

Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process

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Sexual minorities must meet the same evidentiary burden as all other refugee claimants. Independent country information produced by international human rights organisations plays an important role in meeting this burden. However, in the case of gay, lesbian, bisexual, and transgender claimants, existing country documentation still fails to provide the kind of information refugees need to support their claims. This is due to the continual struggle of human rights organisations to properly document abuses against sexual minorities. Also, the legal questions most relevant to claims based on sexual orientation and gender identity have shifted over the last 15 years. Early cases turned on whether a claimant's fear of persecution was well founded or whether the claimants were able to prove their sexual orientation. Recent cases have focused on the distinction between persecution and discrimination, the availability of state protection, and possible regional contrasts in the treatment of sexual minorities within a country. The shift in legal issues requires evidence that is either not available or is not sufficiently focused or detailed to meet the legal requirements of the Canadian refugee determination process.

Keywords: refugee law; human rights organisations; sexual minorities; sexual orientation; gay and lesbian; Canada

Introduction

In May 2008, Gambian President Yahya Jammeh vowed to 'cut off the head' of any homosexual found in his country and announced his intention to introduce legislation that would be 'stricter than those in Iran' with regard to same-sex sexual conduct.¹ For the third year in a row, the 2008 gay pride event in Moscow was marred by violence and municipal authorities refused to authorise the gathering.² In April 2008, the police raided a Kyrgyzstan centre for gay, lesbian, bisexual, and transgender communities.³ In Jamaica, the police failed to protect individuals from a string of homophobic mob attacks that occurred in 2007 and 2008.⁴ In June 2008, three Ugandan human rights defenders were arrested after they distributed a press release calling for HIV prevention programmes for members of the gay, lesbian, bisexual, and transgender communities.⁵

The events described above underscore two important facts about the persecution of sexual minorities.⁶ First, the human rights situations of sexual minorities around the world continue to be alarming. Many countries maintain severe criminal penalties for consensual sex between persons of the same sex, including the death penalty.⁷ Sexual

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minorities also are frequent targets of hate crimes.⁸ In several countries, restrictions have been imposed on freedoms of expression and association of sexual minorities,⁹ while in others homosexuality and transexuality are perceived as Western phenomena,¹⁰ anti-revolutionary behaviours,¹¹ crimes against religion,¹² sexually deviant and immoral behaviours,¹³ mental disorders,¹⁴ or unacceptable challenges to gender-specific roles.¹⁵

The second conclusion to be drawn from a 2008 sample of human rights violations against sexual minorities is that international human rights organisations are now making serious efforts to document abuses against sexual minorities. Indeed, all of the incidents mentioned above were reported by mainstream human rights organisations such as Amnesty International and Human Rights Watch, as well as by organisations devoted to documenting abuses against sexual minorities such as the International Gay and Lesbian Human Rights Commission (IGLHRC). This is a relatively new development; as recently as the early 1990s, abuses against sexual minorities were rarely documented by human rights organisations.

The continued human rights violations against sexual minorities and the increased attention given by human rights organisations to such abuses are of great significance in the context of refugee law. Egregious human rights violations have led some gay, lesbian, bisexual, and transgender people to seek refuge in countries with better human rights protection. This movement has led some states to interpret international norms to extend asylum and refugee protection to women and men fleeing persecution based on their sexual orientation and gender identity. In the last 20 years, decision-makers in countries such as the United States,¹⁶ the United Kingdom,¹⁷ Germany,¹⁸ New Zealand,¹⁹ Australia,²⁰ Finland,²¹ Belgium,²² and the Netherlands²³ have granted refugee status to individuals who fear persecution based on their sexual orientation or gender identity.²⁴

In order to support their claims for refugee status, refugees are generally required to rely on documentary evidence outlining the human rights conditions in their countries of origin. Independent country information thus plays an important role in the refugee determination process. It is used to ascertain the existence of a risk of persecution and to assess a claimant's credibility and the plausibility of the claimant's account of persecution.²⁵ It is therefore essential that human rights violations against sexual minorities be documented.

This paper examines a specific evidentiary problem facing women and men who make refugee claims based on sexual orientation or gender identity persecution, namely, the extent to which independent country information provides adequate and useful evidence in support of their applications. I will focus on claims submitted by sexual minorities to the Canadian refugee determination system that were adjudicated between 1991 and 2008. Canada is the first reported jurisdiction to accept refugee claims based on sexual orientation and gender identity. Until recently, its administrative tribunal was the only such body to have adjudicator training on these issues and to produce in-house human rights information on the situations of sexual minorities in different countries. As such, Canada's longstanding and comprehensive case law and experience yields interesting conclusions about the use of documentary evidence in refugee cases dealing with sexual minorities.

Two time periods are examined, as distinctive trends have emerged in Canada over the past 17 years in relation to the role of human rights documentation in claims based on sexual orientation and gender identity. I will begin by examining the evidentiary hurdles that confronted sexual minorities in the 1990s when claims were first processed in Canada. It will be seen that when claims based on sexual orientation or gender identity were first presented, both the refugee claimants and the Immigration and Refugee Board of Canada (IRB) were unable to produce what was perceived as acceptable independent country evidence on the situations of sexual minorities in the claimants' countries of

origin. A review of cases in the last 10 years reveals that while some of the initial obstacles have been overcome, existing human rights documentation still fails to provide the kind of information sexual minority refugees need to support their claims. The analysis in this paper will demonstrate that problems with independent country information can translate into poor assessments in the refugee hearing room.

Refugee claims based on sexual orientation and gender identity between 1991 and 1998

The refugee determination process in Canada

a. General principles

The international community strengthened international protection for refugees following the massive displacement of populations during and after World War II.²⁶ The result was the codification of the rights and status of refugees in two international instruments: the 1951 UN Convention Relating to the Status of Refugees (hereinafter referred to as 'Convention'),²⁷ and the 1967 Protocol Relating to the Status of Refugees (hereinafter referred to as 'Protocol').²⁸ Canada ratified both the Convention and the Protocol in 1969 and thus accepted the main obligation that flows from the international instruments, embodied in Article 33 of the Convention, that signatory states will not return any individual to a territory where the individual's life or freedom will be threatened. In Canada, the refugee determination process is entrusted to the IRB, an independent tribunal established in 1989. The IRB's Refugee Protection Division (RPD) handles claims brought by persons seeking refugee status and determines whether claimants meet the definition of refugee. Section 96 of the Immigration and Refugee Protection Act states that a refugee is a person who fears persecution by reason of race, religion, nationality, membership in a particular social group, or political opinion, and who cannot obtain the protection of his or her country of nationality or habitual residence.²⁹

The notion of persecution is at the heart of the definition of refugee. In order for the feared abuse to be deemed persecution, it must be considered sufficiently serious. Furthermore, a claimant must establish that the persecution is based on the claimant's political opinion, race, religion, nationality, or membership in a particular social group. Finally, refugee protection is conferred on the claimant only if the claimant succeeds in showing that the claimant's country of nationality or habitual residence is unwilling or unable to offer protection.³⁰ If any person satisfies the definition of refugee, Canada has an international obligation not to return the person to the country where the person may face persecution.³¹

It is generally understood that 'a well-founded fear of being persecuted' contains both a subjective and an objective requirement. This dual criterion was recognised in Canada in *Adjei v. Canada*.³² The Federal Court of Canada held that the fear of persecution is two-fold. On the one hand, the 'fear must be present in the mind of the applicant for the definition of Convention refugee to be met'.³³ On the other hand, this subjective fear must have an objective basis, that is, the 'refugee's fear [must] be evaluated objectively to determine if there is a valid basis for that fear'.³⁴ It is clear that even the most fervently stated fear of persecution will not be enough if objective evidence tends to deny the existence of risk.³⁵ The practical result is that objective evidence of a reasonable chance of persecution is a necessary and decisive element in any refugee claim.

In order to meet the requirements of the Convention definition of refugee, a claimant must therefore present supporting evidence at the full hearing. Evidence to support a refugee claim normally consists of testimony of the claimant and general evidence of a

country's human rights record. In the absence of evidence of past persecution, a claim may be established by objective evidence that 'persons similarly situated to the claimant are at risk in the state of origin'.³⁶ The claimant's testimony may constitute the whole of the evidence if it is 'plausible, credible and frank'.³⁷ Independent country information is typically drawn from governmental, non-governmental, and media reports. Evidence from witnesses, including expert witnesses, may also be introduced in the course of a claim.³⁸ Both the claimant and the RPD share the responsibility of fact-finding. The RPD may take judicial notice of any facts, information, or opinions within its specialised knowledge.³⁹ This process is assisted by the IRB's national network of publicly accessible Resource and Documentation Centres, which collect and summarise available sources of relevant information. Finally, as an administrative tribunal, the IRB is not bound by legal or technical rules of evidence.⁴⁰ The Immigration and Refugee Protection Act provides that proceedings shall be as informal and expeditious as are consistent with fair treatment.⁴¹ The RPD may base a decision on evidence it considers credible and trustworthy in the circumstances of the particular case.⁴²

b. Sexual minorities and the refugee determination process

Sexual minorities have claimed refugee status in Canada since 1991; the first reported sexual orientation claim to be decided by the IRB was dated 7 October 1991.⁴³ Since then, the RPD has dealt with thousands of claims based on sexual orientation and gender identity. In April 2002 *The Globe and Mail*, a major Canadian newspaper, reported that, '[i]n the past three years, nearly 2,500 people from 75 different countries have sought asylum on the basis of sexual orientation in Canada'.⁴⁴ Sean Rehaag found that the RPD decided 1351 sexual-orientation-based claims in 2004.⁴⁵ In the same study, Rehaag examines the grant rates in sexual orientation cases and concludes that 'sexual-minority refugee claims are, on average, approximately as successful as traditional refugee claims'.⁴⁶

A review of cases reported between 1991 and 1998 reveals that the majority of sexual orientation and gender identity cases turned almost exclusively on one or a combination of three legal issues. First, when such claims were initially submitted to the RPD, adjudicators debated whether sexual minorities fit any of the grounds set out in the Convention definition of refugee.⁴⁷ This question was eventually resolved by a decision of the Supreme Court of Canada, which extended refugee status to sexual minorities primarily because of the persecution individuals feared they would be subjected to as members of a particular social group. In *Ward v. Canada*,⁴⁸ it was confirmed obiter that sexual orientation constitutes the basis of a particular social group as defined in the Convention.⁴⁹ Subsequently, the Federal Court of Canada found that the question of whether sexual orientation can be the basis of a claimant's membership in a particular social group 'has effectively been put beyond doubt by the decision of the Supreme Court of Canada in *Ward*'.⁵⁰ The majority of sexual minority refugees have since claimed that their fear of persecution is grounded on their membership in a particular social group, one constituted by individuals with the same sexual orientation or gender identity as their own.⁵¹

Second, women and men claiming to be homosexuals, bisexuals, or transgendered had to satisfy adjudicators that they were in fact members of a sexual minority.⁵² Since sexual minorities claim to be members of a 'particular social group', one of the elements to be satisfied in a refugee claim based on sexual orientation or gender identity is the claimant's membership in that group.⁵³ Gay, lesbian, bisexual, and transgender claimants, for example, are rarely able to provide conclusive documentary or witness evidence to confirm their sexual orientations, and, therefore, the element most determinative in establishing whether the individual is a

member of the particular social group is the claimant's credibility. Assessing the veracity of the claimant's sexual orientation or gender identity is a very difficult, sensitive, and complex task in the context of an administrative or quasi-judicial hearing. In particular, the very private and intimate nature of an individual's sexual orientation or gender identity poses real challenges for adjudicators, who are nonetheless required to engage with claimants about their personal lives and relationships. The RPD acknowledged in 1995 that adjudicators were struggling with this aspect of sexual minority claims.⁵⁴ In addition, claimants themselves began to provide supporting evidence of their sexual orientations, including asking their partners, families, or friends to testify at the refugee hearing;⁵⁵ providing photographs or videos of partners or activities in the gay, lesbian, bisexual, or transgender communities;⁵⁶ submitting letters or proof of membership in gay, lesbian, bisexual, and transgender organisations;⁵⁷ and presenting medical and psychological reports.⁵⁸ While a case may still turn on the issue of the claimant's sexual orientation,⁵⁹ steps have been taken to improve the quality of the inquiry in the refugee hearing room.

The third recurring issue, and the one most relevant to the present inquiry, relates to the absence or reliability of independent documentary evidence on human rights violations against sexual minorities. A refugee claimant is required to show 'a reasonable fear of future persecution through credible, direct, and specific evidence'.⁶⁰ In addition, such evidence must outline either the government's participation in the persecution of sexual minorities or the state's unwillingness or inability to provide protection from persecution performed by private actors.⁶¹ Generally, assessments of whether a refugee claim has an objective basis are made by relying on a broad cross-section of official and non-governmental sources in addition to the testimony of the claimants themselves.

When claims based on sexual orientation and gender identity were first presented in the early 1990s, sexual minorities encountered a specific set of problems in the area of fact-finding.⁶² First, in many countries, very little information was available on human rights violations against sexual minorities. Governmental and non-governmental organisations were not documenting human rights violations against sexual minorities and thus were not able to provide the independent country information necessary to prove the objective components of the definition of refugee. Second, when available information originated from gay, lesbian, bisexual, and transgender organisations, their evidence was sometimes dismissed as biased and unreliable. I will now examine both of these evidentiary problems.

Independent country information

*a. Evidentiary challenges*⁶³

Several reasons explain the absence of documentary information on human rights violations against sexual minorities in the early 1990s. At that time, only a minority of non-governmental organisations (NGOs) were beginning to document abuses against sexual minorities. Amnesty International, one of the most prominent international human rights organisations, refused until 1991 to document abuses against sexual minorities.⁶⁴ Other prominent human rights organisations were also slow in working on behalf of sexual minorities.⁶⁵ Many more NGOs continued to maintain that the rights of homosexuals and other sexual minorities were not human rights issues at all.⁶⁶ Meanwhile, various intergovernmental institutions also demonstrated a reluctance to legitimise the rights of sexual minorities internationally by inquiring into their status. During its 50-year existence, the UN Commission on Human Rights issued only one report concerning sexual minorities.⁶⁷ The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities consistently ignored calls by

human rights organisations to appoint a special rapporteur to undertake a comprehensive study of discrimination against sexual minorities.⁶⁸ In 1995, the Fourth UN Conference on Women dropped any direct reference to sexual orientation in the final platform document issued from the conference.⁶⁹

The scarcity of human rights documentation, and the serious consequences this had for claimants, was evident in many RPD decisions. In *Re R. (U.W.)*,⁷⁰ a gay man from Uruguay was unable to present to the refugee panel any documentary evidence on the treatment of sexual minorities by state officials in Uruguay. This led the panel to conclude that the documentary record did not support the fear of persecution the claimant alleged, and his request for protection was denied. A similar conclusion was reached in a case involving a gay man from Jordan,⁷¹ in which not only did the adjudicators decide that the absence of evidence failed to support the claimant's fear of persecution, but they also considered it an indication that homosexuals as a group were *not* persecuted in Jordan. Claimants from Mexico and Brazil also failed to convince the RPD that their fears of persecution were well founded due to a lack of documentary evidence.⁷²

Often, if documentary evidence on the persecution of sexual minorities was found, it was produced by gay, lesbian, bisexual, and transgender organisations that often investigated and compiled human rights documentation because of the refusal of mainstream governmental and non-governmental human rights organisations to consider the plight of sexual minorities. Juan Pablo Ordoñez, a Colombian human rights lawyer, described what a human rights ombudsman had told him: 'the moment a faggot begins hanging around my house [his] human rights are over . . . I'd rather have a daughter who's a whore than a faggot son . . . [If I were to have a homosexual child] I would treat him like the family dog, just like any other case from my office. I believe I love my dog more than I'd love a faggot.'⁷³ In Uruguay, the family of a lesbian, who was arrested by the Argentinean military and subsequently disappeared, joined an association for the relatives of disappeared persons. When the woman's sexual orientation became known, the association ignored her family and abandoned all efforts to find her.⁷⁴ In the Philippines, a lesbian working for a human rights organisation was fired when the board of directors found out about her sexual orientation.⁷⁵ The lack of interest and, in many cases, open hostility to sexual orientation and gender identity issues on the part of human rights organisations convinced many gay, lesbian, bisexual, and transgender organisations to document human rights violations themselves in order to draw international attention.

