THE ALTERNATE REFUGE CONCEPT: A SOURCE OF SYSTEMATIC DISADVANTAGE TO SEXUAL MINORITY REFUGEE CLAIMANTS*

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I. INTRODUCTION

The availability of alternate refuge is considered at various stages of the Canadian refugee determination process. In the context of refugee law, alternate refuge refers to the analysis undertaken by refugee-receiving states regarding the availability of protection for refugee claimants outside their own borders. Under Canadian refugee law, the two main applications of the alternate refuge concept are the safe third country rule and the internal flight alternative (IFA).

This paper analyzes the procedural and substantive elements of the alternate refuge requirement and determines their impact upon individuals seeking protection on the basis of their sexual orientation or gender identity, namely gay men, lesbians, bisexuals and transgendered people (sexual minorities).[1] In doing so, the analysis

* This is an edited and revised version of a research paper prepared for the LL.M. program at the University of Ottawa. I would like to thank Professor Nicole LaViolette for her guidance, as well as my family for their support.

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[1] While judicial and administrative decision-makers commonly refer to certain claimants as "homosexuals," this practice is best avoided. Arguments against this use of language include its medicalization of sexuality and lack of use within the community of sexual minorities. See: Kristen L. Walker, "Sexuality and Refugee Status in Australia" (2000) 12:2 Int'l J. Refugee L. 175 at 176. The term "sexual minority" is used in this paper where reference is made to individuals who seek refugee status on the basis of their membership in a particular social group, namely due to their sexual orientation or gender identity. The term sexual minority is defined so as to include gay men, lesbians, and bisexual and transgendered persons. The term therefore incorporates both individuals who are attracted to people of the same biological sex and those who violate societal gender-norms. See: Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) 19:2 Int'l J. Refugee L. 169 at 185 at FN 92 [LaViolette, Gender]. Some legal scholars have defined the term so as to include people suffering from HIV/AIDS. See: Walker, cited above in this note, at 176. Unfortunately, the impact of alternate refuge measures upon individuals experiencing the intersection of HIV/AIDS and sexual minority status is a matter beyond the scope of this research paper. The term will be therefore be limited by the definition noted above.

examines how Canadian refugee law determines in individual cases if protection is available to refugees in a safe third country or within their home states by way of an internal flight alternative. The study reveals that alternate refuge measures systematically disadvantage sexual minority claimants. This negative impact could be alleviated, however, if decision-makers applied a more nuanced analysis to such claims. Decision-makers must consider the particular circumstances of sexual minority claimants in a consistent manner and refine their evaluations of country conditions, in order to reduce the disadvantage perpetuated by the current methods of analysis.

The research paper is structured in four parts. Part I provides the reader with an overview of Canada's legal obligation toward refugees and discusses the fundamental principle of *non-refoulement.* Part I then outlines the parameters of Canada's refugee determination system and explains how claims asserted on the basis of sexual orientation and gender identity have been addressed within it. Part II of the research paper focuses upon the safe third country rule and analyzes its impact upon sexual minority claimants. This section examines the procedural and substantive elements of the concept, specifically how the opportunity to claim refuge in a third country can affect the ability of individuals to make successful refugee claims within Canada. The *Safe Third Country Agreement* (STCA) between Canada and the United States (U.S.),[2] relevant Federal Court decisions, and the issue of credibility are examined in this part.

Part III of the research paper explores the nature of IFA findings and how they affect sexual minority claimants. This section focuses on the legal principles developed by the Federal Court and the Federal Court of Appeal and the principles applied by the Immigration and Refugee Board (the Board), whereby the availability of refuge within other regions of a claimant's home state affects the viability of his or her refugee claim. Part III focuses on refugee determinations involving Mexican claimants. Part IV draws out commonalities between the issues explored in the previous parts and argues that sexual minority claimants are systematically disadvantaged by the application of the alternate refuge requirement to their claims.

1.1 The Canadian Refugee Determination Process

Canada is a signatory to both the *Convention relating to the Status of Refugees* (the Refugee Convention) and the *Protocol relating to the Status of Refugees.*[3] These

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[2] *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status from Nationals from Third Countries* (5 December 2002) [STCA], online: Citizenship and Immigration Canada (CIC): <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>.

[3] *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 7 [Refugee Convention]; *Protocol relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, Can. T.S. 1969 No. 29 [Protocol].

international instruments constitute the primary source of Canada's legal obligations toward refugees; their objectives have been incorporated domestically in the *Immigration and Refugee Protection Act* (IRPA) and its regulations.[4] Of particular interest to the current study is the obligation found in Article 33(1) of the Refugee Convention:[5]

> No Contracting States shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

The principle of non-refoulement is a cornerstone of international refugee law.[6] Pursuant to this principle, which is also enshrined in Article 3 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),[7] receiving countries may not, whether directly or indirectly, return refugees to a country where they face a serious risk of persecution.

The prohibition against refoulement is not absolute. Article 33(2) of the Refugee Convention provides that where there are reasonable grounds for believing that a refugee is a danger to the receiving country, he or she may not benefit from the principle of non-refoulement.[8]

The alternate refuge concept is directly connected to the principle of non-refoulement. Requiring a refugee claimant to seek protection outside of Canada, whether from a third country or a different region of his or her home state, involves determining whether he or she faces a risk of refoulement or persecution in the country to which he or she is being deported. This determination requires close analysis on the part of the decision-maker of both the claimant's personal circumstances and the country conditions he or she might face outside Canada.

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4 S.C. 2001, c. 27 [IRPA].

5 Refugee Convention, *supra* note 3 at Art. 33(1).

6 Nils Coleman acknowledges that "majority doctrinary opinion" considers non-refoulement a principle of customary law, but argues that it is no longer an unconditional regional international custom in Europe, due to the evolution of a new norm that allows exceptions in cases involving mass influxes of refugees. See: Nils Coleman, "Non-Refoulement Revised: Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law" (2003) 5 Eur. J. Migr. & L. 23 at 23.

7 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 [CAT].

8 Refugee Convention, *supra* note 3 at Art. 33(2).

Refugee claims made from within Canada or at the Canada-U.S. land border are subject to findings regarding the availability of alternate refuge.[9] The inland refugee determination process begins when an individual advises an immigration official of his or her desire to claim refugee status. The officer then proceeds to interview the claimant and makes a threshold determination regarding the eligibility of his or her claim. Claims may be ineligible if the person: has refugee status in Canada or elsewhere, is a failed refugee claimant, traveled through a safe third country prior to entering Canada, or is a serious security/criminality risk.[10] The exclusion of refugee claimants on the basis of their passage through the U.S. is discussed in Part II.

Eligible claims are then referred to the Refugee Protection Division of the Immigration and Refugee Board for determination. Once the claimants file their Personal Information Form (PIF), the Board may hear their claim via the fast-track or full hearing process.[11] Issues involving access to a safe third country or the availability of an IFA are addressed in the context of the hearing process. Failed refugee claimants may seek judicial review of the Board's decision with leave from the Federal Court. An application for judicial review is not equivalent to an appeal. The judicial review process involves an assessment of the Board's decision based upon administrative law principles.[12] If the application for judicial review is allowed, the claim is usually sent for re-determination by a different member of the Board. Further appeals may be sought from the Federal Court of Appeal and the Supreme Court of Canada, subject to leave requirements.[13]

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[9] Note that individuals may also seek asylum from outside Canada, for instance from refugee camps or through the resettlement program. See: Martin Jones and Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 187-214 [Jones, Refugee Law].

[10] Immigration and Refuge Board, "Process for Making a Claim for Refugee Protection", online: IRB: < http://www.irb-cisr.gc.ca/en/references/procedures/processes/rpd/rpdp_e.htm>.

[11] *Ibid.*

[12] Decisions by administrative tribunals such as the Board are subject to review on one of two standards: reasonableness and correctness. The level of deference accorded to a particular decision depends upon the nature of the issues at stake. Decisions involving questions of fact are generally reviewed on a reasonableness standard, and are therefore accorded a higher level of deference, while questions of mixed law and fact are subject to a lower level of deference. Pure questions of law are subject to a correctness standard and are subject to the least amount of judicial deference. (See: David J. Mullan, *Administrative Law: Cases, Text and Materials* (Toronto: Emond Montgomery, 2003) at Chapter 3 "Jurisdiction".). It is important to note that the standard of patent unreasonableness was recently dismissed by the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, (2008) 291 D.L.R. (4th) 577.

[13] In order to appeal a Federal Court decision, the lower court must certify a serious question of general importance. See: IRPA, *supra* note 4 at para. 74(*d*). In order to appeal a Federal Court of Appeal decision, leave of the Supreme Court of Canada is required. In this situation, leave may be obtained where the case raises an issue of public importance. See: Supreme Court of Canada, "Filing an application for leave", online: SCC < http://www.scc-csc.gc.ca/faq/ala-daa/index-eng.asp>.

1.2 Refugee Claims Based on Sexual Orientation or Gender Identity

In a journal article published in 1993, Suzanne Goldberg described the persecution experienced by sexual minorities throughout the world as follows:

> Their persecution takes the form of police harassment and assault, involuntary institutionalization and electroshock and drug "treatments", punishment under laws that impose extreme penalties including death for consensual lesbian or gay sexual relations, murder by paramilitary death squads, and government inaction in response to criminal assaults against lesbians and gay men.[14]

Fifteen years later, sexual minorities continue to face serious discrimination and persecution at the hands of both state and private actors. Human rights organizations such as Amnesty International and Human Rights Watch have documented this abuse and published reports regarding the persecution faced by sexual minorities worldwide.[15]

Sexual contact between consenting adults of the same sex is criminalized in eighty-six member-states of the United Nations and is punished by death in seven countries.[16] As noted in a 2007 report issued by the International Lesbian and Gay Association (ILGA), while many states do not actively enforce these laws, they "reinforce a culture...where hatred and violence are somehow justified by the State and force people into invisibility or into denying who they truly are."[17] The criminalization of sexual activity between same-sex partners creates a pervasive homophobic environment within which the extortion, suppression, physical and sexual abuse, and harassment of sexual minorities is tolerated and perpetuated by a multitude of actors. Sexual activity between same-sex partners is also regulated indirectly through "morality" and "public order" provisions.[18] Therefore, sexual minorities in states that

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[14] Suzanne B. Goldberg, "Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men" (1993) 26 Cornell Int'l L. J. 605 at 605 to 606.

[15] For more information about the worldwide persecution of sexual minorities see the following reports: Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity*, (New York: Amnesty International USA, 2001); Human Rights Watch, "Turkey: We Need a Law for Liberation: Gender, Sexuality, and Human Rights in a Changing Turkey" (2008), online: HRW < http://hrw.org/reports/2008/turkey0508/turkey0508webwcover.pdf>.

[16] International Lesbian and Gay Association (ILGA), "Being lesbian or gay is risking jail time in 86 countries and death penalty in 7", News Release, (14 May 2008), online: ILGA <http://www.ilga.org/news_results.asp?FileCategory=9&ZoneID=7&FileID=1165>.

[17] Daniel Ottoson, "State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults" (April 2007) at 4, online: ILGA < http://www.ilga.org/statehomophobia/State_sponsored_homophobia_ILGA_07.pdf>.

[18] Jenni Millbank, "Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2004) 18 Geo. Immgr. L. J. 71 at 89.

do not explicitly criminalize their sexual relations still encounter persecution in their daily lives.

Article 1A of the Refugee Convention defines a refugee as any person who:

> ...owing to well-founded fear of being persecuted for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[19] [emphasis added]

This definition is incorporated in Canadian legislation.[20] The grounds listed in the Convention's definition do not explicitly provide for refugee protection on the basis of sexual minority status; it is now well-established in Canadian jurisprudence, however, that refugee claims based upon sexual orientation or gender identity may constitute membership in a particular social group for the purposes of the refugee definition.[21]

Legal scholars Catherine Dauvergne and Jenni Millbank conducted a study which determined that, between 1994 and 2000, the success rate of refugee claims made in Canada based upon sexual orientation was about fifty-four percent.[22] Building upon this research, Sean Rehaag cites UN documentation establishing that the overall success rate of refugee claims in Canada during this period was sixty percent, therefore the rate for sexual minority claimants was not far off the overall average.[23] Rehaag also found that in 2004 claims based on sexual minority status were equally, if not somewhat more, successful than the average claim. Forty-nine percent of sexual minority claimants were granted refugee status, while the average success rate for all claims was forty-five percent.[24] While the acceptance rates raise no immediate concerns, a closer look at the scope and application of the alternate refuge concept reveals problems with the analysis made in cases based on sexual orientation or gender identity.

