July 2018

“Pernicious [E]ffects”: Discretionary Decision-making in Queer Immigration to Canada

Renata Colwell

University of Victoria, rcolwell@uvic.ca

---

Recommended Citation

Renata Colwell, ““Pernicious [E]ffects”: Discretionary Decision-making in Queer Immigration to Canada”, (2018) 8:2 online: UWO J Leg Stud 5
“Pernicious [Effects”: Discretionary Decision-making in Queer Immigration to Canada

Abstract
Over the past sixty-five years, Canada’s official attitude towards queer immigration has undergone dramatic changes, from overt exclusion to ostensible welcome. However, discretionary decision-making has remained a constant component of the evolving immigration frameworks affecting queer immigrants, with negative repercussions for queer applicants. From 1952 to 2017, queer immigration to Canada has been plagued by arbitrariness, unaccountability, unpredictability, and administrative scope for discriminatory exercises of discretion by decision-makers, resulting in harms that range from stress and vulnerability to unjust exclusion. In charting future courses to improve immigration outcomes for queer applicants and refugee claimants who seek to join us on Indigenous lands, care should be taken to strike the right balance between making it easier for individuals to fit into the categorical boxes that will allow them to join us in ‘being here to stay’, and questioning the categories, arbitrary geopolitical lines, and presumptions about legitimate decision-making authority on which Canada’s immigration system currently rests.

Keywords
Queer, Immigration, Discretion, Discrimination, Legal History

Cover Page Footnote
The author is grateful to Gillian Calder, Emily MacKinnon, and the students of LAW 357 for their helpful comments.
"PERNICIOUS [E]FFECTS": DISCRETIONARY DECISION-MAKING IN QUEER IMMIGRATION TO CANADA

RENATA COLWELL*

INTRODUCTION

In the common-law settler colony of Canada, Lamer C.J.’s proclamation that “we are all here to stay” remains a foundational aspect of the law. However, who is and is not allowed to enter Canada and become part of the “all” who are “here to stay” is a product of the intersection of law, policy, and discretion—all of which are shaped by value judgments regarding who is and is not a desirable addition to the Canadian “mosaic.” Over the past sixty-five years, for example, the official attitude towards queer immigration to Canada has undergone a dramatic change from overt exclusion to ostensible welcome. However, discretionary decision-making has remained a key feature of the evolving immigration framework affecting queer immigrants—with negative repercussions for queer applicants both in the past and at present.

This paper traces change and continuity in queer experiences with Canadian immigration decision-making and focuses on four distinct time periods: 1952–1978, an era when homosexuals were explicitly banned from entering Canada; 1978–1991, during which ‘homosexuals’ were no longer prohibited outright but many queer immigrants were still constructively excluded; 1991–2002, an era when queer refugees and same-sex partners began to be admitted on a discretionary basis; and 2002–2018, which has seen queer immigrants increasingly subsumed into mainstream immigration bureaucracy, with varying outcomes. I argue that, despite these changes, queer immigration has been and continues to be plagued by arbitrariness, a lack of accountability, unpredictability, and—perhaps most importantly—broad administrative scope for the discriminatory exercise of discretion by decision-makers. The foregoing issues have resulted in harms to queer immigrants, ranging from stress and vulnerability to unjust exclusion.

In the administrative law context of immigration, discretion refers to the scope of choice available to the decision-maker. While some discretion is generally appropriate...

Copyright © 2018 by COLWELL.

* Renata Colwell completed her Juris Doctor (J.D.) at the University of Victoria Faculty of Law in 2017. She holds a B.A. (Hons.) in History from Queen’s University, where she completed her undergraduate thesis on the history of sexuality. Her current research interests include Indigenous legal issues, human rights law, and environmental law. She is grateful to Gillian Calder, Emily MacKinnon, the students of LAW 357, and the reviewers and editors of the Western Journal of Legal Studies for their helpful feedback on earlier versions of this paper.

1 The title of this paper is taken from David Corbett’s 1957 critique of discretionary power under the Immigration Act, 1952, SC 1952, c 42, which partially inspired the argument that follows. See DC Corbett, Canada’s Immigration Policy: A Critique (Toronto: University of Toronto Press, 1957) at 92.

and even necessary in implementing legislative and policy directives, too much discretion may allow decision-makers to slip into arbitrary decision-making. Arbitrary decisions may include those that are

biased, illogical, unreasonable, or capricious… exhibit a lack of care, concern, or good judgment on the part of the decision-maker… show mere opinion, preference, stereotyping, or negative discrimination… [or] treat individuals with a lack of respect, ignore dignity interests, or deny [their] equal moral worth.³

To the extent that discretion in Canadian immigration decision-making has left and continues to leave space for homophobia and associated biases and stereotypes to contribute to arbitrary or discriminatory treatment of queer applicants, the system requires improvement in order to achieve just and equitable outcomes.

