by this decision-maker who exercised power over her future life in Canada. It was a traumatizing experience.

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This paper explores the experiences of transgender refugee claimants in Canada. We use mixed methods, including quantitative analysis of data obtained from the Immigration and Refugee Board (IRB), reviews of published and unpublished decisions obtained from the IRB, examinations of country condition documentation packages, and interviews with refugee lawyers. We attempt to discern why transgender claims seldom appear in IRB data and policy instruments, explore patterns in the substance and outcomes of transgender claims, and offer recommendations for how the refugee determination system could better respond. We argue that while the Canadian refugee system has progressed meaningfully in seeing and accepting transgender people, various institutional and political barriers nevertheless limit the full realization of transgender asylum in Canada, preventing lawyers and scholars from adequately serving the distinct needs of this highly marginalized community.

Overall, we recognize that in recent years most transgender refugee claims in Canada have succeeded, and that the IRB has made important strides in fairly evaluating transgender refugee claims, particularly in the past five years. This progress has coincided with broader improvements in the treatment of claims made on the basis of sexual orientation, gender identity and expression, and sexual characteristics ["SOGIE(SC)"].

However, broader limitations in organizational practices and policy have left Canada's fulfilment of its international legal and human rights obligations with respect to transgender refugees incomplete. Moreover, we identify an erasure of transgender claims and claimants in the available data, with problematic consequences. Thus, despite what appears to be a marked improvement in the treatment of transgender claims and claimants, the low recorded numbers of transgender refugees both obscures and reveals how transgender people are literally erased — i.e., vanished, excluded, denied, and mislabeled — in the process of seeking and securing asylum in Canada. We argue that barriers to entry, obstacles to self-recognition, subjection to discrimination in Canada, and disorientation within the demands of the refugee status determination process, all result in what we identify as a surprisingly high success rate among transgender refugees, even as the experiences of these refugees and the lawyers who assist them is fraught, under-resourced, demanding, and traumatizing. We have chosen to describe this process using the word "erasure" in the title of this article to highlight how these policies and practices result in the systematic underreporting, invisibilization, and dismissal of the diversity, complexity, and humanity of transgender people. In other words, as we argue, despite (and at times, even through) these positive changes, transgender refugees are erased.

The paper begins with an overview of the refugee status determination process context. It then describes our methods and materials, and it provides a quantitative overview of outcomes in the refugee determination process — noting the small number of refugee claims categorized by the IRB as involving transgender claimants. Next, it explores the development of IRB guidelines for SOGIE(SC) claims, and how credibility arises both generally and in transgender refugee claims specifically, noting the impact of medicalization and country conditions materials on transgender claims. The paper then interrogates possible explanations for the IRB's low numbers of transgender claims and concludes with policy recommendations.

A note on terminology: we use "transgender" throughout as an umbrella term to describe individuals and communities who identify and express their gender in ways that transcend the gender assigned to them at birth. We use this label for individuals who may also identify as transsexual, gender non-conforming, or simply trans without qualification. We depart from "transgender" only when referring to a specific source or experience. This decision follows Susan Stryker, who notes that, though terminological debates are interesting and illuminating, "transgender" ultimately works "as a simple word for indicating when some practice or identity crosses gender boundaries that are considered socially normative" in the contemporary West, and that the decision to fold together these different gender-crossing experiences in one word should be read

simply as "a device for telling a story about the political history of gender variance that is not limited to any one particular experience."[1] In making this decision, we recognize that much has been written about the epistemic struggle to "translate" transgender experiences across contexts (i.e., in characterizing variance of gender identity and expression in non-Western societies). This topic, though fascinating, lies outside the immediate scope of our paper. Finally, while the literature occasionally uses the terms *LGBTQ* or *SOGIE*, we use the more updated term "SOGIE(SC)" wherever possible.

I. Context

To make a refugee claim in Canada, a person first needs to arrive on Canadian territory.[2] Canada utilizes several mechanisms to prevent the arrival of refugees.[3] These include visa requirements,[4] electronic travel authorizations,[5] fines and criminal sanctions imposed on airlines that bring refugee claimants to the country without visas or electronic travel authorizations;[6] extra-territorial border control enforcement that aims to prevent refugee claimants from circumventing the visa requirement through irregular entry or false documents;[7] and the Safe Third Country Agreement, which prevents most refugee claimants from entering Canada via the United States.[8]

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1 Susan Stryker, *Transgender History*, SEAL Studies (Berkeley: Seal Press, 2008) at 24. We have intentionally avoided wading into theoretical reflections on the definition and meaning of transgender identity, in the interest of keeping our discussion focused on the law—which in this immediate context, has thankfully eschewed outright circumscription of transgender identity, in favour of more ambiguous terms like "gender identity and expression." Our use of "transgender" is intended to name explicitly the communities at risk, with as much of both breadth and specificity as possible.

2 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 99(3) [*IRPA*].

3 See generally Andrew Brouwer & Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (2003) 21:4 Refuge 6 at 8,10; Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement" (2005) 36:2 Colum HRLR 365; François Crépeau & Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 IRPP Choices at 12–13,17; Efrat Arbel, "Bordering the Constitution, Constituting the Border" (2016) 53:3 Osgoode Hall LJ 824.

4 *IRPA*, *supra* note 2, s 11(1).

5 *Ibid*, s 11(1.01).

6 *Ibid*, ss 148–50.

7 Arbel, *supra* note 3 at 834–44.

8 *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, 5 December 2002, Can TS 2004 No 2 (as amended by *Additional Proto-*

Those who surmount these barriers can initiate a refugee claim by indicating a desire to do so to immigration officers at a port of entry or inland office, and by filling out relevant forms and providing supporting documents, including a Basis of Claim Form that sets out why they are seeking protection.[9] An immigration officer will determine whether the claimant is eligible to have their claim referred to the Immigration and Refugee Board (IRB),[10] a quasi-judicial administrative tribunal that includes a Refugee Protection Division (RPD) that makes first instance refugee determinations.[11] Absent unusual circumstances such as some forms of criminality, security risks, prior unsuccessful claims, or having already made a claim in some other countries, claims will be found eligible for referral.[12]

Once a claim has been referred to the IRB, the RPD will undertake a preliminary screening to determine whether the claim can be granted under expedited process without a hearing.[13] Unless the claim is streamed to a paper-based grant of protection, a hearing will be scheduled[14] — though it can take several years to get to a hearing due to inadequate resources allocated to the IRB.[15]

At the hearing, an IRB member in the Refugee Protection Division will determine whether the claimant meets the refugee definition.[16] That definition is set out in legislation that draws on the 1951 Refugee Con-

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col to the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, entered in force 25 March 2023, Can TS 2023 No 3, online: <canada.ca> [perma.cc/XLX5-Q768]).

9 *IRPA*, *supra* note 2, ss 99(3), 100(4). See also Immigration and Refugee Board of Canada, *Basis of Claim Form* (November 2012), online: <irb.gc.ca> [perma.cc/L6EJ-GPB9].

10 *IRPA*, *supra* note 2, s 100(1).

11 *Ibid*, s 151.

12 *Ibid*, s 101.

13 *Ibid*, s 170(f). See also Immigration and Refugee Board of Canada, *Less Complex Claims: The short-hearing and file-review processes* (3 November 2020), online: <irb.gc.ca> [perma.cc/N649-HUG6].

14 *IRPA*, *supra* note 2, s 170(b); the paper review process is elaborated in Immigration and Refugee Board of Canada, *Instructions Governing the Streaming of Less Complex Claims at the Refugee Protection Division* (29 January 2019), online: <irb.gc.ca> [perma.cc/X3UF-XB3P].

15 Immigration and Refugee Board of Canada, *2021–22 Departmental Results Report* (2 December 2022), online: <irb.gc.ca> [perma.cc/7NM4-AQCP] (noting that, in 2021–22 wait times for a hearing were on average longer than 24 months 50% of the time).

16 *IRPA*, *supra* note 2, s 107.

vention:[17] "a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, […] is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries..."[18]

While the statutory definition does not explicitly include people who face persecution on account of their transgender identity, the Supreme Court confirmed in 1993 that "membership in a particular social group" includes people facing persecution on account of their gender or their sexual orientation.[19] Since at least that time, it has been clear in Canadian refugee law that people facing persecution due to their transgender identity, or otherwise non-conformity to gender norms, can qualify for refugee protection.[20]

The central questions of the refugee status determination process tie directly into the core components of the refugee definition. A claimant must establish on a balance of probabilities that they have an objectively well-founded fear of persecution; that this persecution is due to one of enumerated Convention grounds; and that they are unable to seek protection from their home country. This last element includes a failure of police and other institutions to protect them against persecution, and a lack of "internal flight alternatives," such as safe cities or regions to flee to within their home country. Refugee claimants must present evidence of all of these considerations, using documentary evidence (e.g., identification documents, health documents), evidence of country conditions (e.g., media reports, human rights documentation), and their own testimony. Those who are deemed not credible, or otherwise fail to establish a key element

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17 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 at art 10 (entered into force 22 April 1954).

18 *IRPA*, *supra* note 2, s 96. In addition to meeting these inclusion criteria, refugee claimants must also demonstrate that they are not excluded from refugee protection due to having committed certain human rights violations or serious non-political crimes (see *ibid*, s 98).

19 *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 739, 1993 CanLII 105 (SCC) [*Ward*].

20 Many early decisions involving claimants who might today be characterized as transgender involved "transvestites" and "cross-dressers." The Federal Court accepted that such claimants may face persecution on account of their membership in a particular social group, typically without much discussion. See e.g. *Contreras Hernandez v Canada (Citizenship and Immigration)*, 2007 FC 1297 at para 29; *Cascante v Canada (Citizenship and Immigration)*, 2008 FC 161 at para 2.

of the refugee definition, are generally denied protection, and set on track for removal.[21]

II. Methods

To understand how Canada's refugee determination system treats claims involving persecution against transgender individuals, we began by reviewing literature on transgender claimants in Canada.

Several overlapping themes emerged in this literature, pointing to the limitations imposed upon transgender people not only in reaching Canada, but in expressing themselves authentically and legibly to decision-makers. Lee, for example, studies how colonialism and liberalism force the displacement of transgender people in the Global South, paying attention to liberationist discourses often demanded of transgender asylum seekers.[22] Jacob and Oswin cover a similar theme, though chiefly studying transgender refugees' experiences outside of the status determination process.[23] Jordan takes up how SOGIE(SC) refugees negotiate their self-narratives for different audiences,[24] a theme also explored by Mulé.[25] Hodge, Hallgrimsdottir, and Much argue that biometric screening negatively impacts gender non-conforming people crossing the border.[26]

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21 *IRPA*, *supra* note 2, s 107(2). Claimants must also establish that they are not excluded from refugee protection, for reasons related to serious non-political crimes, war crimes, crimes against humanity, and acts contrary to the principles and purposes of the United Nations (*Ibid*, s 98).

22 Edward Ou Jin Lee, "Tracing the Coloniality of Queer and Trans Migrations: Resituating Heterocisnormative Violence in the Global South and Encounters with Migrant Visa Ineligibility to Canada" (2018) 34:1 Refuge 60 at 62–63; Edward Ou Jin Lee, "Responses to Structural Violence: The Everyday Ways in Which Queer and Trans Migrants with Precarious Status Respond to and Resist the Canadian Immigration Regime" (2019) 10:1 Intl J Child, Youth & Family Studies 70 at 71, 74; Edward Ou Jin Lee & Shari Brotman, "Speak Out! Structural Intersectionality and Anti-Oppressive Practice with LGBTQ Refugees in Canada" (2013) 30:2 Can Soc Work Rev 157 at 168–69.

23 Tai Jacob & Natalie Oswin, "Trans migrations: Seeking refuge in 'safe haven' Toronto" (2023) 67:2 Can Geographer 202.

24 Sharalyn R Jordan, "Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution" (2009) 26:2 Refuge 165 at 173–79.

25 Nick J Mulé, "Safe Haven Questioned: Proof of Identity Over Persecution of SOGIE Asylum Seekers and Refugee Claimants in Canada" (2020) 18:2 J Immigrant & Refugee Studies 207 at 217–18.