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[19] Refugee Convention, *supra* note 3 at Article 1A. The time restriction in the Convention was lifted pursuant to the 1967 Protocol, *supra* note 3.

[20] IRPA, *supra* note 4 at s. 96.

[21] *Canada (A.G.) v. Ward*, 2 S.C.R. 689, (1993) 103 D.L.R. (4th) 1 at para. 70 [*Ward*].

[22] Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melbourne U. L. Rev. 144 at 148 -149 [Millbank, Imagining].

[23] Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 McGill L.J. 59 at 69.

[24] *Ibid.* at 71.

II. SAFE THIRD COUNTRY RULE

The safe third country rule is premised on the concept that refugee-receiving states may deflect claimants to any safe country they have traveled through prior to their arrival.[25] As a result, refugee claimants are forced to seek alternate refuge outside the state where they originally chose to make their claim. A common manifestation of the safe third country rule is the "country of first arrival" principle. Pursuant to this principle, refugee-receiving states may return claimants to the first country from which they could have sought refugee status after fleeing their home states. The impact of the safe third country rule upon individuals seeking refugee status in Canada is particularly significant, since it is often impossible to reach Canada without first traveling through the U.S. or another state, such as the United Kingdom.

The main justification for the rule is that it allows states to share the burden of dealing with the international population of refugee claimants in a collective manner.[26] The safe third country rule addresses the issue of forum- or asylum-shopping by refugee claimants by working to invalidate their choice of asylum location by authorizing their return to a state where they are deemed to have had the opportunity to claim refugee status.[27] Moreover, the safe third country rule may be used to question the genuineness of refugee claims. A claimant's failure to seek asylum at the first opportunity can lead decision-makers to make negative inferences about the credibility of his or her subjective fear of persecution.

This study considers the application of the safe third country rule to refugee claims made by sexual minorities in two contexts: substantive credibility determinations made within the Canadian refugee determination system and the STCA between Canada and the U.S. It is important to distinguish the decision-makers involved in these contexts. Credibility determinations are made by the Board and may be subject to judicial review before the Federal Court, while the STCA is an agreement negotiated, adopted, and implemented by the two states involved.

2.1 Credibility Findings – Subjective Fear of Persecution

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[25] James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 295 [Hathaway, The Rights of Refugees].

[26] *Ibid.* at 293. See also: preamble to the STCA, *supra* note 2.

[27] The UNHCR considers a refugee claimant's choice of country of asylum to be an important consideration, which problematizes initiatives such as the STCA. See: Kemi Jacobs, "The Safe Third Country Agreement: Innovative Solution or Proven Problem?" (2002) Policy Options 33 at 35.

The assessment of a claimant's credibility is a pivotal component of the refugee determination process.[28] Generally, a claimant's sworn testimony is presumed true unless there is reason to question its validity.[29] In assessing a claimant's credibility, the Board may consider issues such as demeanour, the consistency of his or her testimony, and the plausibility of the evidence presented during the hearing.[30] Refugee claimants bear the onus of demonstrating that their fear of persecution is both subjectively and objectively well-founded. There is some controversy over the validity of the subjective element of the bipartite test, given the difficulty of assessing the state of mind of a refugee claimant.[31] It appears, however, that the Board still makes credibility findings in relation to the subjective element of the requirement, namely that a claimant's state of mind is one of fear of persecution.[32]

An individual's failure to seek refugee status in a safe third country can have a negative impact upon the Board's assessment of his or her subjective fear of persecution. As noted by Michael Bossin and Laila Demirdache, the Board's "understanding of human behaviour" often equates the failure to seek refuge in a safe third country with a lack of subjective fear of persecution.[33] In *Ilie v. Canada (M.C.I.)*, the Federal Court held that evidence of a refugee claimant's failure to seek asylum in other countries was a relevant consideration in assessing his or her subjective fear of persecution. With respect to this issue, the Court stated:

> Finally, in my opinion the tribunal was entitled to consider his failure to claim refugee status in other countries while traveling from July 1992 to January 1993 in Europe, and to consider the applicant's evidence in light of that. In doing so it here concluded that his traveling for six months or so without seeking refugee status negated his evidence of fear of persecution if he were returned to Romania. That finding goes to the root of the applicant's claim. It was not necessary to set out other or more detailed

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[28] See: Steve Norman, "Assessing the Credibility of Refugee Applicants: A Judicial Perspective" (2007) 19:2 Int'l J. Refugee L. 273.

[29] See: *Maldonado v. M.E.I.*, [1980] 2 F.C. 302, 31 N.R. 34 (C.A.) at para. 5.

[30] IRB Legal Services, "Assessment of Credibility in Claims for Refugee Protection" (31 January 2004), online: IRB <http://www.irb-cisr.gc.ca/en/references/legal/rpd/assesscred/index_e.htm?>.

[31] Michael Bossin and Laila Demirdache cite refugee law scholars James Hathaway and Guy Goodwin-Gill in reaching the following conclusion: "Adopting a test that requires more attention to the objective nature of risk facing refugee claimants, and less on what may be going on in their minds, would place emphasis, quite properly in our view, on the need for protection." See: Michael Bossin and Laila Demirdache, "A Canadian Perspective on the Subjective Component of the Bipartite Test for 'Persecution': Time for Re-evaluation" (2004) 22:1 Refuge 108 at 116.

[32] Emily Carasco *et al*, *Immigration and Refugee Law: Cases, Materials, and Commentary*, (Toronto: Emond Montgomery, 2007) at 582.

[33] Bossin, *supra* note 31 at 111.

> reasons for not accepting that the applicant had established a well-founded fear of persecution.[34]

The Court's decision in *Ilie* establishes that the Board may draw a negative inference with respect to a refugee claimant's subjective fear of persecution where he or she has failed to seek asylum in a safe third country.

It is important to note that failure to seek refugee status in a country of first arrival, or in any other safe country, is not determinative of a refugee claim. In *Gavryushenko v. Canada (M.C.I.)*, the Federal Court established that, while failure to seek refugee status in a safe third country was a relevant consideration with respect to credibility, it did not preclude claimants from seeking refuge in Canada.

There is, however, evidence that the Board continues to struggle with the nature of safe third country considerations. *Romero v. Canada (M.C.I.)* involved a bisexual refugee claimant from Panama who studied in Costa Rica from 1994 until 1998.[35] The Board's decision with respect to her claim provides a cursory overview of the facts alleged and concludes as follows:

> While I empathize with the problems that Kaila had in Panama because of her bisexuality, the fact of the matter is that she stayed in Costa Rica for almost five years. Costa Rica is the most liberal of the Latin American countries as far as gays and lesbians are concerned. Kaila has given no explanation why she could not have stayed on in Costa Rica and enjoyed the kind of lifestyle there that Panama denied her. She gave no satisfactory explanation as to why she did not claim refugee status in Costa Rica, especially since Costa Rica is one of the Convention signatories.[36]

Upon judicial review, the Court noted the claimant's argument that she had not sought asylum in Costa Rica because "the events that gave rise to her decision to seek refugee protection in Canada took place several years after she had returned from Costa Rica."[37] The Court concluded that the Board had erred in both failing to address Romero's substantive refugee claim and denying the claim on the basis that she had failed to seek asylum in a safe third country, without ever questioning her on the subject.

In *Mendez v. Canada (M.C.I.)*, the Board explicitly treated a claimant's failure to seek asylum in a safe third country as determinative of his refugee claim.[38] *Mendez* involved a refugee claimant who fled Peru and claimed refugee status in Canada after

[34] (1994) 88 F.T.R. 220 (F.C.T.D.) at para. 15 [*Ilie*].

[35] [2004] R.P.D.D. No. 840 (QL).

[36] *Ibid.* at para. 6.

[37] *Romero v. Canada (M.C.I.)*, 2005 FC 1705 at para. 6 [*Romero*].

[38] *Mendez v. Canada (M.C.I.)*, [2004] R.P.D.D. No. 159 (QL). [*Mendez*]

spending only nine days in the U.S. The Board rejected the claimant's explanation that he was uncomfortable with the political situation in the U.S. and found Canada to be more peaceful. The Board determined that a person who asserts a fear of persecution in his or her home state must seek asylum in a safe country at the first opportunity and denied the refugee claim.[39] Upon judicial review, the Court found that the Board had erred in asserting that the issue was determinative of the claim.[40]

The Federal Court has provided guidance with respect to the factors to be considered in evaluating a claimant's failure to seek asylum in a safe third country. Overall, the cases emphasize the importance of considering the particular circumstances facing an individual claimant in failing to claim refugee status in a safe third country, as well as the reasonability of his or her explanation for having failed to do so. The factors considered by the courts in assessing the reasonability of a refugee claimant's failure to seek asylum in a safe third country are: the length of time spent in a safe third country prior to arrival in Canada, age, and experience (for example, education, travel experience, and familiarity with the refugee determination system).[41] Other factors identified in the jurisprudence include a claimant's cultural background and social experiences.[42] The next section of the paper examines whether these factors are applied effectively in cases involving sexual minority claimants.

2.2 Credibility Concerns and Sexual Minority Claimants

Refugee claimants who fail to seek asylum in safe third countries prior to their arrival in Canada, including sexual minorities, face common issues. For example, failure to seek asylum at the first opportunity may be considered evidence of a claimant's intention to use the refugee determination system as a faster means of migrating to Canada.[43] Another significant problem arises when Board members fail to undertake a substantive analysis of refugee claims and rely solely upon safe third country considerations in denying them.[44] The issue of notice is also important, since refugee claimants must be provided with a fair opportunity to respond to questions about their failure to seek asylum outside Canada.

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[39] *Ibid.* at para. 18.

[40] *Mendez v. Canada (M.C.I.)*, 2005 FC 75, (2005) 307 F.T.R. 48 at para. 35.

[41] *El-Naem v. Canada (M.C.I.)* (1997), 126 F.T.R. 15, 37 Imm. L.R. (2d) 304; *Ilyas v. Canada (M.C.I.)*, 2004 FC 1270, (2004) 41 Imm. L.R. (3d) 3.

[42] See: *Mendez*, *supra* note 41 at para. 38.

[43] See: *D.I.Z. (Re)*, [2000] C.R.D.D. No. 211 (QL) at para. 22, wherein the Board notes that the claimant, who had alleged persecution on the basis of sexual orientation, had failed to seek asylum in Spain, Mexico, and the U.S., and further states: "In fact, what you were seeking to do was not so much to leave your country to come to North America and claim refugee status as to come and settle in Canada."

[44] See: *Romero*, *supra* note 38, which involved a bisexual claimant. The Court stated at para. 7:"the Board failed to address the essence of Ms. Paris Romero's claim for refugee protection and the evidence supporting it."

In addition to the issues noted above, it is argued that sexual minority claimants face particular challenges in dealing with the application of safe third country considerations to their claims. There is evidence that a number of factors relating to the experience of sexual minority claimants, such as a general lack of awareness of their ability to claim refugee status or being closeted, may influence whether they seek asylum prior to their arrival in Canada. It is therefore important to recognize that failure to seek asylum in a safe third country should not necessarily undermine the credibility of a sexual minority claimant or negate the subjective element of his or her fear of persecution.

(i) Familiarity with the Refugee Determination Process

There is evidence that sexual minorities experiencing persecution throughout the world are often unaware of their eligibility for refugee status.[45] While refugee claimants may be familiar with the fact that political opinion is a protected ground in refugee law, this may not be the case in relation to sexual orientation and gender identity.[46] In Canada, the state of the law surrounding the legitimacy of refugee claims based upon sexual orientation was uncertain until the Supreme Court of Canada's 1993 decision in *Ward*.[47] Canada was one of the first refugee receiving states to settle the law on this issue; other jurisdictions may still have unclear policies for dealing with sexual minority claimants.[48] Refugee claimants may therefore fail to seek asylum based upon their sexual orientation or gender identity until they are made aware of the availability of this option.

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[45] Victoria Neilson & Aaron Morris, "The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals seeking Asylum or Witholding of Removal" (2006) 8 N.Y.C. L. Rev. 233 at 263.

[46] Affidavit (Regarding the one-year deadline for filing asylum applications in the United States), sworn by Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, submitted to the Federal Court re: Court file IMM-7817-05 (*Canadian Council of Refugees et al v. Canada*) at para. 13.

[47] *Ward*, *supra* note 21.