Before continuing, a brief note about terminology is warranted. As David Murray notes, “all sexual and gender identity terminologies (including queer) are fraught with historical, political, linguistic, and cultural specificities that are heightened and intensified when inserted into the bureaucratic and juridical apparatus of the immigration and refugee determination system.”⁴ Further, such terminology may not always “reflect an individual’s chosen self-ascription.”⁵ That being said, some form of shorthand is required to facilitate my discussion. Following Melissa White, I have chosen to use the word “queer” as “an umbrella term for contemporary lesbian, gay, [and] bisexual… ‘identities.’”⁶ Though White’s use of “queer” also includes trans, two-spirit, and gender non-conforming identities,⁷ this article primarily focuses on the intersection of immigration decision-making and sexual orientation. Thus, it does not purport to deal extensively with the unique challenges that members of these gender-identity groups may encounter in Canada’s immigration bureaucracy.⁸ Such challenges would undoubtedly benefit from deeper analysis in a future article. I note also that although the pejorative use

---

⁵ Ibid.
⁶ MA White, “Documenting the undocumented: Toward a queer politics of no borders” (2014) 17:8 Sexualities 976 at 978.
⁷ Ibid.
⁸ Members of these gender-identity groups face some of the same administrative barriers as lesbian, gay, and bisexual applicants and, to that extent, the content of this article is also applicable to their experiences. However, “the experiences of transgender forced migrants also vary from those of lesbian, gay, and bisexual forced migrants.” For example, “[t]ransgender individuals not only experience violence and discrimination but also may have difficulty accessing appropriate health care. Gender-nonconforming individuals may be at increased risk of discrimination if their physical appearance does not correspond to the gender indicated on their identity documents.” See EJ Alessi, S Kahn & R Van Der Horn, “A Qualitative Exploration of the Premigration Victimization Experiences of Sexual and Gender Minority Refugees and Asylees in the United States and Canada” (2017) 54:7 J Sex Research 936 at 937.
of the term “queer” dates back as far as Oscar Wilde’s day, its reclamation only began in the 1980s. Thus, using the term in a non-derogatory sense when discussing periods prior to the 1980s is arguably ahistorical and something I will strive to avoid. When discussing the last seven decades in their entirety, however, I feel its use is appropriate.

I. THE HOMOSEXUAL PROHIBITION (1952–1978)

The Canadian government first addressed sexual orientation in the context of immigration in 1950, when the interdepartmental committee tasked with drafting legislation to replace the Immigration Act, 1910 proposed a clause banning the entry of “prostitutes, homosexuals, lesbians, and persons coming to Canada for any immoral purpose.” Writing in 1987, legal scholar Philip Girard attributed the proposal to stereotypical Cold War era anxieties that homosexuals posed a threat to security. This was intensified by the still-familiar phenomenon in Canada of pressure to conform to American security priorities. Though the draft’s reference to “lesbians” was removed before the bill was tabled in Parliament in early 1952, the proposed prohibition of “homosexuals” remained, along with a section requiring local officials to report to the Director of Immigration any non-resident who “practices, assists in the practice of or shares in the avails of prostitution or homosexualism.”

Over the objections of a senior civil servant who thought the language “too general for a statute” and potentially overbroad, Parliament passed the legislation in June 1952 without debating the provisions in question. Previous legislation had prohibited those “convicted of a crime of ‘moral turpitude,” which included buggery or gross indecency, from entering Canada. Thus, it was the first time Canadian legislation had targeted people on the basis of sexual identity rather than behaviour. The departure from criminal conviction as a precondition for prohibited entry also gave the new Act the potential to

---

9 University of Pittsburgh Keyword System, sub verbo “queer,” online: <www.keywords.pitt.edu>; and Jake Hall, “Tracing the history of the word ‘queer’” (28 July 2016), Dazed (blog), online: <www.dazeddigital.com/artsandculture/article/32213/1/tracing-the-history-of-the-word-queer>.
10 Immigration Act, 1910, SC 1910, c 27 [Immigration Act, 1910].
12 Girard, ibid at 6.
14 Immigration Act draft meeting, supra note 11, cited in Girard, supra note 11 at 7.
15 Ibid at 7-8.
16 Ibid at 6.
17 R Whitaker, Double Standard: The Secret History of Canadian Immigration (Toronto: Lester and Orpin Denys, 1987) at 38. This change in focus mirrors an earlier conceptual shift in Western thought, from condemning same-sex acts to creating and policing sexual identities or sexualities. See e.g. M Foucault, The History of Sexuality, Volume 1: An Introduction, translated by Robert Hurley (New York: Pantheon Books, 1978) at 43.
exclude far more same-sex-involved people than the previous one.\textsuperscript{18} Like its legislative predecessor, the \textit{Immigration Act, 1952} \textsuperscript{19} gave immigration officials “enormous discretion over the admissibility and deportation of aliens.”\textsuperscript{20} By placing a “strong emphasis on administrative discretion, on the power of the state and the insignificance of the individual in the face of the state,” and by failing to provide clarity regarding “what criteria security officers were to employ in detecting homosexuals,” the \textit{Act} created perfect conditions for arbitrary and unpredictable application of its clearly—but not impermissibly—discriminatory anti-homosexual provisions.\textsuperscript{21}

