

The ABCs of Guideline 9: Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE)

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2.4 The IRB recognizes that gender identity and gender expression are distinct, but interrelated, concepts.

Gender identity: Each person’s internal and individual understanding of their gender. It is their sense of being a woman, a man, both, neither, or being anywhere along the gender spectrum. A person’s gender identity may be the same as, or different from, their birth-assigned sex. A person’s understanding of their gender may change.

Gender expression: How a person expresses or presents themselves in ways that may be associated with gender, including how a person is perceived in relation to gender. This can include behaviour and outward appearance such as dress, hair, makeup, body language, mannerisms, gait, and voice. A person’s chosen name and pronoun are also common ways of communicating gender. How a person expresses their gender may change.

2.5 Sexual orientation: A person’s physical, romantic and/or emotional attraction to, and/or intimate relations with, individuals of a different gender, the same gender, no gender, or more than one gender. A person’s understanding of their sexual orientation may change.

2.6 There is no standard terminology that adequately captures the diversity within and between the evolving concepts of sexual orientation and gender identity and expression across cultures and societies.

Put simply, gender identity is who you think are. Sam Killermann writes “Formation of identity is affected by hormones and environment just as much as it is by biological sex.”² Clients may find that certain or all aspects of their identity cohere with the societal role of men, women, or neither gender.

I never felt that my outer body matched with my inner body. Despite being born a girl, I always felt that I was a boy on the inside. At XX years old, I was considered a tomboy. I use the pronoun “she” with people who I’m not close with, while I use “he” with people with whom I am close. It matters to me that people who I know refer to me as a man because this is how I feel inside.

Ever since I opened my eyes, I have known my whole live I was born in the wrong body. I have felt like my soul does not fit this body. I look at myself as a man.

Gender expression is how you demonstrate who you are. It is often defined in relation to societal norms on gender, for instance, men wear pants whereas women wear dresses. Gender expression may change over time and context. A person’s gender may match their biological sex, but may express their gender in ways falling outside the spectrum of gender conformity, for example, someone born female, who identifies as a woman, but whose appearance, mannerisms, and body language seem masculine.

² Sam Killermann, *The Social Justice Advocate’s Handbook: A Guide to Gender* (Texas: Impetus Books, 2013) at pp 74-75 [Killermann].

Clients may have never heard positive language, or any language, that might reflect their personal SOGIE. As such, they may have extremely limited experience putting their understanding of their SOGIE into words:

Miriam voiced her struggle to form an identity under conditions of erasure. Her first encounter with a name for her experience was layered with associations of criminality, and a medical authority specifying a particular intervention. Encountering this narrative of transexuality in the newspaper brought a mix of relief, shame, and fear—she hid the article to prevent her family finding it and recognizing her in it. Reaching out online allowed Miriam a relational space, emotionally intimate but physically removed, for enacting herself as woman.³

Mzlando was not connected with Rainbow Refugee during his application, and I met him for the first time at our interview. He informed me that, aside from a psychologist, his lawyer, and the officer at his hearing, I was the only person in Canada with whom he had ever discussed his sexuality. In comparison to interview participants with whom I had a prior relationship through Rainbow Refugee, Mzlando's narrative of his sexuality was sparse. He frequently used phrasing that distanced himself from a sexual identity claim.⁴

Terms like “gay” or even “homosexual” may be unfamiliar to claimants. Murray provides the following example:

Odu was born in Lagos, Nigeria....He remembered looking at boys in high school, and “I liked what I saw,” but he wasn't sure if this was normal, although he did ‘do some things’ with a friend. He went to university to study economics, and this was where he started to meet other men like him...When I asked him if he knew of any organizations or support groups for LGBT people at the university or anywhere else in the country, he shook his head saying, “No, because I was so scared. I didn't want anyone to know. I was like, really in denial. No one knew what I was doing...I kept this a secret from [every]one.”⁵

As such, clients may struggle to think about and explain their SOGIE to the Board, in turn impugning their credibility.

