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# POLICY BRIEF

## Human Lives At Stake:

*Refugee Reform Bill C-11 and its Potential Impact on Lesbian,  
Gay, Bisexual, Trans and Queer Refugees*



*Speak Out!*

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**AGIR: Action for Lesbian, Gay, Bisexual, Trans and Queer Immigrants and Refugees**



### **Who is AGIR?**

AGIR is a community-based association whose membership includes a network of refugees, immigrants, community activists and service providers whose main purpose is to develop and provide services, resources and advocacy for Lesbian, Gay, Bisexual, Trans and Queer (LGBTQ) refugees, immigrants and non-status newcomers within the Montreal-area. AGIR hosts a monthly LGBTQ newcomer information, support and referral group, held the last Wednesday evening of each month, where we provide and facilitate a safe gathering space for LGBTQ newcomers in Montreal to link with services and support, while at the same time connecting with each other. AGIR is a member of Multi-Mundo Coalition, a coalition of LGBTQ ethnocultural community organisations and their allies.

### **Speak Out Project**

This community-based research project aims to raise awareness about the experiences of Lesbian, Gay, Bisexual, Trans and Queer (LGBTQ) refugees living in Toronto and Montreal. Our results will be used to support efforts to develop research, policy and practice within mainstream refugee serving, ethnocultural and LGBTQ organisations, in addition to broader Canadian refugee law.

### **Executive Summary**

This policy brief is presented by AGIR with the support of *The Speak Out Project*. AGIR would like to thank the Standing Committee on Citizenship and Immigration for providing the opportunity to present this policy brief in order to describe in more detail the potential impact of Bill C-11 on Lesbian, Gay, Bisexual, Trans and Queer (LGBTQ) refugees. AGIR has identified a number of concerns with how particular aspects of Bill C-11 may specifically impact sexual orientation and gender identity (SOGI) based refugee claims. Therefore, this policy brief will include some background information about the legal context of SOGI based claims in Canada, in addition to specific policy analysis and constructive recommendations to improve Bill C-11.

In order to continue to be seen by the international community as a global leader in relation to refugee protection, Canada must strive towards building a more just and equitable refugee determination process. Improving our refugee determination system requires adequate time to engage in community consultations and dialogue with all Canadians. AGIR strongly encourages the members of the standing committee for Bill C-11 to take more time to engage in meaningful and in-depth consultation with key stakeholders, including, refugee serving organisations, legal representatives/associations and community groups/coalitions.

This brief will identify the potential consequences to LGBTQ refugees of the following aspects of Bill C-11: **Face to Face Interview within 8 Days, Hearing within 60 days, Designated Countries of Origin, Refugee Appeal Division (RAD), and Humanitarian and Compassionate Consideration (H & C).**

*\* the refugee names from the vignettes in this policy brief have been changed in order to protect their anonymity.*



## Canadian Refugee Law and Claims based on Sexual Orientation and Gender Identity

Many LGBTQ refugee claimants have fled countries due to various forms of persecution, including torture, arrest, imprisonment, extortion, rape, and death threats because of their sexual orientation or gender identity. In fact, a report published by Human Rights Watch in December 2008, identified that over 80 countries worldwide still criminalize same-sex sexual activity. Under these circumstances, living with dignity and basic human rights is sometimes impossible, oftentimes requiring survival skills which include remaining silent or hidden and sometimes fleeing one's country of origin.

Refugee protection in Canada due to sexual orientation or gender identity (SOGI based claims) has been in place for almost two decades. Canada was in fact, one of the first Western nations to grant refugee status due to SOGI based claims, having done so in 1992. This landmark case led the way to the Supreme Court ruling *Canada v. Ward* a year later, which resulted in the explicit inclusion of sexual orientation within Canadian refugee law. This meant that any individual claiming refugee status because of fleeing persecution due to their sexual orientation had the right to access Canada's refugee determination process.

Recently, the United Nations High Commissioner for Refugees (UNHCR) issued a guidance note in November 2008, for refugee claims relating to sexual orientation and gender identity, making it the first internationally recognized document which acknowledges the right for LGBTQ individuals to claim refugee status based on persecution due to their sexual orientation or gender identity. Upon completing a formal Access-to-Information request, legal scholar Sean Rehaag found that in 2004, 1351 refugee claims based on sexual orientation were decided, with acceptance rates of approximately 50%, about on par with the average grant rate for all refugees for that year. What if those accepted (roughly 645 refugee claimants) in 2004 arrived in Canada with the policy reforms presented in Bill C-11 already in place?

### *Want to learn more about Canadian Refugee Law and SOGI based claims?*

LaViolette, N. (2009). The UNHCR's guidance note on refugee claims relating to sexual orientation and gender identity. *The American Society of International Law*, 13(10), 1-8.

LaViolette, N. (2007). Gender-related refugee claims: Expanding the scope of the Canadian guidelines. *International Journal of Refugee Law*, 19(2), 169-214.