While sexual minority rights organisations were often the only source of documentary evidence, early decisions of the RPD on sexual orientation and gender identity refugee claims indicated a strong preference for materials from mainstream human rights organisations. The decision in *Re H. (Y.F.)*⁷⁶ provides a good illustration of how the absence of evidence of persecution in reports from mainstream and well-known human rights organisations impacted on claimants negatively. In that case, a gay man from Brazil claimed a well-founded fear of persecution because of his membership of a particular social group, namely homosexuals, in Brazil. Despite the presentation of documentary evidence on extra-judicial killings collected by a Brazilian sexual minority rights group, the adjudicator denied the refugee claim, stating,

if there was a serious possibility that homosexuals, as a particular social group, had a well-founded fear of persecution because of their sexual orientation, the panel is of the opinion that one or more of the human rights publications would cite this as a concern . . . [however] [t]he panel was not able to find any reference to such a concern in the recent Amnesty International Report or Human Rights Watch World Report.⁷⁷

This view was repeated in *Re N. (L.X.)*,⁷⁸ where one of the adjudicators noted that reports from Human Rights Watch, Lawyers Committee for Human Rights, Amnesty International, and the United States State Department did not identify homosexuals as being at risk of persecution in Argentina.⁷⁹ What these decision-makers failed to acknowledge was that those organisations were not mandated to investigate violations against sexual minorities, or had only recently adopted policies to document human rights abuses and had not begun to collect information.

In other cases, the RPD found materials from sexual minority rights organisations to be lacking in credibility. For instance, in *Re N. (L.X.)*, a RPD adjudicator dismissed reports submitted by the gay claimant's counsel because '[m]ost of the documentary evidence is from gay advocacy groups or publications that would understandably highlight and possibly exaggerate the issues of the homosexual community. These publications are in my view one-sided.'⁸⁰ In *Re H. (Y.F.)*,⁸¹ documentary evidence, which suggested that gay men, lesbians, and transvestites in Brazil were victims of systematic violence and extrajudicial killings, was dismissed. The source of the evidence was the Grupo Gay da Bahia, one of Brazil's most active sexual minority rights organisations, and the RPD refused to accept their findings as credible without corroboration from other sources such as mainstream newspapers or human rights organisations.⁸² In a case involving a gay man from Pakistan, the claimant's counsel objected to the characterisation of documents submitted from sexual minority rights organisations as carrying little or no weight.⁸³ The panel dismissed his complaints, stating that 'it will give all documents submitted in evidence the appropriate probative weight'.⁸⁴

Many organisations, for instance, those representing international trade unions, journalists, and religious groups, pay particular attention to human rights violations against their members and their observations are regularly accepted as evidence.⁸⁵ Often, interested human rights groups have the knowledge, expertise, and connections to best document specific kinds of persecution. This is particularly true of sexual minorities, who, as extremely marginalised members of society, are often difficult to reach. Amnesty International acknowledged this in a letter to sexual minority rights activists in which the human rights organisation stated that

[a]s with all human rights documentation, the abuses Amnesty investigates are brought to its attention through a wide range of human rights networks. Our work in this area has developed in cooperation with both international and local gay and lesbian groups who have documented abuses by governments in many countries. The work of gay and lesbian groups has been absolutely crucial, since many mainstream human rights organizations have failed to address the violations gay men and lesbians suffer.⁸⁶

In fact, mainstream human rights organisations were relying on sexual minority rights organisations' sources in their own work. Amnesty International's letter cited above was presented to sexual minority rights activists by representatives of the organisation at an international sexual minority conference.⁸⁷ The objective was to encourage and recruit gay men and lesbians from around the world to bring to the organisation's attention violations against sexual minorities. The evidence submitted by the claimant in the Brazilian case *Re H. (Y.F.)*⁸⁸ regarding the extrajudicial killings of more than 600 gay men, transvestites, and lesbians was included in a publication by Amnesty International (USA),⁸⁹ a clear indication that the human rights organisation found the evidence very credible. Moreover, the United States State Department used documentation from the IGLHRC in their annual reports.⁹⁰ In a letter to Canadian lawyer El-Farouk Khaki, Human Rights Watch stated that they considered the work of IGLHRC to be credible and trustworthy.⁹¹ Without the

groundbreaking work of sexual minority rights organisations, mainstream human rights organisations would have faced an even more difficult task in documenting abuses against sexual minorities.

Criticisms were directed at the RPD for failing to adequately address documentation problems. Several lawyers complained to the RPD about the difficulty in either obtaining documentation or having it deemed credible and trustworthy by refugee claims adjudicators.⁹² In 1995, the Canadian Council for Refugees (CCR) adopted a policy statement in which it recommended that the RPD ‘research and make widely available information on the culture and human rights status of gay men and lesbians in each part of the world from which claimants come’.⁹³ Moreover, the CCR specifically called on the RPD to recognise the value and expertise of both the documentation from sexual minority rights groups and the testimony of their members when they appear before the Board as expert witnesses.

b. Overcoming the problems

While the problems with documentary evidence were significant in the early 1990s, both mainstream and sexual minority rights organisations increased their efforts to uncover the most flagrant violations of the human rights of sexual minorities. In the mid- and late-1990s, several mainstream human rights organisations started to produce reports or publicly denounced human rights violations against sexual minorities, including Amnesty International,⁹⁴ the Committee to Protect Journalists,⁹⁵ the Inter-Church Committee on Human Rights in Latin America,⁹⁶ the Lawyers Committee for Human Rights (now known as Human Rights First),⁹⁷ and Human Rights Watch.⁹⁸ Moreover, as mentioned above, mainstream human rights organisations also began to collaborate with gay, lesbian, bisexual, and transgender rights groups to document human rights abuses. The collaboration produced reports that benefited from the investigative expertise of general human rights organisations and the specific knowledge and resources of groups dedicated to defending the rights of sexual minorities.⁹⁹

The willingness of international human rights organisations to document abuses against sexual minorities translated into an increase in objective documentation available in the refugee hearing room. For example, in granting refugee status to a Cambodian gay man in 1999, the RPD commented that there was ‘ample documentary evidence on human rights abuses in Cambodia’ to satisfy the RPD that there was an objectively valid basis for fear of persecution.¹⁰⁰ In deciding a case involving a gay man from Belarus, the RPD noted that ‘there is considerable evidence regarding the plight of homosexuals in Belarus’.¹⁰¹

Moreover, documentation produced by sexual minority rights organisations like IGLHRC began to be cited as reliable and credible sources in refugee claims. In fact, Amnesty International recommended that refugee tribunals and adjudicators use information gathered by sexual minority rights organisations.¹⁰² In describing a documentary source that outlined the status of gay men and lesbians in Mexico, an adjudicator of the RPD stated, ‘The panel views this article as reliable given that its author draws upon a variety of sources including reports from Amnesty International, the International Gay & Lesbian Human Rights Commission, various human rights organisations situated in Mexico, and prominent intellectuals in the field of homosexuality and gay rights within and outside Mexico.’¹⁰³ In 1995, the RPD granted refugee status to a Russian gay man by relying on reports from both Amnesty International and IGLHRC.¹⁰⁴ In another case, involving a lesbian from the Ukraine, the panel used an IGLHRC report on Russia as documentary evidence, stating that while the report ‘does not deal specifically with the Ukraine, the Panel finds it useful by analogy’.¹⁰⁵ In a case involving a Chilean gay man, the claim was accepted in part because of information

gathered by a Chilean sexual minority rights group and the IGLHRC.¹⁰⁶ In a decision involving a Bulgarian claimant, the RPD characterised the International Lesbian and Gay Association as 'a credible and trustworthy source'.¹⁰⁷

In many cases, the best and most reliable sources of documentary evidence are at the local level. In addition to acknowledging international organisations like IGLHRC and the International Lesbian and Gay Association (ILGA) as important sources of information, the RPD has extended the same credibility to information from domestic groups. For instance, information provided by the Gay Enhancement Association of Trinidad and Tobago was referenced in a 1998 claim.¹⁰⁸ Information provided by the Lambda Legal Defense and Education Fund (LLDEF) in the United States was cited in relation to a claim brought forth by an American gay refugee claimant. LLDEF was described as 'a leading gay rights organization that has undertaken substantial research on the U.S. situation'.¹⁰⁹ The group was also described as an 'informed and unbiased [group] with no interest in the outcome of these proceedings'.¹¹⁰

Moreover, the RPD took some steps to overcome the difficulties it had in gathering information. The Resource and Documentation Directorate (hereinafter referred to as 'the Directorate') is responsible for meeting the needs of the RPD in 'bringing forth credible and trustworthy information relating to country conditions'.¹¹¹ It produces both country information packages and specific responses to requests for information by adjudicators. A review of materials produced by the Directorate between January 1992 and July 1995 indicated that researchers were often unable to locate information when requests for information on the issue of sexual orientation were made by the RPD.¹¹² Efforts were soon made to overcome this problem. General publications began to include references to the status of gay men and lesbians. For instance, a 1995 chronology of events in Iran makes several references to the criminalisation of homosexuality and the death penalty that attaches to persons convicted of same-sex sexual conduct.¹¹³ In 1996, the division produced its first document specifically on sexual minorities, a bibliography and selection of articles on sexual orientation issues in Latin America.¹¹⁴ Several more documents on sexual minorities were published in 1999 on Mexico,¹¹⁵ Poland,¹¹⁶ and Russia.¹¹⁷ The Directorate now regularly produces information on the situations of sexual minorities in different countries.¹¹⁸

In addition, Refugee Protection Officers (RPOs) began to actively pursue documentary evidence in specific cases. In the Canadian refugee determination process, the RPO assists the refugee determination process by ensuring that all relevant information is laid before the decision-maker responsible for deciding a claim. In a 1999 claim, the adjudicator deciding a case involving a Colombian lesbian noted that the refugee claims officer (RCO) (as they were then called) was of great assistance to the panel and it was '[t]hanks mainly to the tireless efforts of the RCO . . . [that] new material was obtained on the situation of lesbians in Columbia'.¹¹⁹ The material gathered included 'information on the treatment of lesbians by Colombian state authorities and the general public, and on the protection available to lesbians who are physically and/or sexually abused'.¹²⁰ In addition, the officer was able to obtain specific information on sexual minority rights groups by communicating directly with activists in Colombia.¹²¹ Evidence produced by RPOs, often gathered from direct communication with NGOs, has also been determinative in other cases.¹²²

Documentary evidence in refugee claims based on sexual orientation and gender identity was also an issue addressed in the course of professional development training for RPD adjudicators.¹²³ The first such training was held in 1995. The IRB specifically requested that the availability and reliability of independent country information on sexual minorities be addressed in the training sessions. An important section of the presentation therefore dealt with these issues.¹²⁴ The training sessions examined the human rights work done

by both mainstream and sexual minority rights organisations, and it is suggested by some commentators that they have had an impact on the quality of decisions made in the refugee hearing room.¹²⁵

Finally, the difficulty in documenting human rights violations in some countries is at times overcome through a claimant's own evidence. Indeed, the RPD can adduce from the claimant's testimony the information it requires to determine the issue of 'well-founded fear'. In fact, as long as the claimant's testimony is 'plausible, credible and frank, it may constitute the whole of the evidence of objective risk'.¹²⁶ In the case of a gay Pakistani claimant, the three-member panel stated that 'the panel reasons that this claimant in the circumstances that led to his flight from Pakistan has told a plausible story which, in the absence of contrary evidence, can be regarded by the panel as trustworthy evidence'.¹²⁷ The Federal Court of Appeal has stated that when an 'applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there is reason to doubt their truthfulness'.¹²⁸

Refugee claims based on sexual orientation and gender identity between 1998 and 2008

The preceding discussion has attempted to demonstrate how sexual minority refugee claimants were at a disadvantage when claims were first made in the 1990s. The situation changed quickly as mainstream human right organisations expanded their mandates to include the investigation of discrimination and persecution against sexual minorities. In addition, documentation from sexual minority rights organisations was increasingly regarded as a credible source of information for the refugee determination process in Canada. Finally, the IRB took constructive steps to overcome the problems they encountered in finding documentation. The Board showed a willingness to train decision-makers on the specific nature of evidentiary issues in claims based on sexual orientation or gender identity.

These developments translated into significant progress. Nevertheless, while the developments described above allowed many gay and lesbian refugee claimants to provide some supporting evidence of their well-founded fear of persecution by the late 1990s, documentary challenges remain to this day.

Ongoing problems with the availability of independent country documentation

In 2003, Catherine Dauvergne and Jenni Millbank examined the use of independent evidence in refugee cases based on sexual orientation in both the Canadian and Australian refugee determination processes. Information from human rights organisations such as Amnesty International was referred to in 29% of cases while documentation from groups dedicated to the human rights of sexual minorities was used in 14% of cases.¹²⁹ Clearly, the availability of independent country information in 2003 had improved in comparison to the early and mid 1990s.

In addition, an increasing number of mainstream NGOs have expanded their mandates to include the protection of sexual minorities. For instance, International Service for Human Rights and the International Commission of Jurists convened a meeting in 2006 in Yogyakarta, Indonesia, which 'brought together UN experts and others to develop a set of Principles outlining the application of international law to human rights based on sexual orientation and gender identity'.¹³⁰ New NGOs have been established: ARC International has been working since 2003 with UN agencies to push for increased attention to violations of the human rights of sexual minorities.¹³¹ UN Special Rapporteurs are

increasingly integrating sexual orientation and gender identity issues in their reports.¹³² In 2004, the United Nations Commission on Human Rights adopted a 'Resolution on Extrajudicial, Summary or Arbitrary Executions' which called on states to 'investigate promptly and thoroughly all killings committed in the name of passion or in the name of honour, all killings committed for any discriminatory reason, including sexual orientation'.¹³³ ILGA reports that 'there are altogether 60 countries that have publicly supported sexual orientation as an issue at the United Nations Commission on Human Rights/Human Rights Council since 2003'.¹³⁴

Nevertheless, the extent to which international human rights organisations are able to uncover worldwide abuses against sexual minorities is still limited. Louise Arbour, then UN High Commissioner for Human Rights, declared in 2006 that '[b]ecause of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented, and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights.'¹³⁵ An Australian report also describes the current situation:

Although progress has been made in the past ten years, mainstream organisations continue to struggle to properly document human rights abuses against sexual minorities. Amnesty International highlights that state persecution on the basis of sexual orientation may often be hidden in vaguely-worded charges, such as 'participation in a corrupt gathering' or 'harming others', as has been the case in Iran and Saudi Arabia. Persecution by non-state actors may be even more difficult to document, particularly where directed at women whose stories may be more difficult to access. Examples of this type of persecution include 'therapeutic' practices to 'cure' homosexuality, domestic violence and honour killings.¹³⁶

Clearly, significant barriers continue to prevent the documentation of human rights violations against sexual minorities. This in turn translates into a scarcity of information that can be used to support refugee claims. For instance, the IRB's Research and Documentation Directorate still cannot locate independent country information when requested to do so by the RPD. In a 2007 response to a request for information about Mongolia, the Directorate stated that '[u]p-to-date information on the treatment of homosexuals by authorities and society in general was scarce among the sources consulted by the Research Directorate'.¹³⁷ In responding to a request for information about the treatment of homosexuals in the Turkish military, the Directorate relied on a handful of limited sources and admitted that 'additional and more recent information . . . could not be found'.¹³⁸

Amnesty International and Human Rights Watch have made sexual orientation and gender identity serious concerns and both organisations publish reports and news releases documenting human rights abuses against sexual minorities. Nevertheless, neither organisation is able to produce information about all countries. Moreover, only a fraction of situations, often the most egregious, make it into their documentation. While both organisations have fully integrated issues related to sexual orientation and gender identity into their overall work, detailed country reports devoted exclusively to human rights violations against sexual minorities are infrequently released.¹³⁹ Moreover, the reports that are produced may not investigate countries from which significant numbers of gay men, lesbians, bisexuals, and transgender persons are fleeing. The RPD has dealt with a considerable number of Mexican gay, lesbian, bisexual, and transgender claimants,¹⁴⁰ yet neither Amnesty International nor Human Rights Watch has released a current report on the human rights conditions for sexual minorities in Mexico.