Admittedly, the sections in question “reaped a meagre harvest in their first decade of operation” because immigration officials seemingly “did not attempt to enforce” them.\textsuperscript{22} Between 1958 and 1963, no one was deported for practicing “homosexualism,” and only five people were denied entry under the sections that barred homosexuals, prostitutes, pimps, and procurers from Canada—although more may have been screened out overseas by the RCMP.\textsuperscript{23} However, as one commentator noted in 1957, in reference to the \textit{Act}’s broader deportation powers, while “few immigrants are deported… nevertheless, the power exists, and it might have pernicious [e]ffects even if it were never used.”\textsuperscript{24}

Banning homosexuals from entry alongside others regarded as socially undesirable not only “represented the official stigma which the state attached to being homosexual” but also created a climate of uncertainty and vulnerability for anyone with same-sex attractions who attempted or managed to enter the country.\textsuperscript{25} Despite a 1966 white paper acknowledging that “such people are not true dangers to the national interest by virtue simply of their personal failings” and that they “could safely be deleted from the specific list of prohibited persons,”\textsuperscript{26} the homosexual ban remained on the books. This was so even after the 1969 decriminalization of private consensual same-sex activity.\textsuperscript{27} Discretionary enforcement could begin at any moment—and it did, within the scope of new departmental guidelines, when a new generation of openly gay and lesbian travellers began to confront immigration officials in the 1970s.

By the mid-1970s, “the bracing winds of gay liberation”\textsuperscript{28} meant gays and lesbians were “not only unashamed but… inclined to parade their intentions proudly and

\textsuperscript{18} Girard, \textit{supra} note 11 at 6.
\textsuperscript{19} \textit{Immigration Act, 1952}, \textit{supra} note 10.
\textsuperscript{21} Whitaker, \textit{supra} note 17 at 38.
\textsuperscript{22} Girard, \textit{supra} note 11 at 11 & 13.
\textsuperscript{23} \textit{Ibid} at 13.
\textsuperscript{24} Corbett, \textit{supra} note 1 at 92.
\textsuperscript{25} Girard, \textit{supra} note 11 at 18.
\textsuperscript{26} Canada, Department of Manpower and Immigration, White Paper, \textit{Canadian Immigration Policy} (Ottawa, 1966), cited in Girard, \textit{supra} note 11 at 13.
\textsuperscript{27} Girard, \textit{ibid} at 13.
\textsuperscript{28} \textit{Ibid} at 13.
readily admit being homosexuals” at the Canadian border. In 1974, an American visitor who revealed he intended “to distribute a gay newsletter in Toronto” was denied entry at first, though he was admitted on a second attempt. The following year, when the Director of Immigration for the Ontario Region asked Ottawa whether the de jure prohibition on homosexual entry should be applied to potential immigrants who would otherwise be flouting it, Ottawa directed immigration officials “not [to] attempt to elicit information concerning homosexuality during interviews” but to apply the prohibition only “if… an applicant volunteers that he or she is homosexual.”

At the same time, the Canadian government was preparing to overhaul the Immigration Act, 1952 and struck a joint committee to conduct public consultations. These were well attended by gay organizations advocating the repeal of the ban. As the Committee reported to Parliament,

Many organizations and individuals called for the removal of any reference to homosexuals and homosexuality in section 5(e). They argue that homosexual acts between consenting adults are no longer an offense under the criminal code, and that the new immigration laws reflect the fact that Canadian attitudes towards homosexuality have changed significantly since the last act was written. Although a few members of the committee felt strongly that the prohibition against homosexuals should remain, the majority agrees that it should be removed.

Parliament took heed of the committee’s recommendation and repealed the prohibition on homosexual immigration without comment via the 1977 passage of the Immigration Act, 1976, which came into force on April 10, 1978. Even on the eve of repeal, however, Canadian courts continued to use the 1952 Act’s explicit discrimination against homosexuals to justify anti-gay bias in the human rights context.
II. CONSTRUCTIVE EXCLUSION (1978–1991)

Although the 1978 repeal of the ban on homosexual immigration is celebrated as a milestone for queers in Canada and has recently been touted as “effectively turning Toronto into a sanctuary for gay refugees,” the practical effect of the change was somewhat less vindicatory than such a characterization implies. As legal scholar Nicole LaViolette has noted, while “gay men and lesbians were no longer barred from entering the country…Canadian immigration law continued…to allow only heterosexual Canadians to sponsor their spouses as family class immigrants.” Binational same-sex couples who “wanted to make a life together in Canada” were denied a legitimate means of doing so. Throughout the 1980s, many foreign partners had to “spend years as reluctant students on student visas, endure [heterosexual] marriages of convenience in order to obtain permanent residence in Canada, or even live underground” in order to stay with their Canadian partners.