The panel asked the claimant how he identified his sexual orientation. The claimant paused and stated he did not understand. The panel repeated the question and the claimant responded that he sleeps with both men and women but his feeling is stronger with men. The panel asked the claimant whether he considered himself to be gay. The claimant responded that he did not understand. The panel repeated the question and asked the claimant to identify his sexual orientation. The claimant responded that he sees himself as bisexual but he leans more towards men. The panel found the claimant's testimony in this area to be evasive and vague.⁶

³ Sharalyn Jordan, “Un/Convention(al) Refugees: Contextualizing the Accounts of Refugees Facing Homophobic or Transphobic Persecution” (2009) *Refugee* 26:2 165 at 170.

⁴ *Ibid.* at 175.

⁵ David A.B. Murray, *Real Queer? Sexual Orientation and Gender Identity Refugees in the Canadian Refugee Apparatus* (London: Rowman & Littlefield International Ltd, 2016) at pp 26-27 [Murray].

⁶ *RAD TB4-10934*, [2015] RADD No 426 (QL) at para 11 (IRB).

Some claimants may associate themselves with a LGBTIQ+ identity but may not describe their sexuality or gender in accordance with our understanding of the LGBTIQ+ paradigm,⁷ serving as justification to discredit the claimant's SOGIE.⁸

In *Ndowku v Canada (Minister of Citizenship and Immigration)*, the Federal Court agreed that the Board should disbelieve that the gay claimant had a same-sex partner in Nigeria named Kenneth. After the claimant testified that his "girlfriend" told him of his father's death, his counsel asked him to clarify whether he was referring to his "gay friend or girlfriend"; the claimant responded the latter.⁹ In the southern region of Nigeria, some individuals may refer to their partners as *kawa* (girlfriend) rather than *aboki* (male friend),¹⁰ so the claimant in *Ndowku* may have been using the word "girlfriend" to describe Kenneth.

During interviews [with SOGIE refugees] in Ghana, the terms gay or homosexual were almost never mentioned. In Nairobi, four participants presenting as males referred to themselves as females in the questionnaire, three participants referred to themselves as female and gay, and one stated his sexual orientation a lesbian, although he has been in a relationship with a male partner for many years, and identifies himself as male.¹¹

A women from St. Lucia may not feel comfortable self-identifying as lesbian or bisexual because of the term's Eurocentric connotations, yet had to so the Board (or beforehand, the lawyer and support workers) understand her sexuality.¹²

Tip: Fully explain your clients' experiences in describing experiences tied to their SOGIE in their narrative.

I am still very uncomfortable about making a refugee claim. When my lawyer first interviewed me to prepare this narrative, he noticed that I did not use the word "gay" or "homosexual" to describe myself. It is sometimes difficult for me to formulate the words to speak on my experiences and emotions. Sometimes, I feel like I am still in XXXX. But after I started having counselling sessions with XXX, I have become more and more comfortable using the term 'gay' to describe myself. He would tell me that in Canada, it's ok to be gay and that it's normal for newcomers to be afraid at first to identify themselves as someone who is not heterosexual. Also, now that I have known my lawyer for several months, I feel comfortable talking about my identity and experiences with him, but not so much with other people.

I now understand that I am attracted to men, but I am still trying to figure out what sexual identity marker works for me. I have talked about this issue with XXXX and have done some research. The word that I use to describe myself at this moment is 'polysexual.' To me, this means to be attracted to different genders but not everyone. It's not like 'bisexual' because bisexual means to be attracted to males and females, but polysexual covers a broader spectrum of genders. I see myself having a relationship with other men or transgender women.

⁷ Nicholas Hersh, "Challenges to Assessing Same-Sex Relationships under Refugee Law in Canada." *McGill Law Journal* 60.3 (2015) 529 at 556-560 [Hersh].

⁸ In a RAD decision, the claimant's psychological report was given little probative weight in part because in the report, the claimant self-identified as bisexual yet stated that she was only attracted to other women, *RAD TB4-12841*, [2015] RADD No 475 (QL) at para 43 (IRB).

⁹ *Ndowku v Canada (Minister of Citizenship and Immigration)*, 2013 FC 22, FCJ No 40 (QL) at para 35.