26 Edwin Hodge, Helga Hallgrimsdottir & Marianne Much, "Performing Borders: Queer and Trans Experiences at the Canadian Border" (2019) 8:7 Social Sciences 201 at 212.

We then expanded our scope to include non-transgender SOGIE(SC) Canadian scholarship. In this body of literature, authors emphasized claimants' narrative constraints and limited institutional guidance. LaViolette, for example, explores the gaps in early SOGIE(SC) and gender related decision-making guidelines.[27] Rinaldi and Shanti discuss how queer refugees in Canada are treated as threats when making refugee claims.[28] Relatedly, Murray explores discourses deployed by queer refugees to overcome this presumption of threat and resulting scrutiny.[29] Rehaag, one of the co-authors of this paper, examines credibility in sexual orientation claims with a focus on bisexual claims, using empirical methods.[30]

Moving outside of Canada, Berg and Millbank study the recent and shaky development of "transgender" as a particular social group for refugee claims in multiple anglophone countries.[31] Avgeri explores this topic further, drawing from transgender studies scholarship to critique the narrow bounds of the Convention refugee definition.[32] Vogler examines how the American refugee system scrutinizes and constrains transgender migrants' narratives.[33]

In the materials surveyed, many authors identified that refugee law imposes significant constraints on the ability of SOGIE(SC) refugees, and

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27 Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19:2 Intl J of Refugee L 169 at 170–71 [LaViolette, Guidelines]; 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 [LaViolette, "Documentation"]; Nicole LaViolette, "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': a Critical Commentary" (2010) 22:2 Intl J Refugee L 173 [LaViolette, "UNHCR"].

28 Jen Rinaldi & Shanti Fernando, "Queer Credibility in the Homonation-State: Interrogating the Affective Impacts of Credibility Assessments on Racialized Sexual Minority Refugee Claimants" (2019) 35:1 Refuge 32 at 34.

29 David Murray, "Liberation Nation? Queer Refugees, Homonationalism and the Canadian Necropolitical State" (2020) 28:59 REMHU 69 at 72, 77.

30 Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53:1 McGill LJ 59 [Rehaag, "Bisexual"]. See generally Sean Rehaag, "Sexual Orientation in Canada's Revised Refugee Determination System: An Empirical Snapshot" (2017) 29:2 CJWL 259 [Rehaag, "Empirical Snapshot"].

31 Laurie Berg & Jenni Millbank, "Developing a Jurisprudence of Transgender Particular Social Group" in Thomas Spijkerboer, ed, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Abingdon: Routledge, 2013) at 121.

32 Mariza Avgeri, "Assessing Transgender and Gender Nonconforming Asylum Claims: Towards a Transgender Studies Framework for Particular Social Group and Persecution" (2021) 3 Frontiers in Human Dynamics 1 at 5–6, online: <frontiersin.org> [perma.cc/HG7M-P2TS].

33 See generally Stefan Vogler, "Determining Transgender: Adjudicating Gender Identity in U.S. Asylum Law" (2019) 33:3 Gender & Society 439.

particularly transgender claimants, to successfully communicate their experiences of persecution. Beyond these examples which offer insights to our area of study, the bulk of the literature on SOGIE(SC) claims deals primarily with cisgender claimants. It became clear to us that the legal operation of "gender identity and expression" as a basis of claim was a comparatively unexplored area, despite the long history of transgender people seeking protection across borders.

After reviewing the literature, we next tried identifying all relevant published Canadian refugee law decisions. This proved challenging. Published decisions are not categorized by claim type, and the only way to identify the ones dealing specifically with transgender cases is by text searches. In May 2022, we attempted searches of the IRB decisions published on CanLII, and then reviewed them manually.[34] Successive rounds of searches and reviews eventually produced 39 cases from 2000 to 2020, of which 13 involved transgender claims. Of those 13 cases, seven resulted in refugee protection, meaning that these cases had a 54% recognition rate. Claimants in these 13 cases came from six countries — Mexico, South Korea, Brazil, Iran, Afghanistan, and Costa Rica. Mexico was the top country of origin, producing seven out of 13 claims; South Korea was second, with two.

This dataset is not only small, but it is also not representative of all transgender refugee determinations due to publication practices. Only a small proportion of Canadian refugee decisions are published, and most published decisions involve appeals or judicial reviews of refugee claims that were initially denied.[35]

We used four additional research methodologies to overcome the challenges caused by the limited number of decisions available and the unrepresentative nature of those decisions. First, we used Access to Information requests[36] and data sharing agreements with the IRB[37] to obtain

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[34] The precise combination of words was the product of significant experimentation. We tried a number of options to improve accuracy and reduce the number of false positives, but ultimately settled on the verbatim keyword phrases "a transgender," "a transsexual," "his gender," and "a transvestite." Some of these phrases are questionable in terms of everyday parlance; however, they ended up accurately capturing how IRB members described the transgender people sitting before them through the years with the lowest rate of false positives.

[35] For a discussion of publication practices and how they lead to skewed datasets, see Rehaag, "Empirical Snapshot", *supra* note 30 at 269–72.

[36] Immigration and Refugee Board of Canada, *A-2021-01792* (Access to Information and Privacy Request) (Ottawa: IRB, 11 July 2022); Immigration and Refugee Board of Canada, *A-2020-01130* (Access to Information and Privacy Request) (Ottawa: IRB, 3 June 2021) via email [communicated to authors].

data about every principal applicant refugee claim[38] decided in Canada's refugee determination system since that system was revised in December 2012.[39] This data includes the outcome, the date of the decision, the country of origin of the claimant, and the category ("claim category") and subcategory ("claim type") of the claim as identified by the IRB. The IRB's internal database tracks cases by categories and subtypes of claims. Claims identified as involving "Particular Social Group: Sexual Orientation" is one of the categories tracked — and, starting in 2019, the IRB began tracking "Transgender" as a claim type within that category. Using a computer program written in Python, we processed that data and generated statistics on claim categories and claim types set out later in this article.[40] It should be noted that the data on claim category and type must be approached with some caution. This data is gathered for administrative purposes early in the refugee determination process, and the data is not updated if the basis of the claim changes. Moreover, categorizing claims is a subjective exercise. Despite these limitations, statistics from this data provides more accurate picture than the more limited view offered by published decisions.[41]

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37 Immigration and Refugee Board of Canada, *Memorandum of Understanding between The Immigration and Refugee Board of Canada (IRB) and Sean Rehaag and his research team* (Ottawa: IRB, 8 July 2022); Immigration and Refugee Board of Canada, *Memorandum of Understanding between the Immigration and Refugee Board of Canada and Sean Rehaag and his research team for the disclosure of personal information for research and statistical purposes pursuant to Paragraph 8(2)(j) of the Privacy Act* (Ottawa: IRB, 2 June 2021).

38 Where a family makes a refugee claim together, one applicant is typically identified as the "principal applicant" and other claimants are identified as "associated claimants." The data provided by the IRB covers only principal applicants.

39 These revisions materialized through, among others, the adoption of the *Balanced Refugee Reform Act,* SC 2010, c 8 and the *Protecting Canada's Immigration System Act,* SC 2012, c 17, and the adoption and amendment of regulations under the *Immigration and Refugee Protection Act* (especially the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and the *Refugee Protection Division Rules*, SOR/2012-256).

40 Python is an open-source computer programming language that is frequently used by data scientists because it is simple to learn and because a large community of developers have built and shared packages that facilitate data analysis. See generally Python Software Foundation, "About Python™" (2023), online: <python.org> [perma.cc/7GVT-UHDC].

41 For further discussion of using IRB quantitative data in this way, including a discussion breaking down various claim types in Canada's refugee determination system using computational methods, see Sean Rehaag, "Claim Types in Canada's Refugee Determination System: An Empirical Snapshot (2013-2021)" (2023) Refugee Law Lab, Working Paper No 4341740, online: <papers.ssrn.com> [perma.cc/7P2J-ZA3B] [Rehaag, "Claim Types"].

Second, we made Access to Information requests[42] to the IRB to obtain redacted copies of all unpublished decisions categorized by the IRB as involving transgender claimants from 2019 to 2021. We then reviewed those redacted cases.

The IRB provided the requested quantitative data on the condition that we enter into a data sharing agreement. That agreement aims to protect the privacy of claimants through a small value suppression policy that limits how we can report statistics on groups that are smaller than 20 refugee claimants. Specifically, while we are allowed to report percentage figures for such groups, we are not allowed to report the precise number of individuals. As such, the quantitative overview below rounds figures to the nearest 20 claims. The IRB provided redacted copies of the decisions under the regular Access to Information request process, and in principle there are no limitations on our use of those cases. However, out of an abundance of caution, we are adhering to the same small value suppression policy in the way that we report statistics on these cases because we identified the relevant cases using the quantitative data provided — meaning that we report percentages but round the number of individuals falling into any given group to the nearest 20.

Third, to improve our understanding of how transgender refugee claims make use of evidence, we conducted a review of selected National Documentation Packages (NDP). NDPs are curated selections of publicly available documents such as reports, surveys, and news stories that provide information on the conditions in various countries. They are produced by the IRB and are available on the IRB's website. Many refugee claims make use the contents of NDPs as evidence of a claimant's objective fear of persecution in their home country, though some may require supplementation with additional evidence. We reviewed the most recent NDPs at the time of data collection in spring 2022 for five countries that generated transgender refugee claims: Mexico, South Korea, Hungary, Morocco, and Turkey.

Fourth, we conducted semi-structured interviews with 15 lawyers involved in transgender refugee claims. We identified these lawyers by referencing decisions, through professional contacts, and through snowball

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[42] Immigration and Refugee Board of Canada, *A-2022-00210*, (Access to Information and Privacy Request) (Ottawa: IRB, 2 June 2022); Immigration and Refugee Board of Canada, *A-2022-00665*, (Access to Information and Privacy Request) (Ottawa: IRB, 8 August 2022); Immigration and Refugee Board of Canada, *A-2022-00978*, (Access to Information and Privacy Request) (Ottawa: IRB, 22 September 2022) via email [communicated to authors].

sampling.[43] Interviews lasted approximately 25-45 minutes each. We recorded the interviews, transcribed them, and reviewed them for common themes. As required through the research ethics approval process,[44] we removed any identifying information in the transcripts. As such, throughout this paper, the interview subjects are referred to by randomly assigned letter (A, B, C, etc). While the experiences recounted by our interviewees help supplement the information that we were able to glean from published decisions, quantitative IRB data, and the unpublished decisions that we reviewed, we recognize that these interviews are limited. For example, our interviewees were not randomly selected, nor practicing in all 13 provinces and territories; and, we did not hear the perspectives of others involved in the refugee determination process, including claimants, decision-makers, and government actors. As such, our observations are necessarily partial and should be supplemented by additional research.[45]

III. Quantitative Overview

Based on the quantitative data provided by the IRB, Table 1 offers an overview of all claim types in Canada's refugee determination system from 2013 to 2021.[46] As the table shows, claims categorized as involving "sexual orientation" accounted for 12,760, or approximately 11% of all claims during this period. Their recognition rate was 77%, which is higher than the 70% average recognition rate for all claims during this period.

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43 Snowball sampling refers to a sampling technique whereby individual subjects recruit potential new subjects from among their own known contacts. Several of our subjects recommended colleagues for us to interview. Owing to the small size of the SOGIE(SC) refugee bar, this was a very effective way to connect with potential subjects. In the interest of retaining confidentiality, we did not inform participants of our decision to speak to their recommended peers, nor did we mention the source of any referrals.

44 Alison M Collins-Mrakas, York University, Office of Research Ethics, "Representing Transgender Refugees: Evidence, Erasure, and Embodiment in the Canadian Refugee Context – Certificate #e2022-236" (30 June 2022) via memo [communicated to author].