Even NGOs exclusively dedicated to documenting human rights violations against sexual minorities have limited abilities to investigate and publish information. The IGLHRC has published country reports but many of these are now outdated.¹⁴¹ The most recent country or regional report was published in 2003.¹⁴² Shorter ‘action alerts’ about human rights developments in different regions and countries are posted on the IGLHRC website but information on many pages appears outdated, suggesting limited resources.¹⁴³ ILGA published an annual report of state-sponsored homophobia in 2008 which provides a survey of states with legislation criminalising consensual sexual acts between persons of the same sex.¹⁴⁴ Yet the report is not able to provide any specific information about the ways in which the laws are applied, the number of prosecutions, or the overall repressive impact of the criminal prohibitions. This would require resources and research beyond the means of the organisation. Keeping information current is also difficult for NGOs with limited resources. In *Garcia v. Canada (Minister of Citizenship and Immigration)*,¹⁴⁵ the RPD ignored a report by the Mexican Citizen’s Commission Against Homophobic Hate Crimes on assassinations that were motivated by homophobic hate, because the study was not current. While the RPD was faulted for ignoring the information altogether, the Federal Court of Canada noted that the report was prepared six years before the claimant’s hearing, and, as a result, the RPD could decide not to ascribe much weight to the report.¹⁴⁶

National human rights associations face the same challenge as international ones; most notably, increased activism is met with attacks on human rights defenders. This has seriously impeded their ability to document violations. The particular risks faced by human rights defenders working on issues of sexual orientation were recognised by the Special Representative of the UN Secretary-General on human rights defenders in 2001:

Greater risks are faced by defenders of the rights of certain groups as their work challenges social structures, traditional practices and interpretation of religious precepts that may have been used over long periods of time to condone and justify violation of the human rights of members of such groups. Of special importance will be women’s human rights groups and those who are active on issues of sexuality especially sexual orientation and reproductive rights. These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by State forces but other social actors.¹⁴⁷

The UN High Commissioner for Human Rights recognised the problem as well:

I recognize that many LGBT human rights organizations work in extremely difficult circumstances. They are denied freedom of association when the authorities shut them down, or otherwise prevent them from carrying out their work. They are physically attacked when they organize demonstrations to claim their rights. Many have even been killed for daring to speak about sexual orientation. They are denied access to important fora, including at the international level, where they should be able to have their voices heard.¹⁴⁸

Increasing the risks is the fact that, according to the *2008 State-Sponsored Homophobia* report, being a gay man or a lesbian risks jail time in 86 countries and the death penalty in seven.¹⁴⁹ Serious risks are therefore involved in investigating, documenting, and reporting human rights violations against sexual minorities, especially if researchers are themselves gay, lesbian, bisexual, or transgender.

The absence of official government reporting increases the challenges of providing reliable information. Most countries do not collect statistics or report publicly on incidents of violence against sexual minorities. For instance, in a recent report on sexual minorities in Turkey, Human Rights Watch cited figures on homophobic violence from a study

apparently conducted by the Turkish Ministry of Justice.¹⁵⁰ But, as the study remains unpublished, and the number of subjects and the methodologies unknown, Human Rights Watch were careful to note that while the data were consistent with their findings the 'figures must therefore be treated as inconclusive'.¹⁵¹ A number of sexual minority rights organisations have tried to monitor reports of violence and incidents of homophobia, and their research and findings have been used by mainstream human rights organisations. For instance, Human Rights First cites surveys conducted by sexual minority rights groups in several countries in their 2007 report *Homophobia: 2007 Hate Crime Survey*.¹⁵² Human Rights First does state, however, that while such surveys offer evidence of the problem of homophobic violence the 'surveys are not always undertaken with scientific precision or cannot claim to be fully representative'.¹⁵³

The absence of reliable independent country information can lead refugee tribunals to use inappropriate sources as substitutes. In 2002, Michael Battista, a refugee lawyer in Toronto, sent a letter to the IRB to complain about material contained in a standard information package prepared by the RPD which was produced for a hearing of a claimant he was representing.¹⁵⁴ According to Battista, the package contained material promoting Mexico's gay tourist and travel industry. This included downloaded information from websites promoting Mexico's gay tourist destinations. Battista claimed that such material was inherently promotional and depicted social conditions in the most palatable light. In addition, the information was unreliable, as sources or authors were not identified. Finally, Battista argued that the material was highly prejudicial, as it relied on stereotypical notions of gay men as primarily interested in socialising, parties, and sexual activity.¹⁵⁵ Dauvergne and Millbank have similarly criticised the Australian Refugee Review Tribunal for relying on the *Spartacus Guide*, a travel guide aimed at gay men, at refugee hearings.¹⁵⁶

Failure to document abuses can still impact on claimants negatively.¹⁵⁷ In 2000, a gay man from the Bahamas failed to obtain refugee status in part because the RPD concluded that the absence of reports of abuses by Amnesty International meant that 'gays are not persecuted in the Bahamas and that human rights are respected'.¹⁵⁸ In *Canada (Minister of Citizenship and Immigration) v. Shwaba*,¹⁵⁹ the RPD found that there was no documentation on the conditions in Grenada with respect to the alleged persecution of homosexuals except for a document that was ten years old.¹⁶⁰ A gay Thai claimant failed to secure refugee status in Australia because the tribunal concluded that 'if there was a problem with homosexuals being seriously threatened and attacked in Thailand or if police refused to provide adequate state protection to homosexuals . . . that this would be reported in independent country information'.¹⁶¹ Moreover, as the analysis will now show, shortcomings in the availability and specificity of independent country information make it difficult for gay, lesbian, bisexual, and transgender claimants to meet legal specific requirements of the refugee determination process, which can translate into poor assessments in the refugee hearing room.

The challenge of emerging legal issues

As discussed above, claims in the 1991–98 period generally turned on whether sexual orientation or gender identity constituted the basis of a particular social group, whether claimants were able to prove their sexual orientations or gender identities, and on the legitimacy of a claimant's well-founded fear. With regard to the last, the early cases focused almost exclusively on whether a claimant could buttress her or his testimony regarding fear of persecution with objective evidence that human rights abuses against sexual minorities did in fact occur in the claimant's country of origin. Very often, without such evidence, claimants were unsuccessful in gaining protection.

Two developments would change the nature of the inquiry in sexual orientation cases. Information on the nature, scope, and seriousness of human rights abuses against sexual minorities was slowly becoming accessible to refugee claimants and decision-makers. At the same time, increased activism by gay, lesbian, bisexual, and transgender people at both national and international levels was securing modest legal and social achievements for sexual minorities in different countries.

The developments impacted on the refugee determination process in Canada. The inquiry into a claimant's well-founded fear became more layered. Whether a claimant has a well-founded fear of persecution is in fact a complex factual and legal issue. Rather than simply assessing the existence of serious human rights violations against sexual minorities, adjudicators were increasingly interested in determining whether claimants feared discrimination rather than persecution. In addition, since a claimant's fear of persecution could result from a state's failure to protect the claimant, the focus of the hearing began to turn on the availability of state protection and the existence of internal flight alternatives. All three of these issues are linked to objective conditions in the country of origin and therefore require documentation in order to properly evaluate their relevance to a claimant's case. The analysis will look at each issue in turn, and its accompanying evidentiary challenges.

a. Discrimination versus persecution

The notion of persecution is at the heart of the definition of refugee, yet the concept is poorly defined.¹⁶² In *Ward*, the Supreme Court of Canada defined persecution as 'sustained or systematic violation of basic human rights demonstrative of a failure of state protection'.¹⁶³ In *Rajudeen v. Canada (Minister of Employment and Immigration)*,¹⁶⁴ the Federal Court of Appeal defined persecution as 'acts of harassment, cruelty, punishment, injury or annoyance inflicted in a persistent, systematic or repetitive manner'.¹⁶⁵ In terms of specific acts, tribunal and courts decisions recognise torture, rape, arbitrary arrest and detention, assault, and repeated harassment as forms of persecution.¹⁶⁶ The definition of persecution consequently necessitates that the harm feared be serious and that it be inflicted in a persistent, repetitive, or systematic way.¹⁶⁷

The requirement that the harm be serious has led to a distinction between persecution, on one hand, and discrimination, on the other. It is true that persecution can be manifested by a series of discriminatory acts; the concept of discrimination is therefore an aspect of persecution. However, refugee law makes an important distinction between discrimination and persecution. According to the *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status*,¹⁶⁸ while discrimination may amount to a violation of human rights, it will not necessarily amount to persecution. Paragraph 54 of the *Handbook* states,

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.¹⁶⁹

Thus, what distinguishes persecution from discrimination is the degree of seriousness of the harm.

Canadian refugee law adopts this important distinction between discrimination and persecution. At the same time, courts have recognised that discrimination may also rise to the level of persecution. The Federal Court of Canada stated, in the case of *Sagharichi v. Canada (Minister of Employment and Immigration)*,¹⁷⁰ that incidents of discrimination may very well amount to persecution. Refugee claimants must demonstrate that incidents cumulatively or singly ‘constitute a serious, systematic and repeated violation of core human rights’.¹⁷¹ Discrimination in itself does not establish persecution, but it may ground a finding if it is very serious. In all cases, it is a mixed question of law and fact.¹⁷² Finally, the distinction between discrimination and persecution rests entirely on the evidence submitted to the RPD.¹⁷³

A few refugee claims based on sexual orientation or gender identity raised the distinction between discrimination and persecution before 1998,¹⁷⁴ but it was really in the last ten years that Canadian decision-makers increasingly evaluated evidence to determine whether a sexual minority claimant would be subjected to persecution or to the less serious harm of discrimination. One reason for the increased relevance of the issue is the fact that in several countries the social, political, and legal situations of sexual minorities has been changing. While some countries continue to seriously repress homosexuality and transexuality, other countries are becoming more accepting of sexual diversity.

The impact of this progress is now often at issue at refugee hearings. According to a refugee lawyer in Toronto, the RPD ‘tends to be more sympathetic to claimants from countries such as Pakistan and Iran where homosexuality is illegal’.¹⁷⁵ More tenuous are cases involving claimants from countries that have emerging sexual minority communities and rights organisations and concrete legal reforms, such as Mexico and several Latin American and Eastern European countries.¹⁷⁶ For example, in *Cuesta v. Canada (Minister of Citizenship and Immigration)*, the RPD described the situation in Colombia in 2003 thus:

I note it is very clear from the documents that there is a continuum of an improving situation for persons of the claimant’s particular sexual orientation. The situation there is not perfect by any means, but it is clear that there have been improvements, starting in 1980 when consensual homosexuality was decriminalized. Regarding the Constitution of 1991, even his counsel described a very liberal Constitution.¹⁷⁷

Similar conclusions were drawn in numerous cases, including in a 2004 Brazilian claim where the RPD concluded that ‘[w]hile the panel accepts that in Brazil, deeply ingrained attitudes against homosexuality continue to exist, there are numerous examples in the documentary evidence that the situation for sexual minorities is improving’.¹⁷⁸ After canvassing the situation in Ghana, the RPD decision-maker in *Titus-Glover v. Canada (Minister of Citizenship and Immigration)* stated that ‘[t]he overall impression I get is that there is definitively discrimination against homosexuals in Ghana but no persecution’.¹⁷⁹ A similar conclusion was reached in a 2006 case relating to South Korea: ‘Thus, while it is clear the situation for gays in South Korea is not as good as it is in Canada, I find there is insufficient evidence to show there is systemic and repeated violation of human rights or serious and sustained discrimination and harassment that amounts to persecution of all gays.’¹⁸⁰

The fact that independent human rights documentation continues to be difficult to obtain for many parts of the world means that assessment of whether a particular country’s conditions constitute discrimination rather than persecution is sometimes based on little objective evidence. Moreover, some adjudicators may continue to reason, as they did in the early sexual orientation and gender identity claims, that the scarcity or absence of reports evidences a lack of persecution.¹⁸¹ This appears to have been the case in a decision

reviewed by the Federal Court of Canada, where the RPD had reviewed the independent country information and concluded that,

if violence against homosexuals was serious and widespread, it would have appeared in the United States' Department of State Report on Human Rights, Amnesty International Reports or the Human Rights Watch World Report. Since violence against homosexuals was not mentioned in any of these three reports, the Board concluded that it was not a serious and widespread problem in Hungary.¹⁸²

Considering the comparatively recent mainstream attention given to persecution based on sexual orientation and gender identity, and the ongoing challenges in documenting human rights abuses, refugee claims adjudicators should be careful to avoid drawing conclusions that no persecution exists without clear positive evidence.¹⁸³ Amnesty International warns that 'lesbians and gay men who have experienced torture or ill-treatment may not have access to documented evidence of their personal experiences. Patterns of torture and other abuses facing lesbians and gay men are not well documented in most countries, although some non-governmental organisations have begun to track these abuses.'¹⁸⁴ Adjudicators must 'take into account reasons why reports of persecution may be unavailable'.¹⁸⁵

The lack of evidence is a challenge for both the claimant and the decision-maker. For instance, in *Zakka v. Canada (Minister of Citizenship and Immigration)*,¹⁸⁶ the Federal Court of Canada stated that an applicant cannot simply rely on the existence of a law proscribing homosexual acts to demonstrate risk. The claimant must produce evidence that similarly situated persons were subjected to arbitrary harassment and detention under the law. This was the conclusion also in *Birsan v. Canada (Minister of Citizenship and Immigration)*,¹⁸⁷ where the Federal Court held that '[i]t is certainly not unreasonable to conclude that the mere existence of a law prohibiting homosexuality in public cannot prove, if it is not enforced, that homosexuals are persecuted'.¹⁸⁸ In *Oviawe v. Canada (Minister of Citizenship and Immigration)*,¹⁸⁹ the absence of persuasive evidence regarding the manner and frequency with which section 214 of the Nigerian Criminal Code, which rendered sodomy punishable by up to 14 years' imprisonment, was enforced resulted in the conclusion that the claimant did not face persecution. As the Federal Court of Appeal in *Sagharichi* pointed out, 'the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution'.¹⁹⁰ Thus, in *Inigo Contreras v. Canada (Minister of Citizenship and Immigration)*,¹⁹¹ the documentary evidence, including the 2004 United States Department of State Report, was far from definitive on the issue of persecution. The evidence suggested the existence of discrimination against homosexuals and acts of persecution, but also pointed to government efforts to fix the situation and to the work of NGOs in trying to improve the treatment of sexual minorities. In *Re J.Q.U.*,¹⁹² the RPD pointed out that previous IRB decisions went both ways in relation to homosexuals from Poland on the issue of discrimination versus persecution. Similarly, while the documentary evidence in a Brazilian claim outlined problems with the treatment of sexual minorities, including that: (1) 'Brazilian cities . . . have laws protecting homosexuals from discrimination on the basis of sexual orientation, although their enforcement is sketchy'; (2) "'average" homosexuals . . . are viewed as a threat'; (3) '[i]n Rio, there are also antihomosexual hit squads'; (4) '[p]olice not only fail to stop the killings, but also occasionally participate in them without any fear of legal repercussions'; and (5) '[Brazilian] macho culture [creates] an understanding among police and judges that violence and murder of homosexuals does not deserve serious attention',¹⁹³ the RPD

concluded that 'homosexuals may experience measures of harassment and discrimination and incidents of violence in rare circumstances in Brazil, but are not subject to serious harm amounting to persecution'.¹⁹⁴ This was based on the fact that the same documentary evidence suggested that homosexuality was not illegal; that a public opinion poll showed that 60% of Brazilians of both sexes were in favour of recognition of couples of the same sex; that flamboyant homosexuality was widely accepted; and that a federal human rights official had scheduled meetings with sexual minority rights representatives.¹⁹⁵ The weighing of evidence in this decision on Brazil seems to have inexplicably favoured the minor progress outlined in the independent country information rather than the more serious reports of homophobic violence and impunity.