Rehaag, S. (2008). Patrolling the borders of sexual orientation: Bisexual refugee claims in Canada. *McGill Law Journal*, 53(1), 59-102.



**Face to Face Interview within 8 days**

*Bill C-11 proposes to implement a policy whereby all refugee claimants must be interviewed by a Canadian refugee protection officer after 8 days of placing their claim.*

We recognize that the current refugee determination process, under which some refugee claimants must wait upwards of 2 years before their IRB hearing is too long and should be improved. However, going in the complete opposite direction and forcing refugee claimants to have their first interview with the IRB after only 8 days is highly problematic. Having only 8 days before being required to share traumatic stories of persecution to a government representative can result in LGBTQ refugee claimants leaving out information that is crucial to their case because of shame/embarrassment or simply because they have not yet been able to speak about their traumatic history with a trusted professional (i.e. psychologist or social worker) or legal representative.

Furthermore, some LGBTQ refugees may leave our information during this face-to-face interview with a government official because of experiences of persecutory gay bashing at the hands of authority figures in their countries of origin (i.e. police, government officials, etc). Some LGBTQ refugees do not even realize that they can make a SOGI based refugee claim until after they arrive in Canada. Because of this trauma and fear of authority, LGBTQ refugees require adequate time to connect with the proper helping professionals and legal representatives to accurately describe their experiences of persecution.

**Hearing within 60 days**

*Bill C-11 proposes to implement a policy whereby all refugee claimants must have their hearing with the Immigration and Refugee Board (IRB) within 60 days for their initial application for refugee status.*

LGBTQ refugee claimants must provide evidence to assure the adjudicator presiding at their hearing that they are indeed a sexual or gender minority. Building links with LGBTQ communities and having groups like AGIR provide a letter of support for refugees becomes a potential way for adjudicators to confirm a claimant's sexual orientation or gender identity. Due to social isolation, it can sometimes take months before refugees find LGBTQ community groups like AGIR, making a 60 day time limit for a hearing highly problematic for LGBTQ refugees. Furthermore, gathering the necessary documentation in relation to SOGI based refugee claims can be difficult to obtain within 60 days, especially for those LGBTQ refugee claimants who were previously in hiding in their country of origin.

In addition, a study about LGBTQ refugees in Toronto and Montreal identified the challenges that LGBTQ refugees encounter in finding a lawyer that is competent in relation to SOGI based refugee claims. It would be difficult for refugee claimants to find adequate legal representation within this short time frame of 8 days before the first interview and 60 days before the hearing. For LGBTQ refugees, having ill-prepared legal representation that are not knowledge-able around LGBTQ issues can drastically diminish the possibility of a successful claim.

### *Miguel's Story*

Miguel was a journalist by trade in his country of origin. After experiencing persecution because of his sexual orientation in his country of origin, Miguel fled to Canada, seeking protection as a gay refugee claimant. One month (DAY 30) after arriving to Canada, Miguel found a lawyer to represent him for his hearing. Over the next month and a half (DAY 75), Miguel's lawyer was rarely available and did not seem to have any expertise in LGBTQ refugee protection issues. This concerned Miguel and so, he began searching for a new lawyer. Within a few weeks (DAY 90), Miguel was able to find a skilled and competent lawyer. Six months later, Miguel had a successful refugee hearing and is now considered a Convention refugee. Had the 60 day hearing policy as written in Bill C-11 been in place while Miguel was seeking status, Miguel would not have had competent legal representation for his hearing, which would have seriously jeopardized his refugee claim.

### **Designated countries of origin**

*If Bill C-11 were to pass it is currently written, the power to designate countries would be left in the power of the Minister. This means that the Minister has the power to designate any country, part of a country or group within a country as "safe countries of origin".*

While refugee claimants would have access to a hearing, no one from that country (or group within that country) would be able to access the refugee appeal process in Canada. Even more troubling is the fact that there are no criteria identified within the text of Bill C-11 in terms of how the Minister would make the decision for which countries would be designated "safe". AGIR argues that this policy is two-tiered, and therefore, discriminatory, resulting in an appeal process for some but not for others. Refugee determination in Canada has always been based on an individual's particular case. The denial of a fair process for claimants from supposed "safe" countries may lead to their forced return to persecution, which is a violation of international human rights standards.

For LGBTQ refugees, this is clearly a concern. While there has been an increase in the inclusion of LGBTQ specific human rights legislation across the globe, this legislation does not, in and of itself, fully protect all LGBT individuals in any given country. Similar to (and sometimes overlapping with) gender-based persecution, oftentimes, the violence and persecution which LGBTQ refugees face are from powerful individuals and groups they meet in their everyday lives. This includes friends, family members, work colleagues, etc. This means that every refugee claim based on sexual orientation must be context-specific and take into consideration a complex set of factors in order to ascertain whether a claimant is facing persecution due to their sexual orientation or gender identity.