45 For research that draws on the experience of transgender and other SOGIE(SC) claimants and/or on the perspectives of decision-makers, see e.g. Avgeri, *supra* note 32; David AB Murray, *Real Queer? Sexual Orientation and Gender Identity Refugees in the Canadian Refugee Apparatus* (London: Rowman & Littlefield International, 2016).

46 Table 1 is also available in Rehaag, "Claim types", *supra* note 41 at 15. We chose 2013 as the start date, as this is shortly after Canada's current refugee determination system came into effect.

Table 1: Claim Categories (2013-21)

Categories	Number*	Proportion (%)	Recognition Rate (%)
All	**113,000**	**100**	**70**
Political Opinion	**38,740**	**34**	**78**
PO: Activity/Occupation	20,120	18	80
PO: Organization	11,460	10	76
PO: Varied/Other	4,820	4	73
PO: Military Service	2,340	2	90
PO: State Policy Issues	1,800	2	53
PO: Activism	140	0	95
Particular Social Group	**31,280**	**28**	**72**
PSG: Gender-based/Domestic Violence	14,300	13	70
PSG: Sexual Orientation	12,760	11	77
PSG: Varied/Other	5,660	5	65
No Nexus	**25,580**	**23**	**48**
NN: Criminality/Corruption	22,420	20	48
NN: Varied/Other	3,660	3	48
Religion	**18,580**	**16**	**78**
Race/Ethnicity/Nationality	**13,580**	**12**	**79**
No Category Provided	**4,480**	**4**	**68**

*Rounded to nearest 20

Table 2 breaks down claims within the "sexual orientation" category by subtype.[47] As the table shows, of the 12,760 sexual orientation claims, approximately 80 (1% of sexual orientation claims, 0.07% of claims overall) are categorized as involving "transgender" claims. The recognition rate in these claims is remarkably high: 97%, compared to 77% for sexual orientation claims, and 70% for claims overall.

Table 2: Sexual Orientation, Gender Identity & Expression Claim Types (2013-21)

Claim Types (SOGIE)	Number*	Proportion (%)	Recognition Rate (%)
All	**12,760**	**100**	**77**
Gay	5,800	45	79
Bisexual	3,620	28	68
Lesbian	2,720	21	84
Varied/Other	600	5	73
Transgender	80	1	97
Imputed Sexual Orientation	60	0	74
Family of / Related to LGBTQ person	60	0	73

*Rounded to nearest 20

Claimants identified in the IRB's database as having made transgender claims came from 37 different countries. The top five countries of origin were: Mexico, India, Iran, Saudi Arabia, and the Bahamas. The small number of unsuccessful claims involved a single Western democratic country.

47 Table 2 is also available in Rehaag, "Claim types", *supra* note 41 at 19. We chose 2013 as the start date, as this is shortly after Canada's current refugee determination system came into effect.

Based on the data provided by the IRB, it appears that, whereas the IRB has long tracked sexual orientation claims, they only began breaking out transgender claims as a separate claim type in 2019. While we know from our analysis of published cases that there were transgender claims prior to this time, none are explicitly categorized as such prior to 2019 in the IRB's data. It is unclear to us how these cases would have been categorized previously. For example, were they categorized in the "varied/other" subtype of "sexual orientation" claims? Were they simply subsumed within "gay", "lesbian" or "bisexual" claims? Were they included within residual "other" categories of gender-based violence claims, another category of claims, but one that does not explicitly include transgender claims? Looking only at the quantitative data, it is difficult to tell.

IV. Guideline 9

As noted above, in 1993, the Supreme Court of Canada recognized that people facing persecution on account of sexual orientation or gender can meet the refugee definition. The IRB developed guidelines to assist decision-makers hearing claims involving gender-based persecution that same year.[48] However, it took almost twenty-five years—and pressure from scholars and activists[49]—for the IRB to do the same for claims involving sexual orientation, gender identity and gender expression, and sexual characteristics.

The IRB published its *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE)* in May 2017.[50] Prior to that date, scholars and lawyers made occasional use of similar UNHCR guidelines for the adjudication of SOGIE(SC) claims.[51] However, the UNHCR guidelines were neither bind-

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48 Immigration and Refugee Board of Canada, *Chairperson's Guideline 4: Gender Considerations in Proceedings Before the Immigration and Refugee Board* (Policy Instrument), (Ottawa: IRB, 18 July 2022) online: <irb.gc.ca> [perma.cc/LT39-HK6S]. For a historical account of the gender guidelines, see LaViolette, "Guidelines", *supra* note 27 at 175–76.

49 The guidelines recognize this pressure in an introductory note saying that the guidelines are "dedicated to the late Nicole LaViolette, Professor, Faculty of Law, University of Ottawa, whose work informed and inspired the development of the Guideline": see Immigration and Refugee Board of Canada, *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* (Policy Instrument), (Ottawa: IRB, 1 May 2017) online: <irb.gc.ca> [perma.cc/SY7Q-ABD9].

50 Immigration and Refugee Board of Canada, *Review of the implementation of the Sexual Orientation and Gender Identity and Expression (SOGIE) Guideline* (Ottawa: IRB, 2020) online: <irb.gc.ca> [perma.cc/EAM9-E87J] at 4 [IRB, *SOGIE Implementation*].

51 LaViolette, "UNHCR", *supra* note 27 at 176.

ing,[52] nor, as our interviewees attested, regularly invoked. Moreover, the UNHCR guidelines—first published in 2008 and updated in 2012—contain few transgender-specific instructions. They nevertheless helpfully distinguish gender identity from sexual identity, emphasize fluidity and variety throughout, and encourage decision-makers to de-emphasize medicalization (and especially bottom surgery) in assessing credibility.[53] The UNHCR guidelines also note that analogy may be appropriate where country condition information is absent about a specific community under the SOGIE(SC) umbrella, which assists in overcoming a common evidentiary barrier in transgender cases where robust statistics are often scarce. These positive aspects were carried through into the IRB's SOGIE(SC) Guidelines.

The 2017 Guidelines were only on the books for two years before an official review began in 2019. According to the IRB, the purpose of this review was to determine where and how the Guidelines were being used by decision-makers, and augment their application by identifying gaps and areas of improvement.[54] The IRB's internal review found that appellate-level Refugee Appeal Division (RAD) decision-makers tended to be more familiar with the Guidelines than first-level RPD decision-makers, and that the latter often struggled to interpret the Guidelines in determining the credibility of SOGIE(SC) claimants. The credibility and evidentiary challenges posed by SOGIE(SC) claims, and therefore, the potential for arbitrary outcomes or appealable errors, was seen as justifying more thorough guidance for IRB members.[55]

The IRB published a backgrounder for its review and recommendations, including its methodology, that featured both interviews and case law analysis. The "Case law analysis" section of the review describes the sample of IRB and Federal Court cases that the IRB reviewed to understand how the Guidelines were being interpreted and applied. Sample cases were selected from the IRB's internal case management system from a list of 2018 cases (this year was chosen to give enough time after the 2017 Guidelines had been introduced), where there was a note indicating that the Guidelines had been considered. Furthermore, 45 Federal Court cases were selected through keyword searches for: "SOGIE", "Guideline 9", "Sexual Orientation", "Gay", "Lesbian", and "Bisexual". No-

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52 *Ibid*.

53 See *Guidelines on International Protection No. 9*, UNHCR, UN Doc HCR/GIP/12/09 (2012) at 3, 12, and 16, online: <unhcr.org> [perma.cc/FPQ7-Q4FB].

54 IRB, *SOGIE Implementation*, *supra* note 50 at 4.

55 *Ibid* at 14.

tably, "Transgender" and related terms were absent in this keyword search. This absence is neither addressed nor explained.[56]

Suppose that our own small sample of keyword search results indicates that status determination panels are inconsistent in their categorization of transgender cases and their use of terminology (which seems also to be borne out in review responses by stakeholders), and that transgender cases are generally less common than cisgender queer cases. It stands to reason, then, that without concerted efforts to collect transgender-specific information, the absence of such data likely persisted throughout the review process. The IRB also made little reference to academic literature, and, where it did, the materials emphasized largely cisgender subjects.[57]

In any case, in its review and in the resulting updated Guidelines, the IRB took care to highlight that gender and identity fluidity, as expressed by transgender claimants, should not be judged on the narrow grounds of the traditional "Particular Social Group" analysis. Traditional understandings of particular social group membership could be read as encouraging decision-makers to evaluate whether a claimant's persecuted identity was intrinsic, natal, or involuntary.[58] This emphasis on fixity and stability stands in contrast to an understanding of gender identity as evolving over time. The IRB's review and its revised Guidelines, though, the IRB urge decision-makers to be flexible and forgiving of apparent inconsistencies in claimants' stories of their identities. For example, the updated 2021 Guidelines make explicit mention of how inconsistent self-description and contradictions between official and personal identification may be common, and are not sufficient grounds to automatically disqualify a SOGIE(SC) claim.[59] Based on our reading of the decisions obtained from our 2019-2021 ATIP requests, this point largely reflects a recent practice, as decision-makers appeared to be reasonably open-minded and adaptable when claimants expressed uncertain or shifting identities and expressions, and did not fault claimants who lacked "evidence" of transi-

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56 *Ibid* at 29.

57 The IRB review document did make explicit reference to one source that directly engaged with transgender subjects, however, the content of that source is concerned primarily with cisgender individuals. The article was cited four times in this section, suggesting the IRB relied on it heavily for this component of their review of the *Guidelines*. See also Hodge, Hallgrimsdottir & Much, *supra* note 26 at 203.

58 *Ward,* supra note 19.

59 Immigration and Refugee Board of Canada, *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, (Policy Instrument), (Ottawa: IRB, 17 December 2021) at 16–17, online: <irb.gc.ca> [perma.cc/GMW5-XC66].

tion. Late disclosures of transgender status were also accepted as reasonable by decision-makers and did not visibly cause credibility concerns.

Elsewhere in the review, the IRB mentions comments from stakeholders who expressed confusion over the appropriate language for transgender claimants and sought specific policies for navigating "transgender situations." The review's accompanying recommendations honed in on this point, emphasizing ongoing review and adaptation of terminology and etiquette for handling claimants' names and pronouns, among other items like, developing glossaries and reviewing standard form letters.[60] Though transgender cases were relatively few in number, stakeholders still seemed vocal in their concern over how to handle these cases. This concern was consistent with our review of the pre-2017 cases, in which a range of terms used for transgender people (including some offensive language) indicated unfamiliarity with the transgender community and their commonly preferred terms of address.

Though the implementation is by no means perfect, the 2019–2021 cases obtained via ATIP demonstrate greater standardization in how panelists navigate transgender people's names and pronouns. The same rough formula of "XXX is a transgender woman. Her documents say XXX, but she has asked to be referred to as XXX…" is found with little variation across the cases, and, though the reasons are all redacted, there are few signs of flagrant misgendering. Appropriate gendering practices were especially visible in more recent cases. The updated Guidelines encourage decision-makers to defer to the claimants on the use of terms, which was also well-reflected in the studied cases.

It is difficult to overstate how much of a break this new approach seems to be from the pre-2019 status quo. For much of its history, the Canadian refugee system largely treated transgender claims as an afterthought, using the same norms and processes applied to sexual orientation claims—without recognizing the distinct issues that may arise. By contrast, the updated Guidelines highlight gender identity and expression as a distinct basis of claim and provide conceptual language to ground those claims. There is now a textual framework for a set of experiences that may have previously been illegible to some IRB members—and to some lawyers as well.

This subject came up during an interview with O*, who had been practicing refugee law since the 1990s:

> When I started representing trans clients, all we had was sexual orientation, and gender. There was no explicit reference to gender identity or gender expression back in the day.

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60 IRB, *SOGIE Implementation*, *supra* note 50 at 20.