[48] See: *E.Y.W. (Re)*, [2000] C.R.D.D. No. 116 (QL), at para. 12-13 [*E.Y.W. Re*]: "...the claimant could not have reasonably been expected to have made a claim to refugee status on the basis of his sexual orientation when he signed his Personal Information Form (PIF) on March 29, 1993, before the Supreme Court of Canada's decision in Ward...basing a claim to refugee status on sexual orientation was far from settled law in 1992." Turkey is an example of a state with unclear policy with respect to sexual minority refugees. Iranian sexual minority claimants often seek initial refuge in Turkey, where they face continued persecution and may look to Canada as an alternate source of protection. See: Tonda MacCharles, "Minister backs refugee status for gay Iranians" *The Star* (28 February 2009), online: Star <http://www.thestar.com/article/594493>.

A related issue is whether the country that a claimant has previously traveled through even recognizes refugee claims on the basis of sexual orientation or gender identity.[49] According to the International Lesbian and Gay Association (ILGA) Europe, "there are nations which are still reluctant to refine immigration laws pertaining to asylum by including cases where a person's life is being threatened due to sexual orientation."[50] It is therefore important for the Board to consider whether sexual orientation is recognized as a ground of asylum in a given state before concluding that a claimant should have sought refuge there. Hossein Alizadeh, Communications Coordinator for the International Gay and Lesbian Human Rights Commission (IGLHRC), recently issued a press release regarding the plight of two Iranian refugees living in Turkey. The article explains that:

> ...once gay refugees arrive in Turkey, the situation is bleak. Due to the volume of applications, it normally takes up to two years for them to be reassigned to a country willing to accept them. During the transitional period, gay refugees are only allowed to live in small towns, without the right to work or pursue education. While the UN Refugee Agency may provide some financial aid, the amount is nominal and before they are eligible they must be recognized as "genuine" refugees. This is a process with results that are not guaranteed...The situation for gay refugees is complicated because the Turkish public and law enforcement agents are very hostile to sexual minorities, despite the fact that homosexuality is not a crime in Turkey. In recent years, many gay and lesbian refugees have been subject to verbal and physical attacks.[51]

The situation described by Alizadeh highlights the precarious position of sexual minorities in states that are hostile to such claimants. Sexual minorities should not be penalized in the Canadian refugee determination process for failing to seek

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[49] In 2000, the Parliamentary Assembly of the Council of Europe highlighted the fact that most member states did "not recognize persecution for sexual orientation as a valid ground for granting asylum" in a draft recommendation urging members to recognize homosexuals as members of a particular social group for the purposes of asylum-seeking. See: Ruth-Gaby Vermot-Mangold (rapporteur), "Situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe", Doc. 8654 (25 February 2000), online: CE, Parliamentary Assembly: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc00/EDOC8654.htm>.

[50] ILGA Europe, "Asylum and Immigration: Protection Elsewhere", online: < http://www.ilga-europe.org/europe/issues/asylum_and_immigration>. For example, Amnesty International notes that "persecution on the basis of sexual orientation is not explicitly recognized in law as a ground for granting refugee status...There have been no known cases of LGBT people seeking asylum in Belarus on the grounds of persecution because of their sexual orientation or gender identity." See: Viachaslau Bortnik, *Belarus* (2007) at 3, online: Amnesty International <http://www.asylumlaw.org/docs/sexualminorities/BELARUSLGBT0207.pdf>.

[51] IGLHRC, News Release, "The world an unkind place for gay refugees" (20 June 2008), online: IGLHRC < http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/iglhrcscommentaries/232.html>.

refugee status in countries where their sexual identity may not be recognized as a ground for refugee status under the Convention.

Another relevant consideration is the manner in which refugee claimants perceive the treatment of sexual minorities in other countries. It is possible that a refugee claimant might conclude that countries that ban same-sex marriage or adoption by same-sex couples might also fail to recognize sexual minorities as refugees. For example, while the U.S. accepts refugee claims based on sexual orientation and gender identity, the recent election resulted in a ban on same-sex marriage in three states and the preclusion of same-sex partners from adopting children in Arkansas.[52] Sexual minority claimants who are unaware of their eligibility for refugee status under U.S. law might infer from their knowledge of the treatment of same-sex couples in the U.S. that their claims would be rejected. It is therefore important to consider whether the treatment of sexual minorities in a safe third country was a factor in the decision of a claimant not to seek refuge earlier.

Sexual minority claimants may also consider the advice of legal counsel in deciding whether to pursue refugee status in a country prior to arriving in Canada. In *E.Y.W.(Re)*, an Indian refugee claimant left Canada for the U.S. after his claim for refugee status based upon religious grounds was rejected. He remained in the U.S. for seven months and, on the advice of counsel, chose not to seek refugee status while there. He then returned to Canada and filed a second refugee claim, this time on the basis of his sexual orientation. The claimant's lawyer, who was also volunteer counsel for the Lesbian and Gay Human Rights Task Force, explained the reasons for his advice as follows:

> Based on the disturbing trends in adjudications and my conversations with my Canadian counterparts, I have felt it my duty to advise individuals (including Mr. xxxxxxx) that they will receive a fairer and more professional adjudication of their asylum claim from the Canadian authorities.[53]

The Board accepted this explanation for the claimant's failure to claim refugee status in the U.S. and did not draw a negative inference from his behaviour. It is therefore evident that lack of familiarity with the refugee determination system and the recognition of sexual orientation as a ground for refugee status in safe third

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[52] The election resulted in a ban on same-sex marriage in California, Florida, and Arizona. See: Jesse McKinley and Laurie Goodstein, "Bans in 3 States on Gay Marriage" *The New York Times* (6 November 2008) A1. For more information on the U.S. approach to sexual minority refugee claims, see: Midwest Human Rights Partnership for Sexual Orientation and the Lesbian and Gay Immigration Rights Task Force, *Preparing Sexual-Orientation Based Asylum Claims: A Handbook for Advocates and Asylum Seekers*, 2nd ed. (2000), online: Asylumlaw <http://www.asylumlaw.org/docs/sexualminorities/handbookpart1.pdf>.

[53] *E.Y.W (Re)*, *supra* note 48, at para. 14.

countries are important factors to consider in evaluating a sexual minority claimant's failure to seek alternate refuge in a safe third country.

(ii) Social Experiences

The social experiences of sexual minority claimants often affect their ability to claim refugee status at any given time. As outlined in the introduction of the paper, sexual minorities throughout the world are being subjected to serious homophobic violence, harassment, and threats in their home states at the hands of both individual and state actors. The psychological implications of such dehumanizing treatment, such as post-traumatic stress disorder (PTSD), can impact the ability of sexual minority claimants to seek asylum promptly.[54] It can also lead to difficulties dealing with people in positions of authority, such as immigration officials. The Board acknowledged this issue in *E.Y.W (Re).*, wherein it cited the following instructive evidence from Dusty Araujo, Program Coordinator for the IGLHRC:

> ...some asylum seekers experience a great deal of fear in divulging information about their sexual orientation or HIV status. Many immigrants who may qualify for asylum fear or believe that revealing their sexual orientation or HIV status will exclude them from the process...
>
> For fleeing immigrants around the world, asylum claims based on political opinion, religion, nationality or race, are for the most part, well known established grounds. There is generally no sense of shame or feelings of self oppression in revealing this kind of information under these grounds. For many applying under "Particular Social Group," sexual orientation issues may carry with it a sense of shame, self-hating and/or great fears of losing their life, their freedom, or their livelihood.
>
> ...Many asylum seekers have been victims of persecution by the state and/ or may have a profound distrust of government. Understanding the internal oppression in these cases is essential to giving them a fair opportunity to be heard.[55]

The Board then concluded:

> The panel finds that the psychological and medical evidence and the declaration from Mr. Dusty Araujo not only corroborates the claimant's

[54] Affidavit, sworn by Victoria Neilson and submitted to Federal Court, Court File IMM 7818-05, *Canadian Council of Refugees et al v. Canada*, at para. 12. [Affidavit Neilson]. See also: *C.D.T. (Re)*, [1996] C.R.D.D. No. 90 (QL); and *O.R.C. (Re)*, [1997] C.R.D.D. No. 66 (QL).

[55] *E.Y.W. (Re)*, *supra* note 48 at para. 18.

> subjective fear of persecution as a homosexual, should he return to India, but it also helps to explain the claimant's actions in not immediately claiming refugee status on the basis of his sexual orientation.[56]

The Board's analysis of the claimant's situation focuses upon his specific life experience and acknowledges that failure to claim refugee status at an earlier point can sometimes bolster credibility, rather than affect it negatively.

Failure to claim refugee status in a safe third country may also be the result of a claimant's prior closeted experience. In *Cuesta v. Canada (M.C.I.)*, a gay refugee claimant from Colombia explained that he did not seek asylum while traveling through Europe and Mexico because he had not yet experienced persecution in his home state of Colombia.[57] While in Colombia, he had hidden his sexual orientation and it was not until he met a partner abroad and wished to live openly with him that he began fearing persecution. The Board determined that the claimant could have sought asylum in any country he had visited after meeting his partner and therefore denied his claim due to a lack of subjective fear of persecution. The Board's finding was upheld on judicial review. This case acknowledges the claimant's closeted experience in Colombia, but weighs it against his failure to seek asylum in multiple safe third countries and results in the denial of the claim.

Overall, it appears that the Board and the Federal Court are assessing the subjective fear of sexual minority claimants in light of their failure to claim refuge in a safe third country by focusing upon factors such as familiarity with the refugee determination system and social experience. The following excerpt from the Board's decision in *V.N.N. (Re)* demonstrates a nuanced approach to the issue:

> With respect to delay and failure to claim in the United States, this was probably the most troublesome issue of this hearing. However, in my view, it was not determinative because generally, delay and failure to claim is not in itself a basis upon which I would be prepared to render a negative determination, particularly where there are no other bases upon which I might have to doubt your subjective fear of persecution or the credibility of your testimony. Quite apart from that, and this is the more important reason with respect to the delay issue, I accept your explanation for the delay. *You said you were having trouble dealing with your sexuality, or it was apparent to me that that was the case.* As well, *you were terrified with respect to approaching American authorities as to what the consequences might have been* and you also admitted perhaps some irresponsibility in that regard having been counseled to take some steps and perhaps delaying. In any event, I accept your explanation as a plausible one for the delay in the United States and I also accept your explanation as to the reasons as to why you finally chose to come to Canada. *I do not draw any negative*

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[56] *Ibid.* at para. 19.

[57] 2005 FC 5 [*Cuesta*].

> *inference from the delay and the failure to claim in the U.S.*[58] [emphases added]

The Board's analysis of the claimant's situation in *V.N.N. (Re)* thus acknowledges the psychological difficulties he faced with respect to his own sexuality, as well as his fear of dealing with American immigration authorities.

Where, however, the Board does not interpret a refugee claimant's conduct in accordance with such factors, this may result in a negative credibility determination. In *Herrera v. Canada (M.C.I.)* a gay refugee claimant fled El Salvador for the U.S., where he remained for five years without seeking asylum.[59] He arrived in Canada in 2006 and sought refugee status on the basis of his sexual orientation. He omitted his stay in the U.S. from his PIF and, when confronted with the truth, gave two explanations for failing to seek asylum in the U.S.: that the process was too costly and that he had not thought of making a claim. The Board rejected this explanation and found that the claimant lacked both credibility and a subjective fear of persecution. This finding was upheld on judicial review.

Herrera touches upon a number of important issues regarding the impact of safe third country considerations upon the credibility and subjective fear of sexual minority claimants. It is evident that several elements of the *Herrera* case warranted more careful examination by the Board. One factor that was not addressed by the Board was the claimant's age at the time of his stay in the U.S. On his PIF, the claimant stated that he was born in 1981, meaning that he would have been about 20 years old when he arrived in the U.S.[60] Acknowledgement of the claimant's youth and relative inexperience may have helped contextualize his failure to seek asylum in the U.S. In addition, no reference was made to whether the claimant was closeted while living in the U.S. There is evidence that the claimant initially gave a different reason for fleeing El Salvador when he entered Canada, namely, "conflict stemming from the distribution of his stepfather's inheritance," and later sought refugee status on the basis of his sexual orientation.[61] Further inquiry into this aspect of the case may have provided insight into the claimant's failure to seek asylum in the U.S. Asserting different grounds of protection is a common experience among sexual minority claimants, who may feel shame or fear over revealing their sexual identity to border officials.[62]

Finally, there is a question as to the claimant's awareness of the possibility of claiming refugee status on the basis of his sexual orientation. One of the claimant's reasons for failing to seek asylum in the U.S. was that "he never thought of making

[58] *V.N.N. (Re)*, [1999] C.R.D.D. No. 185 (QL).
[59] 2007 FC 979 [*Herrera*].
[60] *Ibid.* at para. 9.
[61] *Ibid.* at para. 8.
[62] *E.Y.W. (Re)*, *supra* note 48 at para. 18.

such a claim."[63] This explanation seems to reveal a lack of familiarity with the refugee determination process, which both the Board and the Federal Courts have cited as a reasonable explanation for failing to seek asylum in a safe third country. Unlike the cases outlined above, the analysis in *Herrera* involves a less thorough application of the factors relevant to safe third country considerations. It is possible that these issues were eclipsed by the claimant's failure to mention his five-year stay in the U.S. on his PIF but, given the particular circumstances facing sexual minorities outlined above, they warranted a more specific analysis.