¹⁰ Steven Pierce, "Identity Performance and Secrecy: Gendered Life and the "Modern" in Northern Nigeria" (2007) 33:3 *Feminist Studies* 539 at 547.

¹¹ Yiftach Millo, "Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel, and Kenya" (2013) Hebrew Immigrant Aid Society Working Paper at 19, online: Hebrew Immigrant Aid Society <www.hias.org/sites/default/files/invisible-in-the-city_0.pdf> [Millo, "Invisible in the City"]

¹² Murray, *supra* note 5 at 50.

Tip: Be consistent in the terminology used in the narrative to match the clients' description of their SOGIE.

I told XXXX why I'm here in Canada and why I escaped from my country, XXXX. I have felt comfortable telling XXXX my story because I know he is like me. He has been very supportive, telling me that if I have this feeling of wanting men, then in Canada, people will help me, not hurt me like in XXXX.

Similarly, the XXXX people will ostracize me if they find out I am not heterosexual. I may be attacked or killed in the street for having this problem, and nobody would care.

Tip: Do not obligate your clients to describe their SOGIE in ways that match our understanding of SOGIE.

3.1 Depending on factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education, individuals with diverse SOGIE recognize and act on their SOGIE differently. An individual's self-awareness and self-acceptance of their SOGIE may present as a gradual or non-linear process. There is no standard set of criteria that can be relied upon to establish an individual's identification as an individual with diverse SOGIE.

Claimants' credibility may be undermined if they vaguely describe their SOGIE.

The RPD was also justified in making the same finding when, during the hearing, the claimant was unable to explain why he realized he was homosexual at the age of 18 and not earlier. In fact, although his explanation about his first sexual encounter with XXXX XXXX did not hold up, he still maintained that it was truly at the age of 18 that he knew he was attracted to men and not women. However, according to his BOC Form and his own statements at the hearing, from an early age he played sexual or erotic games only with other boys. I am of the opinion that he was never able to explain what seemed to have changed at the age of 18 to make him realize that he was gay, when during his childhood and adolescence he was attracted to men only and women did not excite him.¹³

However, claimants may face a variety of difficulties understanding questions about experiences tied to their SOGIE. For example, clients may have sexual, emotional, or romantic same-sex attractions but have not necessarily attributed them to their SOGIE. Murray explains, "Not all societies may have sexual identity terms that easily equate to 'gay' or 'homosexual', and even in societies with identity terms for people who engage in same-sex relationships, there may be significant temporary and/or cognitive gaps between the memory of initial desire for someone of the same and realizing that one's desires are associated with a particular sexual identity term."¹⁴

I never suspected I was different from other people. The schools in XXXX are segregated by gender and I went to an all-boys school. During recess, I sometimes touched other boys in a

¹³ X (Re), 2016 CanLII 55285 (CA IRB); See also *Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at para 18.

¹⁴ Murray, *supra* note 5 at 104.

joking way. We would touch each other, but I did not think of it as sexual. I thought that all boys in single-gendered schools played like this. It did not cross my mind that maybe I was attracted to boys.

Even though I heard homosexuality was haram, I did not actually understand what was meant by homosexual behavior when I was young. When I was XX years old, my friend's XXXX used to sleep with me....After that experience, I went to my friend's house to have relations with my friend's XXXX...I was feeling happy and comfortable with this experience for about XX months. But then, people started to make comments about my mannerisms and appearance... I started feeling that what I was doing with my friend's XXXX was wrong, so after about XX months, I just stopped going to see him... As I got older, around XX or XX years old, I became more aware of what XXX people thought of these guys that see other men, like what I was doing at XX years old.

Claimants may omit information about past and present same-sex partners, damaging their credibility.

I did not write about XXXX when I first submitted my application for refugee protection. One of the questions on the Basis of claim form was whether I had a same-sex partner. I answered no because XXXX is not in Canada claiming refugee protection with me. I assumed at the time that I could not talk about XXX because he was not with me... I was also never harmed when I was with him...It has also been very difficult emotionally to talk about XXXX with anyone. Even with my friend XXXX, who knew that I am homosexual like him, I could never discuss out loud how I felt for XXXX.