When asked about at what point the concept of gender identity or expression crystallized in the refugee law context, O* responded: "I guess it started to happen maybe with the Guidelines." The introduction of Guideline 9 motivated a "discussion" that made "gender identity and expression" relevant terms with functional meanings, which IRB members were increasingly trained to recognize and respond to. As such, a primary benefit of Guideline 9 seems to be in establishing a textual framework through which the specific basis of claim of gender identity and expression become visible in Canadian law.

Texts can be thought of as instrumental to coordinating and replicating social relationships across an organizational terrain, even to the point of dictating, to some degree, what can be thought and said in that space.[61] Comparing the experience of lawyers trying to make their transgender clients' experiences and identities salient to decision-makers before and after the Guidelines offers an example of this phenomenon. Before the Guidelines, O* reported having to do the additional work of explaining how his transgender clients' stories both matched and diverged from the narratives that board members were used to hearing from cisgender claimants, walking board members through the relationship between gender and sexuality. This was an onerous burden, which complicated proceedings.

Another interviewee, B*, who practiced refugee law with SOGIE(SC) clients in the 2000–2010 period, attested to this challenge as well. According to B*, the absence of transgender people as a recognizable category impacted how B* engaged with her clients and their claims. This was especially present with one client—a claimant who identified initially as a gay man and later discussed that much of his social and working life was lived as a woman. In our interview, B* described how the lack of "gender identity and expression" as a conceptual device to hook on made it difficult to fully think about and represent the client's narrative. In B's words:

> There are categories of boxes, and everyone is getting fit in a box. And our refugee law screening forms back in the day, just — that was the paradigm… I don't mean there were actually physical boxes on the form, I just mean the way that we sort of framed it and conceptualized it and thought about it. And I don't think trans was ever one of those boxes. It just wasn't a category that I had encountered until this claim… That was the first time that a client of mine had said, "You know, I am a gay man… but you know, I also have this other side to me." And then we talked about her… I think, at the time, I didn't have her experience as a sort of separate gendered ex-

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61 Dorothy E Smith, "Texts and the Ontology of Organizations and Institutions" (2001) 7:2 Studies in Cultures Organizations & Societies 159 at 164.

> perience. I certainly didn't have her in my mind as a trans woman. I didn't have that framework at the time.

The same issue that B* highlighted was replicated downstream. As B* described, the IRB member who conducted the hearing was unable to grasp how someone could experience gender-based violence as a woman even while identifying as a gay man in other areas of his/her life.[62] Without the language of "gender identity and expression," this aspect of the case was lost on the board member, who ended up deciding the claim based on sexual orientation alone without considering the claimant's gender identity and gendered persecution. As B* describes, it was difficult to find or make space for the gender identity dimension of what, on its surface, was not visible as a claim about gender:

> But finding a space for that aspect of his experience and her experience in that hearing was really hard. And it was really hard to make her a part of that picture, and make that part of what was happening in that claimant's life…. I had this in my mind as, you know, a gay man who is facing the kinds of problems that gay men are facing, and who also lives his life in this other way as well. And when *she* is out in the world, *she's* also facing other kinds of troubles.

B's description attests to the relationship between the representation of concepts or categories within and through documents, e.g. the Basis of Claim form, and how those concepts and categories then become realized in a practical work context. Even without actual boxes in the Basis of Claim form that sharply delineated the possible nature of a claim, the fact that established practice did not account for transness effectively made transness unthinkable. B's reference to the screening forms highlights the role of texts in organizing social relations in people's interactions with the refugee system as initial asylum-seekers, clients, lawyers, and IRB members. In much the same way as the deployment of the idiom of "gender identity and expression" through the text of Guideline 9 rendered this concept legible to lawyers and to IRB members, the text of the forms used in B's practice, even without explicitly excluding transgender claims, had the effect of preventing B from considering such a basis of claim as a possibility.

Taken together, we find evidence indicating that the IRB's updated Guidelines have made a difference in transgender refugee claim adjudication, particularly by making gender identity and expression visible and articulable within the SOGIE(SC) umbrella. The majority of our inter-

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[62] In this context, we have opted for the use of "his/her" rather than the more conventional gender-neutral "their" because, as was relayed in the interview, the claimant in question used both *he* and *she* pronouns, expressing a distinct male and distinct female self-identity rather than a coherent nonbinary or gender-neutral one.

viewees voiced support for the updated Guidelines. Several noted that the Guidelines helped to resolve the once-pervasive issues of misgendering and dead-naming transgender claimants, and made it easier to discuss a specifically transgender basis of claim.

However, while interviewees agreed that the situation had improved since the Guidelines were issued, in many ways, the system still falls short of creating supportive conditions for transgender claimants and their counsel. In particular, the Guidelines fail to adequately consider and account for the distinct experiences of transgender refugees. Moreover, occasional problems in practice continue to arise, with some IRB members displaying ignorance or even hostility towards transgender claimants.

Because of these problems, interviewed counsel reported that they could not be certain that claimants would be met by appropriately sensitive, trained, and conscientious IRB members who would approach a gender identity and expression claim with an appreciation for fluidity, complexity, cultural specificity, or claimant vulnerability. Notwithstanding the Guidelines, counsel were concerned that their clients might be assigned one of the few IRB members who adopt an invasive, stereotypical, and over-medicalized approach to their clients. Counsel reported having to marshal evidence and prepare clients for this potential. In other words, conscientious lawyers still needed to prepare clients for the worst-case scenario. This process required digging into intimate personal information, condensing complex identities into digestible narratives, preparing to discuss traumatic experiences with a hostile authority figure, and practicing insensitive scrutiny of performed gender identities and expressions.

Such preparation can have traumatizing impacts for clients, even when the claimant is heard by a good decision-maker. This points to a serious concern: the occasional problematic, insensitive, or insufficiently trained decision-maker has a disproportionate effect beyond the claimants appearing before them. One lawyer, K*, explained frankly: "Even with the SOGIE(SC) guidelines, you still have to prepare as though you're going to get the most bigoted, close-minded member who's going to really gun on credibility."

One of the main sites where lawyers spoke about potentially traumatizing their clients was in preparing to respond to scrutiny about their credibility. More generally, flawed credibility reasoning was frequently identified as a persistent concern, despite the benefits conferred by the new SOGIE(SC) Guidelines. This issue reflects the incompleteness of the new Guidelines with respect to transgender claimants, and wider flaws in the IRB's policies and practices.

V. Assessing Credibility

The IRB is tasked with scrutinizing whether claimants meet the refugee definition and are thus deserving of protection and, ultimately, Canadian citizenship. That premise produces a procedural scheme that operates on the basis of suspicion, with the goal of weeding out inauthentic claimants who are slated for removal.[63] The process puts the burden of proof on claimants.[64] Establishing credibility is therefore essential to a successful claim.

However, in the case of many SOGIE(SC) claimants, credibility is a difficult hurdle to overcome.[65] Sexual orientation is often difficult to document beyond the testimony of the claimant themselves. Claimants must persuade IRB members of their sexuality, and relatedly, of their gender identity and expression, through compelling narratives of identity discovery and development, often presented as "coming out" stories, with highlights detailing one's sexual and romantic history. These narratives may require evidence in the form of letters and photographs from lovers and community members back home or in Canada. For claimants from states where queer sexuality is repressed or criminalized, marshalling this kind of evidence can be incredibly difficult—even dangerous.[66]

IRB decision-makers often reduce their analysis to assessments of whether a SOGIE(SC) claimant is indeed *what they say they are* — i.e., that their expressed sexual identity genuinely accords with their actions

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63 Crépeau & Nakache, *supra* note 3 at 14—15.

64 Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection* (Legal Resources), (Ottawa: IRB, 31 December 2020) at 1—10, online: <irb.gc.ca> [perma.cc/98X6-QPR6]. See also Hilary Evans Cameron, "The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-making" (2019) 42:1 Dal LJ 1.

65 This issue is a common theme when LGBTQ+ people encounter various aspects of Canadian immigration law. For a discussion of LGBTQ+ credibility in the context of family class immigration, see e.g. Megan Gaucher, *A Family Matter: Citizenship, Conjugal Relationships and Canadian Immigration Policy* (Vancouver: University of British Columbia Press, 2018) at 75—98.

66 See generally Jennifer Bond & David Wiseman, "Imperfect Evidence and Uncertain Justice: An Exploratory Study of Access to Justice Issues in Canada's Asylum System" (2020) 53:1 UBC L Rev 1 at 23—41; David Murray, "Queer Forms: Producing Documentation in Sexual Orientation Refugee Cases" (2016) 89:2 Anthropological Q 465 at 472—79; LaViolette, "Documentation", *supra* note 27 at 440–41. For a discussion of the difficulty and risks associated with uncertain or untrustworthy information access for refugees in other contexts, see Melissa Wall, Madeline Otis Campbell & Dana Janbek, "Syrian refugees and information precarity" (2017) 19:2 New Media & Society 240 at 245—52.

and experiences.[67] The difficulty of proving one's sexuality, accompanied by suspicion among some IRB members as to the authenticity of SOGIE(SC) claims, can pose problems for sexual orientation claimants.

As a result, refugee lawyers who work with SOGIE(SC) claimants use various techniques to guide their clients in expressing narratives of identity, sexuality, and persecution for easy consumption. This preparation can take many forms. Interviewee A* describes practicing with clients the linear storytelling style often expected by IRB members, and preparing clients by running through potential answers to invasive questions about gender identity and sexual history they might encounter at the hearing. C* describes the narrative framework that IRB members often find most persuasive as a "formula" recounting a person's childhood identity discovery, adolescent development, and flight upon coming out in adulthood. In C*'s words, the legibility and coherence of this narrative has been determinative:

> I've been lucky in that this has been uniformly the experience that my clients have had, but what I'm worried about it is that I'm going to have someone whose experiences don't fit into the cookie cutter mold… and how that's going to impact what happens during the hearing—like, how a member's going to receive something that's not the standard form story.

Among other interviewees, the perception is that unaccounted-for deviations from what C* called the "standard form story" of gender identity discovery can potentially reflect negatively on a claimant's credibility. Lawyers like E* are thus motivated to encourage their clients to choose their stated gender identity and express it somewhat strategically. This strategic decision can be complicated for transgender claimants, as it relies on communicating a degree of certainty and unambiguity that may not authentically reflect their feelings at that particular moment in their journey of identity development. As E* describes: "If a trans person is identified by the other gender… it's even [relevant in] how they dress for a hearing… Like, you have to look—you know what I mean, in a certain way."

Furthermore, aspects of a person's SOGIE(SC) may be hard to communicate in a manner that conforms to the IRB members' expectations at the status determination hearing. Gender identity on its own may be

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[67] Nicole LaViolette, "Sexual orientation, gender identity and the refugee determination process in Canada" (2014) 4:2 J Research in Gender Studies 68 at 86—96; Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21:1 Intl J Refugee L 1 at 8–11; David AB Murray, "Real Queer: 'Authentic' LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System" (2014) 56:1 Anthropologica 21 at 26.

somewhat ephemeral and difficult to describe; indeed, research with SOGIE(SC) refugees notes that claimants often struggle to articulate their identities in positive, stable terms, owing to a pattern of erasure and stigmatization that begins in their home countries and persists in Canada.[68]

Similarly, cultural context is relevant: gender and sexuality may be understood as fluid rather than distinct, or primarily using concepts that are unfamiliar to IRB members or counsel, necessitating a degree of complicated cultural translation.[69] Communicating a person's past and ongoing deviations from gendered norms requires a deep awareness of cultural and social context, which may be hard to adapt and analogize to audiences who do not share experiences or frames of reference. Transgender refugee claimants end up retelling the story of their lives and identities multiple times—to themselves, to immigration officers, to their counsel, and to IRB members. This process is difficult for both claimants and their counsel, and preparing claimants for it requires that counsel provide significant area-specific knowledge and personalized care. As lawyer C* described, some degree of explanation may be required just to familiarize the IRB member with the essential elements of the claim, and ensure that they are not relying on unconscious biases about gendered behaviour. That process involves working with the claimant to frame their story in a manner that is legible to outsiders:

> With transgender claims, the real difficulty I think comes mostly with trying to, like, prove… trying to help them express gender — like, gender as an abstract, like gender as the concept — in a way that sort of makes sense, not only to them but also to the outside world… It just makes everyone's life easier if we sort of cover that base, just in case.