Moreover, although the “mutually beneficial ‘sham’ marriage strategy was the “only real pathway to permanent residency and citizenship,” it was typically available only to “closeted queers.” The spousal sponsorship process forced openly queer applicants to out themselves to immigration officials by listing “each and every social or political organization, club or group” in which they had participated over the past decade. As American-born gay activist Bob Gallagher neared the completion of his Canadian degree in 1985, he dreaded being forced to leave his partner. Gallagher saw no legal alternative until Chris Bearchell, “Canada’s highest-profile lesbian… convinced [him] the cheeky thing to do was to marry her and file for immigration” anyway. Following a campy, gender-bending ceremony at Hart House, the newlyweds dutifully listed a decade’s worth of gay and lesbian activism on their sponsorship application and sent it off “prepared for spectacular failure.” However, as Gallagher noted in a recent queer history anthology, he and Bearchell had “overlooked the fact that [they] were filing for immigration in a … system [that] was rule-based, but… populated with the mosaic of that the refusal was improperly based on “personal bias against homosexuals and homosexuality” rather than “concern for any standard of public decency.” The trial judge upheld the Board’s order on appeal. However, the decision was later overturned by the Court of Appeal: Branca JA suggested that bias against homosexuals was not unreasonable, in part because they were still “forbidden entry into Canada as undesirables.” After the repeal of the Immigration Act, 1952—though not explicitly because of it—the Supreme Court of Canada restored the trial judgment and the Board of Inquiry’s order in Gay Alliance Toward Equality v Vancouver Sun, [1979] 2 SCR 435.

---

38 LaViolette, supra note 3 at 973.
39 Ibid at 974, citing Donald G Casswell, Lesbians, Gay Men, and Canadian Law (Toronto: Emond Montgomery, 1996) at 568.
41 Gallagher, ibid at 302.
42 Ibid at 302-303.
43 Ibid.
Canadians”—one that featured “some bureaucrats who were authoritarian, some compassionate… and some just bored.” To Bearchell and Gallagher’s great good fortune, the decision-maker assigned to their file was a “strong, heavyset, shorthaired, baritone-sounding woman” with a “look and a smile Chris had become familiar with decades earlier,” who appears to have used her discretion to quietly approve the application.

However, Gallagher’s odds-defying immigration story should also be read as a cautionary tale. Elsewhere in the system, immigration decision-makers like Mike Molloy were deciding people’s fates on the basis of arbitrary questions, such as “if this person moves in next to my mom, what's she going to think about it?” Evidently, immigration officers in the 1980s had plenty of scope for discretionary decision-making based on personal and normative biases. Any other decision-maker would likely have used that scope to reject Gallagher—and they almost certainly did in other cases. During this period, the vast majority of queer immigrants without the means to study, the willingness to live closeted, or the willingness to live outside the law continued to be constructively excluded from Canada. Arguably, the discretionary space afforded by the immigration system did more to compound its discriminatory impact than alleviate it. However, queer persons were about to stop skirting the rules and to start challenging them outright through national lobbying efforts and constitutional challenges.


The early 1990s saw the rise of two queer-specific administrative routes of entry to Canada. The first applied to foreign same-sex partners of Canadian citizens who wanted to join their partners permanently, while the latter applied to queer refugees seeking to escape persecution in their countries of origin through Canada’s refugee determination system. Both routes required applicants to navigate complex hurdles and put their fates in the hands of unpredictable immigration decision-makers possessed of a great deal of administrative discretion.

The development of the first route began in 1991, when a group of queer Canadians with non-resident partners launched the Lesbian and Gay Immigration Task Force (LEGIT) to lobby against the family-class exclusion of same-sex spouses. That year also saw the first exercise of ministerial discretion to admit the same-sex partner of a Canadian citizen on “humanitarian and compassionate grounds” because he could not be sponsored through the family class. When a number of queer Canadians launched

---

44 Ibid at 303.
47 LaViolette, supra note 35 at 974.
legal challenges to their partners’ exclusion under the legislation starting in 1992, the department used a similar approach to settle the cases and avoid a precedent-setting verdict.49 As one queer historian wrote, “Immigration Canada dodged the bullet by agreeing to accept same-sex partners on a case-by-case basis through independent applications or humanitarian grounds.”50 In 1993, the minister of immigration delegated this power to overseas program officers, and in 1994 the department “officially recognized that the separation… of same sex-couples and heterosexual common-law partners may cause ‘undue hardship’ and therefore constitute grounds for exercising the broad and discretionary ‘humanitarian and compassionate’ decision-making criterion” if the foreign partner was not independently eligible to immigrate.51 By 1995, over sixty same-sex couples had benefitted from the new policy—many with LEGIT’s help.52

However, the mid-1990s approach to queer immigration still “left the issue up to the discretion of individual immigration officers and, although it worked in many cases, such discretionary decisions could be arbitrary and were not open to appeal.”53 Success turned on convincing the decision-maker assigned to the file that the couple was in a bona fide relationship that “met undefined requirements of duration and stability” and that the relationship had not been established primarily for immigration purposes.54 This required queer couples—who could not marry and often could not cohabit prior to applying—to “develop extensive documentary proofs of relationship” in hopes of satisfying the discretionary criteria.55 It also left queer applicants vulnerable to the vagaries of individual decision-makers’ biases, giving rise to widespread criticism that it was “too discretionary, arbitrary, and lacking in transparency.”56 As one commentator asserted, “the homophobia of particular visa officers may have unfairly affected their assessment of an application, for instance, in their evaluation of the bona fides of a gay or lesbian relationship.”57 After all, as another commentator pointedly stated, “[a] humanitarian and compassionate immigration official may well be neither.”58