2.3 Safe Third Country Agreement – Background

In assessing the STCA's impact upon sexual minorities, it is useful to outline the agreement's legislative background. Section 102(2) of the IRPA authorizes the creation of regulations pertaining to the designation of safe third countries by the Canadian government. The provision lists the following factors to be considered in making such a designation:

(a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;

a) le fait que ces pays sont parties à la Convention sur les réfugiés et à la Convention contre la torture;

(b) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention Against Torture;

b) leurs politique et usages en ce qui touche la revendication du statut de réfugié au sens de la Convention sur les réfugiés et les obligations découlant de la Convention contre la torture;

(c) its human rights record; and

c) leurs antécédents en matière de respect des droits de la personne;

(d) whether it is a party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee Protection.

d) le fait qu'ils sont ou non parties à un accord avec le Canada concernant le partage de la responsabilité de l'examen des demandes d'asile.[1]

Subsection 102(3) of the IRPA places a duty upon the Governor in Council to ensure the continuing review of these factors in relation to each designated country. Paragraph 101(1)(*e*) of the IRPA establishes that individuals arriving in Canada via a designated country may not be referred to the refugee determination process.[64]

[63] *Herrera*, *supra* note 59 at para. 9.

[64] *Ibid.* at para. 101 (1)(*e*).

On December 5, 2002, Canada and the U.S. entered into a bilateral safe third country agreement formally known as the *Agreement between the Government of Canada and the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries.*[65] The STCA is part of the *Smart Border Action Plan* signed by the two countries in December 2001[66] and represents the culmination of negotiations that began in the 1990s.[67] The STCA came into force on December 29, 2004,[68] and was implemented via amendments to the *Immigration and Refugee Protection Regulations* (IRPR).[69]

The STCA is predicated upon the country of first arrival principle. Pursuant to the agreement, an individual seeking refugee status in Canada who has traveled through the U.S. prior to arriving at the Canada-U.S. land border may be returned to the U.S. for the determination of his or her refugee claim, and vice versa. The preamble to the STCA describes the agreement as a burden-sharing mechanism whereby international refugee protection efforts may be strengthened and garner further public support.[70] Article 4 constitutes the main operative provision of the STCA and states that, subject to a number of exceptions:

> ...the party of the country of last presence shall examine, in accordance with its refugee determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.[71]

This provision of the STCA therefore authorizes the "party of the country of last presence" to determine refugee claims made at a land border port of entry between Canada and the U.S., subject to a number of exemptions.[72]

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[65] STCA, *supra* note 2.

[66] Foreign Affairs and International Trade Canada, "The Canada-U.S. Smart Border Declaration Action Plan for Creating a Secure and Smart Border", online: DFAIT: <http://www.dfait-maeci.gc.ca/anti-terrorism/actionplan-en.asp>. Point 5 under the Action Plan states: "Managing of Refugee/Asylum Claims:Negotiate a safe third-country agreement to enhance the managing of refugee claims."

[67] "Canada-United States of America: Discussions on Responsibility-Sharing for Asylum Seekers Adjourned" (1998) 10 Int'l J. Refugee L. 256.

[68] CIC, News release, "Safe Third Country Agreement comes into force today" (29 December 2004), online: CIC <www.cic.gc.ca/ENGLISH/department/media/releases/2004/0420-pre.asp>.

[69] *Immigration and Refugee Protection Regulations*, S.O.R. 2002-227 as am. [IRPR].

[70] STCA, *supra* note 2, preamble.

[71] *Ibid.* at Art. 4.1. The "country of last presence" is defined in Article 1(*a*) of the STCA as "that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry."

[72] *Ibid.* at Art. 4.2.

As noted above, the Canadian government implemented the STCA through amendments to the IRPR. Section 159.3 of the IRPR designates the U.S. as a safe third country that complies with the non-refoulement provisions of the Refugee Convention and the CAT.[73] At the moment, the U.S. is the only country designated by Canada as a safe third country. Prior to the publication of the regulations, the federal government consulted a number of stakeholders, including "the UNHCR [the office of the United Nations High Commissioner for Refugees], the Immigration and Refugee Board, the Canadian Bar Association and human rights and refugee advocacy groups."[74] Many of these organizations seriously questioned whether the U.S. was in effect a safe third country for refugee claimants and highlighted problematic issues within the U.S. refugee determination system, such as the detainment of claimants, time-limits for making claims, and the possibility of widespread recourse to human smuggling.[75]

The Canadian Council for Refugees (CCR) has consistently objected to the STCA since its inception. In 2002, Kemi Jacobs, President of the CCR, characterized the STCA as the "None Is Too Many Agreement" and argued that it would exacerbate the administrative inefficiency of the refugee determination system and increase human smuggling.[76] In a policy paper issued in 2006, the CCR supported its argument that the U.S. was not a safe third country for refugees by noting its violation of the non-refoulement provisions in the Refugee Convention and the CAT, as well as its tarnished human rights record.[77] The CCR pointed to the Governor in Council's failure to ensure the continuing review of U.S. policy and practices and urged that, upon proper consideration of these issues, its designation as a safe third country for refugees should be withdrawn. The organization's concerns were also articulated in a brief provided to Parliament's Standing Committee on Citizenship and Immigration in February 2007.[78] As outlined later in the paper, the controversy over the legitimacy of the STCA culminated in proceedings before the Federal Court.

Canada and the U.S. were obligated to produce a one-year report following the implementation of the STCA. The report was issued in November 2006 and it

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[73] IRPR, *supra* note 70 at s. 159.3.

[74] *Regulations Amending the Immigration and Refugee Protection Regulations*, C. Gaz. 2004. II, online: Canada Gazette, http://canadagazette.gc.ca/partII/2004/20041103/html/sor217-e.html [Gazette].

[75] *Ibid.*

[76] Jacobs, *supra* note 27 at 33.

[77] CCR, "Less Safe Than Ever: Challenging the Designation of the U.S. as a Safe Third Country for Refugees" (November 2006), online: CCR < http://www.ccrweb.ca/Lesssafe.pdf> at 37.

[78] CCR, "Brief to the Standing Committee on Citizenship and Immigration" (16 February 2007), online: CCR < http://www.ccrweb.ca/s3cfeb07.html>.

determined that the Agreement had been implemented successfully.[79] The report noted that, in monitoring the implementation process, the UNHCR had reached the following conclusion:

> ...the Agreement has generally been implemented by the Parties according to its terms, and with regard to those terms, international refugee law. Individuals who request protection are generally given an adequate opportunity to lodge refugee claims at the ports of entry (POE) and eligibility determinations under the Agreement have generally been made correctly.[80]

In addition to this general assessment, the report provided statistical figures regarding the impact of the STCA upon the number of refugee claims in Canada and the U.S. and highlighted how various issues were dealt with by the parties.

As expected, the STCA had a far more severe impact upon individuals seeking to enter Canada from the U.S. in order to make refugee claims.[81] When compared with figures from 2004, the total number of refugee claims made in Canada decreased by twenty-three percent (19,735) in 2005, with fifty-five percent fewer refugee claims (4,033) being made at the land border.[82] The vast majority of individuals (3,254) who made claims at the land border were found eligible for exceptions to the STCA, with

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[79] CIC, "A Partnership for Protection One Year Review", Canada Chapter, (November 2006), online: CIC < http://www.cic.gc.ca/English/department/laws-policy/partnership/chapter4.asp > [CIC, Partnership]. See: Index, online: CIC <http://www.cic.gc.ca/English/department/laws-policy/partnership/index.asp>.

[80] *Ibid.* See: Summary, online: CIC < http://www.cic.gc.ca/English/department/laws-policy/partnership/summary.asp>.

[81] *Ibid.* See: United States Chapter, online: CIC < http://www.cic.gc.ca/English/department/laws-policy/partnership/chapter5.asp> [CIC, Partnership, U.S. Chapter]. The STCA had a negligible impact upon the number refugee claims made in the U.S. at the land border. In 2005, 66 claims were made at the land border, which was consistent with figures from previous years. Sixty-two claimants were returned to Canada pursuant to the STCA. The report highlighted the matter of detainment and noted issues such as access to communication services. The U.S. rejected a UNHCR recommendation to stop applying the "direct back" policy, preferring instead to limit its use. In addition, the U.S. demonstrated a commitment to confirming "both the [refugee] applicant's valid legal status in the country to which he or she is being directed back, and the ability of the individual to appear for his or her scheduled interview." A UNHCR recommendation to establish an administrative review process for reconsidering decisions under the STCA was rejected by the U.S. for similar reasons as those put forward by Canada.

[82] *Ibid.* See Canada Chapter, Statistics Section, online: CIC < http://www.cic.gc.ca/English/department/laws-policy/partnership/chapter4.asp#c>.

303 claimants being returned to the U.S.[83] Women represented forty-seven percent of the claimants at the land border and the "preliminary gender impact analysis" determined that the STCA did not have a differential impact based on gender. The issue of the intersection of gender and sexual minority status was not contemplated within the report.

2.4 Impact of the STCA upon Sexual Minority Claimants

In *Canadian Council for Refugees v. Canada* a refugee claimant from Colombia and three non-governmental organizations (the applicants) challenged the validity of the STCA by filing an application for judicial review before the Federal Court.[84] While the claimant was not seeking asylum on the basis of his sexual orientation, several arguments were put forward regarding the detrimental impact of the STCA upon sexual minorities. The applicants were initially successful in obtaining a declaration of invalidity with respect to the designation of the U.S. as a safe third country; however, the Court's finding was eventually overturned on appeal.[85] Justice Noël of the Federal Court of Appeal defined the central issue as whether the relevant regulations and the STCA were *ultra vires* the IRPA.[86] In narrowing the scope of review, the appellate court failed to address the arguments made regarding the impact of the STCA upon sexual minority claimants.

The Federal Court of Appeal determined that the lower court had erred in finding "that the designation of the U.S. as a safe third country and the related Regulations were outside the authority of the GIC or that the Safe Third Country Agreement between Canada and the U.S. was illegal."[87] Justice Noël noted that the Governor in Council had considered the factors listed in section 102 in designating the U.S. as a safe third country and that "there was nothing left to be reviewed judicially."[88] It was also found that the Governor in Council had fulfilled its duty of ongoing review under subsection 102(2) of the IRPA. Finally, the Court refused to answer any arguments related to the *Canadian Charter of Rights and Freedoms*, given that they lacked a proper factual foundation. In response to the appellate decision, Gloria Nafziger of Amnesty International commented:

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[83] *Ibid.* Number of claimants who qualified for each exception: family in Canada – 1,577; temporary suspension of removal due to generalized risk– 1, 218; capital punishment – 0; unaccompanied minor – 49; possessed Canadian visa – 373; and no Canadian visa required – 37.

[84] 2007 FC 1262, [*C.C.R.*].

[85] *Canada v. Canadian Council for Refugees*, 2008 FCA 229 [*C.C.R.* (FCA)].

[86] *Ibid. C.C.R.* (FCA) at para. 64.

[87] *Ibid.* at para. 82.

[88] *Ibid.* at para. 78.

> Sadly the court chose to focus on the scope of the review and questioned the right of the petitioners to bring forward such a challenge, rather than on the human rights issues at stake for refugees...The evidence shows that [the] United States falls short of its responsibilities to protect refugees under international law. It fell short of those responsibilities on the day the Agreement was signed, and has continued to fall short of these responsibilities to this day.[89]

Nafziger's statement highlights the Federal Court of Appeal's failure to engage in substantive analysis of the STCA's impact on refugees.

Ultimately, the validity of the SCTA was upheld by the courts and the Agreement remains operative. The Supreme Court of Canada refused leave to appeal the Federal Court of Appeal's decision in February 2009. Regardless of the result in this case, there is evidence that the STCA has a particularly negative impact upon sexual minority refugee claimants. Three important issues are: the preclusion of refugee claims under the one-year time bar, difficulties with claiming an exemption under the STCA, and the exclusion of same-sex partners from family reunification initiatives under U.S. law.