The RPD noted that while the Applicant testified that he had met his current partner, Godwin Ogundipe (“Ogundipe”) on October 15, 2014, the Applicant had not mentioned him in his BOC, which was signed on October 31, 2014. The RPD did not accept the Applicant’s explanation for this omission, being that he did not think it had anything to do with his persecution, given that the basis of his entire claim rested on his bisexuality and such evidence would have directly supported his purported bisexual identity.¹⁵

Some Board Members have disbelieved claimants who have not disclosed their SOGIE to others in Canada. For example, despite acknowledging that a gay claimant “might be uncomfortable, cautious or worried about what would happen to him if he were to return to live in his country of origin, where homosexuality is prohibited,” the Board Member of the RAD opined that the claimant would have nonetheless behaved “as a homosexual person living in a free society where homosexuality is allowed” after living in Canada for one year.¹⁶ This finding was based on the claimant’s testimony that he did not have any gay friends, same-sex relationships, nor had he reached out to LGBTQI-focused organizations.¹⁷

The RAD conclusion above is concerning because even once in Canada, clients may not be ready, or even wish, to espouse an identity of self- acceptance and pride.¹⁸ Or, their interpretation of a safe and open lifestyle may greatly differ from the Board’s pre-conceived notions of SOGIE. For example, In *Houshan v Canada (Minister of Citizenship and Immigration)*, the Federal Court upheld the

¹⁵ *Irvibogbe v Canada (Citizenship and Immigration)*, 2016 FC 710 at para 4.

¹⁶ *RAD File No. MB5-00120*, [2015] RADD No 751 (QL) at para 44 (IRB).

¹⁷ *Ibid.* at paras 43-44.

¹⁸ Hersh, *supra* note 7 at 563-579.

Board's adverse credibility finding of a gay Syrian man, who testified that he had not had any same-sex relationships or joined any gay organizations since arriving in Canada. The Court stated:

In short, there was no evidence that he was living in an openly gay lifestyle as he had claimed he wanted to do in his PIF, despite having been in Canada for several years. This was a serious contradiction and given the deference owed to the Board on findings of fact, this was sufficient to justify the Board's negative credibility finding. Given the applicant's statements, I do not find that the Board imposed any stereotypical views of gay lifestyle on the applicant.¹⁹

The Court's reasoning raises two concerns. First, the court opines that an openly gay lifestyle necessarily involves having gay relationships, joining gay organizations, and attending gay establishments. Yet for the claimant in *Houshan*, an openly gay lifestyle may be experienced differently. Second, it seems that to the court, expressing a desire to pursue an openly gay lifestyle in Canada means that the claimant should have reached a state of self-pride and confidence, seeing as he had lived in Canada for several years by the hearing date.

Clients may also not have chosen Canada as their country of destination to openly and freely express their gender or sexuality, for example, they came with family members, or as international students, or were smuggled.

I remember one day, I was in downtown Ottawa and I saw two men holding each other's hands and kissing. It was something I had never seen before in my life or thought could exist. In XXXX, even if a boy and a girl held hands and kissed in public, they would be in trouble. But, I noticed this didn't seem to be a problem in Ottawa. During lunchtime one day at XXXX, I asked one of my friends, XXXX, if he had ever seen two men holding hands and kissing before. He told me he has, that these were called gay people. My friend was explaining to me that in Canada, gay people have the freedom to be who they are. I didn't tell XXXX about my own personal attractions towards men. I could tell that XXXX was uncomfortable talking about gay people, so I didn't feel comfortable telling XXXX about my own personal feelings towards other men.

Tip: Ask your client to describe their experiences and feelings surrounding their SOGIE.

I realized when I around XX years old that I was attracted to boys. I never understood at that age what it meant for a boy to be attracted to another boy, but I knew it was something wrong. In XXXX, we never spoke about sex, even between people of the opposite gender. My village was all Muslim people. I never tried to touch or kiss another boy during that time because I was afraid someone would find out.