Even as LEGIT helped same-sex couples navigate this unpredictable process, the organization characterized it as “the worst possible set of procedures,” and complained bitterly about its lack of procedural and substantive rule-of-law safeguards, lamenting, “[t]here are no rules. There are no appeals. There are no rights. There is no assurance of consistency of decision making by the program managers and visa officers in the various

49 LaViolette, supra note 35 at 973-976.
50 Tim McCaskell, Queer Progress (Toronto: Between the Lines, 2016) at 379.
51 LaViolette, supra note 35 at 976.
52 Ibid at 977; and MA White, “Archives of Intimacy and Trauma: Queer Migration Documents as Technologies of Affect” (2014) 120 Radical Hist Rev 75 at 78. [“Archives of Intimacy”].
53 McCaskell, supra note 50 at 379.
54 LaViolette, supra note 35 at 976.
55 “Archives of Intimacy,” supra note 52 at 78.
56 LaViolette, supra note 35 at 977.
57 Ibid, citing Casswell, supra note 39 at 560.
embassies and consulates. There is no openness, no transparency, no publicity.\textsuperscript{59} LEGIT’s push for a more standardized approach to same-sex partner applications gained some traction in 1997, when the Immigration Legislative Review Advisory Group reported its findings and made the following recommendation:

While department guidelines are beginning to provide for more sensitive treatment of immigrants in common law and same-sex unions, applicants are reliant upon the less than uniform application of unpublicized administrative directives. The goal should be transparency, fairness and equality of treatment, and these must be enshrined in law…. The effective discrimination against homosexuals and lesbians in the current legislation should be relegated to history.\textsuperscript{60}

In 1998, Citizenship and Immigration Canada acknowledged that “routinely land[ing]” same sex couples under “a provision…intended to deal with exceptional circumstances”\textsuperscript{61} was not a workable long-term solution. The department admitted that “the discretionary nature of the guidelines results in a lack of transparency and has led to complaints of inconsistent treatment.”\textsuperscript{62} It recommended regulatory changes that would recognize common law and same-sex relationships, in order to “strengthen family reunification…[and] eliminate the recourse to discretionary administrative guidelines.”\textsuperscript{63} When the immigration minister proposed changes to the \textit{Immigration Act, 1976} in early 1999, the inclusion of “lesbian and gay partners in the family class provisions” was among the promised amendments.\textsuperscript{64}

At the same time that same-sex partners of queer Canadians were gradually gaining a foothold in the immigration system—albeit through unpredictably discretionary means—the Immigration and Refugee Board (IRB) was dealing with some of its first claims by individuals seeking protection from sexual orientation related persecution. Under the Geneva Convention Relating to the Status of Refugees,\textsuperscript{65} Canada must offer protection to people who are outside their country of origin and, “owing to a well-founded
fear of being persecuted” on the basis of their “membership [in] a particular social group” (among other characteristics), are “unable or, owing to such fear… unwilling to return” to or “avail [themselves] of the protection of that country.”66 In Canada, the IRB is the “quasijudicial… independent, administrative tribunal” tasked with “hearing claims by persons seeking protection and… [with] determining who meets the definition of a bona fide refugee.”67

The year 1992 marked the first time the IRB granted a refugee claimant “asylum in Canada based on sexual orientation.”68 The landmark case of Jorge Inaudi involved a gay Argentinian man who had been fired, harassed, arrested, beaten, tortured, and sexually assaulted by police because of his sexual orientation.69 Appearing before a panel of two IRB decision-makers, Inaudi convinced one of them that he faced persecution at home as a result of his sexual orientation.70 That IRB decision-maker “found that sexual orientation constituted membership in a particular social group, and anyone facing persecution because of that membership would therefore be eligible for refugee status.”71 Under the refugee determination system in place at the time, “one positive vote of an IRB member was enough… to be granted asylum”; the dissenting decision-maker’s views did not jeopardize the applicant’s ability to stay in Canada.72 Inaudi’s success opened the door for other queer refugee claimants and, in the decade that followed, “IRB members… deemed many such cases of asylum-seekers from a variety of countries to be credible and… granted the claimants Convention refugee status.”73

However, queer claimants’ experiences with Canada’s refugee determination system in the years that followed were not without challenges. Although the IRB now recognized sexual orientation as constituting membership in “a particular social group” for Geneva Convention purposes, queer refugee claimants “were often required to ‘prove’ their gayness to straight refugee Board officials” before proceeding to the proof-of-persecution stage. This was a hurdle that refugee claimants seeking protection from persecution on the basis of other grounds did not meet with to the same extent.74 Due to the comparatively private nature of queer sexual behaviour—particularly in contexts where the threat of homophobic persecution often forced claimants to “pass” to survive—