(i) One-Year Time Bar

The American refugee determination system applies a mandatory one-year time bar to refugee claims.[90] Claimants must therefore apply for refugee status within one year of arriving in the U.S., subject to a few exceptions. Claimants who seek refugee status after the one-year period are only eligible to obtain "withholding of removal," which is a less secure status that requires a higher standard of proof.[91] Numerous stakeholders, including lawyers, representatives from non-governmental organizations, and legal

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[89] See: Canadian Council of Refugees. "Rights Groups Express Dismay with Appeal Court Ruling on Safe Third Country," News Release (2 July 2008), online: CCR < http://www.ccrweb.ca/eng/media/pressreleases/02july08.htm>.

[90] The *Immigration and Nationality Act*, U.S.C. 8 s. 208(2)(b) (1996) states: Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

[91] Individuals applying for "withholding of removal" who are unable to establish past persecution are subject to a higher standard of proof for establishing the likelihood of future persecution. The standard is described as "more likely than not." See: 8 C.F.R. s. 208.16 (b) (2) (2004). In contrast, the standard of proof for regular asylum seekers under U.S. law is significantly lower. The standard has been described as follows: "Instead of requiring that persecution be more likely than not, the Supreme Court relied on authority stating that even a one in ten chance (and possibly less) of facing future persecution should be sufficient to warrant a well-founded fear." See: Neilson, *supra* note 46 at 237-238. Individuals who obtain "withholding of removal status" also have a less secure legal status in the U.S. because they lack the right to permanent residence, are unable to petition for relatives to join them, and cannot obtain refugee travel documents.

scholars, have commented upon the effect of the one-year time bar upon sexual minority claimants. Victoria Neilson, Legal Director for Immigration Equality (formerly known as the Lesbian and Gay Immigration Rights Task Force), issued the following statement on behalf of the organization prior to the implementation of the STCA:

> We are especially concerned that for LGBT and HIV-positive asylum seekers who may not be aware that they are eligible to apply for asylum and therefore miss the one year filing deadline under U.S. law will never have an opportunity to obtain a fair hearing on their claims. For many LGBT asylum seekers, Canada has been the only option after missing the one year filing deadline.[92]

Neilson's statement illustrates how sexual minority claimants are particularly disadvantaged by the STCA, given that they are more likely to miss the U.S. filing deadline and lose the opportunity to make a claim in Canada.

As noted in the previous section, both the Board and reviewing courts recognize that a number of factors can contribute to the failure of sexual minority claimants to seek asylum in a safe third country. These factors include severe psychological trauma resulting from persecution, lack of familiarity with the refugee determination process, and personal struggles with sexual orientation or gender identity. Victoria Neilson relayed an example of this reality in an affidavit submitted by the applicants for the Federal Court's consideration in *C.C.R.*:

> For example, last fall I was contacted by an HIV positive gay man from Venezuela. He had filed his asylum application approximately 18 months after he arrived in the United States. Although he suffered from depression, his lawyer never submitted a brief arguing that the applicant qualified for an exception to the one-year filing deadline. The applicant had been raped so violently by a Venezuelan policeman who made vile, homophobic comments, that he required rectal surgery after the attack. Nonetheless, the applicant lost his asylum case and his immigration appeal. He was able to cross the border to Canada days before the implementation of the Safe Third Country Agreement. In May 2005, his application for refugee status was granted in Canada. He would have been removed to Venezuela had he not been able to seek protection in Canada.[93]

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[92] Immigration Equality, Press Release, "New 'Safe Haven' Rules May Endanger Asylum Seekers, Says Immigration Equality", (30 November 2004), online: Immigration Equality < http://www.immigrationequality.org/uploadedfiles/Safe%20Third-Country.pdf>.

[93] Affidavit Neilson, *supra* note 54 at para. 7.

This example demonstrates how the effects of persecution, including severe physical trauma and depression, can impact the ability of sexual minorities to apply for refugee status within the one-year limit, placing them at risk of refoulement to persecution.

The Federal Court has acknowledged the challenges facing sexual minorities in meeting the U.S. time limit for refugee claims. The lower court decision in *C.C.R.* noted the applicants' evidence regarding the disproportionate impact of the time bar upon gender-based and sexual minority claimants and stated:

> These claimants are more likely to delay their claims because of a lack of information and because of the shame these types of claimants often feel. The Applicants make solid theoretical arguments about why this bar would have a disproportionate impact.[94]

In this instance, the Court recognized how the particular situation of sexual minority claimants could make them more vulnerable to the time limitations under U.S. law.

The international community of refugee law scholars has become increasingly concerned with alternate refuge or protection elsewhere measures such as the STCA. The *Michigan Guidelines on Protection Elsewhere* are the product of the Colloquium on Challenges in International Refugee Law held at the University of Michigan Law School in November 2006.[95] These guidelines attempt to formulate a framework for the proper transfer of refugees pursuant to safe third country agreements. Article 4 of the guidelines states:

> Unless the receiving state acknowledges the refugee status of the person to be transferred or will in fact ensure that all rights set by Arts. 2–34 of the Convention are granted to him or her without need for recognition of refugee status, every transfer of protection responsibility must be predicated on a commitment by the receiving state to afford the person transferred a meaningful legal and factual opportunity to make his or her claim to protection. The sending state must in particular satisfy itself that the receiving state interprets refugee status in a manner that respects the true and autonomous meaning of the refugee definition set by Art. 1 of the Convention.[96]

Building upon Article 4 of the Michigan Guidelines, legal scholar Michelle Foster argues that in safe third country agreements "where the third state does not have an adequate status determination system, there is a risk that returning or transferring a

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[94] *C.C.R., supra* note 85 at para. 162.

[95] James C. Hathaway, "The Michigan Guidelines on Protection Elsewhere" (2007) 28 Mich. J. Int'l. L. 207 [Hathaway, Protection].

[96] *Ibid.* at Article 4.

refugee to that state would involve indirect refoulement contrary to Article 33" of the Refugee Convention.[97] In support of this argument Foster cites a study by Audrey Macklin, which notes that procedures in the U.S., such as the one-year time bar, create "a risk of indirect refoulement when refugees are transferred from Canada to the United States."[98] The inability of sexual minority claimants to seek refugee status in Canada after having their claims barred in the U.S. due to time is therefore a serious consequence of the STCA which could potentially lead to their refoulement to persecution.

(ii) Exemptions under the STCA

Refugee claimants may seek an exemption from the application of the STCA on a number of grounds, including the presence of family members in Canada. Sexual minorities with a spouse in Canada are eligible for an exemption under the STCA. This category of exemption can, however, raise particular difficulties for such claimants. In order to be eligible under this exemption, refugee claimants must disclose their sexual orientation or gender identity to border authorities, as well as the presence of their spouse living in Canada. This requirement can be problematic for individuals who find it difficult to disclose these aspects of their identity.[99]

There are many reasons why refugee claimants may feel uncomfortable telling border authorities about their sexual orientation or gender identity. Individuals may be reluctant to disclose this information for fear of retaliation from homophobic border authorities. They may have been treated harshly by authorities in their home states, struggle with feelings of confusion and shame over their identity, or experience internalized homophobia. Sexual minorities therefore face particular challenges in accessing exemptions from the STCA that could give them access to the Canadian refugee determination system.

(iii) Family Reunification

Sexual minorities making refugee claims in the U.S. are unable to benefit from family reunification initiatives, since federal legislation such as the *Defence of Marriage Act*

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[97] Michelle Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2008) 28:2 Mich. J. Int'l L. 223 at 249.

[98] *Ibid.* at 249, FN 107, citing: Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement (2005) 36 Colum. Hum. Rts. L. Rev. 365 at 402-405.

[99] This criticism of the STCA was made by El-Farouk Khaki, a refugee lawyer in Toronto, during the following panel: "Sexual Diversity Panel on Human Rights and Refugee Law Issues" (28 October 2008) McGill University.

precludes the possibility of recognizing same-sex partners as spouses.[100] Therefore, successful sexual minority refugee claimants in the U.S. are unable to sponsor partners who may face continuing persecution in their home states. Victoria Neilson provides an example of a transgender refugee claimant whose claim was accepted by the U.S., but who could not protect his partner from further persecution by sponsoring her.[101] Same-sex couples making refugee claims in the U.S. are also treated in a differential manner, as they do not benefit from the opportunity afforded to heterosexual couples to put forward joint claims. Neilson explains the situation as follows:

> Whereas a married heterosexual couple would pursue their claims together, and if only one of the claims met the asylum standard, both spouses could remain in the United States, gay couples must put forward their asylum cases individually. Thus, for example, I recently met with a gay couple from Colombia both of whom are in removal proceedings in front of different immigration judges. One of the men is HIV positive and had suffered past persecution on account of his sexual orientation. The other man is HIV negative and has no evidence of past persecution. It is likely that the claim of the HIV positive man with evidence of past persecution will prevail while his partner will be ordered removed.[102]

Couples seeking refugee status in the U.S. based on their sexual orientation or gender identity are therefore clearly disadvantaged under U.S. law.

The principle of family reunification informs much of Canadian immigration policy.[103] This principle is expressly articulated in paragraph 3(2)(*f*) of the IRPA, which states:

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[100] *Defence of Marriage Act* § 3, 1 U.S.C. § 7 (1996) (providing that, for the purposes of federal law, 'spouse' refers only to a person of the opposite sex who is a husband or a wife). It is also notable that the UNHCR recommended that the U.S. use the public interest exception (Article 6 of the STCA) to include same-sex partners. In rejecting this recommendation, the U.S. government noted that its federal law ruled out the possibility of including same-sex partnerships within the definition of the term "spouse." See: CIC, Partnership, United States Chapter, online: CIC < http://www.cic.gc.ca/English/department/laws-policy/partnership/chapter5.asp>.

[101] Affidavit Neilson, *supra* note 54 at para. 11.

[102] *Ibid.* at para. 12.

[103] Nicole LaViolette, "Coming out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act" (2004) 49 McGill L.J. 969 at 971.

(2) The objectives of this Act with respect to refugees are	(2) S'agissant des réfugiés, la présente loi a pour objet :
...	...
(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;	(f) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;

Canadian refugee law facilitates the family reunification of refugees via the joint application and sponsorship processes. The STCA also facilitates family reunification through a number of exemptions, however this goal is compromised in cases where sexual minority claimants do not disclose the existence of spouses in Canada for various reasons.

Pursuant to the Board's rules of procedure, refugee claims involving certain designated family members must be heard jointly. For example, the claims of spouses or common-law partners must be heard together.[104] The main benefit of this provision is that both individuals are eligible for refugee status if one is found to be a genuine refugee, therein upholding the principle of family reunification. Same-sex relationships are legally recognized under Canadian law, unlike in the majority of the U.S., where the recent election results reflect the country's hostility toward recognizing the family ties of sexual minorities.[105] Therefore, sexual minority couples are eligible to have their refugee claims heard jointly in Canada. Sexual minorities accepted as refugees in Canada are also eligible to apply to sponsor a family member who is still abroad, such as their spouse or common-law partner.[106] This option is not available to sexual minority claimants in the U.S.

The effect of the one-year time bar and the inability to reunite with family members upon sexual minority claimants is severe, as it can result in indirect refoulement to persecution or continued persecution of a successful claimant's spouse. In addition, the principle of family reunification is breached where sexual minority claimants are deflected to a country where they are unable to sponsor their partners or have their claims heard jointly. There are therefore strong arguments in support of

[104] *Refugee Protection Division Rules*, r. 49(1): "The Division must join the claims of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, brother, sister, grandchild or grandparent."

[105] McKinley, *supra* note 52.

[106] IRPA, *supra* note 4 at s. 13(1) states: "A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class." A "family member" is defined in s.1(3) of IRPR, *supra* note 70, and includes "the spouse or common law partner of the person." Section 1(1) of the IRPR defines "common law partner" as "an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year."

the assertion that sexual minority claimants suffer disproportionately as a result of the STCA.

III. INTERNAL FLIGHT ALTERNATIVES

Determinations made by the Board regarding the availability of internal flight alternatives to refugee claimants are another manifestation of the alternate refuge requirement.[107] This part of the paper explains the role of IFA findings within the Canadian refugee determination system and discusses their impact on claims made by sexual minorities. Decisions involving sexual minority claimants hailing from Mexico are used to illustrate the analysis because they constitute a large proportion of sexual minority claims processed within the Canadian refugee determination system.[108] In addition, the Board's policy response with respect to the availability of IFAs to Mexican claimants reveals problems with its analysis of the issue. It is therefore important to evaluate the effectiveness of the Board's approach to these claims as a way of examining the issues that will arise when IFAs are raised in claims from other countries.