Further, problematic approaches to credibility assessments arising in other contexts also occur in SOGIE(SC) claims, exacerbating their specific evidentiary and conceptual challenges. On this matter, Hillary Evans Cameron argues that most individuals struggle to recount impactful memories in a detailed chronological narrative; dates and locations, for example, are frequently lost or mismatched, sometimes by entire years.[70] Empirical memory tests find that consistency is an unreliable indicator of truthfulness—a worrying finding given that consistency of a narrative from one telling to another is often used by IRB members as a measure of

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68 Jordan, *supra* note 24 at 175; Jacob & Oswin, *supra* note 23 at 205–06.

69 Avgeri, *supra* note 32 at 7–8; LaViolette, "UNHCR", *supra* note 27 at 183, 194; Rehaag, "Empirical Snapshot", *supra* note 30 at 262–63.

70 Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010) 22:4 Intl J Refugee L 469 at 470–79.

claimant credibility.[71] As Evans Cameron notes, these memory issues may be worsened in the context of a refugee claim hearing, where subjects are asked to recount the details of fast-moving, long-past, traumatic or confusing events in a high-stakes setting.

Trauma also plays a significant role. The intense emotions associated with a fearful traumatic experience, far from ensuring memories will be retained, actually work against the narrative demands of the hearing context: sensory elements are emphasized over chronology, and the relationship of events to each other is often buried rather than exhumed.[72] Studies focusing on memory and narrative in the context of refugee claims find this same pattern again and again. Individuals who have experienced repeated and ongoing traumatic events are unlikely to recall and recite these events in a linear, detailed, and chronological fashion that is immediately coherent to IRB members.[73] Refugee claimants thus require significant—and itself, potentially retraumatizing—preparation. In the case of SOGIE(SC) claims, and particularly transgender claimants, the weight of trauma compounds with the ephemeral nature of the basis of claim itself to impede the ability of claimants to testify in a way that seems credible. For these reasons, counsel we interviewed reported being very detail-oriented in preparing clients for hearings, even while recognizing that this approach has risks for the claimants' mental health.

One lawyer, H*, indicated that a good portion of her work with clients is in preparing them for a potentially invasive and upsetting hearing:

> Often I find that a lot of the work is also just emotionally preparing that client. Like, trying to manage expectations [and] make them feel confident enough to tell their story. Because by the time we get to the hearing, they feel very comfortable talking to me, but it's very different when they're in front of a board member.

H* went on to describe how dissonance between the aims of the IRB member and the subjective experience of the refugee claimant can create especially difficult hearings with heightened traumatic consequences. H* described a specific hearing she had attended earlier that day with a transgender client who was a teenager. She recounted an experience with

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71 *Ibid* at 508.

72 Jordan, *supra* note 24 at 178.

73 Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge: Cambridge University Press, 2018) at 46–48. This same problem arises in other, similar asylum systems, see Jane Herlihy & Stuart Turner, "Memory and Seeking Asylum" (2007) 9:3 European J Psychotherapy & Counselling 267 at 270–74.

IRB questioning that felt "microscopic,"[74] seemingly designed to dig into difficult details, despite the client's well-documented trauma and her requests for accommodations.

> I think the member was just being very microscopic… I had to really highlight, again, the vulnerabilities dealing with the intersectional barriers—cultural, psychological—how that impacts testimony. I think I referenced the new gender guidelines ... where they brought in more information about the neurological impact on people who have survived sexual assault ... because at the hearing, the board member really focused on chronology, timelines, dates, ages, and what we were trying to get across was [that] for a lot of clients who have endured so much, a lot of it is talking about emotional memories, emotional significance, and not chronology.

Another related concern is how the assessment of credibility in SOGIE(SC) claims, especially involving transgender claimants, may often come down to an assessment of the apparent authenticity and stability of a claimant's gender identity. This evaluation is itself a fraught determination, relying on a set of speech patterns and physical or aesthetic cues with which claimants themselves have an uneasy and actively unfolding relationship. Thus, it is often necessary, albeit problematic, for both claimants and IRB members to look to gender stereotypes. Indeed, scholars have found that IRB members who conduct credibility assessments of SOGIE(SC) claims often either explicitly or subconsciously consider gender stereotypes premised on Western cultural representations of queer sexuality.[75] Some SOGIE(SC) groups experience particular difficulty in credibly "proving" their sexuality based on these limited and stereotypical assumptions, such as bisexual people.[76] For transgender claimants, lawyers therefore described their attempts to do "trans 101" work in the claim submissions alongside the client's testimony, using secondary sources like social science journals, local news articles, and affidavit evidence from experts in the field.

Despite these measures to ease the narrative process, multiple lawyers described their clients' frustration in adapting their experiences to the categories and timelines provided in the available refugee law texts.

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74 There is a wealth of caselaw ruling that microscopic analysis of refugee claimant's evidence, concentrating on non-essential discrepancies or seemingly in search of contradictions, constitutes an unreasonable basis for rejecting a claim. See *Clermont v Canada (Citizenship and Immigration)*, 2019 FC 112 at para 31; *Mukamusoni v Canada (Citizenship and Immigration)*, 2015 FC 196 at para 29; *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 20; *Gomez Florez v Canada (Citizenship and Immigration)*, 2016 FC 659 at para 29.

75 This approach is now expressly prohibited by Guideline 9, but interviews suggest that it still exists to some degree, or at least, must still be negotiated.

76 Rehaag, "Bisexual", *supra* note 30 at 79.

One lawyer, E*, spoke about how clients struggled to "fit into a box" for the purpose of evincing a credible claim while still unsure about how they wanted to identify and express themselves in their day-to-day lives:

> The legal test is you have to fit into a box, right? You have to be *something*, and then we figure out if that *something* is persecuted. So it's very difficult, you know, to go in to say, 'This person is not this, or not this, or not this, or not this, or not this, I don't know what they are, and then now I don't know what to attach it ... to in country conditions.' It's definitely a limitation. Sometimes, words like 'SOGIE' or 'queer,' or like — just the widest possible lens you could see somebody under is the easiest.

This challenge of fitting into a "box" is compounded by heightened suspicions that may arise in SOGIE(SC) claims. One interview subject, J*, described a sense among some IRB members that sexual orientation claims were popular among so-called "bogus" refugee claimants because sexuality is difficult to disprove:

> There's a marketing of SOGIE claims. It's a perception in the mind of the board members, which has to be dealt with. The board members feel that there's just agents, selling these SOGIE claims.

In this context, claimants who are unable to provide adequate evidence or account for the details of their personal and sexual histories to dispel these fears may therefore be met with greater distrust. Similarly, K* noted that credibility in sexual orientation claims can often only be established on the strength of the claimant's testimony.

> To prove your sexuality is just a lot more ephemeral, it relies a lot more on the kind of *credibility*, credibility, like, 'do I think this person is telling the truth?', not, 'have they assembled credible evidence for the claim?'

As a result, K* found that many IRB members approach sexual orientation claims from a place of critical distrust, which may only be overcome if the claimant's recounted life experience matches IRB members' stereotypical expectations about queer and transgender lives:

> On the sexual orientation claims, I feel like there's a lot more of the holdover—particularly in less recently trained members, I would say—of really grilling people on their sexual orientation. Despite what the Guidelines say, they are really looking for some kind of coming out narrative that accords with their understanding of a traditional coming out.

In addition to credibility concerns related to their subjective fear of persecution—as in those rooted in uncertainty about *who* and *what* they are—SOGIE(SC) claimants may face challenges substantiating their objective fear. In other words, they may struggle to "prove" widespread anti-LGBTQ persecution in their country, particularly regarding their specific community. Epistemological erasure of queer and transgender identities and societal suppression of community activist groups means that even

official, international human rights organizations may fail to adequately record the conditions of gender and sexual minorities around the world, leaving SOGIE(SC) claimants at a disadvantage.[77] Similarly, SOGIE(SC) claimants also may struggle to marshal evidence of widespread persecution throughout their countries, thus discounting the possibility of an internal flight alternative. Accumulating the necessary comprehensive evidence may be especially difficult in cases where the agent of persecution is a private actor, like one's family or community, as is often the case in SOGIE(SC) claims.

All of these credibility issues have historically produced heightened challenges for SOGIE(SC) refugees. The result is that claimants, their lawyers, *and* IRB decision-makers are often confused about the criteria involved in assessing SOGIE(SC) claims, potentially leading to errors in adjudication.

VI. Transgender Credibility in Context

While credibility in SOGIE(SC) claims in general raise many issues, there are also specific concerns that arise in transgender cases. Throughout our interviews with refugee lawyers and in the available IRB data, we found that credibility concerns in transgender refugee claims center on two key evidentiary considerations: the medicalization of transness, and the lack of country condition evidence for transgender communities.

A. Medicalization of Transness and the Use of Medical Evidence

To understand how transgender refugee claims negotiate the issue of credibility, we began by reviewing the dataset of redacted cases involving transgender claimants obtained via ATIP requests. Many of these reasons provided detailed insight into how and where decision-makers considered the credibility of a claimant's transgender identity in deciding their claims.

Remarkably, despite the frequency of credibility issues arising in sexual orientation cases, credibility arose as an issue in *0%* of the decisions categorized by the IRB as involving transgender claims in 2019-2021. There was not a single incident of the decision-maker explicitly questioning the authenticity of the claimant's identity and expression in any written decision. This is true even in the small number of negative decisions in the dataset which failed on other grounds, such as the availability of state protection. Moreover, in several of the decisions, the IRB member referenced extensive corroborative evidence provided by the claimant as

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77 LaViolette, "Documentation", *supra* note 27 at 447.

pre-emptively satisfying any credibility concerns.[78] In 46% of the 2019-2021 cases, the IRB decision-maker explicitly mentioned the claimant having provided medical evidence of some kind — including diagnostic letters from a psychologist or endocrinologist, prescriptions for hormone replacement therapy medications, or evidence of having undergone gender affirming surgery.

The medicalization of transness appears to contribute to making available the kind of authoritative evidence required to overcome potential credibility concerns. In their reasons, IRB members often made explicit mention of documentary evidence that claimants provided about their gender identity and expression. They frequently discussed the content of this evidence, its placement in the chronology of the claimant's gender identity development and flight narrative, the medical authority issuing it, and, occasionally, whether the issuing provider was based in Canada or in the claimant's country of origin.

The seemingly central role played by authoritative medical evidence in these cases reflects the outsized weight given to medical authorities in defining transgender experiences. In Canada, despite many provinces adopting an informed consent model, access to gender affirming care nevertheless often requires navigating medical gatekeepers, who have long approached the provision of care from a position of distrust and pathologization.[79] To prove the authenticity of one's transness, especially as distinct from some other disqualifying mental or physical condition, entails the collection of various letters, referrals, and approvals from different medical professionals. It is, in essence, a credibility assessment, where eligibility for what some recognize to be lifesaving care, hinges on the credible performance of severe distress and hardship, and paradoxically, acute mental stability, clarity, and certainty in one's identity and expression.[80]

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78 The IRB decisions referenced here were included in materials acquired via ATIP request (#A-2022-00665 and #A-2022-00210), and as a result, they are not publicly available for citation. See our section *Methods* above and footnote 36 for a discussion of the use of ATIP requests for collecting data.

79 Kinnon R MacKinnon et al, "Preventing Transition 'Regret': An Institutional Ethnography of Gender-Affirming Medical Care Assessment Practices in Canada" (2021) 291:114477 Soc Science & Medicine 1 at 4–5; Travis Amengual et al, "Readiness Assessments for Gender-Affirming Surgical Treatments: A Systematic Scoping Review of Historical Practices and Changing Ethical Considerations" (2022) 13:1006024 Frontiers in Psychiatry 1 at 12; Jodie M Dewey & Melissa M Gesbeck, "(Dys) Functional Diagnosing: Mental Health Diagnosis, Medicalization, and the Making of Transgender Patients" (2017) 41:1 Humanity & Society 37 at 47–50.