66 “Archives of Intimacy,” supra note 52 at 82.
67 Ibid.
70 Vagelos, ibid at 262; Fairbairn, supra note 68 at 238-239; and McCaskell, supra note 50 at 379.
71 Re: Inaudi, supra note 69 at 4-10, cited in Vagelos, ibid at 263; and McCaskell, supra note 50 at 379.
72 Fairbairn, supra note 68 at 239.
73 McCaskell, supra note 50 at 379; and Fairbairn, ibid at 242.
74 Ibid.
documentary proof of queer sexual orientation was often difficult to obtain. Where claimants’ cases were consequently based primarily on their own testimony, this increased the risk that a claimant’s identity would be found not to be credible.

Additionally, in the 1990s, mainstream human rights groups like Amnesty International were only just starting to collect country-specific information on queer human rights. Accordingly, claimants often had to rely on documentation prepared by smaller queer-focused groups to put their narrative of homophobic abuse into context for IRB decision-makers. According to immigration lawyers active during this period, “a number of IRB members clearly did not believe [that] the documentation provided by LGBT groups was objective and therefore credible information” and were prone to dismissing it out of hand. Indeed, the dissenting decision-maker in Inaudi’s case had disbelieved his testimony about police rape, in part because he rejected corroborating documentation prepared by “‘self-serving’ gay groups” that would, in his view, “possibly exaggerate the issues of the homosexual community.” Unfortunately, “the absence of countervailing information from ‘credible’ rights organizations” left the dissenting decision-maker “free to use his own knowledge, historically and culturally shaped by ideologies of heterosexual masculinity.” Relying on “entrenched folk knowledge… including common sense understandings of rape as lust,” he dismissed Inaudi’s testimony as not credible.

These dissenting reasons reveal troubling misconceptions, biases, and “similar reasoning…[which likely] prevailed in other cases for which there [was] a lack of mainstream human rights documentation.” When attending certain queer refugee hearings in the 1990s, expert witness Bill Fairbairn heard IRB decision-makers ask questions that “echo[d] the very same misgivings expressed by the dissenting IRB member” in Inaudi’s case. These included the dismissal of queer-collected information on human rights abuses and a stereotypical “lack of appreciation of male-male rape as a crime of violence rather than one of desire.” When Parliament turned its mind to immigration amendments at the end of the twentieth century, there was a great deal of room for improvement in the way IRB decision-makers exercised their discretion in queer refugee cases. Regrettably, the amendments that followed have resulted in comparatively

75 “Archives of Intimacy,” supra note 52 at 83; and LaViolette, supra note 35 at 982.
77 Fairbairn, supra note 68 at 239.
78 Miller, supra note 76 at 155-156.
79 Ibid at 156.
80 Ibid at 155-156.
81 Ibid at 156.
82 Fairbairn, supra note 68 at 240.
83 Ibid.
little improvement in this area, even as they have dramatically improved the immigration prospects for same-sex partners of queer Canadians.


At the start of the new millennium, the Canadian government made good on its plans to amend Canada’s legislative immigration framework with the passage of the *Immigration and Refugee Protection Act, 2001*, which came into force in June 2002. Significant changes to the discretionary decision-making processes used to assess same-sex partners and queer refugees followed. However, while those changes were generally beneficial to the former group, they compounded the challenges facing the latter.

Under the new legislative scheme, same-sex partners’ eligibility for family class sponsorship as “common-law partners” was to be achieved by regulatory definition. The initial proposal would have required queer couples to cohabit for at least one year in order to qualify as “common-law partners,” unless they could prove (to an unspecified evidentiary standard) that such cohabitation had been prevented by persecution or penal law. The criticism from queer groups was fierce and immediate. This approach not only lacked legislative transparency but also ignored the multitude of other factors that could legitimately prevent cohabitation. Furthermore, it privileged heterosexuals by giving them a way to circumvent the cohabitation requirement that was not accessible to queer couples in this pre-gay-marriage era: the legally married “spouse” category.

In response, the minister created the category of “conjugal partner” in 2005, which continues to benefit both queer and straight binational couples who have been in a bona fide conjugal relationship for one or more years without being able to cohabit. However, proving conjugal partnership has continued to constitute a heavier evidentiary burden than the “spouse” category for sponsorship, under which Citizenship and Immigration Canada refused to process applications until May 2004.