An IFA may be defined as an alternate location within a refugee claimant's home state where he or she may seek protection from persecution. For example, individuals may genuinely fear persecution in their village, but could potentially seek

[107] While the term "internal flight alternative" is used by Board members and the judiciary, other terms have been suggested for the concept, such as the "internal relocation alternative" and the "internal protection alternative" (See: UNHCR, "Summary Conclusions - Internal Protection/Relocation/Flight Alternative," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection,* Erika Feller, Volker Turk and Frances Nicholson, eds., (Cambridge: Cambridge University Press, 2003) at 418 [Feller]. Refugee law scholar James Hathaway advocates the use of the term "internal protection alternative," since it focuses upon the availability of "true internal *protection*" within a claimant's home state as a ground for refusing a refuge claim. (See: James C. Hathaway and Michelle Foster, "Internal protection/relocation/flight alternative as an aspect of refugee status determination" in Feller, cited above [Hathaway, Internal Protection]. For the purposes of this paper, the term "internal flight alternative" or IFA will be used, which accords with the terminology used in Canadian case law and tribunal decisions.

[108] Mexican claimants represent the majority of refugee claims in Canada, about twelve percent of the overall number of claims. See: Radio Canada archives, online: <http://www.radio-canada.ca/Actualite/v2/tj22h/archive113_200805.shtml>. Mexico has surpassed China as the leading source of refugees processed within Canada. In 2006, 4,953 refugee claims were made by individuals from Mexico and, mid-way through 2007, 3,090 claims had been made by Mexican claimants (See: Jessica Rafuse, "Rumour of open-door policy drawing claimants, lawyer says" *The Globe and Mail* (22 September 2007) at A10. Mexico is also a leading source of refugee claims based on sexual orientation. From January 2000 to December 2003, the majority of refugee claims (602) based on sexual orientation came from Mexico. See: Marina Jimenez, "Gay refugees seek haven in Canada" *The Globe and Mail* (25 April 2004), online: Globe and Mail: < http://www.theglobeandmail.com/servlet/story/RTGAM.20040423.wrefugee24/BNStory/Front/>.

protection in a larger city within their home states. As noted by Ninette Kelley, former member of the Board, the consideration of an IFA is a relatively recent development within the refugee determination process. Kelley asserts that while, traditionally, it was sufficient for refugee claimants to establish a well-founded fear of persecution in their local area, decision-makers are now using the availability of IFAs to restrict eligibility for refugee status.[109] The Refugee Convention does not explicitly refer to the availability of an IFA to refugee claimants, but the Federal Court of Appeal has stated that "the IFA concept is inherent in the Convention refugee definition."[110] As a result, it has become an important issue in many refugee decisions.

IFA considerations may be characterized as "an extension of the concept of state protection."[111] While some legal scholars find that the availability of an IFA is relevant to establishing a well-founded fear of persecution, James Hathaway argues that the IFA analysis is "relevant to the question [of] whether national protection is available to counter the well-founded fear shown to exist in the applicant's region of origin."[112] Pursuant to this analysis, once a refugee claimant's well-founded fear of persecution has been established, the Board must consider whether he or she may obtain state protection in the region from which he or she fled, or in a different location within his or her home state (an IFA).

Refugee claimants, who bear the onus of disproving the availability of an IFA, must be given the opportunity to respond to the matter.[113] While as a matter of procedural fairness refugee claimants must be given sufficient notice that the issue will be raised, case law regarding the scope of such notice is contradictory. According to Kelley, the best practice is to advise the refugee claimant of the particular locations that will be considered as potential IFAs.[114]

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[109] Ninette Kelley, "Internal Flight/Relocation/Protection Alternative: Is it Reasonable?" (2002) 14 Int'l. J. Refugee L. 4 at 4-5.

[110] *Rasaratnam v. Canada (M.E.I.)*, [1992] 1 F.C. 706, 140 N.R. 138 (C.A.) at para. 6. [*Rasaratnam*].

[111] Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13 Int'l J.H.R. 437 [LaViolette, Independent].

[112] Hathaway, Internal Protection, *supra* note 109 at 381.

[113] *Thirunavukkarasu v. Canada (M.E.I.)*, [1994] 1 F.C. 589, (1993) 109 D.L.R. (4th) 682 (C.A.) at para. 10.

[114] Kelley, *supra* note 111 at 11, wherein Kelley states: "In light of these conflicting decisions, what is the better view? The answer lies in the recognition that as a matter of natural justice, the claimant should know the case he or she has to meet...To be effective notice, an area of proposed IFA must be specific and the claimant must be provided with an opportunity to prepare an adequate response." This position accords with that put forward in the *Michigan Guidelines on the Internal Protection Alternative*. See James C. Hathaway, "International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative" (1999) 21 Mich. J. Int'l. L. 131 at 140 [Hathaway, Guidelines IPA].

In *Rasaratnam v. Canada (M.E.I.)*, the Federal Court of Appeal established the following two-prong test for assessing the availability of an IFA:

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.[115]

There are therefore two important issues in determining the validity of an IFA. First, the Board must consider whether there is a serious possibility of the refugee claimant being persecuted in the IFA; secondly, the reasonability of relocation to an IFA must be evaluated in light of a claimant's particular circumstances and conditions in the IFA. In cases where the Board finds a valid IFA, the refugee claim is denied. IFA findings may therefore trump otherwise valid refugee claims.

3.1 IFAs and Sexual Minority Claimants

The availability of IFAs to sexual minority refugee claimants is a contentious matter. Nicole LaViolette provides the following rationale for the increasing saliency of IFA findings to refugee claims involving sexual minorities:

> Social, political, and legal progress is sometimes highly localized in a State; more tolerant destinations may therefore constitute an IFA for gay men, lesbians, bisexuals or transgender people. In addition, meaningful protection in a different area of the country may indeed be available to an asylum-seeker in situations where the individual 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.[116]

Significant progress in certain areas of a state, such as larger and more cosmopolitan cities, may therefore result in the provision of adequate protection to sexual minorities. Accordingly, the availability of IFAs in such locations has become a dominant issue in cases involving sexual minority claimants.

Increased awareness of the availability of IFAs in more progressive regions of refugee-producing countries prompted a particular policy response from the Board. In light of localized socio-political progress in Mexico, Gaetan Cousineau, Deputy Chairperson of the Board, designated the decision in *Gutierrez v. Canada (M.C.I.)* as

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[115] *Rasaratnam*, *supra* note 112 at para. 10.
[116] LaViolette, Independent, *supra* note 113.

a "persuasive decision" in 2006.[117] Persuasive decisions serve as informal guidelines for reasoning in similar cases. The Board's policy with respect to persuasive decisions is as follows:

> Persuasive Decisions are decisions that have been identified by a Division head as being of persuasive value in developing the jurisprudence of the Division. They are decisions that decision-makers are encouraged to rely upon in the interests of consistency and collegiality.
>
> The application of persuasive decisions by the Division enables the Division to move toward a consistent and transparent application of questions of law or of mixed law and fact. Their designation promotes efficiency in the hearing and reasons writing process by making use of quality work done by colleagues within the tribunal.
>
> Unlike Jurisprudential Guides, decision-makers are not required to explain their decision not to apply a persuasive decision in appropriate circumstances. Their application is voluntary.[118]

Gutierrez was designated as being relevant to the availability of an IFA to Mexican claimants seeking refugee status on the basis of their sexual orientation. The case involved a gay couple from Guadalajara who fled Mexico after allegedly being verbally and physically abused by family members and detained by the police. In considering the availability of an IFA to the claimants in Mexico City, the Board pointed to evidence that the gay subculture was represented in government, legislation was passed banning discrimination on the basis of sexual orientation, gay and lesbian organizations were spreading, larger cities were more tolerant of sexual minorities, and political activism such as gay pride parades and protests took place in larger cities.[119] Overall, the Board concluded that both prongs of the IFA test (serious harm and reasonability of relocation) were satisfied and the claims were denied.

In May 2008, Ken Sandhu, Deputy Chairperson of the Board, revoked the designation of *Gutierrez* as a persuasive decision. The reasons for its revocation were stated in the following policy note:

> The decision in TA4-10802/03 was identified as having persuasive value regarding the availability of an internal flight alternative in Mexico for refugee claimants whose claims are based on the Convention ground

[117] [2005] R.P.D.D. No. 179 (QL) [*Gutierrez*]. Since the withdrawal of *Gutierrez* as a persuasive decision, it no longer appears in online databases or on the IRB website.

[118] IRB, "Persuasive Decisions", online: IRB <www.irb-cisr.gc.ca/en/references/policy/persuasive/index_e.htm>.

[119] *Gutierrez, supra* note 119 at paras. 13-19.

> of membership in a particular social group on the basis of sexual orientation.
>
> Over time, the evidence on which the above noted decisions was 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.[120]

The designation and subsequent revocation of *Gutierrez* as a persuasive decision illustrates a number of problems with the Board's IFA analysis. IFA findings are determinative of refugee claims and should only be considered once persecution in the claimant's local area has been established. The designation of *Gutierrez* is, however, evidence of a trend in the Board's reasoning whereby IFAs have become the primary issue in cases involving sexual minorities. Furthermore, the revocation of *Gutierrez* demonstrates that persuasive decisions are ill-suited for informing the Board's IFA analysis. The test for finding an IFA requires the Board to consider evidence regarding a claimant's personal circumstances, as well as current country conditions. Since country conditions may change over time, the evidence relied upon in designating a persuasive decision may lose currency and become irrelevant to subsequent IFA determinations. This problem is addressed in the context of the issues examined below.

The following issues are explored in considering the impact of the Board's IFA analysis upon sexual minority claimants: the Board's reliance upon the discretion requirement, the nature of the agents of persecution, and problems regarding objective evidence of country conditions.

(i) Discretion Requirement

The relevance of acting discreetly to avoid persecution in one's home state is an issue that has been raised in relation to refugee claims made by sexual minorities.[121] Under Canadian law, sexual minority claimants are not required to act discreetly to avoid

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[120] IRB, "Policy Note: Notice of Revocation of Persuasive Policy Decisions" (8 May 2008), online: IRB <www.irb-cisr.gc.ca/en/references/policy/polnotes/rev_ta417681_10800203_18833_e.htm>.

[121] See Christopher Kendall, "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?" (2003) 15:4 Int'l J. Refugee L.715 at 718, wherein he states: "Homophobia aims to ensure that women and men do not violate those gendered norms central to patriarchal power structures and that lesbians and gay mean are suppressed, silenced, made invisible to the extent that their relationships and sexuality do so. Given this, any decision that requires 'discretion', for which, read silence and invisibility, in order to avoid abuse does little more than prop up those inequalities that the Convention seeks to address and which are the core of both homophobia and sexism."

persecution.[122] Nevertheless, it appears that the Board sometimes considers the issue of discretion in the context of IFA findings involving sexual minority claimants. In *Perez v. Canada (M.C.I.)*, the Board's IFA analysis included the consideration of a gay refugee claimant's prior cautious behaviour in concealing his sexuality, as well as his masculine appearance. The Board stated:

> Finally, when the claimant was asked whether he could live elsewhere in Mexico, such as Mexico City, he said he would have to start all over again and that he would have to be respected...In addition, according to the claimant, he was always careful not to publicly display his sexual orientation. This means that, since he would not be considered to be effeminate (afeminados) or to be a cross-dresser, he would not be particularly targeted in Mexico City. The panel finds that internal flight is a realistic and achievable alternative for the claimant, particularly in view of the claimant's previous experience in Gueretaro.
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> ...
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> Furthermore, the panel finds that...he has an internal flight alternative elsewhere in Mexico, specifically, Mexico City, since he has not publicly displayed his sexual orientation.[123]

Relying on these conclusions, the Board held that Mexico City was a viable IFA for this discreet gay refugee claimant.

This approach is problematic for a number of reasons. It is premised upon a requirement that is not valid under Canadian law, that of requiring sexual minority claimants to act discreetly. Acting discreetly is often a means of self-preservation

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[122] See *X.M.U. (Re)*, [1995] C.R.D.D. No. 146 (QL) at para. 102-104. See also Kendall, *supra* note 123 at 740, wherein the author states: "Donald G. Caswell of the University of Victoria, for example, upon reviewing the jurisprudence on this issue, has concluded that 'a lesbian or gay man is certainly not expected to hide their sexual orientation in order to be safe somewhere in their country'."

[123] [2004] R.P.D.D. No. 78 (QL) at paras. 19-21.

for sexual minorities; it is a way to avoid persecution.[124] As such, requiring a refugee claimant to continue concealing his or her sexual orientation directly violates basic principles of refugee law. Refugees should not have to suppress basic human rights to avoid persecutory acts. An IFA is supposed to constitute a safe alternate location for a refugee claimant, one in which he or she might live free of persecution. Forcing sexual minorities to act discreetly is in itself a distinct form of oppression.[125] It is therefore perverse to found an IFA finding upon a presumption of past or future discretion in a given location.