One of the problems lies in the type of country information that may be available to the adjudicators. In a 1999 case involving two gay men from Uruguay, the RPD concluded that the situation for homosexuals in Uruguay was not perfect but constituted discrimination falling short of persecution.¹⁹⁶ Yet the documentary evidence mentioned in the RPD's reasons focused exclusively on the improved social position of homosexuals. Independent country information, including information from a Uruguayan sexual minority rights group, outlined the existence of some gay groups in the capital city of Montevideo, and the holding of a public parade and workshops, including one event where a psychiatrist held an open panel on homophobia at a town council.¹⁹⁷ However, I argue, this type of documentation does not provide useful assessment of the specific human rights situation of sexual minorities in a particular country. If the independent country information focuses on the mere existence of a sexual minority rights organisation, adjudicators may fail to appreciate that this 'does not reveal much detail about the conditions for that organisation, the size or influence of the organisation and/or any restrictions on its operations'.¹⁹⁸ Adjudicators require a diversity of country information that paints a complete picture of the situation for them to be able to understand 'the nature of homophobic persecution, which is cemented by a complex interaction between legal, political, social, religious and familial spheres'.¹⁹⁹ For instance, in the Uruguayan case, the absence of penal provisions prohibiting homosexuality was mentioned by the RPD. Such absence, however, does not mean that same-sex conduct is legally condoned, especially in public settings. Many Latin American countries have used laws that penalise offences against morality and decency to repress homosexuality.²⁰⁰

The fact that much current documentary evidence is often not determinative on the issue of discrimination versus persecution is illustrated by the findings in four Sri Lankan cases decided between 2004 and 2007, in each of which documentary sources suggested that homosexuality was illegal under Sri Lankan law and punishable by up to 12 years' imprisonment; that gay men were subject to harassment, extortion, and blackmail from police; and that gay men were generally treated with aversion. At the same time, evidence pointed to more societal openness; the emergence of support organisations for gay men and lesbians; and the fact that, while a law prohibiting homosexuality remained on the books, it was not being used in practice to prosecute individuals. Similar human rights documentation was introduced at the hearings, yet different conclusions were reached over whether the country conditions constituted persecution or discrimination. In *De Seram v. Canada (Minister of Citizenship and Immigration)*, the RPD focused on the improvement in the conditions for sexual minorities to conclude that the claimant would face 'harassment and prejudice' rather than persecution.²⁰¹ In *Abdul Hameed v. Canada (Minister of Citizenship and Immigration)*, the RPD concluded that 'gays in Sri Lanka, and the claimant, face discrimination and not persecution', even though the decision-maker acknowledged that 'homosexuality is illegal under Sri Lanka law'; that gay men were 'generally being treated with distaste'; and that 'incidents of gay beatings are reported

in Sri Lanka'.²⁰² In contrast, in the third case, the RPD concluded that an accumulation of human rights violations, including risk of blackmail from police and alienation from family and society at large, did amount to persecution.²⁰³ In the last case, the Federal Court of Canada allowed an application for judicial review of the RPD's determination that a claimant's testimony was not credible in light of the documentary evidence that indicated that, although there was a law on the books prohibiting homosexuality in Sri Lanka, the law was not enforced by the police.²⁰⁴ The Federal Court of Canada concluded that the RPD failed to refer to evidence that sexual minority rights 'organisations are frequent police targets, and that members are physically and verbally abused by the police'.²⁰⁵ In addition, the Federal Court stated that 'although the law banning sodomy is not enforced, the police often use the existence of the law to blackmail homosexuals'.²⁰⁶

b. State protection

International refugee law was designed to reinforce protection individuals may receive from their own countries. Absent a complete breakdown of the state apparatuses or an admission by the state authorities that they are unable to protect the claimant, a claimant must advance clear and convincing evidence of the state's inability to protect him or her. The claimant has the burden of proof and 'must assume his or her legal burden on a balance of probabilities'.²⁰⁷ The Federal Court of Appeal recently clarified that the evidence adduced must be 'relevant, reliable and convincing'.²⁰⁸ The Supreme Court of Canada in *Ward* held that such proof may consist of testimony of 'past personal incidents in which state protection did not materialize' or of 'similarly situated individuals who were let down by the state protection arrangement'.²⁰⁹ The focus of the inquiry is on determining whether there is objective evidence outlining inadequate state protection.²¹⁰

In addition, courts have held that 'where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection'.²¹¹ Further in *Kadenko*, the Federal Court of Appeal stated that the burden of proof was proportional to the degree of democracy within the state in question.²¹² The more democratic the state, the more available domestic remedies the claimant must exhaust before claiming refugee protection.

State protection has been a consistent and recurring issue in sexual orientation and gender identity claims in the last ten years.²¹³ Increasingly, the outcome of claims has depended on whether the claimant has adduced clear and convincing evidence that state authorities cannot or will not protect sexual minorities. The relevance of this inquiry is illustrated by the fact that one of only two decisions to ever be designated as a 'jurisprudential guide' by the IRB is a 2003 case dealing with state protection for sexual minorities in Costa Rica.²¹⁴ A jurisprudential guide is designated pursuant to section 159(1)(h) of the Immigration and Refugee Protection Act.²¹⁵ Adjudicators are expected to adopt the reasoning in a jurisprudential guide if the facts of the case before them are sufficiently similar. When the RPD received an unusual number of claims from sexual minority claimants from Costa Rica, the RPD decided that these cases turned on the issue of state protection and designated as a jurisprudential guide a decision that concluded that state protection was generally available in Costa Rica.

Several reasons explain the growing relevance of availability of state protection. Availability of state protection has been influenced by the social, political, and legal progress in several countries. Legal reforms include specific measures to protect the human rights of sexual minorities, including remedies such as mechanisms for individual complaints to an

ombudsman or human rights commission or measures to counter homophobia within police and state security forces. Refugee claims adjudicators have therefore begun to examine the extent to which a gay man, lesbian, bisexual, or transgender person can seek protection in his or her country of origin rather than obtain refugee protection in Canada.

Another reason the question of state protection is increasingly relevant in sexual orientation and gender identity claims is the fact that a significant number of claims identify private violence as the source of the feared persecution. Violence against sexual minorities is often committed by individuals who do not represent the state. Shannon Minter states that lesbians, like other women, are often victims of violence at the hands of family members. They are forced to marry; subjected to psychiatric treatment against their will; deprived of their children; and are victims of discrimination with respect to housing, employment, education, and health services.²¹⁶ Gay male claimants also testify about abuse received at the hands of family members,²¹⁷ and the family and social pressures that require them to conform to strict gender-based social roles. Some of the claimants have been forced into marriages of convenience,²¹⁸ while others claim to have been pressured to have children.²¹⁹ The situation of a Nigerian claimant shows the extent to which family members may become the agents of persecution: 'The claimant's father and his three brothers confronted the claimant while he was at university, broke the information that they had about his homosexuality, horsewhipped him, and mistreated him, whereupon the father involved the village elders in a ritual and gave his son, the claimant, an ultimatum: either get married or be gotten rid of by the father.'²²⁰ In another case, a claimant of Moroccan origin testified about the abuse and torture he was subjected to at the hands of his father.²²¹ In such cases, where the agents of persecution are private individuals, the availability of state protection becomes a key issue to be determined, as it is presumed that a claimant could turn to the state for protection from family members or other private persecutors.

The fact that human rights organisations still do not provide adequate documentation on many countries has serious consequences for claimants who have the burden of proof when it comes to state protection. It is difficult to rebut the presumption of state protection when human rights documentation is unavailable or provides little information on attitudes and actual practice. While some cases benefit from extensive and wide-ranging human rights documentation,²²² others rely on a relatively small range of sources.

For example, in a 1999 case involving a gay man from Estonia, the RPD noted that the claimant made unsuccessful attempts to obtain documentary evidence about similarly situated persons.²²³ He was unable to secure any credible human rights information; rather, according to the RPD, he provided second- or third-hand anecdotal evidence and 'opinions gleaned from TV and newspapers' which were not considered sufficient evidence to rebut the presumption of state protection.²²⁴ The documentary evidence that was available showed that 'Estonia is a democracy that is making serious efforts at protecting its citizens from human rights abuses'.²²⁵ While the RPD acknowledged that the documentary evidence made no mention of sexual minority rights, it concluded that 'there was no evidence that Estonian police are homophobic'²²⁶ and the claim was rejected. Lack of evidence was also an issue in *Re J.M.Y.*²²⁷ While homosexuality was found to be against the law in Jordan, the RPD noted that the 'the claimant provided little evidence that the law was generally enforced'.²²⁸ In another case, the RPD cited a 'Response to Information Request' prepared by the Documentation and Resource Directorate on state protection and remedies available to sexual minorities in Brazil who were victims of physical violence.²²⁹ The adjudicator noted that the document highlighted a public opinion poll that showed that 60% of Brazilians of both sexes expressed support for recognition of couples of the same sex.²³⁰ The adjudicator, however, failed to explain how a favourable public opinion poll may evidence state protection.

An additional concern is the emphasis the RPD sometimes places on human rights documentation that outlines progress in the recognition of the rights of sexual minorities over evidence that may suggest that this has not translated into effective state protection. El-Farouk Khaki described the problem thus: ‘We need to look beyond what social advances have been made to the overall human rights situation to see how rights have improved for gay people.’²³¹ Khaki added that ‘[m]ost Latin American countries have amazing constitutions, but that doesn’t mean [they are] enforced.’²³² As has been noted in the Australian context, ‘the absence of criminalising provisions seem[s] to raise overly positive assumptions about the lack of state prosecution or the availability of securing state protection’.²³³ Moreover, where laws do criminalise same-sex sexual conduct, further evidence of their enforcement or threat of enforcement is required in order to rebut the presumption of state protection.²³⁴

The problem, however, is that human rights documentation does not always deal specifically or directly with the availability of state protection for sexual minorities. Take, for instance, a caveat Amnesty International inserted in their recent report on the decriminalisation of homosexuality:

This paper does not provide a survey of statutes and practices that directly or indirectly criminalize individuals for consensual same-sex practices and, by erroneous association, transgender people irrespective of their sexual orientation. Such a study requires careful research across languages and criminal law, analysing specifically what actions are criminalized; how vague laws are interpreted by law enforcement officials and across the legal system(s); how actual or imputed behaviour, gender expression and claims to sexual or gender identity are differently criminalized for women, men and transgender people; how these practices of criminalization are informed by race and class, and so forth. Such a study would be invaluable but is outside the scope of this overview.²³⁵

Unfortunately, comprehensive examinations of statutes and practices are rarely conducted. Even the 2008 ILGA report *State-Sponsored Homophobia* does not include an analysis of the scope, impact, and enforcement of laws that criminalise same-sex conduct. What is required is specific information about how criminal sanctions, whether enforced or not, ‘reinforce persecutory environments and destroy opportunities for [sexual minorities] to seek protection from state authorities’.²³⁶ An Australian refugee decision made the following observation:

The exact numbers of LGBT [lesbian, gay, bisexual and transgender] people that are being prosecuted may not be available, but those figures do not necessarily indicate the level of tolerance or acceptance by public authorities. The ‘effectiveness’ in oppressing LGBT people of legislation criminalising homosexuality is not necessarily reflected in the number of prosecutions. Many LGBT people either abstain from same-sex relationships, or keep occasional social and sexual contacts secret, applying severe restrictions to their social life and personal identity, in order to prevent arrests, harassment or prosecutions. As long as ‘open homosexuality’ is not allowed, and LGBT people live their life in fear and secrecy, the criminalisation of homosexuality can be said to be ‘effective’ in its repression, even if this is not reflected in large numbers of prosecutions and/or arrests.²³⁷

Amnesty International has also recognised that the extent to which a specific law represses sexual minorities goes beyond the direct enforcement of the legislation:

Such laws, even when not implemented, construct societal attitudes, sending a clear message of, at best, second-class citizenship to people who identify as lesbian, gay, bisexual or transgender, or anyone who engages in any form of consensual same-sex sexual conduct, or

those whose self-defined gender identity or gender expression differs from acceptable ‘norms’ of gender and sexuality. It is not just the conduct that is denounced by law but the individual who performs it. Such laws encourage private and state acts of violence and fuel impunity for those acts.²³⁸

Independent country information will be more useful to adjudicators and claimants if the documentation ‘look[s] beyond official reports of prosecutions and persecution to cultures of silence which surround human rights abuses against sexual minorities’²³⁹ and examines the reasons why homophobic violence and abuses may be underreported.

Moreover, when objective evidence is available, the RPD sometimes emphasises evidence that describes progress in the social situation of sexual minorities rather than information that suggests problems with state protection.²⁴⁰ For instance, in *Re D.I.Z.*,²⁴¹ the RPD relied on the ILGA *World Legal Survey* to assess state protection for gay men in Bulgaria. The decision focused on the report’s description of the social networks that have developed in the gay and lesbian communities:

In spite of the negative attitude of the society towards gays and the sexual anonymity of most of the gays the situation has changed in the last several years. Several issues of a gay magazine were issued, gay books were published, gay dating agencies were established, several gay bars, clubs, discos, sex shops were opened. The independent private media inform about gay events, the national and the private television cast films with gay themes, and gay movies are shown in the cinema.

It also stated the following on the capital city of Sofia in particular: ‘there are as many as four gay clubs in Sofia, along with a “sex shop” known as Flamingo’s. The Website further states that Sofia’s Orlov Most (“Eagles Bridge”) and Vazrazhdane Square are gay cruising areas.’²⁴² The RPD noted that ‘[t]he document also refers to discrimination against gays and lesbians and cases of police brutality’ but that the report characterised these incidents as ‘occasional rather than systematic’,²⁴³ and the claim was rejected. In *Pitrowski v. Canada (Minister of Citizenship and Immigration)*,²⁴⁴ the RPD cited a report from a Polish sexual minority rights group,²⁴⁵ but set aside some of its findings in relation to the high rates of violence against sexual minorities²⁴⁶ and refusal to report incidents to the police.²⁴⁷ The RPD emphasised instead evidence indicating that the police were courteous at the Warsaw gay pride parade.²⁴⁸ The decision concluded thus:

Given the documentary evidence and notwithstanding the incidents referred to in the LAMBDA Warsaw Association Report (there are two million gay and lesbian persons living in Poland), plus noting the fact that Poland is now a member of the European Union and is still being monitored as such regarding the extent to which it is capable of protecting its citizens, I find that the claimant has not established a well-founded fear of persecution for a Convention ground in Poland.²⁴⁹

Such decisions suggest that the RPD will interpret human rights documentation that describes the growing social space achieved by sexual minorities as evidence that state protection exists.

Similar human rights documentation can also lead to different conclusions in relation to the availability of state protection. In *Re B.B.Y.*,²⁵⁰ the RPD concluded that the documentary evidence supported the gay claimant’s case that he could not benefit from state protection in Lebanon. Provisions dealing with homosexuality existed in the penal code that made it an imprisonable offence to engage in homosexual activities. Yet in another decision decided a day earlier the RPD dismissed the importance of the same provisions. Relying on ‘gay and

lesbian guides' as evidence, the RPD concluded that despite the fact that open homosexual relationships were not allowed and there was no visible support for gay rights, discreet homosexual behaviour was possible and Lebanese authorities did not actively prosecute homosexuals.²⁵¹

Another issue of relevance for sexual minorities is the fact that they have to declare their sexual orientation in order to access state protection. The question becomes whether this is realistic or reasonable;²⁵² this is an assessment that can benefit from independent country information. For instance, Human Rights Watch published a report on homophobic violence in Jamaica in 2004 and their findings on police authorities are summarised as follows:

Victims of violence are often too scared to appeal to the police for protection. In some cases the police themselves harass and attack men they perceived to be homosexual. Police also actively support homophobic violence, fail to investigate complaints of abuse, and arrest and detain them based on their alleged homosexual conduct. In some cases, homophobic police violence is a catalyst for violence and serious – sometimes lethal – abuse by others.²⁵³

The report detailed numerous violent and abusive incidents supporting the conclusion that it would be unreasonable for Jamaican gay men and lesbians to seek state protection.

In *Re V.Z.D.*,²⁵⁴ the RPD was able to rely on documentation to take into account the impact disclosure of a Mexican woman's sexual orientation would have on her custody dispute with her ex-husband. The RPD concluded thus:

The panel further took into consideration the consequences for xxxxx xxxxxx of such exposure of a police report whereby she would have to disclose her lesbian relationship, given the custody battle between her and her former spouse. The documents indicate that custody could be removed from the custodial parents if moral codes are at issue. The panel finds that in this particular case and circumstances the claimant has established that they are unwilling, due to their fear, to seek the protection of the authorities in Mexico, and that they have provided clear and convincing proof that, given their particular circumstances, the state is therefore unable to protect them.²⁵⁵

In another case, the adjudicator found the documentary evidence regarding state protection to be mixed, but nevertheless concluded that the particular circumstances of the claimant made it unreasonable to expect him to come out and declare himself to be a homosexual in order to access state protection.²⁵⁶ The same conclusion was reached in the case of a Nigerian gay man where the RPD concluded that the claimant would risk his life 'with the exposure of his own alternative lifestyle' to the police.²⁵⁷

While the aforementioned cases carefully examined the issue of disclosure to public authorities, and concluded that the refusal to come out was reasonable, the RPD dismissed a similar reluctance to disclose by a Polish gay man in a 2007 claim. The RPD reviewed the documentary evidence on homophobia in Poland submitted by the claimant and stated that 'it is easy to understand why homosexuals in Poland very often hide their sexual orientation and frequently face discrimination at work, in the street and in their own families'. Nevertheless, the adjudicator concluded,

The fact that he alleged that he did not file a complaint because he was afraid of revealing that he is a homosexual and because he believed that the police sometimes discriminate against homosexuals is not a reasonable excuse for not contacting the authorities, especially when at least some of the aggressors against whom a complaint can be filed can be identified.²⁵⁸

The RPD added that the fact '[t]hat some victims are reluctant to take administrative or legal action against the people who assaulted them, because they do not want to reveal that they are homosexual and because they doubt the effectiveness of the recourse in question, is not clear and convincing evidence of the state's inability to protect them, but simply evidence that such protection is not perfect.'²⁵⁹ Consequently, a claimant's fear of coming out to state authorities needs to be buttressed by human rights reports that specifically detail the consequences of disclosure. While some human rights organisations have begun to include this kind of information, as Human Rights Watch did in the report on Jamaica mentioned above, this is not always the case in other independent country information.