80 Kinnon R MacKinnon et al, "'I Don't Think They Thought I Was Ready': How Pretransition Assessments Create Care Inequities for Trans People with Complex Mental Health in Canada" (2020) 49:1 Intl J Mental Health 56 at 72.

Many transgender patients experience this scrutinized supplication to cisgender medical authority as "pathologizing"[81] and "dehumanizing."[82]

Though the historical hardships facing transgender patients have changed over time, nevertheless, there is no guarantee of positive outcomes for those seeking access to transition related care. Every practitioner and every institution effectively sets its own rules with limited oversight, and patients must therefore brace for the possibility of ignorance and obfuscation. In these ways, the experience of medical gatekeeping is remarkably akin to the refugee status determination process.

Ironically, though these hurdles in demonstrating credibility to medical authorities are often experienced as dehumanizing by transgender refugee claimants, the medical evidence that such processes produce seems to be advantageous to their refugee claims. In the refugee law context, the medicalization of transness and the associated obligation to provide sufficient medical documentation generates a paper trail of transness that can then be used to overcome credibility concerns by even the most scrutinizing IRB members.

While beneficial for their claims, then, this experience of dual gatekeeping for transgender refugees is also doubly burdensome. It entrenches the authority of external, mostly cisgender decision-makers—care providers, IRB members, and even their own lawyers—to determine their access to healthcare and status, requiring oppressively onerous performances of credibility and subjectivity by vulnerable and traumatized transgender claimants.

Transgender claimants who had already begun medical transitioning had the additional "advantage" (for the sake of credibility assessment) of being recognizable as transgender. In contrast to sexual orientation claims, where credibility concerns arise due to sexuality's perceived unprovability, many gender identity and expression claims were characterized by physical "clues," such as a claimant's manner of dress, affect, and visible signs of having undergone gender affirming surgical interventions, the latter of which might also come with official documentation. For this reason, some lawyers that we interviewed said that they often recommended that clients complete at least one initial step in accessing transition-related care for the purpose of having the requisite documents on hand, even if they were uncertain about their overall interest in medically

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81 Kinnon R MacKinnon, "Pathologising Trans People: Exploring the Roles of Patients and Medical Personnel" (2018) 11:4 Theory in Action 74 at 86–87.

82 Florence Ashley, "Gatekeeping hormone replacement therapy for transgender patients is dehumanising" (2019) 45 J Medical Ethics 480 at 481.

transitioning.[83] Claimants without medical evidence of their transness—either because they had not yet begun the process of medically transitioning, or were unsure if they wanted to, or they did in fact want to but faced logistical barriers—may struggle to establish credibility if met with problematic IRB members. Moreover, as noted above, lawyers must prepare their clients for the worst decision-maker who might be assigned.

One interview subject, A*, described a claim where her client came out to her as a trans woman "literally… the week before the hearing." The claim had been initially submitted with a focus on sexual orientation, with lesser emphasis on gender identity, and so A* had to "scurry" to prepare and submit new evidence, which the board member refused to accept. A* noted that this client had been victimized multiple times by police in her home country for reasons related to her gender identity and expression. In A*'s view, her client's fear and discomfort with disclosure and authority figures was directly related to her experience of persecution, and ought to be accommodated in the status determination process. She connected her client with whatever resources and supports were available. A* described the discussion that occurred between herself and the IRB coordinator immediately prior to the hearing, where the coordinator initially refused to direct the IRB decision-maker to accommodate the client. Ultimately, A* succeeded in convincing the IRB coordinator to accept the new evidence of the client's gender identity. However, the difficulties that A* encountered at that preliminary meeting then trickled down into the actual hearing. The IRB member deciding the case declined to fully accommodate A*'s client, nor to acknowledge her gender identity during proceedings.

In A*'s case, even with some documentation on hand attesting to the client's experience of persecution on the basis gender identity and expression, the board member's fixation on medical evidence proved to be a significant theme in the hearing and a major trigger for the client. A* recounted that this was the first hearing of two. Afterwards, the client felt significantly worse, and it impacted their experience of the second hearing (though the claim was ultimately successful). A* reported that the client was traumatized by her experience:

> It retraumatized my client. Everything she had experienced throughout her whole life was encapsulated and thrown back at her in that hearing. All the denials about her gender identity, about her sexuality… everything that she had come to Canada to escape, was thrown at her in one hearing. She was very traumatized after that. There was an attempt at self-harm after the hearing. Her mental health, which had been improving, spiraled after that first hearing.

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[83] Interviewees E*, L*, and H* mentioned this issue.

Though medical evidence may often be determinative in establishing transgender credibility, it appears that the absence of such evidence is *not always* negatively decisive, particularly when IRB members are willing to accommodate claimants and to adhere to the Guidelines.

One lawyer, I*, represented a transgender claimant who was a minor at the time of his hearing, and had not yet begun to access transition-related medical care.[84] In his words, the lack of readily available medical evidence in this case was offset by the client's sophistication and clarity in communicating his gender identity and his efforts to actualize it, including binding his chest and asking peers to refer to him by a new name. As I* put it, the strength of the client's narrative seemed to be a major deciding factor in his success. Interestingly, I* expressed this strength and clarity in specifically gendered terms:

> I think a lot of it had to do with the way he testified and the steps he'd taken. I will say, as well, I wonder if this is something that impacted the decision even though it wasn't referenced in the decision. [He] came across quite male. And I—that might be a weird thing to say. I'm not trying to be offensive. He cut his hair short in a boy's haircut, but it was beyond that. He had taped his chest, but apart from that. He was not a traditionally feminine person in demeanour, in appearance… It was just in the way he carried himself.

The apparently undeniable masculinity of I*'s young transgender client, and the strength of his testimony in demonstrating and asserting it, seemed to be decisive in overcoming any credibility issues even in the absence of evidence of medical transition. This was a pattern in our interviews; though the Guidelines explicitly forbid IRB members from relying upon gendered stereotypes in making credibility determinations as to a person's sexual orientation or gender identity and expression, multiple lawyers nevertheless acknowledged that the claim was likely to be easier if their clients' preferred gender identities and presentations happened to align with a visual and affective vocabulary that was recognizable to the IRB member.

B. Country Conditions — Beyond the National Documentation Packages

In addition to concerns relating to medicalization, lawyers we spoke to noted problems related to country conditions documentations in transgender cases.

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[84] I* was somewhat unique in our sample, as this was the lawyer's first transgender refugee claim, and he had only seen "two or three" clients where gender identity was a core element of the claim at that time. By contrast, most of the interviewed lawyers specialized at least partly in SOGIE(SC) refugee law, save for two—I* and M*.

The IRB website provides a National Documentation Package (NDP) for each country that includes statistics and reports from prominent human rights research organizations, which claimants can access for use in making their refugee claims.[85] Some countries have robust and detailed NDPs; others are more sparsely sourced and may contain no information for certain issues and communities. As discussed above, until 2019, the IRB failed to specifically record gender identity and expression claims as a unique ground of persecution in their database. Along similar lines, many lawyers we spoke to mentioned that the IRB's NDPs also fail to adequately address the specificity of transgender experiences, requiring counsel to undertake their own research.

L*, for example, told us that "I always put in my own documents." She noted that the NDPs tend to underreport the conditions in most countries, whereas news stories and reports from local LGBTQ organizations, if available, more accurately reflect the situation on the ground.

N*, as well, noted that news sources may misidentify the victims of violence, especially if they are transgender. For example, an attack against a trans man, though certainly an instance of gender-based violence, may be reported as a femicide and thus be lost as evidence of the conditions facing transgender people. For this reason, he also recommended actively connecting with local LGBTQ activists and organizations who can provide more nuanced and contextual information to buttress anecdotal evidence from the claimant themselves. However, N* also noted that these sources may be disregarded by IRB members for being too informal or unofficial to be considered persuasive.

Similarly, transgender claimants may suffer from limited evidence available on their specific communities. In researching this issue, we reviewed the spring 2022 versions of NDPs for Mexico, South Korea, Hungary, Morocco, and Turkey, five countries that generated transgender refugee claims in the period under examination. These NDPs seldom mentioned transgender people in older documents cited — with some increase over time as the concept of gender identity and expression has gained more salience in contemporary human rights circles.

Some NDPs, however, continue to lack information on transgender people entirely. For example, in one version of the Moroccan NDP consulted at the time of writing, materials related to SOGIE(SC) claims focused solely on the criminalization of same-sex activity; this framing results in the NDP being dominated by incidents involving cisgender gay

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[85] See generally Immigration and Refugee Board of Canada, "National Document Packages" (last modified 23 January 2024), online: <irb.gc.ca> [perma.cc/ DT73-64U6].

men caught by these laws.[86] This representation is only a partial story, given that sexuality and gender policing are intertwined, and that the language of "transgender" is deliberately unavailable in describing these criminalized behaviours. As a result, we are left with an NDP that can establish a claim based on SOGIE(SC) persecution, but nevertheless requires transgender claimants and their counsel to be strategic in arguing their claims, and to interpret the available resources creatively to overcome the absence of transgender-specific materials.

The Hungarian NDP had a similar issue, until recently. A more recent version we reviewed at the time of writing was prepared shortly after a transphobic law was introduced to the country that prohibited Hungarians from changing their legal gender; as a result, the NDP addressed this issue.[87] Older versions, by contrast, featured only two resources for the entire SOGIE(SC) category.[88] Overall, the NDP was light on discussion of transgender-specific issues, only addressing the societal stigmatization of queerness in a general sense. This lack of information or distinction regarding transgender experiences arguably flows from a homophobic climate and laws in Hungary which compound to erase transness as a topic of discussion, let alone data collection. Indeed, one Hungarian transgender decision that we obtained through our Access to Information Request indicated that the claimant had no concept of transgender identity while she was living in Hungary, and therefore took a long time after coming to Canada to begin to understand herself as transgender and seek protection on that basis.

The limited information about transgender issues in NDPs means that transgender claimants must often creatively deploy evidence about other SOGIE(SC) groups to evince their claims. One lawyer, E*, attested to this issue:

> We'll often have to use connectors to say, you know, if trans people are treated like this, then gender nonbinary people are gonna get the same or similar sorts of treatment. But in some cases, it's vastly different how trans people are treated as to how gay people are treated or lesbian people are treated. The country conditions can change dramatically. And so, it becomes harder as the categories get more nebulous, I find.

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86 Immigration and Refugee Board of Canada, *National Document Packages – Morocco* (31 May 2023), item 6.1, online: <irb.gc.ca> [perma.cc/4WZ7-J683].

87 Immigration and Refugee Board of Canada, *National Document Packages – Hungary* (31 August 2021), items 6.3–6.6, online: <irb.gc.ca> [perma.cc/5KJ5-3GFX].

88 Immigration and Refugee Board of Canada, *National Document Packages – Hungary* (30 September 2019), items 6.1–6.2, online: <irb.gc.ca> [perma.cc/3B3B-3XWA].

E* therefore described needing to use other kinds of evidence, like academic literature, expert letters or signed statements, news clippings, local reports and anecdotes, letters from the claimant's community back home, or leaning heavily on the claimant's personal testimony.