The Board's finding in *Perez* does not appear to be an isolated case. In *P.L.L. (Re),* the Board determined that a refugee claimant's "sexual orientation would not even be suspected in the workplace if he preferred to keep it a private matter."[126] This finding was made in support of the availability of an IFA in Mexico City. The discretion requirement is therefore informing the Board's IFA analysis in a manner that is undermining refugee claims. Claimants are essentially being punished for their ability to "pass" as heterosexual in a different region of their country.[127] As noted by Jenni Millbank, sometimes being too private about one's sexual identity can lead decision-makers to deny refugee claims on the basis that the harm they have suffered does "not qualify as persecution and will be regarded as merely private and/or readily avoided."[128] Millbank concludes that "discretion reasoning [has] led to the assumption that applicants would be safe in a big city because no-one will know they are gay (and

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[124] In *S395 v. Minister of Immigration and Multicultural Affairs*, [2003] HCA 71 at para. 43 (9 Dec. 2003), Justices McHugh and Kirby of the High Court of Australia made the following statement with respect to this issue: "The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her... membership in a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor, and that the relevant persecutory conduct is the *harm* that will be inflicted. In many – perhaps the majority of – cases, however, the applicant has acted in the way he or she did only because of the *threat* of harm."

[125] Jenni Millbank, "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003" (2005) 14 Soc. & Leg. Stud. 115 at 120.

[126] [2005] R.P.D.D. No. 21 (QL) at para. 49.

[127] The term "passing" is used to describe a practice used by some sexual minorities of concealing their sexual identity in order to "pass" as heterosexual in certain contexts. See: Brooke Kroeger, *Passing: When People Can't Be Who They Are*, (Public Affairs, 2003) at 8, where passing is described as "erasing details or certain aspects of a given life in order to move past perceived, suspected, or actual barriers to achieve desired ends."

[128] Millbank, Imagining, *supra* note 22 at 144.

they can keep it that way), rather than because it actually *was* safe to be gay in the big city."[129]

The Board's reliance upon discretion reasoning parallels early decisions that cited documentary evidence asserting that "there are three groups for whom an IFA is not possible [in Mexico]: effeminate men, HIV-positive men, and political activists and whistle-blowers."[130] The Board has described gay refugee claimants as "athletic" and "masculine" in finding that an IFA is available to them.[131] This focus upon a refugee claimant's effeminacy has led to the decision by at least one gay refugee claimant and his legal counsel to re-formulate the Convention ground asserted in his claim to "effeminate homosexuals."[132] The Board's perception of the masculinity of lesbian refugee claimants has also been used to undermine their well-founded fear of persecution,[133] thereby leaving open the possibility that discretion requirements might also be applied to IFA findings involving lesbians. The relationship between the legal test for an IFA and the physical appearance or demeanour of a gay or lesbian refugee is questionable as well as problematic since it relies upon stereotypical views of sexual minorities.

(ii) Agents of Persecution

Sexual minority claimants often report persecution at the hands of state agents such as the police.[134]Democratic states such as Mexico are, however, subject to the presumption of state protection under Canadian law.[135] It can therefore be challenging for sexual minority claimants to rebut the presumption that a democratic state is capable of protecting its own citizens. A related issue is the ability of local police to continue persecuting claimants in an alternate location in the country, whether directly or through connections with other state agents.

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[129] Jenni Millbank, "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom" (2009) Int'l J. H. R. (forthcoming).

[130] *V.X.Q. (Re)*, [2002] R.P.D.D. No. 516 (QL) at para. 11 [*V.X.Q. (Re)*].

[131] See: *Valdes v. Canada (M.C.I.)*, [2004] R.P.D.D. No. 140 (QL) at para. 42.

[132] See: *F.N.K. (Re)*, [2005] R.P.D.D. No. 881 (QL) at para. 3.

[133] See: *P.W.Z. (Re)*, [2000] C.R.D.D. No. 47 (QL) at para. 6.

[134] For example, in *Gutierrez*, *supra* note 119, a gay refugee couple alleged unlawful detainment by the police; in *Martinez v. Canada (M.C.I.)*, [2005] R.P.D.D. No. 68 (QL), a gay refugee couple were allegedly beaten by police; in *Parrales v. Canada (M.C.I.)*, [2005] R.P.D.D. No. 326, a lesbian refugee claimant alleged sexual assault by the police; and in *Garcia v. Canada (M.C.I.)*, 2005 FC 807, a gay claimant alleged sexual assault by the police [*Garcia*]. However, IRB research states that "Reports of police officers sexually abusing homosexuals were scarce among the sources consulted by the Research Directorate," Response to Information Request, MEX 102682.E (09 January 2008), online: IRB <http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=451639>.

[135] See *Ward*, *supra* note 21.

The UNHCR's guidelines regarding IFAs make it clear that where the agent of persecution is the state, there is a presumption that its authority applies state-wide, thereby precluding the availability of an IFA to refugee claimants.[136] With respect to persecution by local authorities, the UNHCR Guidelines presume that such actions are authorized by the state, unless there is evidence that the local authority has no presence outside the immediate region.[137] The *Michigan Guidelines on the Internal Protection Alternative* echo the UNHCR Guidelines in this regard:

> 15. First, the "internal protection alternative" must be a place in which the asylum-seeker no longer faces the well-founded fear of persecution for a Convention reason which gave rise to her or his presumptive need for protection against the risk in one region of the country of origin. It is not enough simply to find that the original agent or author of persecution has not yet established a presence in the proposed site of internal protection. There must be reason to believe that the reach of the agent or author of persecution is likely to remain localized outside the designated place of internal protection.
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> 16. There should be a strong presumption against finding an "internal protection alternative" where the agent or author of the original risk or persecution is, or is sponsored by, the national government.[138]

Therefore, an IFA may only be considered where there is no chance of local authorities extending their influence beyond their jurisdiction.

The Board generally approaches the issue of persecution by local authorities in Mexico from the perspective that they have little reach outside their limited jurisdiction. For example, in *V.X.Q. (Re)*, the Board found it unlikely that police officers from Puerto Vallarta might follow the claimant to Mexico City. The Board concluded that an IFA was available in Mexico City, since it was within the jurisdiction of a different police force.[139] In *Orozco Gonzales v. Canada (M.C.I.)*, the Board found it unlikely that police officers from Veracruz would seek out the claimant if he relocated to Mexico City.[140] The Board's approach to the issue was formalized in *Gutierrez*, where the Board found that:

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[136] UNHCR, "Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, at para. 13-14. Online: UNHCR < http://www.unhcr.org/publ/PUBL/3f28d5cd4.pdf> [UNHCR, Guidelines].

[137] *Ibid.*

[138] Hathaway, Guidelines IPA, *supra* note 116 at 137-138.

[139] *V.X.Q. (Re)*, *supra* note 132 at paras. 7-9.

[140] [2004] R.P.D.D. No. 120 (QL) at para. 14.

> ...there is nothing before me to convince me within the preponderance of probabilities that the Guadalajara police officers would be able to influence any police response in Mexico City, which is quite obviously an entirely different police jurisdiction.[141]

The Board's reasoning in *Gutierrez* therefore supported an informal presumption that the reach of local authorities in Mexico was limited in scope.

There are, however, cases in which the Board is willing to acknowledge that the boundaries of police jurisdiction in Mexico are more permeable. *V.Z.D. (Re)* involved a lesbian refugee claimant who had been stalked and attacked by her ex-husband and a number of local police officers he had hired as agents. The Board ultimately concluded that there was no IFA available to the claimants.[142] Cases involving the federal police force are also less likely to result in positive IFA findings, given the force's country-wide jurisdiction. In *X.D.W. (Re)*, the agent of persecution was a member of the judicial/federal police. The claimants had attempted to relocate from Mexico City to Guadalajara, but they were tracked down by the police, leading the Board to conclude that there was no IFA available to them.[143]

Having reviewed a number of cases involving the availability of IFAs to sexual minority claimants in Mexico, it appears that the Board's approach runs counter to both the *Michigan Guidelines on the Internal Protection Alternative* and the UNHCR Guidelines noted above. In particular, the Board tends to work from the position that local authorities do not have a wide reach and it requires claimants to rebut this presumption. Claimants who can show evidence of relocation and continued persecution are more likely to rebut potential IFA findings. Individuals who flee their local region immediately and seek asylum abroad due to state persecution, however, face serious challenges in rebutting presumptions about the reach of local authorities.

(iii) Documentary Evidence of Country Conditions

In making IFA findings, decision-makers are called upon to weigh evidence of both country conditions and a claimant's personal circumstances. It is therefore essential for the Board to rely upon up-to-date and accurate country information. Sexual minority claimants often have difficulty obtaining sufficient documentary evidence to bolster arguments against the viability of a particular IFA. Nicole LaViolette argues that the broad objectives of human rights organizations make it difficult for them to report upon the distinct legal criteria sought by refugee claimants in rebutting potential IFAs. LaViolette finds that "human rights reports rarely compare internal locations to determine whether a part of the country is a safer place for specific minorities or

[141] *Gutierrez, supra* note 119 at para. 24.
[142] *V.Z.D. (Re)*, [2001] C.R.D.D. No. 37 (QL) at paras. 27 and 30.
[143] *X.D.W. (Re)*, [2006] R.P.D.D. No. 1 (QL) at para. 26.

targeted individuals."[144] The dearth of location-specific information therefore hampers the ability of claimants to successfully challenge IFAs.

Under Canadian law, the Board is presumed to have considered all of the evidence before it and is not obligated to refer to every piece of evidence in its decision. Where a key piece of evidence contradicts a significant finding made by the Board, however, the Board must provide reasons for its preference.[145] For example, in *Garcia v. Canada (M.C.I.)*, the Board failed to mention why evidence pertaining to the rate of homophobic murders in Mexico City did not influence its finding of an IFA in that city. Upon judicial review, the Federal Court held that:

> The evidence referred to by the Board does not squarely address the incidence of violent crime directed at gays and lesbians in Mexico City because of their sexual orientation. The central issue in this case is whether the fact that he is an openly gay man, Mr. Garcia would be able to live safely in Mexico City. As such, evidence relating to homophobic crimes directed against gay men in that city should have been of critical concern to the Board.

While it might have been open to the Board to choose not to ascribe much weight to the Report, given that it was prepared six years before Mr. Garcia's refugee hearing, in all of the circumstances, it was not open to the Board to simply ignore it.[146]

The result in *Garcia* demonstrates how the Board's consideration of documentary evidence can impact the validity of its IFA findings.

The Board must also contend with the schism between a state's official anti-discrimination policy with respect to sexual minorities and the lived reality of such individuals. One reason for the designation of *Gutierrez* as a persuasive decision was the Board's thorough analysis of evidence pertaining to country conditions for sexual minorities in Mexico. The Board noted a number of legislative developments, such as anti-discrimination laws, which seemed to bode well for the protection of sexual minorities. It is important to note that *Gutierrez* was decided in February 2005 and that the decision-maker relied upon a National Documentation Package dated November 26, 2004, even though an updated version was available at the time.[147] One year later, in October 2006, *Gutierrez* was designated as a persuasive decision.

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[144] LaViolette, Independent, *supra* note 113.

[145] See *Cepeda-Gutierrez v. Canada (M.C.I.)* (1998), 157 F.T.R. 35 (F.C.T.D.) at para. 17.

[146] *Garcia*, *supra* note 136 at paras. 16-17.

[147] See: *H.K.T. (Re)*, [2007] R.P.D.D. No. 28 at para. 15 [*H.K.T. (Re)*], where the Board states: "Moreover, the panel relied, in February 2005, on a national documentation package dated November, 2004 (although a package dated January, 2005, was available.)"

Over time, Board members became increasingly uneasy with applying *Gutierrez*. There is evidence that as early as November 2006 certain Board members were relying upon more up-to-date country-condition documentation and becoming increasingly skeptical about the effectiveness of the legislative changes being implemented in Mexico. In *H.W.X. (Re)*, the Board stated:

> The panel is of the opinion that the internal flight alternative is not a reasonable possibility in this case. The panel takes note of decisions TA-10802 and TA4-10803, which are persuasive, but in this case the claimant was not living in a provincial town but in Mexico City, the most tolerant city in the country according to the documentary evidence. Even in Mexico City, homophobia is still common, and although protective measures exist, they are, according to the document MEx101377.EF, ineffective.[148]

In *H.K.T. (Re)*, the Board went further in its criticism of *Gutierrez* as a persuasive decision. The Board noted that, regardless of the legislation passed in order to protect sexual minorities in Mexico, little concrete change was taking place.[149] In addition, the Board refused to rely on the outdated evidence cited in *Gutierrez* and preferred to take into consideration evidence found in a more recent National Documentation Package. As noted above, the persuasive decision was not revoked until May 2008, when the Deputy Chairman of the Board acknowledged its diminished relevance in light of changed country conditions. It is impossible to determine how many refugee decisions expressly applied or rejected *Gutierrez* between its designation and revocation, since the Board does not publish all of its decisions; however, it is argued that *Gutierrez* had a significant impact upon sexual minority claims from Mexico and its revocation will likely weaken the informal presumption in favour of finding IFAs in Mexico.