To summarise, in Canadian refugee law, unless the state apparatuses have broken down completely, the state is presumed to be capable of protecting its citizens. Refugee claimants must therefore rebut the presumption of state protection by showing clear and convincing evidence that the state authorities in their countries of origin are unable or unwilling to protect them. This burden is made more difficult for sexual minorities, as independent country information remains hard to find for many parts of the world and because current information is often general and descriptive in relation to state protection rather than specific and evaluative.

c. Internal flight alternative

Claimants have an additional evidentiary burden when making their case for a well-founded fear of persecution. The concept of 'internal relocation alternative', or 'internal flight alternative' (IFA) is an extension of the concept of state protection. In assessing whether a refugee's fear of persecution is well founded, the RPD will determine whether the claimant can avail himself or herself of a safe place in the country of origin. Refugee protection will be denied if a claimant did not exhaust all possibilities of reaching safety in an area within the claimant's own country before seeking international protection. James Hathaway has expressed the concept of IFA as follows: "'internal protection alternative" analysis should be directed to the identification of asylum-seekers who do not require international protection against the risk of persecution in their own country because they can presently access meaningful protection in a part of their own country'.²⁶⁰

While the concept of IFA is not mentioned in international legal instruments, in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, the Federal Court of Canada held that 'a determination of whether or not there is an IFA is integral to the determination of whether or not a claimant is a Convention refugee'.²⁶¹ As outlined in *Rasaratnam* and *Thirunavukkarasu*,²⁶² the test to be applied in determining whether there is an IFA is two-fold: (1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country where it finds an IFA exists; and (2) conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him or her to seek refuge there.²⁶³

The IFA rule essentially involves an analysis of the general situation in the country to determine the risks faced by the claimant in the proposed site of relocation. It also involves a consideration of the individual's personal circumstances to assess the claimant's ability to effectively access and integrate into that location. Both of these conditions must be satisfied for a finding that the claimant has an IFA. Finally, while the burden of proof rests upon the claimant once the issue of IFA has been raised, the RPD 'cannot base a finding that there is an IFA, in the absence of sufficient evidence, solely on the basis that the claimant has not fulfilled the onus of proof'.²⁶⁴

IFAs are increasingly being assessed in claims based on sexual orientation and gender identity.²⁶⁵ Social, political, and legal progress is sometimes highly localised in a state; more tolerant destinations may therefore constitute an IFA for gay men, lesbians, bisexuals, or transgender persons. In addition, meaningful protection in a different area of the country may indeed be available to a claimant where he or she is being persecuted by a non-governmental entity acting independently of any governmental control or support. As mentioned above, private persecution is regularly raised in cases brought forth by members of sexual minorities.

As IFAs are an extension of the concept of state protection, many of the problems identified in the previous section apply to the use of independent country information in determining the viability of an IFA for sexual minorities. Similar to the presumption of state protection, the problem associated with IFAs stems from its increasing use to deny refugee status to claimants who cannot produce enough evidence to negate the possibility of an IFA. While some decisions do rely on extensive documentary evidence,²⁶⁶ many others did not. In many cases, the independent country information did not address the issue of IFAs or the effectiveness of measures that purported to ensure state protection in the alternative location. The concern that independent country information does not probe the actual reality of protection is a constant concern in refugee claims based on sexual orientation and gender identity. For instance, a gay claimant acknowledged that Mexico City had recognised same-sex relationships, in addition to extending inheritance rights and benefits, but he dismissed the reforms: 'But that's paper. I don't need papers in my life, I need reality.'²⁶⁷ In *Orozco Gonzalez v. Canada*, Mexico City was considered a viable IFA on the basis of documentary information that indicated that the capital city had its own annual gay parade; the city government had adopted anti-discrimination legislation; and the police forces had created a preventive policing unit in order to address the issue of homophobia.²⁶⁸ Nothing in the independent country information addressed the actual implementation of the measures adopted by authorities in Mexico City; in fact, it appears that such an assessment was not available. The claimant, who had the burden of proof, could offer no objective evidence to rebut the suggestion that Mexico City was a viable IFA. He simply described the independent country information as 'crap'.²⁶⁹ In another case, the RPD dismissed a claimant's attempt to challenge the existence of an IFA on the basis that the documentary evidence was outdated.²⁷⁰

The problem with independent country information is in large part due to the fact that an IFA is a highly specific refugee law concept. International and national human rights organisations generally engage in fact-finding in attempts to influence public opinion and international organisations and to shame and stigmatise abusive governments. They are not primarily concerned with gathering information to meet the specific legal needs of asylum seekers and refugee claimants. Therefore, human rights reports rarely compare internal locations to determine whether one part of a country is a safer place for minorities or targeted individuals. In their recent report on Turkey, Human Rights Watch provided a comprehensive picture of the discrimination and repression facing sexual minorities.²⁷¹ However, the report did not compare the status of gay men, lesbians, bisexuals, and transgender persons relative to their geographic location within the country. It is therefore unclear how useful the information in the report will be to a refugee claimant trying to counter claims that large cities like Ankara or Istanbul may constitute IFAs.

The unreliability of independent country information in relation to IFAs is evidenced by the RPD's attempt to deal with the issue in relation to Mexican claims. In October 2006, the IRB identified a 2005 decision, *Gutierrez v. Canada*,²⁷² as having persuasive value regarding the availability of an IFA in Mexico for refugee claims on grounds of

sexual orientation or gender identity.²⁷³ While persuasive decisions are not binding on adjudicators, they are offered 'as models of sound reasoning that may be adopted in appropriate circumstances'.²⁷⁴ Adjudicators 'are encouraged to rely upon them in the interests of consistency and collegiality'.²⁷⁵ In the Mexican case, decided on 24 February 2005, the RPD held that Mexico City constituted an IFA for gay men and lesbians. The finding relied on a national documentation package dated November 2004, although more recent information from 2005 was available at the time.²⁷⁶ In addition, the viability of Mexico City as an IFA was buttressed by a 2003 report by the World Policy Institute in which the author claimed that strong regional contrasts existed in the treatment of sexual minorities but that substantial gains had been made in such urban centres as Mexico City.²⁷⁷ Several RPD decisions cited this 2003 human rights report in support of their findings that Mexico City was an IFA for sexual minorities.²⁷⁸

The IRB must have felt fairly confident that the decision was reliable to designate it as a persuasive decision in 2006. Yet, less than a year later, RPD adjudicators were calling into question the conclusion that Mexico City was a safe place for sexual minorities. Indeed, even as an IRB spokesperson was quoted in July 2007 as saying that 'there is a persuasive decision that argues homosexual refugee claimants have an in-country flight alternative in Mexico City to escape persecution for their sexual orientation',²⁷⁹ some refugee claims adjudicators were rejecting the accuracy of the decision. In *Re H.K.T.*, the persuasive decision was characterised as an older case that, having relied on evidence available in 2004, was now pre-empted by evidence available in 2007.²⁸⁰ The adjudicator concluded that the persuasive decision 'is neither persuasive, nor helpful, for a case to be determined in 2007'.²⁸¹ The viability of an IFA in Mexico City was rejected and the claimant was considered to be a person in need of refugee protection on account of his sexual orientation. In another 2007 case, the persuasive decision was also found to be unhelpful because the claimant was already living in Mexico City and the adjudicator held that, 'even in Mexico City, homophobia is still common, and although protective measures exist, they are ... ineffective'.²⁸² Interestingly, both these 2007 decisions used country information packages put together by the Documentation and Research Directorate of the IRB to conclude that the findings of the persuasive decision in relation to Mexico City as an IFA were not in fact persuasive.²⁸³ Finally, in May 2008, the Deputy Chairperson of the RPD issued a notice revoking the persuasiveness of the decision regarding the availability of an internal flight alternative in Mexico, stating that 'over time, the evidence on which the ... decisions were based may have become dated and the reasoning in the decisions, based on the evidence, may no longer have persuasive value relevant to more recent claims'.²⁸⁴

Conclusion

The preceding discussion has attempted to demonstrate how gay, lesbian, bisexual, and transgender refugee claimants in Canada continue to find themselves disadvantaged when it comes to proving the objective elements of the refugee definitional test. The study reveals that evidentiary challenges have evolved since 1991, when claims based on sexual orientation were first introduced in the refugee determination process in Canada. It is certainly significant that mainstream human rights organisations are no longer reluctant to advocate on behalf of sexual minorities, in contrast to the neglect that existed as recently as the early 1990s. This has resulted in an increase in independent country information on the human rights situations of gay men, lesbians, bisexuals, and transgender people around the world. In addition, the efforts of sexual minority rights organisations to overcome

indifference of mainstream human rights organisations by investigating and reporting the most egregious violations are no longer regarded with distrust at refugee hearings.

Despite these developments, assessment of the objective basis of sexual-orientation- or gender-identity-based claims for refugee protection continues to present challenges to both claimants and RPD adjudicators. First, availability of documentation remains a problem. The extent to which mainstream international human rights organisations and sexual minority rights groups are able to uncover worldwide abuses against sexual minorities is still limited. In most countries, stigma continues to attach to issues surrounding sexual orientation and gender identity. This often means that homophobic violence is frequently unreported, undocumented, and ultimately unpunished, making it difficult to investigate the problem. Increased activism has also been met with attacks on gay, lesbian, bisexual, and transgender human rights defenders, which seriously impede their ability to document violations. Resource limitations also hinder the ability of human rights groups to investigate and publish reliable, current, and comprehensive information. Failure to document abuses can still impact claimants negatively and the absence of reliable independent country information has led adjudicators to use inappropriate sources as substitutes.

Second, the legal issues considered determinative of a refugee claim have shifted towards more complex issues of fact and law. The inquiry into a claim based on sexual orientation or gender identity has become increasingly layered. Rather than simply assessing the existence of serious human rights violations against sexual minorities, adjudicators are now interested in determining whether claimants fear discrimination rather than persecution, whether they can access state protection, and the extent to which another internal location can serve as alternative refuge. All three of these issues are linked to objective conditions in the country of origin and therefore require documentation in order to properly evaluate their relevance to a claimant's case. The absence of independent country information that is sufficiently focused or detailed to meet these new issues often translates into poor assessments in the refugee hearing room.

The findings of this study suggest two main paths to improving the evidentiary burden of sexual minority claimants. First, refugee claims adjudicators must take into account the obstacles that continue to impede the production of adequate independent country information. While documentation has increased and improved, significant challenges remain, especially in relation to providing the kind of specific and detailed evidence now required to distinguish persecution from discrimination, and to rebut the presumption of state protection. In the early 1990s, the IRB responded to problems with independent country information by providing training to adjudicators in addition to increasing their own efforts to research human rights situations. Such efforts must be continued, as evidentiary problems facing sexual minorities have not yet disappeared, and adjudicators must understand the scope of ongoing challenges. In addition, research conducted and evaluated by the IRB can often be more specific to the issues raised at refugee determination hearings than general human rights reports may offer.

Second, human rights organisations must take steps to improve the independent country information that ends up being used at refugee hearings. Human rights organisations must explicitly acknowledge that their work is not only used to influence public opinion and to shame abusive governments, but is also a vital piece in the refugee determination process. For instance, country reports produced by human rights organisations should not only direct recommendations to the government of the state under investigation, but data should also be assessed in a way that will be useful to refugee-accepting countries. Increased focus should be given to the distinction between persecution and discrimination, to the availability of state protection as well as to possible regional contrasts in the treatment of sexual minorities

within a country. More human rights organisations must research the situations of sexual minorities, and those who already do must augment their work in the area in order to ensure that information is available for all regions of the world. Finally, human rights information must be produced for countries from which significant numbers of sexual minorities are fleeing, as these refugees will in all likelihood require objective evidence to gain refugee protection in another country.

Independent country information plays an important role in the refugee determination process. It is therefore essential for refugees that international human rights organisations continue to document violations against sexual minorities and take into account the specific requirements of the refugee determination process when producing information. Refugee claims adjudicators in turn must keep in mind the cultures of silence which surround human rights abuses against sexual minorities and examine the reasons why homophobic violence and abuses may be under-reported. Should both these developments take place, the refugee determination process in Canada and elsewhere as it applies to sexual minorities will ultimately provide a better guarantee of protection.

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Notes

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2. Human Rights First, *Homophobia: 2007 Hate Crime Survey* (New York: Human Rights First, 2007), 5–6, <http://www.humanrightsfirst.info/pdf/07601-discrim-hate-crimes-web.pdf> (accessed 29 November 2008); IGLHRC, 'IGLHRC Condemns the Violence at Moscow's Gay Pride Rally', press release, 30 May 2007, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=733> (accessed 29 November 2008); and Kent Coolen, 'Moscow Pride Organizers Outwit Opposition', *Xtra!*, 4 June 2008, http://www.xtra.ca/public/viewstory.aspx?Aff_TYPE=1&STORY_ID=4877&PUB_TEMPLATE_ID=1 (accessed 29 November 2008).
3. Human Rights Watch, 'Kyrgyzstan: Halt Anti-gay Raids', <http://hrw.org/english/docs/2008/04/17/kyrgyz18570.htm> (accessed 29 November 2008).
4. Human Rights Watch, 'Jamaica: Shield Gays from Mob Attacks', <http://hrw.org/english/docs/2008/02/01/jamaic17957.htm> (accessed 29 November 2008); Krishna Rau, 'Fleeing for My Life': Jamaican Activist Seeks Refuge in Canada', *Xtra!*, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=4387&PUB_TEMPLATE_ID=2 (accessed 29 November 2008).
5. Amnesty International, 'Uganda: Amnesty International Condemns Attacks against Lesbian, Gay, Bisexual and Transgender People', <http://www.amnesty.org/en/library/asset/AFR59/004/2008/en/6e4ca521-32e1-11dd-863f-e9cd398f74da/af90042008eng.pdf> (accessed 29 November 2008).
6. The expression 'sexual minority' will be used throughout this paper to refer to those whose minority status is a result of either their sexual or emotional conduct with another person of the same sex or their refusal to conform to social roles tied to their biological sex at birth. Thus, the notion of sexual minorities regroups gays, lesbians, bisexuals, and transgender persons who include transsexuals and transvestites. The author recognises, however, that the expression does not distinguish differences among sexual minorities. The terms 'gay',

'lesbian', 'bisexual', 'transgender', 'homosexual', and 'same-sex' will also be used in a partial attempt to address the inadequacies of the expression 'sexual minority'.