---

86 *Ibid* at 982.
87 *Ibid* at 982-983.
88 *Ibid* at 984.
89 In a letter from April 27, 2004, officials informed a gay applicant that “all sponsorship applications ... submitted on the basis of a same-sex marriage to a Canadian Citizen or Permanent Resident are to be held pending advice from the Department of Justice regarding the implications for immigration and legislation required to change the definition of marriage.” The department took this position despite the fact that same-sex marriage was already legal in Ontario, British Columbia, and Quebec. On May 18, 2004, the department seemingly “recognized the legal invalidity of its policy” and announced an interim policy that recognized same-sex marriages performed in one of those three provinces that involved at least one Canadian citizen or permanent resident. Same-sex couples who had wed outside Canada or were both foreign nationals presumably had to wait until July 2005, when same-sex marriage was legalized nationwide. *Ibid* at 993. See also *Civil Marriage Act, 2005*, SC 2005, c 33.
Following the nationwide legalization of same-sex marriage in 2005,90 queer couples’ administrative routes to sponsorship more closely mirrored those of straight couples. However, queer couples continue to be subject to disproportionate evidentiary burdens and other unique challenges that make them vulnerable to negative exercises of decision-making discretion. Proving a bona fide relationship may require queer couples to square their relationships with decision-makers’ Western, heteronormative conceptions of what a genuine relationship looks like.91 As with queer refugees, documentation or corroboration of queer identities and relationships may be more difficult to obtain if safety requires secrecy or a sham heterosexual marriage in the sponsored partner’s home country.92 This hurdle is made all the more significant in light of the fact that, since 2002, most family-class applications have been decided without either partner being interviewed by the decision-maker.93

While immigration decision-makers “still use interviews to clarify ambiguities and inconsistencies, to assess truthfulness, to gauge credibility, and to measure risk,” queer applicants may “find it very difficult… to speak about their sexual orientation and their lives… to state officials.”94 Cultural differences and intersectional identities can compound these difficulties. Additionally, immigration decision-makers are not always willing to hear claimants’ answers to questions about their sexual lives. For example, in 2011, a visa officer complained about “hav[ing] to hear…intimate stories” when interviewing family-class applicants, citing the example of a lesbian who “explain[ed]…how she had sex with her partner for the first time.”95 Apparently, this “horrified” both the decision-maker and her interpreter, and she “quickly ended that line of questioning.”96 Although the researcher who recounted this anecdote framed it as an example of decision-maker discomfort when conducting intrusive questioning, the decision-maker’s “horror” seems to reveal discomfort with queer sexuality in particular. This may have resulted in an unwillingness to hear more of a narrative that she would typically have sat through—and unproblematically factored into her credibility assessment—had she been interviewing a straight applicant.

Regrettably, homophobia remains present in Canadian society. While decision-makers should ideally be “reflect[ing] on their own standpoints, biases, and presumptions about homosexuality in order to fairly assess [applications and] appeals from [queer] couples,” this is difficult to enforce, and “prejudicial, stereotypical, or discriminatory views or behaviours… may [still] underlie particular decisions.”97 If an application is

90 Civil Marriage Act, 2005, ibid.
91 “Archives of Intimacy,” supra note 52 at 78-79.
92 LaViolette, supra note 35 at 995-997.
94 LaViolette, supra note 35 at 995-997.
95 Satzewich, supra note 93 at 227.
96 Ibid.
97 LaViolette, supra note 35 at 995.
withheld because an officer mistakenly “believes that a spousal relationship is not genuine,” an appeal may be able to rectify the situation—but “the couple will probably endure months if not years of further separation, and… incur significant legal costs” in the process.\(^9\) To the extent that prejudice, stereotyping, discrimination, and structural barriers are contributing to the rejection of meritorious applications from queer couples, the current system of discretionary decision-making in the family class context continues to need improvement.

That said, the current status quo for queer couples is vastly better than that of queer refugees. Legislative changes to the immigration system have compounded the challenges queer refugee claimants faced in the 1990s. In 2002, the Immigration and Refugee Protection Act reduced the number of IRB decision-makers hearing each case from two to one,\(^9\) rendering future claimants vulnerable to the kind of decision-maker whose dissenting reasons were kept in check by his counterpart in Inaudi’s case a whole decade earlier. This has left “the door open for homophobia to affect what is truly a life or death decision.”\(^10\) For claimants who have adopted secretive survival strategies at home, the very act of applying for refugee status on the basis of sexual orientation by means of a process that affords little privacy puts these claimants at higher risk of harm, and disastrous consequences may result if their claim is ultimately rejected.\(^11\) While some successful applicants report positive hearing experiences involving “understand[ing]” IRB decision-makers, this type of experience is far from universal. Moreover, unsuccessful claimants’ experiences—which are presumably negative—go largely unstudied due to post-deportation access challenges.\(^12\) Claimants are forced to recount traumatic episodes and withstand a credibility-testing barrage of potentially hostile questions in order to demonstrate a basis for a legitimate fear of persecution. Such a process inevitably brings with it the potential to re-traumatize applicants.\(^13\)

In addition, Canada has started to employ “increasingly stringent measures to screen out potential asylum seekers.”\(^14\) In 2012, the Canadian government cut refugee access to healthcare—including hormonal treatment and mental health medications—and shortened the refugee decision-making process from one year to three months. This time reduction has the effect of forcing claimants to scramble wildly to assemble documentation in time to support their claims, all while trying to access basic supports