While some NDPs lacked detail about SOGIE(SC) persecution, in other cases, the NDPs may be robust in documenting issues facing the LGBTQ community, but also neglect some sources of stress, discrimination, hardship, and persecution for transgender people. The Mexican and Turkish NDPs, for instance, both include a confusing resource documenting "public opinion" of transgender people in those countries (generally neutral, likely in light of the urban and educated respondent pool for each).[89] However, these documents provided little information about economic issues facing transgender people like access to housing, healthcare, and stable employment. While such NDPs may helpfully contextualize incidents of extreme violence, they offer little assistance in terms of understanding day to day effects of more typical forms of persecution, leaving transgender claimants at an evidentiary disadvantage. For this reason, like the other reasons mentioned above, counsel often must do their own external research to evidence country conditions.[90]

VII. Accounting for Low Rates of Transgender Claims

As our empirical investigation demonstrated, the IRB only began gathering data about claims made on the basis of gender identity and expression in 2019. Historically speaking, then, transgender claims and claimants are largely invisible in IRB data. Beyond this historical absence, we found that recorded transgender claims make up a small portion of claims (only 0.6% of recorded SOGIE(SC) claims from 2019 to 2021). We also found that transgender refugee claims are both helped and hindered by distinct evidentiary challenges, owing in part to the IRB's ongoing struggle to recognize gender identity and expression as a basis of claim, and to fully integrate transgender-specific considerations into its policies and practices. This struggle manifests in an overemphasis on medical evidence, the paucity of transgender materials in the NDPs, and the only recent and still limited trans-related additions to the SOGIE(SC) Guidelines. In addition to these textual and epistemological issues, the IRB's difficulty in seeing and understanding transgender people and ex-

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89 See e.g. Immigration and Refugee Board of Canada, *National Document Packages – Mexico* (29 April 2022), item 6.3, online: <irb.gc.ca> [perma.cc/ 463Z-5VF8]; Immigration and Refugee Board of Canada, *National Document Packages – Turkey* (29 April 2022), item 6.7, online: <irb.gc.ca> [perma.cc/67YT-FTHJ].

90 Interviewees C*, K*, G*, L* and O* also raised this issue.

periences has also shaped their record-keeping practices, which may play a further role in erasing transgender refugees.

We identified four factors that contribute to the official erasure of transgender refugee claimants. The first two include the interrelated issues of 1) the IRB's claim categorization policies, and 2) the tendency of gender identity and expression aspects to emerge chronologically late in the claims process. More generally, people facing persecution on account of their gender identity or expression may be disproportionately blocked from making asylum claims due to 3) discriminatory visa and travel requirements; and 4) the possibility of transgender migrants being hurt, removed, dissuaded from seeking status, or otherwise "lost" to the system before they are able to commence or complete their claims.

A. IRB Categorization and Late Transgender Disclosure

The IRB categorizes refugee claims according to the information it receives from claimants early in the asylum process, often within days or weeks of arrival in Canada.[91] That initial categorization of claims may not be adjusted if the basis of claim gets amended down the road. This may result in transgender claims being categorized differently in the IRB's database. Several refugee lawyers we interviewed noted that amendments are common in all SOGIE(SC) claims, and especially for transgender claimants.

N*, who works at a SOGIE(SC)-focused refugee law practice, described a phenomenon where the gender identity and expression aspects of a claim developed comparatively late in the claim process. Often, N*'s clients begin their claim on the basis of sexual orientation or some other Convention ground, and then gender identity and expression are added later after the claimant had the chance to access mental health services, community support, or establish trust with counsel. To explain this phenomenon, N* noted that claimants often inhabit cultural contexts where sexual orientation and gender identity and expression are not framed as different categories; as well, they may come from situations of such severe persecution that exploring and articulating a transgender identity feels uncomfortable or unsafe. Exposure to a transgender-inclusive community, access to gender-affirming healthcare, and immersion in a cultural and legal context where gender identity and expression are named as distinct

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[91] Sean Rehaag, "Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations" (2011) 23:2 CJWL 627 at 640. See also Sean Rehaag, "2008 Refugee Claim Data & IRB Member Grant Rates" (4 March 2009) online: <ccrweb.ca> [perma.cc/QH92-BFXF].

phenomena, can all contribute to this aspect's latent emergence. N* described:

> In certain areas of the world, the person might identify initially as gay, for example, or lesbian. But they might not really [feel] comfortable, or perhaps not [use] the same terminology. So sometimes it's a terminology issue, sometimes it's comfort. But once they're here, they're talking within their peer groups and getting a bit more exposure to events or readings, or sometimes just with friends, they might come back to me and be like, 'Actually, you know what, there's this whole other aspect of my life that I didn't realize was important, or [that] it's any different with regards to my sexual orientation.' And so in those cases, I can do an amendment to incorporate that element.

N* also noted that these amendments occasionally occur very close to the hearing, which might account for why the IRB records such low numbers of transgender claims, despite transgender refugee claims making up roughly "a third" of N*'s practice.

Other lawyers brought up similar experiences—for example, C*, L*, F*, and E* all described clients who originally filed claims on the basis of sexual orientation and then later added gender identity and expression to the basis of their claim.

L* commented that they see many couples who initially identify as lesbian, where one partner later adds gender identity and expression to their claim after realizing upon arrival that they also identify as transgender:

> I often see people coming in as couples. Like, people who come in… where they're a couple and then one of them is trans. That's often how I see my trans clients; not always, but often. Like, trans men. People typically start out like identifying as a lesbian, and then they're like a butch lesbian and they get into a relationship with a woman, and then eventually they're like, 'Oh actually I'm trans.'

F* noted that she's even had clients where working on the narrative ended up being a catalyst for gender exploration. Where the very possibility of transition was previously obscured to them, engaging the topic seriously became these individuals' first exposure to transgender identity, and its discovery resulted in changing their basis of claim.

E* recounted a similar situation, saying that many claims "started one way and ended a different way." In his words, many of his clients were now being presented with the first real opportunity they'd had to explore their gender identity, and this meant that the claims would evolve alongside the claimant's self-conception:

> I think people came from abroad and, for the first time in their life, were actually trying to figure out their gender identity. As the process was happening, we would start with them identifying as lesbian or gay… or, I know I had one where it started as lesbian, and as

> we progressed through and redid the BOC and stuff, they [came] out as trans, and so it changed throughout the process. And then they're very different claims.

Other cases may arise where the transgender claimant arrives in Canada with family who may be unaware or unaccepting of their gender identity, and so that aspect of the claim is initially undisclosed and must then be kept secret. J* described one client who arrived as a minor accompanied by their mother, where their gender identity was evolving and unsafe to disclose:

> [When it was] time to prepare for the hearing, the person was in the midst of transitioning. And so it was clearly a transgender claim at that point… But still, all the transgender issue was confidential. I mean, obviously the mother could see that the person was now identifying as another gender, but it was not anything that they ever spoke about, and the mother was not supportive. So that made it more difficult.

The matter of a claimant's identity "shifting," either before or seemingly during the determination process, also arose in the small set of published transgender-related cases we found on CanLII — in two of 13 cases. In one, a transgender claimant from Afghanistan who initially submitted a claim on the basis of his ethnic identity later amended his claim to introduce evidence of persecution on the basis of gender identity.[92] In the other, a RAD case, the claimant mentioned that their gender identity and expression had evolved since the initial hearing, which was accepted as constituting a higher risk of persecution.[93]

Together, IRB record-keeping practices, the recency of including gender identity and expression as its own basis of claim in the IRB's database, combined with the challenges associated with transgender migration, explain the comparatively low numbers for transgender refugee claims in IRB data and its apparent mismatch with the frequency of such claims recounted by our interviewees.

The erasure of transgender claimants from IRB data is not incidental. Erasing transgender people from data produces a cis-centric image of asylum seekers, which in turn justifies further trans-exclusionary practices on the theory that this is too small a community to require attention in NDPs, policy guidelines, training, and other decision-making tools. Disappearing transgender people in the data leads to other disappearances in law and policy making. In this way, these erasures are self-perpetuating. Moreover, as the qualitative evidence from our interviews

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92 *X (Re)*, 2017 CanLII 148635 at paras 4–6 (CA IRB); *X (Re)*, 2019 CanLII 120788 at para 8 (CA IRB).

93 *X (Re)*, 2020 CanLII 123028) at para 8 (CA IRB).

demonstrates, they manifest in outsized burdens borne by counsel to fill in these gaps, which ought to be filled by the IRB.

B. Barriers to Entry and to Claim-Making

In addition to the ways that many transgender claims are rendered invisible in IRB record keeping, transgender claimants are made to disappear from Canada's refugee determination through other border control policies and broader social practices. Many of the lawyers we spoke to commented on barriers that weigh heavily on transgender people — and which prevent many from reaching Canada, seeking protection, or succeeding with their claim.

As discussed above, to make a refugee claim in Canada, claimants must first reach Canadian territory. Numerous laws and policies are designed to prevent the arrival of asylum seekers. One tool is visa requirements imposed on countries that generate asylum seekers. Moreover, even for asylum seekers from countries without visa requirements, transportation companies are required by law to verify that passengers hold valid travel documents.

Requirements for visas and travel documents have disproportionate impacts on people seeking to flee persecution on account of the gender identity and expression. Transgender people frequently face mismatches between their documented legal gender and the gender they identify and express in their daily lives. Getting accurate and affirming documentation is difficult, and in some states, outright impossible.

This problem persists even for those who manage to enter Canada. Canadian authorities often issue identification documents in the claimant's legal name, not their preferred name. As a result, transgender refugees are forced to continually out themselves as transgender to conduct out basic tasks upon arriving in Canada like opening a bank account or looking for housing. These documentary barriers constitute major obstacles to transgender refugees.

Interviewee F* described the story of a trans woman client who was forced to use identity documents with the incorrect name and gender due to Canadian policy at the time — making it near-impossible for her to get an apartment, apply for a job, or open a bank account in her lived identity:

> [The policy states that] the refugee claimant protection document had to be issued to be consistent with the person's passport information. Of course, this is hugely problematic for trans clients who come from countries where they can't change their name or their gender marker…. And she was stuck with this paper, and she had to start her life. She had to open a bank account, she had to find a place to live, she — everything she did, she was exposed…

More generally, discrimination and precariousness are defining experiences for transgender people and for newcomers to Canada, and especially for newly arrived queer and transgender people of colour, compounding their existing material disadvantages.[94] Transgender newcomers to Canada often come without resources and struggle to gain stable housing, employment, and healthcare—without all of which, they are in no position to begin the difficult work required to make a refugee claim. Trouble accessing community, information, health care, and essentials like housing and employment, thus pose indirect but still significant barriers to making out a successful refugee claim and contribute to the delays that some transgender claimants experience in understanding and expressing themselves authentically discussed above. In the case of people who originally arrived in Canada temporarily through various visas (e.g. to study), these issues may limit their likelihood of even learning about the possibility of making a claim for refugee status while in the country. This occurrence is notable, as 18% of the unpublished decisions from 2019-2021 obtained via ATIP explicitly mentioned the claimant having lived in Canada on some other visa before eventually making their refugee claim.

As a result of these barriers, there are instances where claimants become overwhelmed and unable to continue the claims process without adequate supports, far beyond what a lawyer can provide.[95] Such claims may be abandoned, or the claimants may simply disappear. Partly due to these concerns, several lawyers emphasized the importance of being engaged and connected as a member of local queer and transgender communities for the purpose of helping to connect clients with necessary community resources. That was the experience of L*, who had at least four trans women clients who she "lost"—not in the sense that they lost their cases, but that these women stopped answering calls, stopped visiting the office, and just disappeared. L* attributes it to the trauma and stress of their daily lives: "There's so many intersecting vulnerabilities that people are experiencing."

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94 Jacob & Oswin, *supra* note 23 at 210–11; See generally Nicola Gailits et al, "Fighting for inclusion across borders: Latin American Trans women's health in Canada" (2022) 23:1-2 Intl J of Transgender Health 5; See generally Lauren Munro et al, "A bed of roses?: exploring the experiences of LGBT newcomer youth who migrate to Toronto" (2013) 6:4 Ethnicity and Inequalities in Health and Soc Care 137; Alexa DeGagne & Megan Gaucher, "The thin blue line between protection and persecution: Policing LGBTQ2S refugees in Canada" in Kelly Montford & Chloë Taylor, eds, *Building Abolition: Decarceration and Social Justice* (London, UK: Routledge, 2021) 43 at 53; Mego Nerses, Peggy J Kleinplatz & Charles Moser, "Group therapy with international LGBTQ+ clients at the intersection of multiple minority status" (2015) 6:1 Psychology of Sexualities Rev 99 at 104.