### **Refugee Appeal Division (RAD)**

*Bill C-11 proposes to finally implement the Refugee Appeal Division (RAD), an aspect of the Immigration and Refugee Protection Act (IRPA) since its inception 2001, albeit in a significantly revised format. Bill C-11 also includes a provision whereby those refugee claimants from designated countries of origin would be denied access to the RAD.*

AGIR believes the inclusion of the RAD into Bill C-11 is positive because this would allow for the possibility of errors made at the first IRB hearing to be corrected in a timely and efficient manner and reduce the use and ineffectiveness of the Pre-Removal Risk Assessment (PRAA). However, it is important to acknowledge the cumulative impact of the first 3 major policy changes within Bill C-11 on LGBTQ refugees and then consider the impact of the RAD. If the 1) 8 day first interview and 60 day hearing limitations and 2) designated countries of origin were implemented a significant number of SOGI based claims would be rejected from the refugee determination process at some point during this process and therefore, never have access to the proposed refugee appeal process as outlined in Bill C-11.

Furthermore, those LGBTQ refugees identified as coming from previously identified designated “safe” countries of origin would be treated in a discriminatory manner, because they would not have access to appeal. The policy as stated in Bill C-11 would shut the door to some LGBTQ refugee claimants whose case may not have been fairly assessed by the first instance decision maker. AGIR strongly believe in an equal refugee determination process for all refugee claimants.

#### ***Miguel’s Story***

Miguel is now living in Canada as a refugee and productive member of Canadian society. But what if the hearing in 60 days policy in Bill C-11 was in place during his refugee claim process? What if, because of inadequate legal representation, he was rejected at his first hearing? Would he have had access to appeal? What if Miguel was from a country that was designated as “safe”? In this case, he would have been rejected at his first hearing, and been denied access to not only the appeal, but also from applying for a Pre Removal Risk Assessment (PRAA) and Humanitarian and Compassionate (H & C) permit. The potential implications of Bill C-11 for Miguel would have indeed been a matter of life or death.

### **Humanitarian and Compassionate Consideration (H & C)**

*Bill C-11 proposes that refugee claimants should be excluded from applying for the H & C the entire time their claim is in process plus another 12 months after their claim has ended.*

The H & C is an essential recourse for all refugee claimants, including LGBTQ refugees. This would allow some claimants who may not be accepted as a *Convention Refugee* or *Person in Need of Protection* to still be eligible for the H & C. The Canadian Centre for Victims of Torture, for example, fear that a one year ban would force some refugee claimants back to their country or origin where they may end up being at high risk of persecution and even death. LGBTQ refugee claimants who may not have been accepted as a Convention Refugee, may still require access to the H & C process.



### Final recommendations

*In order for Bill C-11 to be just and equitable for all refugees, including LGBTQ refugee claimants, AGIR would like to make the following policy recommendations. These policy recommendations prioritizes and therefore draws from the knowledge of many refugee serving organisations, advocacy groups, lawyer associations, community-based refugee research projects and LGBTQ refugees themselves.*

#### ***8 Day Interview and Hearing after 60 days***

**Policy Alternative:** The government should **retain the 30 day time period** for all refugee claimants to have before submitting a Personal Information Form (PIF) versus an interview by a civil servant. A reasonable timeline for the first instance hearing would be within **9 months** of submitting a refugee claim. This policy should include the option for some refugee claimants to formally request additional time in order to be able to obtain the necessary documentation for their prior to their hearing.

#### ***Designated Countries of Origin***

**Policy Alternative:** There should be **no designated ‘safe’ countries of origin** and all refugee claimants should have the right to the refugee appeal process.

#### ***Refugee Appeal Division (RAD)***

**Policy Alternative:** AGIR agrees that the **Refugee Appeal Division (RAD) should be implemented** (without the policies related to the designation of countries of origin).

#### ***Humanitarian and Compassionate Consideration (H & C)***

**Policy Alternative:** This process should remain, as it is written.

### Conclusion

AGIR affirms the right of all refugees, including sexual and gender minorities, to a just and humane refugee determination process in Canada, where they will be treated in an equitable manner. Refugee policy reforms can not prioritize efficiency, but rather, it must improve the refugee determination system in order to continue to save lives, uphold human rights standards and be accountable to our International obligations especially if Canada is to continue to be viewed as a global leader in refugee issues. We must remember that Bill C-11 is more than just a bill about policy reforms – human lives are at stake. Therefore, **AGIR strongly encourages the Canadian parliament to take more time and engage in further public consultations and work towards improving key aspects of Bill C-11.**

“sometimes I feel like my mother comes and says ‘Come on. Come on. Don’t give up. Go, go, go.’ Because sometimes I feel totally down, like giving up, throw in the towel. You know what I mean? And angels, from I don’t know where, they come and give me the strength to keep on going”  
- Sarah

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