---

98 Satzewich, supra note 93 at 233.
99 Fairbairn, supra note 68 at 238.
101 Alessi, Kahn & Van Der Horn, supra note 8 at 940.
and to acclimatize to a new place, culture, and, potentially, a new language. This expedited timeline also leaves claimants little time to engage with local queer communities or to find a queer partner, both of which constitute conduct IRB decision-makers consider to be indicia of credible queer identity. As with queer family-class applicants, refugee claimants’ chances of success can depend significantly on how well they conform to the IRB decision-maker’s normative idea of what a legitimate applicant looks like. In the queer refugee context, this can be conditioned by a combination of Western and exoticizing stereotypes; it may also require claimants with intersectional identities to adopt “homonationalist narrative trope[s]” that portray Canada as a queer paradise to which they will be forever grateful for rescuing them from their barbaric homeland. In several cases, claimants have been rejected “by the deciding IRB member because they did not look ‘gay’, did not have a relationship… or did not feel comfortable talking about their sexuality.”

Recent empirical research by legal academic Sean Rehaag provides additional insight into IRB decision-making patterns in the queer refugee context. Between 2013 and 2015, sexual orientation-based refugee claims made up 12.3 per cent of total IRB determinations. Of those determinations, 70.5 per cent were in the queer claimant’s favour. This represents a higher success rate than claims based on persecution due to activism or political opinion on state policy issues (69.7 per cent and 58.9 per cent respectively), but a lower success rate than claims based on persecution due to religion or opposition to military service (83.7 per cent). Gay and lesbian claimants had higher-than-average success rates, but bisexual claimants—especially bisexual women—were “substantially less likely to succeed.”

When unsuccessful queer claimants chose to appeal their initial rejection, 27.8 per cent of their claims were “found to have been wrongly denied when the reasons offered” by the original decision-maker were “tested on their merits”—a rate of error that Rehaag sees as “cause for concern.” Furthermore, of the 72.2 per cent of queer claimant appeals that failed, 85 per cent were rejected because the Refugee Appeal Division “expressly disbelieved the claimant’s asserted sexual orientation.” Though legal academics “have warned time and time again about the perils of [making] negative credibility determinations” on the basis of unreliable criteria, Canadian decision-makers have continued to use such criteria to assess queer refugee claims. Remarkably, the Refugee

---

105 Fobear, supra note 102 at 108 & 108, n 7.
106 DAB Murray, “The (not so) straight story: Queering migration narratives of sexual orientation and gendered identity refugee claimants” (2014) 17:4 Sexualities 451 at 466.
107 Fobear, supra note 102 at 106.
109 Ibid at 275-276.
110 Ibid at 276-277, 286.
111 Ibid at 280-281.
112 Ibid at 284-285 & 287.
Appeal Division has deferred to those credibility determinations in 61 per cent of queer claimant appeals.\(^{113}\)

Despite the release in 2017 of new IRB guidelines for proceedings involving sexual orientation or gender identity or expression,\(^{114}\) recent submissions to the Standing Committee on Citizenship and Immigration suggest queer claimants may still be facing many of the stereotypes and other credibility hurdles the guidelines are intended to address.\(^{115}\) To the extent that these dynamics continue to be reflected in current IRB decision-making, the status quo is intolerable and in dire need of improvement.

**CONCLUSION**

There is much to be done to improve the unjust exclusion faced by queer immigration applicants. Improvements to the current status quo for both queer refugee claimants and queer family-class applicants may be possible through better selection of immigration decision-makers; comprehensive, ongoing training\(^{116}\) and regular checks to ensure decision-makers are not using homophobic or stereotypical logic in their decision-making; and more expansive and inclusive guidelines for decision-makers that recognize queer experiences outside of Western contexts.\(^{117}\) In the refugee context in particular, meaningful improvement could also include a return to longer timelines to facilitate evidence gathering and a return to using multiple decision-makers to avoid luck-of-the-draw refugee outcomes.

While the Canadian government may find some of these suggestions unworkable, they are all relatively moderate adjustments to a system that remains premised on the inclusion of a privileged few at the expense of multitudes, those who are excluded from Canada as a result of intersecting factors that include where they or their ancestors happen to have been born.\(^{118}\) In this sense, it is not only the decision-makers whose choices may be seen as arbitrary and discriminatory but also the system as a whole. In charting future

\(^{113}\) *Ibid* at 287.


\(^{116}\) Mike Tutthill of Winnipeg’s Rainbow Resource Centre recently urged the Standing Committee on Citizenship and Immigration to consider requiring decision-makers to complete more than a single day of training on queer issues. See Sanders, *supra* note 115.

\(^{117}\) While the *Guidelines, supra* note 114 are a step in the right direction, more can be done to ensure that both IRB decision-makers and the immigration decision-makers who assess family class applications understand the complexity and diversity of non-Western queer experiences.

\(^{118}\) See White, *supra* note 6 at 985.
courses to improve immigration outcomes for queer applicants and refugee claimants who seek to join us on Indigenous lands, care should be taken to strike the right balance between making it easier for individuals to fit into the categorical boxes that will allow them to join us in being “here to stay,” and questioning the categories, arbitrary geopolitical lines, and presumptions about legitimate decision-making authority on which Canada’s immigration system currently rests.