95 Interviewees H*, G*, O*, K*, and A* mentioned this issue.

Given the level of trauma, many lawyers attested to the need for accommodations to lighten the load placed upon claimants. These include the use of file review, reverse questioning, designated representatives, and other ways of reducing the weight placed on client testimony. As one lawyer, G*, noted, the persecution experienced by transgender claimants produces a degree of trauma that makes invasive questioning difficult. As she put it:

> For my transgender clients, we spend a lot more time on the story, just because we can't get through the interviews like with other clients. The questions are so invasive. And [they] bring them back to things that they don't want to talk about or have to live through… Transition is connected to a person's lived experience of having experienced abuse from their own parents. And so, when I start to ask them about their transition, they're reliving their childhood. And we can't get to those questions, or those questions are so traumatizing for them that they start to regress, and so we can't get the story… Or even talking about their journey, their transition, it's all related to them with discrimination, with feelings of exclusion. So on the one hand, we have to get the legal information, the basic refugee law concretized. And on the other hand, the claimant's lived experience conflicts with that.

In that same vein, lawyers also noted that preparing a client for their hearing entails both legal work and a broader look at the clients' lives and situations. That means addressing the sources of precariousness for transgender newcomers, which includes (but is not limited to) their access to transition. As K* said:

> Most of my job with trans refugee claims is making the process as smooth for them as possible and connecting them with as many resources as possible early on, so that their life is better and so that they're in a place where they're able to show up on the day and tell their story well.

In these ways, the social location and circumstances of a transgender client are integral to their effective preparation and chances of success. Systemic exclusion and discrimination not only worsen a claimant's experiences in Canada, but can also negatively impact their claims.

This demonstrates the link between refugee regimes, immigration programs, and policies on housing, hiring, healthcare, and other areas. Adverse funding decisions related to Legal Aid are directly disadvantageous to SOGIE(SC) and especially transgender claims, which lawyers describe as requiring a unique degree of care and attention. As D* noted, these claims entail far more work than can be achieved through the bare hours provided through Legal Aid:

> The most important thing in the claim is that narrative. You want to spend as much time [on it] as necessary... The allotted Legal Aid hours for general preparation is never enough to do that.

These combined factors are especially burdensome on refugees and their lawyers in light of the uncertainty built into the Canadian refugee determination process. Lawyers must prepare their clients to face the worst decision-maker—with all the emotional and psychological consequences. This uncertainty built into the status determination process is a major factor in shaping a claimant's negative experiences in Canada. No matter the affirming policies in place theoretically, the fact that claimants can never be confident that their case will be heard by an appropriately trained and sensitive decision-maker ensures that they must always be braced for the possibility of invasive, upsetting, and invalidating experiences with the IRB.

Taken together, it is necessary to situate these policy patterns within an understanding of Canadian immigration policies as a barrier to making a successful refugee claim. Accounting for low numbers of transgender refugees in Canada must consider how the border acts as a trans-exclusionary gatekeeper, such that most transgender people simply cannot get to the country, often owing to the same situations of precariousness, poverty, violence, and criminalization that constitute the basis for refugee protection. Moreover, these same challenges often persist upon arrival. One cannot understand the experience of transgender refugee claimants—or appreciate why the numbers of such claimants appears low in IRB data—without an appreciation of this broader context. Canadian immigration institutions are primarily directed at restricting the flow of (mostly racialized) people from the Global South to the Global North.[96] A critical perspective on Canada's border control practices is vital not only in refusing the false "liberationist" narrative of Canadian self-mythology, but also, in that it brings into view the many obstacles and systems that account for the empirical patterns this article explores. Any analysis of transgender people's experiences making refugee claims in Canada must acknowledge the political, legal, and institutional assemblages that these claimants must navigate and overcome. Moreover, and perhaps most importantly, failing to do so would risk participating in the erasure of the many people who got lost along the way.

Recognizing and understanding the IRB as embedded in larger exclusionary structures helps us to see why some transgender refugee claimants experience the asylum process *as state violence*. As Jacob and Oswin argue, for transgender refugee claimants, the border extends beyond their point of entry into Canada, structuring their social and economic relations upon arrival.[97] Forces of racism, imperialism, nationalism, and the larger

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[96] Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Winnipeg, Black Point: Fernwood Publishing, 2021).

[97] Jacob & Oswin, *supra* note 23 at 210.

system of capitalism in making and remaking the border itself continue to limit and constrain the options available to transgender refugees attempting to reach and make a life in Canada. While the IRB cannot extricate itself from these broader social and economic forces, it can and should structure its own practices—including those related to data gathering, document production, training and decision-making—with an eye to mitigating their damaging effects.

Conclusion

Early decisions involving transgender refugee claimants that we reviewed demonstrated problematic reasoning. Lawyers working in this area who we interviewed also raised serious concerns about past IRB practices. However, these lawyers, and more recent decisions that we reviewed, indicate that the IRB has made important strides in improving decision-making in this area—including through the SOGIE(SC) Guidelines first issued in 2017 and revised in 2021. In recent years, the success rate in cases categorized by the IRB as involving transgender claimants is very high—over 95%. Yet, despite the improvements in this area, there are still causes for concern.

First, many transgender claimants are erased from Canada's refugee determination system. This was especially true prior to 2019, when the IRB did not gather data on transgender claims. While current practices now *do* include transgender claims as a category, because of the way data gathering is operationalized, combined with common patterns in how the basis of transgender claims tend to shift throughout the refugee determination process, many transgender claims are miscategorized in IRB data. The result is that, according to this data, only a small number of transgender people seek asylum in Canada—even though lawyers we interviewed indicated that such claimants represent a significant portion of their caseload. This erasure is problematic because it means that we (and the IRB) know less about such claims than we should. Thus, for example, while we know that the success rate in cases categorized by the IRB as involving transgender claimants is high, we do not know whether that is true for other transgender claimants who are not reflected in the data. The erasure also filters down into policy documents, training, and country condition documentation practices, which all insufficiently address the specificity of transgender claims. Even more troubling, broader social and policy practices may be causing transgender claimants to literally disappear from Canada's refugee determination process—including visa and travel document policies that block claimants from reaching Canadian territory, as well as transphobic social and economic exclusion that makes it difficult for some transgender asylum seekers to launch or follow through with refugee claims.

Second, some evidentiary practices at the IRB remain problematic. Our review of the unpublished cases shows that IRB members typically accept the asserted gender identity or expression of such claimants even in cases where claims are denied on other grounds. We do not know if that is the case for transgender claimants whose claims are *not* properly categorized by the IRB—and there are reasons to worry that such claims might disproportionately raise credibility concerns in light of changes in the claimant's narratives. Moreover, some of the reasoning employed by IRB members in their credibility assessments in cases categorized by the IRB as involving transgender claimants are problematic, even if they ultimately believe the claimant. The IRB frequently relies on authoritative medical evidence related to transitions that are not available to all transgender claimants, either because they are not pursuing medical transitions or because of barriers in terms of accessing medical services. Where such evidence is not available, counsel reported that they had to work hard to help claimants present themselves in ways that would make their gender identities and expression legible to cisgender IRB members. The IRB also relied heavily on counsel for relevant country condition evidence, due to sparse relevant evidence in the NDPs prepared by the IRB.

Third, many transgender refugee claimants continue to experience the refugee determination system as traumatizing. Lawyers we interviewed recognized that the IRB has significantly improved their practices. They report that, due to the SOGIE(SC) guidelines and to better training, most IRB members are now far more sensitive to issues that arise in transgender claims than they were in the past. However, lawyers must still prepare claimants to face the worst possible IRB member, just in case. Even where claimants end up with sensitive and respectful decision-makers, if they have high quality counsel, they likely practiced how they would respond to insensitive, invasive, and discriminatory questions—an inevitably harrowing process. Thus, even just one or a handful of problematic decision-makers have a disproportionate impact on the entire system. To resolve this major issue, lawyers must feel confident in whoever is assigned to hear a given refugee claim—and that is, unfortunately, not currently the case. One option going forward would be to assign these cases to a specialized cohort of decision-makers in whom the IRB (and counsel) have confidence. Another option worth consideration is to make greater use of file review processes. Given the high recognition rate in transgender cases, it is unclear what benefit there is to subjecting claimants to potentially traumatizing hearings. Only 22% of the unpublished cases we obtained through Access to Information request were decided by file review compared to a hearing—even though none of the decisions noted credibility concerns. Yet another option would be to *presume* that transgender claimants are vulnerable, and thus should automatically benefit from the various accommodations available to vulnerable claimants without requiring lawyers to make requests.

Fourth and finally, transgender refugee claims occur within a larger social, economic, and political context. We were impressed by the refugee lawyers who we spoke to throughout this project. They were dedicated and conscientious, and they frequently put more time into transgender refugee claims than they were paid for through legal aid programs. Existing limits on legal aid make it difficult for such lawyers to do their jobs, and further cuts would have disproportionate and devastating impacts on groups of claimants whose cases are complex, including transgender claimants. Beyond the question of access to counsel are the broader contexts of transgender social and economic exclusion in Canada, and elsewhere.

Despite some advances in the treatment of transgender claims and claimants, the fact remains that transgender people continue to be excluded and attacked at both the interpersonal and structural levels, not only in the home countries of transgender refugees, but in so-called "safe countries" as well. It is important to recognize that, while we have warned of the dangers of medicalization insofar as it is treated as effective criteria for credibility for some transgender refugees, the criminalization of transition—as has occurred in parts of the United States in 2023, for example—is an offensive abuse of legislative power to discriminate, eradicate, and erase transgender people from public life. In this climate, and this legal context, the time may soon come to critically revaluate our entire refugee regime to facilitate ease of entry for transgender people and extend that emphasis to facilitating better access to transition related care broadly throughout Canada. In doing so, it is essential that we keep in mind that transphobic violence and discrimination are not things that transgender refugee claimants leave behind when they arrive in the country. Indeed, legislative and interpersonal hatred and violence against transgender people is persistent in Canada.[98] Recognizing and adequately

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[98] See Abigail Curlew, "Transgender Hate Crimes are on the Rise Even in Canada", *The Conversation* (20 August 2019), online: <theconversation.com> [perma.cc/CXG5-YTG4]. Statistics Canada notes a recent uptick in hate crimes on the basis of "sexual orientation," a category which includes anti-transgender violence (see Statistics Canada, *Police-reported hate crime, by type of motivation, Canada (selected police services),* Table 35-10-0066-01 (Ottawa: Statistics Canada, 27 July 2023) online: <www150.statcan.gc.ca> [perma.cc/CQ2Z-Y5VP]). On the matter of media portrayals of anti-LGBTQ violence, see Melanie A Morrison et al, "'Newsworthy Enough?': Media Framing of Canadian LGBTQ Persons' Sexual Violence Experiences" (2021) 12:1/2 Psychology & Sexuality 96. For a discussion of the links between structural violence, misogyny, and health disparities for queer and transgender people, see Charmaine C Williams et al, "A Structural Analysis of Gender-Based Violence and Depression in the Lives of Sexual Minority Women and Trans People" (2023) 38:3 Affilia 350. Regarding the specific situation of HIV-related care, see Ashley Lacombe-Duncan et al, "A Qualitative Exploration of Barriers to HIV Prevention, Treatment and Support: Perspectives of Transgender Women and Service Providers" (2021) 29:5 Health & Soc Care in Community e33. See also Alex

supporting transgender refugees in their attempts to secure safety in Canada must be one among many ways that we collectively fight back against transphobia in Canada and abroad.

V Green, "Each death is a preventable tragedy" *This Magazine* (14 June 2018), online: <this.org> [perma.cc/789K-3FCK]; Alex V Green, "Trans liberation can't happen until we abolish prisons" *Xtra Magazine* (27 July 2020), online: <xtramagazine.com> [perma.cc/9687-RYM4]. See generally Viviane Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions, and Imperialism,* 2nd ed (Toronto: Women's Press, 2011).