7. For a survey of laws prohibiting same-sex sexual conduct, see Daniel Ottosson, *State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults* (Brussels: ILGA, 2008), http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf (accessed 29 November 2008).
8. Human Rights First, *Homophobia: 2007 Hate Crime Survey*, 5.
8. Ibid.
9. *The Guardian*, 'Cuba's First Gay Pride Parade Cancelled', 26 June 2008, <http://www.guardian.co.uk/world/2008/jun/26/cuba> (accessed 29 November 2008).
10. See Sonia Katyal, 'Exporting Identity', *Yale Journal of Law & Feminism* 14 (2002): 97, 125–32; see also *Re H.F.P.* [1999] CRDD No. 188 ¶ 15 (QL); *Re C.X.S.* [1995] CRDD No. 134 (QL); *Re U.F.S.* [1999] CRDD No. 81 (QL); *Re J.P.R.* [1999] CRDD No. 182 ¶ 9 (QL); *Re M.X.J.* [2006] RPDD No. 113 ¶ 8 (QL).
11. See *Re U.L.X.* [1998] CRDD No. 83 ¶ 2 (QL); *Re C.Y.T.* [1998] CRDD No. 186 ¶ 2 (QL); *Re V. (O.Z.)* [1993] CRDD No. 164 (QL).
12. See *Re C.X.S.*; *Re P.L.Z.* [2000] CRDD No. 97 ¶ 12 (QL).
13. See *Re L. (M.D.)* [1992] CRDD No. 328 (QL); *Re P. (E.U.)* [1992] CRDD No. 397 (QL); *Re B.B.Y.* [2003] RPDD No. 29 ¶ 8 (QL).
14. See *Re L. (M.D.)*; *Re G.J.M.* [2002] CRDD No. 71 (QL); see also Marta Falconi, 'Gay Italian Labelled as Disabled Wins Discrimination Case against Gov't', *CBC News*, 14 July 2008, <http://www.cbc.ca/cp/Oddities/080714/K071404AU.html> (accessed 29 November 2008); *BBC News*, 'Gay Counselling' Call Rejected', 6 June 2008, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7439661.stm (accessed 29 November 2008); *News 24*, 'Homosexuality Is a Disease', 28 June 2008, http://www.news24.com/News24/World/News/0,,2-10-1462_2348827,00.html (accessed 29 November 2008).
15. See Nicole LaViolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines', *International Journal of Refugee Law* 19, no. 2 (2007): 180.
16. IGLHRC, 'First-Ever Asylum Granted to Persecuted Gay Man', media alert, 3 August 1993; and IGLHRC, 'Attorney General Supports Gay Asylum', press release, 17 June 1994.
17. Brent Creelman, 'Gay Iraqis Win Asylum in UK, but Process Still Too Tough for Most', *Xtra!*, 20 September 2007, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=1&STORY_ID=3622&PUB_TEMPLATE_ID=1 (accessed 29 November 2008); *BBC News*, 'Gay Iranian Granted Asylum', 21 May 2008, http://news.bbc.co.uk/2/hi/uk_news/7411706.stm (accessed 29 November 2008). For an analysis of UK decisions, see Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003', *Social & Legal Studies* 14, no. 1 (2005): 115.
18. Maryellen Fullerton, 'A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group', *Cornell International Law Journal* 26, no. 3 (1993): 505, 531–5.
19. *Re G.J.* [1995] Refugee Appeal No. 1312/93 (Refugee Status Appeals Authority), where the New Zealand Appeals Authority granted asylum to a gay man from Iran.
20. David Tuller, 'Political Asylum for Gays?', *The Nation* 256, no. 15 (19 April 1993): 520; Christopher N. Kendall, 'Lesbian and Gay Refugees in Australia: Now that "Acting Discreetly" Is No longer an Option, Will Equality Be Forthcoming?', *International Journal of Refugee Law* 15, no. 4 (2003): 715.
21. IGLHRC, *International Asylum*, Fact Sheet, 20 April 1995.
22. Ibid.
23. Human Rights Watch, 'Netherlands: Asylum Rights Granted to Lesbian and Gay Iranians', press release, 19 October 2006, <http://hrw.org/english/docs/2006/10/19/nether14428.htm> (accessed 29 November 2008); *Gay Times*, 'Dutch Government Grants Asylum to Gay and Lesbian Refugee', April 1993.
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- B. Goldberg, 'Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men', *Cornell International Law Journal* 26, no. 3 (1993): 605.
25. Ghassan Kassisieh, *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (Sydney: Gay & Lesbian Lobby, 2008), 32.
 26. James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 91–3.
 27. 1951 UN Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, Can. TS 1969 No. 7 (entered into force: 22 April 1954) [Convention].
 28. 1967 Protocol Relating to the Status of Refugees, 16 December 1967, 606 UNTS 267, Can. TS 1969 No. 6 (entered into force: 4 October 1967). The Protocol renders international protection for refugees universal, since the Convention covered only persons whose reason to flee was linked to an event that occurred in Europe prior to 1951.
 29. Immigration and Refugee Protection Act, SC 2001, c. 27. The definition of 'Convention refugee' is as follows: 'A Convention refugee is 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, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.'
 30. *Ward v. Canada (Attorney General)* [1993] 2 SCR 689, reversing [1990] 2 FC 667, affirming (1988) 9 Imm. LR (2d) 48, 709. The agents of persecution can be authorities of the state as well as persons not attached to the government. According to *Ward*, it must be shown that the state is tolerating the persecution by non-state agents or is incapable of protecting the individual who is the target of the persecution. See *Ward*, 709, 713, 717, 720, 721, LaForest J.
 31. Convention, Art. 33.
 32. *Adjei v. Canada* (1989) 7 Imm. LR (2d) 169.
 33. *Ibid.*, 171, citing Immigration Appeal Board in its decision of 19 May 1988.
 34. *Ibid.*, 172. The court held that a claimant's fear of persecution would be well founded if there was a 'reasonable chance' that persecution would take place. This test requires that there need not be more than a 50% chance but there must be more than a minimal possibility: *ibid.*, 173.
 35. James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 71. For a discussion of the subjective element of 'well-founded fear', see Michael Bossin and Laila Demirdache, 'A Canadian Perspective on the Subjective Component of the Bipartite Test for "Persecution": Time for Re-evaluation', *Refugee* 22, no. 1 (2004): 108.
 36. Hathaway, *The Law of Refugee Status*, 89. It is important to note that, because an individual need only fear a future risk of persecution, evidence of individualised past persecution is not necessary, but it is certainly an important indicator of the treatment awaiting the claimant if he or she should return home: *ibid.*, 87.
 37. *Ibid.*, 84. The Federal Court of Appeal has stated that a claimant's testimony will be presumed to be credible if the applicant swears to the truth of the allegations.
 38. Nurjehan Mawaani, 'Evidentiary Matters at the Immigration and Refugee Board in an Age of Diversity', *Canadian Journal of Administrative Law & Practice* 8, no. 1 (1994): 42.
 39. Immigration & Refugee Act, s. 170(i).
 40. *Ibid.*, s. 170(g).
 41. *Ibid.*, s. 162(2).
 42. *Ibid.*, s. 170(h).
 43. *Re R. (U.W.)* [1991] CRDD No. 50 (QL). My analysis of IRB decisions regarding sexual orientation is based on a review of all cases reported in writing by the Convention Refugee Determination Division, now known as the Refugee Protection Division (RPD), and some cases reported by the media. The IRB has a statutory requirement to provide written reasons only when it renders negative decisions. Because of the heavy workload of IRB adjudicators, positive decisions are usually delivered orally and rarely put down in writing unless otherwise requested by a claimant's lawyer: see Gerald H. Stobo, 'The Canadian Refugee Determination System', *Texas International Law Journal* 29 (1994): 391. My examination thus relies on a larger number of negative decisions than positive ones.
 44. Marina Jimenez, 'Gay Refugee Claimants Seeking Haven in Canada', *Globe and Mail*, 25 April 2004, <http://www.theglobeandmail.com/servlet/story/RTGAM.20040423.wrefugee24/BNSStory/Front/?query=%22Gay+refugee+claimants%22> (accessed 29 November 2008).

45. Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada', *McGill Law Journal* 53 (2008): 70.
46. *Ibid.*, 71: Rehaag determined that '[t]he grant rates in sexual-orientation cases in 2004 were 49% overall, 48% for female claimants, and 50% for male claimants' and that the average grant rate for the whole of refugee claims for the same period was 45%.
47. For an analysis of case law pertaining to the definition of 'particular social group' and sexual minorities, see LaViolette, 'The Immutable Refugees'. For specific cases that raised this issue, see *Re R. (U.W.)* [1991] CRDD No. 501 (QL); *Re N. (K.U.)* [1991] CRDD No. 1140 (QL); *Re N. (L.X.)* [1992] CRDD No. 47 (QL); *Re L. (M.D.)*, note 13 above; *Re X. (J.K.)* [1992] CRDD No. 348 (QL); *Re V. (O.Z.)*, note 11 above; *Re E. (Q. R.)* [1993] CRDD No. 331 (QL); *Re H. (Y.F.)* [1994] CRDD No. 185 (QL); *Re H. (Y.N.)* [1994] CRDD No. 13 (QL); *Re W. (U.K.)* [1995] CRDD No. 123 (QL); *Re F.I.N.* [1995] CRDD No. 151 (QL); *Re N. (O.I.)* [1995] CRDD No. 112 (QL); *Re B. (W.B.)* [1995] CRDD No. 108 (QL); *Re C.X.S.*, note 10 above; *Re U.Y.O.* [1996] CRDD No. 163 (QL); *Re J.K.D.* [1997] CRDD No. 307 (QL); *Re K.V.R.* [1997] CRDD No. 312 (QL); *Re B.Q.D.* [1997] CRDD No. 308 (QL).
48. *Ward v. Canada (Attorney General)*.
49. Even though *Ward* had a significant impact on sexual orientation claims, the facts in *Ward* did not revolve around a gay or lesbian claimant. Rather the case involved a member of the Irish National Liberation Army (INLA) who, after helping two hostages escape, was sentenced to death by the terrorist organisation. He fled to Canada, and sought refugee status based on his fear of persecution for membership in a particular social group, i.e. the INLA. In the course of deciding whether the INLA could be considered a 'particular social group', the Supreme Court of Canada set forth a definition of the concept that at the same time resolved the status of sexual minorities as a social group in Canadian refugee law.
50. *Pizarro v. Canada (Minister of Employment and Immigration)* [1994] FCJ No. 320 ¶ 5 (QL).
51. Sexual minority claimants have also founded their fear of persecution on political opinion: see *Re U.L.X.* In addition, sexual minority claimants have founded their fear of persecution on membership in a particular social group based on gender: see *Re C.L.Q.* [1996] CRDD No. 145 (QL).
52. See *Re W. (U.K.)*; *Re I.O.D.* [1995] CRDD No. 167 (QL); *Re F.I.N.* [1995] CRDD No. 151 (QL); *Re N. (O.I.)*; *Re B. (W.B.)*; *Re C.X.S.*; *Re C.D.H.* [1996] CRDD No. 210 (QL); *Re X.Q.P.* [1996] CRDD No. 222 (QL); *Re E.N.U.* [1997] CRDD No. 67 (QL); *Re G.P.E.* [1997] CRDD No. 215 (QL); *Re C.R.H.* [1997] CRDD No. 178 (QL); *Re G.W.M.* [1997] CRDD No. 238 (QL); *Re S.E.X.* [1997] CRDD No. 277 (QL); *Re K.V.R.*; *Re T.B.E.* [1997] CRDD No. 304 (QL); *Re J.M.E.* [1998] CRDD No. 19 (QL); *Re F.V.Y.* [1998] CRDD No. 20 (QL); *Re B.S.J.* [1998] CRDD No. 32 (QL); *Re T.Q.B.* [1998] CRDD No. 101 (QL); *Re C.Y.T.*; and *Re U.O.L.* [1998] CRDD No. 166 (QL).
53. It is important to underscore that a claimant does not actually have to be a member of the particular social group. According to *Ward*, it is sufficient that the agents of persecution believe the person to be a member of the particular social group. This principle was applied by the Federal Court to claims based on sexual orientation in *Dykon v. Canada (Minister of Employment and Immigration)* [1994] FCJ No. 1409 (QL). The Federal Court held that 'it is totally irrelevant ... whether [the refugee claimant] was in fact a homosexual or not' (para. 3). It is the beliefs of the persecutors that are important, and whether the individuals responsible for the persecution perceive the claimant to be a homosexual.
54. The IRB has conducted professional development training with its members on several occasions since 1995 to respond in part to concerns about the use of human rights documentation evidence in claims based on sexual orientation and gender identity. The author developed and presented these professional training seminars to RPD staff in 1995, 1999, 2003, and 2004; see Nicole LaViolette, 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about their Membership in the Particular Social Group', in *Asylum Based on Sexual Orientation: A Resource Guide*, ed. Sydney Levy (San Francisco: IGLHRC, 1996). This particular training document was updated in 2004; see Nicole LaViolette, 'Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about their Membership in the Particular Social Group' (on file with author). The training is also mentioned in Maria Jiménez, 'Nicaraguan Wins Reprieve in Bid to Remain in Canada', *Globe and Mail*, 10 February 2007; Jen Lahey, 'Sweating Bullets: How Canada's Gay Refugees Get Stuck in Legal Limbo', *Capital Xtra*, 20 February 2008, 14.

55. See *Re H.F.P.*, ¶ 9; *Re V.P.F.* [1999] CRDD No. 191 ¶ 4 (QL); *Re Y.J.E.* [1999] CRDD No. 288 ¶ 6 (QL); *Re P.L.Z.* [2000] CRDD No. 97 ¶ 11 (QL); *Re J.Q.U.* [2001] CRDD No. 90 ¶ 3 (QL).
56. See *Re U.O.D.* [1999] CRDD No. 106 ¶ 10 (QL); *Valdes v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 140 ¶ 30 (QL); see also *Re H.S.O.* [2001] CRDD No. 19 ¶ 17–19 (QL) (where the RPD rejected a video that had been submitted by the claimant which showed the claimant having sex with another man, and stated that the ‘videotape was shot purposely to be used as evidence in the refugee hearing and the story about the claimant and xxxxx was a concoction to support his allegation that he was persecuted as a homosexual’).
57. See *Re H.F.P.*; *Re G.J.M.*, ¶ 16; *Re P.L.L.* [2005] RPDD No. 21 ¶ 28; see also *Re U.P.V.* [1999] CRDD No. 145 (QL) (where a claimant’s failure to provide corroborating letters from gay organisations he stated he was involved in led the adjudicator to conclude that he was not gay).
58. See *Re W.X.S.* [2004] RPDD No. 15 (QL) (where a Ugandan claimant filed a medical report in which a Ugandan doctor concluded that the claimant had been having regular anal sex. The claimant testified that this caused him to be expelled from school. The RPD accepted this document as credible in relation to establishing his homosexuality).
59. Matt Mills, ‘Nicaraguan Refugee Goes into Hiding’, *Xtra!*, 16 August 2007, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=3497&PUB_TEMPLATE_ID=2 (accessed 29 November 2008); Kevin Ritichie, ‘Queer Refugees Unfairly Rejected, Critics Say’, *Xtra!*, 11 October 2007, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=3717&PUB_TEMPLATE_ID=1 (accessed 29 November 2008).
60. Tracy J. Davis, ‘Opening Doors of Immigration: Sexual Orientation and Asylum in the United States’, *Human Rights Brief* 6, no. 3 (1999): 19.
61. *Ibid.*
62. See *Re R. (U.W.)*; *Re N.(K.U.)* [1991] CRDD No. 1140 (QL); *Re N. (L.X.)*; *Re P.(E.U.)*; *Re X. (W.B.)* [1992] CRDD No. 549 (QL); *Re J.(F.H.)* [1993] CRDD No. 98 (QL); *Re Q. (B.C.)* [1993] CRDD No. 209 (QL); *Re T. (F.N.)* [1993] CRDD No. 326 (QL); *Re H. (Y.F.)*; *Re H. (Y.N.)*; *Re I.O.D.*; *Re D. (C.J.)* [1995] CRDD No. 86 (QL); *Re C.L.Q.*; and *Re O.R.C.* [1997] CRDD No. 66 (QL).
63. This section is based in part on a previous paper published by the author: Nicole LaViolette, ‘Proving a Well-Founded Fear: The Evidentiary Burden in Refugee Claims Based on Sexual Orientation’, in *Asylum Based on Sexual Orientation: A Resource Guide*, ed. Sydney Levy (San Francisco: IGLHRC, 1996). For an examination of evidentiary issues related to sexual orientation claims in both the Canadian and Australian refugee determination processes, see Catherine Dauvergne and Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers’, *Federal Law Review* 31(2003): 299.
64. James D. Willets, ‘International Human Rights Law and Sexual Orientation’, *Hastings International and Comparative Law Review* 18, no. 1 (1994): 72. Amnesty International had been lobbied for 17 years before finally deciding to regard those imprisoned for their sexuality as prisoners of conscience.
65. For instance, it was only in 1994 that Human Rights Watch, a well-respected human rights organisation based in the United States, adopted a statement opposing human rights violations against gay men and lesbians; see Human Rights Watch, ‘Two Recent HRW Actions’, press release, 24 July 1995. The International Commission of Jurists incorporated sexual minority equality into its mandate in 1994; see John Fisher, ‘A Revolution that’s Going Global’, *Xtra!*, 5 August 1994, 13. The first Canadian NGO report on human rights violations against gay men and lesbians was published in April 1996 by the Inter-Church Committee on Human Rights in Latin America (ICCHRLA): ICCHRLA, *Violence Unveiled: Repression against Lesbians and Gay Men in Latin America* (Toronto, 1996), http://www.choike.org/documentos/gays_violence.pdf (accessed 29 November 2008).
66. The resistance of the international NGO community was evident at the 1993 UN World Conference on Human Rights held in Vienna. A first draft of the report of the NGO forum to be presented to a Plenary Session of the World Conference made no mention of the sexual minority issues that were discussed in several workshops of the Forum. Only after extensive lobbying were gay men and lesbians mentioned in the Final Report: ILGA, *The International Lesbian and Gay Association at the United Nations World Conference on Human Rights* (Brussels: ILGA 1993).