IV. ANALYSIS

This part of the paper assesses the impact of alternate refuge measures upon sexual minority refugee claimants by analyzing common issues arising from the application of the safe third country rule and IFA findings to their claims. The analysis first highlights general problems with the current approach and then focuses on the aspects that systematically disadvantage sexual minority claimants. It is argued that the distinct nature of homophobic persecution increases the vulnerability of sexual minority claimants to the misapplication of the alternate refuge concept. Decision-makers must therefore adopt a more nuanced approach to the issue by taking into account factors specific to sexual minority claimants and focusing upon relevant country conditions.

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[148] *H.W.X. (Re)*, [2007] R.P.D.D. No. 4 (QL) at para. 26.

[149] *H.K.T. (Re)*, *supra* note 149 at para. 12.

4.1 General Problems

The research undertaken above reveals a number of general problems with the current approach to alternate refuge. The analysis will focus on three issues: credibility determinations made by the Board, the impact of the STCA upon refugee claimants, and the Board's reasoning with respect to the reach of local authorities in making IFA findings.

The Board must enhance its understanding of the relationship between a refugee claimant's failure to seek asylum in a safe third country and his or her credibility.[150] As set out by the Federal Court in *Ilie* and *Gavryushenko*, failure to claim refugee status in a safe third country is relevant to the issue of credibility, but is not determinative of a refugee claim.[151] Therefore, the Board must refrain from treating the issue as conclusive and explore any relevant factors before making a negative credibility finding.

Overall, the STCA has a negative impact upon refugee claimants, as it precludes claimants from seeking refuge in their choice of forum when they arrive at the Canada-U.S. land-border. Statistics show that the Agreement has a particularly significant impact upon individuals seeking to claim refugee status in Canada who have previously travelled through the U.S. In 2005, 303 refugee claimants were removed from Canada and returned to the U.S. pursuant to the STCA, while only 66 claimants were removed from the U.S. and returned to Canada.[152] As noted earlier, many refugee claimants have no choice but to travel through the U.S. prior to their arrival in Canada due to the nature of travel arrangements. The STCA therefore has a serious impact upon such claimants.

The designation of the U.S. as a safe third country under the STCA also calls into question Canada's commitment to the principle of non-refoulement. The STCA does not take into account whether an individual making a refugee claim at the Canada-U.S. border is precluded from seeking refugee status in the U.S. under the one-year time bar. It is therefore possible that a refugee claimant who is, because of the time limit, barred from seeking refugee status in the U.S. could also be excluded from the Canadian refugee determination system under the STCA, thereby placing the individual at risk of refoulement to persecution. Several legal scholars, including those involved in developing the *Michigan Guidelines on Protection Elsewhere*, have warned against the transfer of refugee claimants to a state where they may not

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[150] For example: see *Mendez*, *supra* note 39, where the Board treated the claimant's failure to seek alternate refuge in a safe third country as determinative of his refugee claim.

[151] *Ilie*, *supra* note 34; *Gavryushenko*, *supra* note 35.

[152] CIC, Partnership U.S. Chapter, *supra* note 82.

have a meaningful opportunity to put forward their claims, thereby risking indirect refoulement.[153]

In considering the approach of decision-makers to IFAs, it becomes evident that the Board's reasoning with respect to the reach of persecutory authorities is problematic. The UNHCR Guidelines and the *Michigan Guidelines on the Internal Protection Alternative* support the presumption that persecution by local authorities is authorized by the state, unless proven otherwise.[154] This approach reduces the burden upon the refugee claimant. However, it appears that the Board has adopted the position that local authorities involved in persecution are unlikely to wield power outside their jurisdiction. Refugee claimants are therefore placed under the more onerous burden of having to establish that local authorities have a national reach or influence. This can be particularly troublesome for individuals who do not have a history of relocation within their home states and fled persecution immediately.

4.2 Specific Issues - Sexual Minority Claimants

In addition to the general problems noted above, there is evidence that the current approach to alternate refuge systematically disadvantages sexual minority claimants. The analysis focuses on two major issues: the relationship between homophobic persecution and alternate refuge considerations, and the approach taken by decision-makers toward country conditions in determining alternate refuge issues.

(i) Homophobic Persecution

The nature of the persecution experienced by sexual minorities increases their vulnerability to the misapplication of alternate refuge measures. In considering the issue of alternate refuge, decision-makers sometimes presume that sexual minorities have fully embraced their sexual identity and are cognizant of the opportunity to seek asylum in other countries. However, homophobic persecution can force individuals to conceal their sexual identity, thereby forcing them to live a closeted existence in their home states or in transition states. In addition, sexual minorities may internalize societal homophobia, resulting in shame and self-loathing about their sexual identity. Claimants may fear self-identifying as sexual minorities and may not feel safe revealing this aspect of their identity to authorities in other countries. They may also have limited knowledge of their eligibility for refugee status on the basis of their sexual orientation or gender identity. These issues affect the ability of sexual minorities to seek asylum prior to their arrival in Canada.

The Board appears to have acknowledged many of these problems in its approach to credibility determinations. A set of factors has been developed in

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[153] See: Foster, *supra* note 98; Hathaway, Internal Protection, *supra* note 109.
[154] UNHCR Guidelines, *supra* note 138; Hathaway, Guidelines IPA *supra* note 116.

order determine the relevance of a sexual minority claimant's failure to seek asylum in a third country to his or her overall credibility. Struggles with sexual identity, psychological distress, and lack of familiarity with the refugee determination system are key considerations undertaken more recently by the Board in evaluating credibility. An encouraging development took place in *E.Y.W. (Re)*, where the Board found that failure to seek asylum in a safe third country due to psychological distress actually bolstered a sexual minority claimant's credibility.[155] It is important that this analytical framework be applied more consistently in future credibility determinations.

With respect to the Board's IFA analysis, members must be watchful of using discretionary reasoning in assessing claims by sexual minorities. Requiring claimants to act discretely in an IFA does not accord with Canadian law and ignores the influence of homophobic persecution over the decision by sexual minority claimants to hide their sexual identity. The fact that a claimant has lived a closeted lifestyle or does not bear a stereotypically gay or lesbian appearance is not relevant to IFA findings and may actually be considered further evidence of government repression.

Finally, the STCA negotiated between the American and Canadian governments fails to account for the consequences of homophobic persecution set out above. Sexual minority claimants, some of whom have experienced severe psychological and physical trauma or have yet to come to terms with their sexual identity, are likely to miss the one-year deadline for filing a refugee claim in the U.S. Their refugee claims are therefore barred in the U.S. and cannot be processed in Canada if they are made at the Canada-U.S. land border. These claimants are left in limbo and must apply for a less secure status in the U.S., which is more difficult to obtain. It is argued that individuals in this situation should be exempt from the STCA. Canada should authorize this change as an exemption in the public interest under Article 6 of the STCA.

(ii) Country Conditions

The assessment of country conditions, both in a claimant's home state and in a safe third country, is a pivotal aspect of refugee determinations.[156] These assessments are particularly important with regard to the availability of alternate refuge. Decision-

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[155] *E.Y.W. (Re)*, *supra* note 48.

[156] See: Arwen Swink, "Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities" (2006) 29 Hastings Int'l Comp. L. Rev. 251 at 256, where Swink states: The ways in which a reviewing tribunal evaluates, or fails to evaluate, the conditions from an applicant's country of origin have a tremendous impact on a claimant's chances of success...An asylum adjudicator's choice of independent sources, assessment of relative weight of those sources and understanding of the different social contexts faced by gay men, lesbians, bisexuals and transgendered people all weigh heavily in the final analysis of the likelihood that an applicant will face persecution if returned to the country of origin.

makers face specific challenges in evaluating country conditions in cases involving sexual minority claimants. These challenges often arise due to a lack of information regarding the plight of sexual minorities in other countries. Donald Casswell noted the following in a 1996 publication:

> First, board panels may demand documentary evidence of sexual orientation persecution, unreasonably forgetting that in many countries lesbianness and gayness are so taboo that they are, literally, unmentionable...The more repressive a country is the more difficult it likely will be to obtain documentation concerning human rights abuses generally and about persecution of lesbians and gay men in particular.[157]

While access to information about the persecution of sexual minorities throughout the world may have improved, Nicole LaViolette argues that the information obtained by human rights organizations may not always be specific enough to meet the standards required under refugee law, nor is the material used by decision-makers always reliable.[158] Both of these concerns are relevant to the Board's IFA findings. Refugee claimants are often left to rebut IFA findings without adequate information about the availability of protection, or lack thereof, within their home states. Also, for a time the Board relied on an outdated persuasive decision in creating an informal presumption in favour of finding IFAs for sexual minorities in Mexico. Increasing the amount of authoritative information available regarding the country conditions faced by sexual minority claimants and relying on up-to-date information as to these conditions is essential to a fair refugee determination system in Canada.

A second problem results from the failure of decision-makers to make adequate inquiry into country conditions. For example, in assessing a refugee claimant's credibility, the Board may consider whether he or she sought refugee status in any safe third country he or she travelled through prior to their arrival in Canada. A key question in determining this issue is whether sexual minorities are in fact eligible for protection within the refugee determination systems of other states. As established earlier, sexual minority status is not recognized as a ground of refugee status in every state party to the Refugee Convention. Unfortunately, the Board does not appear to consider this issue, or the general treatment of sexual minorities in third countries, when making credibility determinations. Consideration of the eligibility of sexual minorities for refugee status in third countries is an important factor that should influence the Board's credibility analysis.

Finally, further investigation into country conditions is required in designating states as safe third countries. The federal government is responsible for negotiating and

[157] Donald Casswell, "Lesbians, Gay Men, and Canadian Law" (Toronto: E. Montgomery, 1996) at 596.

[158] LaViolette, Independent, *supra* note 113.

implementing safe third country agreements such as the STCA. In doing so, recourse must be had to evidence of country conditions in these states. Prior to designating the U.S. as a safe third country, the federal government conducted a study of gender-based refugee cases in the U.S. and determined that "Canada and the United States have similar approaches and both countries meet international standards on the treatment of gender issues."[159] Sexual minorities were not accorded similar treatment in the process leading up to the implementation of the STCA, as the government's analysis failed to address the link between persecution on the basis of sexual orientation and gender.[160] Given that alternate refuge measures clearly disadvantage sexual minority claimants, it is important that their perspective form part of the consultations undertaken prior to the formalization of such agreements.

4.3 Conclusion

The current approach to alternate refuge systematically disadvantages sexual minority claimants. This research paper discussed two manifestations of the alternate refuge concept: the safe third country rule and IFAs. The analysis was framed under two broad themes: the nature of homophobic persecution and the relevance of country conditions. The study demonstrated how homophobic persecution and problems with evidence regarding country conditions serve to increase the vulnerability of sexual minority claimants to the misapplication of the alternate refuge concept. Decision-makers must therefore consider factors specific to sexual minorities in determining alternate refuge issues.

Canada has long been at the forefront of the movement to protect the rights of sexual minorities, including refugee claimants. The country has demonstrated this commitment by taking steps such as being the first to recognize sexual orientation and gender identity as a ground of refugee status and hearing the refugee claims of same-sex couples jointly. Canada's current approach to the issue of alternate refuge threatens its reputation in this regard and puts the country at risk of participating in the practice of refoulement to persecution. It is therefore imperative that the issues discussed above inform how Canadian policy-makers, legislators, and judicial and administrative decision-makers interpret the conditions faced by sexual minorities in sources of alternate refuge.

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[159] Gazette, *supra* note 75 at 10.

[160] See LaViolette, Gender, *supra* note 1 at 213-214, where LaViolette argues: "It therefore seems relevant that the Canadian Guidelines explicitly reflect the link between gender and sexual orientation within the refugee determination process. The current Guidelines should follow the UNHCR's lead by explicitly acknowledging the gender dimensions of many claims based on sexual orientation. Without clearer directives on the issue, Canadian decision-makers are likely to continue to overlook the gender aspect of the persecution of sexual minorities.