67. UN Economic and Social Council, Commission on Human Rights, *The Legal and Social Problems of Sexual Minorities*, E/CN.4/Sub.2/1988/31, 1987.
68. *Gay Times*, 'UN Briefed on Lesbian and Gay Human Rights', October 1992.
69. Rex Wockner, 'A Critical Mass', *Advocate*, 17 October 1995, 20–1.
70. *Re R. (U.W.)*.
71. *Re P. (E.U.)*.
72. See *Re X. (W.B.)*; *Re Q. (B.C.)*; *Re T. (F.N.)*; and *Re H. (Y.F.)*.
73. Juan Pablo Ordoñez, *No Human Being Is Disposable* (San Francisco: IGLHRC, 1995), 65–6. Ordoñez had his life threatened for investigating abuses against sexual minorities and had to leave Colombia as a result.
74. *Ibid.*, 9.
75. IGLHRC, *The International Tribunal on Human Rights Violations against Sexual Minorities* (New York, 1995), 8–9, <http://www.iglhrc.org/files/iglhrc/reports/Tribunal.pdf> (accessed 29 November 2008).
76. *Re H. (Y.F.)*.
77. *Ibid.*
78. *Re N. (L.X.)*.
79. *Ibid.*
80. *Ibid.*
81. *Re H. (Y.F.)*.
82. *Ibid.* The same evidence was presented in an American asylum case when Dr Luis Mott, the sociologist who had investigated the murders, testified about his findings. The gay man from Brazil was granted asylum by an immigration judge in that case, who found that 'based on the testimony and the documentation submitted ... the respondent's fear of persecution ... is objectively reasonable'; see Jin S. Park, 'Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians under U.S. Immigration Policy', *UCLA Law Review* 42 (1995): 1153.
83. *Re H. (Y.N.)*.
84. *Ibid.*
85. For instance, IRB cited information from the Quaker Council for European Affairs on conscientious objectors in a National Documentation Package on the Ukraine: IRB, *National Documentation Package – Ukraine*, 19 March 2008, http://www.irb-cisr.gc.ca/en/research/ndp/index_e.htm?id=614 (accessed 29 November 2008). Information produced by Reporters Without Borders was included in a National Documentation Package on China: IRB, *National Documentation Package – China*, 19 March 2008, http://www.irb-cisr.gc.ca/en/research/ndp/index_e.htm?id=598 (accessed 29 November 2008). In a similar package about El Salvador, the IRB cited a report from the International Confederation of Free Trade Unions: IRB, *National Documentation Package – El Salvador*, 19 March 2008, http://www.irb-cisr.gc.ca/en/research/ndp/index_e.htm?id=605 (accessed 29 November 2008).
86. Amnesty International, letter to ILGA Members, 'AI Members for Lesbian and Gay Concerns', 28 June 1994.
87. Amnesty International members attended ILGA's international conference held in New York in June 1994.
88. *Re H. (Y.F.)*.
89. Amnesty International USA, *Breaking the Silence* (New York: Amnesty International USA, 1994), 37.
90. Julie Dorf, 'International Human Rights: Advocating for Gays and Lesbians' (lecture, University of Ottawa, Ottawa, Canada, 15 March 1994).
91. El-Farouk Khaki, interview by Nicole LaViolette, Toronto, May 1995.
92. See *Re H. (Y.N.)*.
93. Canadian Council for Refugees, Working Group on Refugee Protection, 'Addressing Claims Based on Sexual Orientation', policy statement, 1995, 4.
94. Amnesty International USA, *Breaking the Silence*; Amnesty International, *Violations of the Human Rights of Homosexuals: Extracts from Amnesty International Action Materials* (London, 1994); *idem*, *Killings of Gay Men in Chiapas: The Impunity Continues* (London, 1994); *idem*, *Human Rights Are Women's Rights* (New York, 1995), 169–210; see also *Re N. (O.I.)*, n. 17 (which relied on a news story which that reported that Amnesty International feared that sexual minorities were being persecuted in Venezuela); *Re J.J.Y.* [1996] DSSR

- No. 50 (QL) (where information from Amnesty International was cited in relation to a Venezuelan claimant).
95. Committee to Protect Journalists, *Double Jeopardy: Homophobic Attacks on the Press, 1990–1995* (New York: Committee to Protect Journalists, 1995).
 96. ICCHRLA, *Violence Unveiled*.
 97. In 1996, the Lawyers Committee for Human Rights criticised the United States Department of State's *Country Reports on Human Rights Practices for 1993* for failing to report the persecution and murder of gay men in Mexico and the failure or lack of appropriate police investigations: see *Re N.K.O.* [1996] CRDD No. 238 ¶ 13 (QL).
 98. Human Rights Watch, Free Expression Project, *A Ruling by U.S. Anti-Pornography Activists is Used to Restrict Lesbian and Gay Publications in Canada* (New York, 1994); Human Rights Watch/Helsinki, letter to the Russian Federation about the harassment of a gay journalist, 18 July 1995; Human Rights Watch/Americas, letter to the Salvadoran government about death threats to AIDS and gay groups, 6 July 1995; Human Rights Watch, *Unsettled Business; Human Rights in Chile at the Start of the Frei Presidency* (New York, 1994), 32–3; Scott Long, *Public Scandals: Sexual Orientation and Criminal Law in Romania* (New York: Human Rights Watch and IGLHRC, 1998), <http://www.hrw.org/reports97/romania/> (accessed 29 November 2008); *Re S.E.X.* (citing information gathered by Human Rights Watch in support of a claim from a Romanian gay man).
 99. See, e.g., IGLHRC and Human Rights Watch, *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa* (New York: Human Rights Watch, 2003), <http://www.hrw.org/reports/2003/safrica/safrighrc0303.pdf> (accessed 29 November 2008); see also Cynthia Rothschild and Scott Long, *Written out: How Sexuality Is Used to Attack Women's Organizing* (IGLHRC and Center for Women's Global Leadership, 2005), <http://www.ighrc.org/files/ighrc/WrittenOut.pdf> (accessed 29 November 2008); Long, *Public Scandals*.
 100. *Re H.F.P.*, ¶ 14–16.
 101. *Re G.J.M.*, ¶ 23.
 102. Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity* (London, 2001), 33, <http://www.amnesty.org/en/library/asset/ACT40/016/2001/en/dom-ACT400162001en.pdf> (accessed 29 November 2008).
 103. *Re F.C.B.* [1999] CRDD No. 89 ¶ 19 (QL).
 104. *Re L.(O.V.)* [1995] CRDD No. 4 (QL). The same report was cited in *Re U.Y.O.*; and *Re Z.P.O.* [1996] DSSR No 47 (QL).
 105. *Re W. (U.K.)*, n. 7; see also *Re G.U.S.* [1996] CRDD No. 239 (QL) (where a statement of Julie Dorf, then Executive Director of the IGLHRC, was cited in support of another Ukrainian claimant).
 106. *Re B. (W.B.)*; see also *Re C.D.H.*; and *Re B.Q.D.* (citing IGLHRC information in support of certain Chilean lesbian claimants).
 107. *Re W.R.O.* [2000] CRDD No. 284 ¶ 10 (QL); but see *Neto v. Canada (Citizenship and Immigration)* 2007 FC 664, [2007] FCJ No. 893 (QL) (where the RPD accepted a report from ILGA provided by IRB as reliable, but rejected an ILGA report produced by the claimant because it did not come from a reliable and independent source).
 108. *Re Q.N.W.* [1998] CRDD No. 38 (QL).
 109. *Re F.O.K.* [1998] CRDD No. 228 ¶ 33 (QL).
 110. *Ibid.*, ¶ 32.
 111. Stobo, 'The Canadian Refugee Determination System', 387.
 112. The author reviewed responses of the Directorate entitled 'Information Requests', which represent answers to questions received from then Convention Refugee Determination Division Board adjudicators.
 113. IRB, Research Directorate, Documentation, Information and Research Directorate, *Question and Answer Series – Iran: Chronology of Events June 1989 – July 1994*, August 1994, 3 and 18.
 114. As a contractor with Human Rights Internet, the author researched and produced the bibliography and selection of articles that was published by the Documentation, Information and Research Branch of IRB in June 1996.
 115. IRB, 'Mexico: Treatment of Sexual Minorities', issue paper, April 1999, http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=108&cid=0&disclaimer=hide (accessed 29 November 2008).

116. IRB, Research Directorate, 'Poland: Situation of Gays and Lesbians', extended response to information request, 11 May 1999, http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=32&cid=0 (accessed 29 November 2008).
117. IRB, Research Directorate, 'Russia: Situation of Gays and Lesbians', extended response to information request, 14 May 1999, http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=34&cid=0 (accessed 29 November 2008).
118. See, e.g., IRB, Research Directorate, 'Jamaica: Treatment of Homosexuals by Society and Government Authorities; Availability of Support Services (2004–2006)', responses to information requests, 22 February 2007, <http://www.irb-cisr.gc.ca/en/research/rir/?action=record.viewrec&gotorec=450935> (accessed 29 November 2008); IRB, Research Directorate, 'Mongolia: The Treatment of Homosexuals by Authorities and by Society in General; Recourse Available to Those Who Have Been Harassed Based on Their Sexual Orientation (2004–March 2007)', responses to information requests, 16 March 2007, http://www.cisr-irb.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=451031 (accessed 29 November 2008) IRB, Research Directorate, 'Saudi Arabia: Treatment of Homosexuals by Authorities and by Society in General; Recourse Available to Those Who Have Been Targeted because of Their Sexual Orientation (2004–2007)', responses to information requests, 19 March 2007, http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=451049 (accessed 29 November 2008).
119. *Re L.L.R.* [1999] CRDD No. 18 ¶ 31 (QL).
120. *Ibid.*, ¶ 46.
121. *Ibid.*, ¶ 49–56.
122. *Re U.F.S.*
123. The author developed and presented professional training seminars on sexual orientation claims to IRB staff in 1995, 1999, 2003, and 2004. For a discussion of professional development training at IRB: see François Crépeau and Delphine Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989–2002', *Journal of Refugee Law* 20, no. 1 (2008), 50, 94–6.
124. In fact, the professional development workshop addressed another recommendation made by the Canadian Council for Refugees, which called on the Board to provide training for staff and RPD adjudicators on issues relating to documentation; see Canadian Council for Refugees, *Addressing Claims Based on Sexual Orientation*.
125. In their 2003 comparative study, Dauvergne and Millbank concluded that the Canadian tribunal developed better evidentiary practices in relation to sexual orientation claims than its counterpart in Australia: Dauvergne and Millbank, 'Burdened by Proof', 317–20. Similar findings are made in Kassisieh, *From Lives of Fear to Lives of Freedom*.
126. Hathaway, *Law of Refugee Status*, 84.
127. *Re H. (Y.N.)*.
128. See Hathaway, *Law of Refugee Status*, 84, citing *Thind v. Canada (Minister of Employment and Immigration)* [1983] FCJ No. 939 (FCA).
129. Dauvergne and Millbank, 'Burdened by Proof', 309.
130. ARC International, 'ARC Annual Report 2006', <http://www.arc-international.net/report2006.html> (accessed 29 November 2008). The Yogyakarta Principles can be found at <http://www.yogyakartaprinciples.org/> (accessed 29 November 2008).
131. ARC International, 'About Us', <http://www.arc-international.net/about.html> (accessed 29 November 2008).
132. United Nations High Commissioner for Human Rights (UNHCHR), 'Discrimination on the Basis of Sexual Orientation', <http://www2.ohchr.org/english/bodies/chr/special/sexualorientation.htm> (accessed 29 November 2008).
133. UNHCHR, *Resolution on Extrajudicial, Summary or Arbitrary Executions*, CHR Res. 2004/37, 55th Mtg., UN Doc. E/CN.4/2004/127 (19 April 2004), ¶ 6.
134. ILGA, ILGA Files, 'Supportive governments: 60 countries have publicly supported sexual orientation at the CHR/HRC between 2003 and 2008', http://www.ilga.org/news_results.asp?FileCategory=61&ZoneID=7&FileID=583 (accessed 20 November 2008).
135. Louise Arbour, 'Presentation of the Office of the United Nations High Commissioner for Human Rights', presentation to the International Conference on LGBT (Lesbian, Gays, Bisexual and Transgender) Human Rights, Montreal, 26 July 2006), <http://www.unhchr.ch/hurricane/>

- hurricane.nsf/view01/B91AE52651D33F0DC12571BE002F172C?opendocument (accessed 29 November 2008).
136. Kassisieh, *From Lives of Fear to Lives of Freedom*, 38 (internal citations omitted).
 137. IRB, 'Mongolia'.
 138. IRB, Research Directorate, 'Turkey: Military and Societal Treatment of Homosexuals Who Have Been Deemed Unfit to Serve in the Military and/or Who Have Been Discharged from the Military Due to Their Sexual Orientation (January 2002 – September 2004)', responses to information requests, 10 September 2004, http://www.cisr-irb.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=44449 (accessed 29 November 2008).
 139. For instance, a search of Amnesty International's online library yields full-length country reports on only a handful of countries: Amnesty International, *Poland and Latvia: Lesbian, Gay, Bisexual and Transgender Rights in Poland and Latvia* (London, 2006), <http://www.amnesty.org/en/library/info/EUR01/019/2006/en> (accessed 29 November 2008); idem, *Ecuador: Pride and Prejudice: Time to Break the Vicious Circle of Impunity for Abuses against Lesbian, Gay, Bisexual and Transgendered People* (London, 2002), <http://www.amnesty.org/en/library/info/AMR28/001/2002/en> (accessed 29 November 2008); idem, *Egypt: Torture and Imprisonment for Actual or Perceived Sexual Orientation* (London, 2001), <http://www.amnesty.org/en/library/info/MDE12/033/2001/en> (accessed 29 November 2008). Human Rights Watch lists the following reports on their website: Human Rights Watch, *'We Need a Law for Liberation': Gender, Sexuality, and Human Rights in a Changing Turkey* (New York, 2008), <http://hrw.org/reports/2008/turkey0508/> (accessed 29 November 2008); idem, *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic* (New York, 2004), <http://hrw.org/reports/2004/jamaica1104/> (accessed 29 November 2008); idem, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct* (New York idem, 2004), <http://hrw.org/reports/2004/egypt0304/> (accessed 29 November 2008) idem, *Uniform Discrimination: The 'Don't Ask, Don't Tell' Policy of the U.S. Military* (New York, 2003), <http://hrw.org/reports/2003/usa0103/> (accessed 29 November 2008) IGLHRC and Human Rights Watch, *More than a Name*; idem, *Hatred in the Hallways: Violence and Discrimination against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools* (New York, 2008), <http://www.hrw.org/reports/pdfs/c/crd/usalbg01.pdf> (accessed 29 November 2008).
 140. Mexico is apparently the largest source of refugee claimants generally in Canada; see Samantha Sarra, 'New Hearing for Rejected Mexican', *Xtra!*, 16 April 2008, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=4648&PUB_TEMPLATE_ID=9 (accessed 29 November 2008).
 141. Ordóñez, *No Human Being Is Disposable*; Masha Gessen, *The Rights of Lesbians and Gay Men in the Russian Federation* (San Francisco: IGLHRC, 1994); Rachel Rosenbloom, *Unspoken Rules: Sexual Orientation and Women's Human Rights* (San Francisco: IGLHRC, 1995); Long, *Public Scandals*; and Luiz Mott, *Epidemic of Hate: Violations of the Human Rights of Gay Men, Lesbians, and Transvestites in Brazil* (San Francisco: IGLHRC, 1997).
 142. IGLHRC and Human Rights Watch, *More than a Name*.
 143. For instance, on 8 July 2008, the description for IGLHRC's programme in Africa did not appear to have been updated since 2003 when it announced the publication of *More than a Name*.
 144. Ottosson, *State-Sponsored Homophobia*.
 145. *Garcia v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ No. 1008 (QL).
 146. *Ibid.*, ¶ 17.
 147. United Nations Economic and Social Council, Commission on Human Rights, *Report of the Special Representative of the Secretary-General on Human Rights Defenders*, UN ECOSOC, 57th Sess., E/CN.4/2001/94 (2001), 24, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/d6c1b351bf405ad3c1256a25005109bc/\\$FILE/G0110638.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/d6c1b351bf405ad3c1256a25005109bc/$FILE/G0110638.pdf) (accessed 29 November 2008).
 148. Arbour, 'LGBT Human Rights'.
 149. Ottosson, *State-Sponsored Homophobia*.
 150. Human Rights Watch, *'We Need a Law for Liberation'*, 5.
 151. *Ibid.*, 5.
 152. Human Rights Watch, *Homophobia*, 11.
 153. *Ibid.*

154. Michael Battista, letter to Jean-Guy Fleury, Chairperson, IRB, 4 December 2002 (on file with author); see also Joel Dupuis, 'Believe the Hype: Refuge Evaluated According to Tourist Info', *Xtra!*, 9 January 2003, <http://archives.xtra.ca/Story.aspx?s=14751297> (accessed 29 November 2008).
155. Battista, letter to Jean-Guy Fleury.
156. Dauvergne and Millbank, 'Burdened by Proof', 317–20.
157. But see *Re V.P.F.*, para. 12 (where the 'dearth of country conditions' information available on sexual minorities in Mongolia did not prejudice the claimants' case).
158. The RPD added, 'It is reasonable to infer that if gays and lesbians were being persecuted then these reports would have said so because Amnesty reports makes a point of referring to violations of human rights.' IRB, *Reasons for Decision – File A99-01249*, 28 June 2000, 3–4 (on file with author).
159. *Canada (Minister of Citizenship and Immigration) v. Shwaba* 2007 FC 80, [2007] FCJ No. 119 (QL).
160. *Ibid.*, ¶ 20.
161. Kasssieh, *From Lives of Fear to Lives of Freedom*, 38, citing RRT Reference N04/49352 (unreported, O'Brien, 30 September 2004).
162. See Mirko Bagaric and Penny Dimopoulos, 'Discrimination as the Touchstone of Persecution in Refugee Law', *International Journal of the Sociology of Law* 32, no. 4 (2004): 303.
163. *Ward v. Canada (Attorney General)*, 734.
164. *Rajudeen v. Canada (Minister of Employment and Immigration)* [1984], 55 NR 129, 133–4 (FCA).
165. *Ibid.*: the Federal Court of Appeal defined persecution thus: '[t]o harass or afflict with repeated acts of cruelty or annoyance . . . to afflict or punish because of particular opinions . . . a particular course or period of systematic infliction of punishment'.
166. See *Chan v. Canada (Minister of Employment and Immigration)* (1993) 20 Imm. LR (2d) 181, 208, [1993] 3 FC 675, 156 NR 279 (FCA), affirmed on other grounds (1995) 128 DLR (4th) 213; see also *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682 (FCA); *Surujpal v. Canada (Minister of Employment and Immigration)* (1985) 60 NR 73 (FCA).
167. *Ranjha v. Canada (Minister of Citizenship and Immigration)* 2003 FC 637, [2003] FCJ No. 901 ¶ 42 (QL); *N.K. v. Canada (Solicitor General)* [1995] FCJ No. 889 ¶ 21 (QL).
168. United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/Rev.1 (1979), <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (accessed 29 November 2008).
169. *Ibid.*, ¶54.
170. *Sagharichi v. Canada (Minister of Employment and Immigration)* [1993] FCJ No. 796 (FCA) ¶ 3.
171. *Kaish v. Canada (Minister of Citizenship and Immigration)* [1999] FCJ No. 1041 ¶ 9 (QL).
172. *Sagharichi v. Canada (Minister of Employment and Immigration)*, ¶ 3. It is true also that identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact.
173. *Gutkovski v. Canada (Secretary of State)* [1995] FCJ No. 566 ¶ 28 (QL).
174. *Re D.C.J.* [1995] CRDD No. 86 (QL); *Re N.K.O.* [1996] CRDD No. 238 (QL); *Re U.Y.O.*; *Re C.L.Q.*; and *Re U.V.G.* [1997] CRDD No. 250 (QL).
175. Kevin Ritchie, 'Successful Refugee Claims Decrease: Burgeoning Queer Movements at Home May Work against Homos', *Xtra!*, 17 January 2007, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=2556&PUB_TEMPLATE_ID=2 (accessed 29 November 2008).
176. *Ibid.*
177. *Cuesta v. Canada (Minister of Citizenship and Immigration)* [2003] RPDD No. 603 ¶ 34.
178. *Re N.E.V.* [2004] RPDD No. 225 ¶ 7 (QL).
179. *Titus-Glover v. Canada (Minister of Citizenship and Immigration)* [2006] RPDD No. 79 ¶ 25 (QL).
180. *Re S.T.V.* [2006] RPDD No. 11 ¶ 16 (QL).
181. For a discussion of how this has been an issue in Australian cases, see Kasssieh, *From Lives of Fear to Lives of Freedom*, 37.

182. *A.J.M. v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ No. 142 ¶ 9 (QL).
183. Kasssieh, *From Lives of Fear to Lives of Freedom*, 38.
184. Amnesty International, *Crimes of Hate*, 27.
185. Kasssieh, *From Lives of Fear to Lives of Freedom*, 37.
186. *Zakka v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1434, [2005] FCJ No. 1759 ¶ 11 (QL).
187. *Birsan v. Canada (Minister of Citizenship and Immigration)* [1998] FCJ No. 1861 (QL).
188. *Ibid.*, ¶ 4.
189. *Oviawe v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1114, [2006] FCJ No. 1421 ¶ 14.
190. *Sagharichi v. Canada (Minister of Employment and Immigration)*, ¶ 3.
191. *Inigo Contreras v. Canada (Minister of Citizenship and Immigration)* 2006 FC 603, [2006] FCJ No. 763 ¶ 12.
192. *Re J.Q.U.*
193. *Re E.K.G.* [1999] CRDD No. 54 ¶ 13-14 (QL).
194. *Ibid.*, ¶ 15.
195. *Ibid.*, ¶ 12–15.
196. *Re N.W.P.* [1999] CRDD No. 3 ¶ 9 (QL).
197. *Ibid.*
198. Kasssieh, *From Lives of Fear to Lives of Freedom*, 34.
199. *Ibid.*
200. Sonia Katyal, 'Sexuality and Sovereignty: The Global Limits and Possibilities of *Lawrence*', *William & Mary Bill of Rights Journal* 14, no. 4 (2006): 1448.
201. *De Seram v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1123, [2007] FCJ No. 1487 ¶ 25. The Federal Court of Canada concluded that RPD committed a reviewable error by not considering contrary evidence that the police harassed, assaulted, and extorted money from gay men. *Ibid.*, ¶ 30.
202. *Abdul Hameed v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 256 (QL).
203. *Re J.F.E.* [2007] RPDD No. 6 ¶ 21 (QL).
204. *Peiris v. Canada (Minister of Citizenship and Immigration)* [2004] FCJ No. 1510 ¶ 10.
205. *Ibid.*, ¶ 21.
206. *Ibid.*
207. *Canada (Minister of Citizenship and Immigration) v. Flores Carrillo* (2008) 69 Imm. L.R. (3d) 309 ¶ 17 and 20.
208. *Ibid.*, ¶ 30.
209. *Ward, Ward v. Canada (Attorney General)*, 724–5.
210. *Ibid.*
211. *Canada (Minister of Employment and Immigration) v. Villafranca* (1992) 18 Imm. LR (2d) 130 (FCA); *Sampayo v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 324 (QL); *Valdes v. Canada (Minister of Citizenship and Immigration)*.
212. *K.N. v. Canada (Minister of Citizenship and Immigration)* [1996] FCJ No. 1376 ¶ 5 (QL).
213. See *Re O.V.D.* [2002] CRDD No. 364 (QL).
214. *Re B.X.Y.* [2003] RPDD No. 8 (QL). For a description of jurisprudential guides and the two decisions designated as such, see IRB, 'Jurisprudential Guides', http://www.irb-cisr.gc.ca/en/references/policy/juriguides/index_e.htm (accessed 29 November 2008).
215. Immigration & Refugee Act.
216. Shannon Minter, 'Lesbians and Asylum: Overcoming Barriers to Access', in *Asylum Based on Sexual Orientation: A Resource Guide*, ed. Sydney Levy (San Francisco: IGLHRC, 1996), IB/3, IB/5–6; see also *Re D.A.K.* [2000] CRDD No. 338 ¶ 23 (QL) (where the RPD noted that discrimination against lesbians in Mexico happened 'usually only within the realm of private life'). An Amnesty International report confirmed that '[t]he imposition of such penalties for same-sex relations must be viewed in the context of the repression of other forms of consensual sexual behaviour which are seen to transgress strict religious or political codes, such as sexual relations between men and women outside marriage. Where gender discrimination is enshrined in law, women accused of any sexual activity outside marriage are particularly at risk of such penalties': Amnesty International USA, *Human Rights and Sexual Orientation and*

- Gender Identity* (New York, 2004), <http://www.amnestyusa.org/outfront/document.do?id=9F25DB548B5696C680256E5C00688E96> (accessed 29 November 2008); Amnesty International, *Crimes of Hate*, 19.
217. *Re U.J.Y.* [2003] RPDD No. 23 (QL); *Perez v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 78 (QL).
218. *Re F.I.N.* [1995] CRDD No. 151 (QL); *Re L.U.M.* [1996] CRDD No. 193 (QL); *Re O.P.K.* [1996] CRDD No. 88 (QL); *Re G.U.S.* [1996] CRDD No. 66 (QL); *Re O.R.C.*; *Re E.N.U.*; *Re U.V.G.* [1997] CRDD No. 250 (QL); *Re Q.N.W.*; *Re U.O.D.*; *Re V.P.F.* It was ironic that, in certain cases, a marriage or relationship of convenience was the only possible way to escape persecution: see *Re L. (M.D.)*; *Re P. (E.U.)*; *Burgos-Rojas v. Canada (Minister of Citizenship and Immigration)* [1999] FCJ No. 88 (QL); *Re O.R.R.* [2000] CRDD No. 122 (QL); *Re C.R.N.* [2001] CRDD No. 526 (QL).
219. *Re L.U.M.*: ‘Being unmarried and without children would always subject me to ridicule and detection as a homosexual, and therefore always at risk’; see also *Re C.Y.T.*; *Re U.F.S.*; *Re K.V.T.* [1999] CRDD No. 64 (QL).
220. *Re A.M.A.* [2000] CRDD No. 103 ¶ 4 (QL).
221. *Re O.R.C.*
222. For an extensive review of documentary evidence on state protection, see *Re S.C.E.* [2004] RPDD No. 8 (QL).
223. *Re U.E.T.* [2000] CRDD No. 66 (QL).
224. *Ibid.*, ¶ 34–6.
225. *Ibid.*, ¶ 34.
226. *Ibid.*, ¶ 35.
227. *Re J.M.Y.* [2000] CRDD No. 506 (QL).
228. *Ibid.*, ¶ 9.
229. *Re E.K.G.*
230. *Ibid.*, ¶ 12.
231. Tamara Letkeman, ‘Gay Man Killed after Refugee Claim Denied’, *Xtra!*, 6 July 2007, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=1&STORY_ID=3287&PUB_TEMPLATE_ID=2 (accessed 29 November 2008).
232. *Ibid.*
233. Kasssieh, *From Lives of Fear to Lives of Freedom*, 55.
234. *Ibid.*, 57.
235. Amnesty International, *Love, Hate and the Law: Decriminalizing Homosexuality* (London: Amnesty International, 2008), 7, <http://www.amnesty.org/en/library/asset/POL30/003/2008/en/d77ce647-4cd3-11dd-bca2-bb9d43f3e059/pol300032008eng.pdf> (accessed 29 November 2008).
236. Kasssieh, *From Lives of Fear to Lives of Freedom*, 57.
237. *Ibid.*, 37, citing RRT Reference 060931294 [2006] RRTA 229 (unreported, Jacovides, 21 December).
238. Amnesty International, *Love, Hate and the Law*, 8.
239. Kasssieh, *From Lives of Fear to Lives of Freedom*, 37.
240. Authors have expressed general concerns that ‘[m]any cases show little consideration for the documentary evidence provided by the counsel for the claimant, and often this evidence is not even mentioned in the reasoning for rejection of the claim’: Cécile Rousseau, François Crépeau, Patricia Foxen, and France Houle, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board’, *Journal of Refugee Studies* 15, no. 1 (2002): 43, 56.
241. *Re D.I.Z.* [2000] CRDD No. 211 (QL).
242. *Ibid.*, ¶ 17–18.
243. *Ibid.*, ¶ 19.
244. *Pitrowski v. Canada (Minister of Citizenship and Immigration)* [2004] RPDD No. 449 (QL).
245. The case referred to the following report: LAMBDA Warsaw Association, *Report on Discrimination on Grounds of Sexual Orientation in Poland* (Warsaw, 2001).
246. Twenty-two per cent of respondents reported experiencing beatings, rapes, and physical assaults, and 51% experienced harassment; see *Pitrowski v. Canada (Minister of Citizenship and Immigration)*, ¶ 94 and 98.

247. Seventy-seven per cent of those who experienced violence did not report it to the police for fear of reaction of law enforcement officers and related social implications and 93.5% of those who experienced harassment did not report it to the police. *Pitrowski v. Canada (Minister of Citizenship and Immigration)*, ¶ 95, 98.
248. *Ibid.*, ¶ 104.
249. *Ibid.*, ¶ 106.
250. *Re B.B.Y.*
251. *Re J.V.D.* [2003] RPDD No. 237 ¶ 26–7 (QL): ‘In the circumstances, the panel is of the opinion that, despite some restrictions, it is possible for the claimant to live as a homosexual, as he apparently did during all of the last years he spent in Lebanon. The panel is of the opinion that using the *Immigration and Refugee Protection Act* is not the appropriate way to shield the claimant from the prejudices that the Lebanese government and Lebanese society allegedly still have against homosexuality.’
252. *Garcia v. Canada (Minister of Citizenship and Immigration)*, ¶ 29; *Re U.O.D.*, ¶ 14.
253. Human Rights Watch, *Hated to Death*, 2.
254. *Re V.Z.D.* [2001] CRDD No. 37 (QL).
255. *Ibid.*, ¶ 26.
256. *Re U.O.D.*, ¶ 23.
257. *Re A.M.A.*, ¶ 10.
258. *Re J.O.U.* [2007] RPDD No. 18 ¶ 14 (QL).
259. *Ibid.*, ¶ 13.
260. James C. Hathaway, ‘The Michigan Guidelines on the Internal Protection Alternative’, *Michigan Journal of International Law* 21, no. 1 (1999): 211.
261. *Rasaratnam v. Canada (Minister of Employment and Immigration)* [1992] 1 FC 706, [1991] FCJ No. 1256.
262. *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 589, [1993] FCJ No. 1172.
263. *Rasaratnam v. Canada (Minister of Employment and Immigration)*, ¶ 4 and 6.
264. IRB, Legal Services, *Interpretation of the Convention Refugee Definition in the Case Law*, 31 December 2005, para. 8.3, citing *Chauhdry v. Canada (Minister of Citizenship and Immigration)* [1998] FCJ No. 1169.
265. *Re Q.L.O.* [2001] CRDD No. 471.
266. *Ibid.*
267. Candace Joseph, ‘Refugees: So Near and Yet So Far’, *Xtra!*, 5 July 2007, http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=3&STORY_ID=3259&PUB_TEMPLATE_ID=2 (accessed 29 November 2008).
268. *Orozco Gonzalez v. Canada* [2004] RPDD No. 120 ¶ 16–17.
269. *Ibid.*, ¶ 17.
270. *Re P.L.L.*, ¶ 48.
271. Human Rights Watch, ‘*We Need a Law of Liberation*’.
272. *Gutierrez v. Canada (Minister of Citizenship and Immigration)* [2005] RPDD No. 179 (QL).
273. IRB, ‘Notice of Revocation of Persuasive Decisions’, policy note, May 2008, http://www.irb-cisr.gc.ca/en/references/policy/polnotes/rev_ta417681_10800203_18833_e.htm (accessed 29 November 2008).
274. IRB, ‘Persuasive Decisions’, policy note, December 2005, http://www.irb-cisr.gc.ca/en/references/policy/polnotes/persuasive_e.htm (accessed 29 November 2008).
275. *Ibid.*
276. *Re H.K.T.* [2007] RPDD No. 28 ¶ 15 (QL).
277. Andrew Reding, *Sexual Orientation and Human Rights in the Americas* (New York: World Policy Institute, 2003), 55–62. The report was cited in *Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 3, n. 5.
278. *Parrales v. Canada (Minister of Citizenship and Immigration)* [2005] RPDD No. 326 ¶ 43–4 (QL); *Re Z.C.J.* [2007] RPDD No. 46 ¶ 14 (QL); *Re F.Y.G.* [2007] RPDD No. 44 ¶ 18 (QL); *Martinez v. Canada (Minister of Citizenship and Immigration)* [2005] RPDD No. 68 ¶ 22 (QL).
279. Letkeman, ‘Gay Man Killed after Refugee Claim Denied’.
280. *Re H.K.T.* [2007] RPDD No. 28, 15 (QL).
281. *Ibid.*

282. *Re H.W.X.* [2007] RPDD No. 4 ¶ 26 (QL).
283. IRB, 'Treatment of Homosexuals and Availability of State Protection', responses to requests for information, June 2006, http://www.cisr-irb.gc.ca/fr/recherche/rdi/index_f.htm?action=record.viewrec&gotorec=450264 (accessed 29 November 2008).
284. IRB, 'Notice of Revocation of Persuasive Decisions'.