I did not really understand when I was younger that I was not attracted to girls. I was very studious and focused on passing my exams. Those exams would determine what universities I could get into. I would stay away from people and did not even hang out with friends after school.

I had gone home with girls before and did not think this encounter would be out of the ordinary. However, I soon learned she was transsexual. In the moment of having sex, this realization did not bother me and in fact, I found the sex pleasurable in the moment. However, after the sexual encounter, I felt very confused and terrified when I left her place. For a long

¹⁹ *Houshan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 650 at para 17, 190 ACWS (3d) 239.

time, all I could think about was that night. I could not fully understand what had happened, why I still felt attracted to that transsexual woman. It made me upset to admit to myself that I enjoyed that night. I was confused about whether I was straight or not.

I first realized that I was different from other people when I was around XX years old. I realized I was thinking and acting differently from the other boys growing up. Boys would talk about how they were interested in talking to and playing with girls whereas I was not interested in being around girls. I was more comfortable with boys, in a way I never felt with girls. When I was young, I did not understand why I did not want to be with girls the same way that other boys did.

It made me sad and angry to realize I was homosexual. XXXX society says that homosexuality is a disease. XXXX do not understand that being homosexual is not a choice, but that I was born homosexual. I had never heard a positive word to describe homosexuals like the word “gay” until I came to Canada.

Tip: Ask your clients what type of life they envision for themselves.

For me, I want to live a life in Canada where I am free to be who I am. I want to focus on my studies and make friends without worrying about what people will say about me.

I am not sure yet what life I would like to have right now. I now understand that Canada is a safe country for all types of people but sometimes, I still feel like I am in XXXX. For now, I am just focusing on work and my refugee claim. I think once the refugee claim is over and I know I won't be deported from Canada, I can think more about the future.

3.2 An individual's testimony may be the only evidence of their SOGIE where, in a given case, corroborative or additional evidence is not reasonably available.

7.1 While an individual's experiences and behaviours related to their SOGIE may be expressed in both the private and public spheres, an individual's testimony may, in some cases, be the only evidence of their SOGIE.

Mosley J. stated that “a lack of corroborating evidence of one’s sexual orientation, in and of itself, absent negative, rational credibility or plausibility findings related to that issue, would not be enough, in my opinion, to rebut the *Maldonado* principle of truthfulness”²⁰

As in claims based on other grounds, the presumption of truthfulness is not absolute. Board members may draw a negative inference regarding SOGIE claimants’ testimonies if they fail to produce evidence that the Board reasonably expects should be available in the claimants’ circumstances, and does not provide a reasonable explanation for failing to produce that evidence.²¹ The Guideline provides several examples where evidence may not be reasonably available in a SOGIE case.

²⁰ *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 (CanLII) at para 38.

²¹ *Radics v Canada (Minister of Citizenship and Immigration)*, 2014 FC 110 (CanLII) at paras 30-32.

7.2.1 Corroborating evidence from family or friends may not be available in cases involving SOGIE. An example of when this type of corroboration may not be available is when an individual has concealed their SOGIE because of perceived stigma or risk of harm.

Tip: Explain the reasons why your clients have not divulged their SOGIE to close friends, family members, or others.

I was too afraid to try and meet other gay people in Canada, either online or real life. If I tried to date someone, and some people I knew saw me, then they would tell my mom and my family would get upset. Even searching gay sites or articles on the internet made me really nervous. What if someone found out what I'm doing on my computer? My family would have noticed that I was trying to hide something. I was only a teenager at the time, so I was really worried about my parents or anyone finding out I am gay.

I did not even want to tell my aunts and uncles that I'm gay, even though they have been living in Canada for a long time and would have a more Western mindset. At my age, I just didn't feel that I could tell them the truth. I was too afraid of the consequences.

In XXXX, when XXXX and I still lived together in Toronto, I told him that I was gay. I felt that I had no choice because he had been grilling me about why I was not talking to my family. He was worried about me and told me that if it was a problem with school, we would be able to fix it. Furthermore, he had been supporting me financially for so long, so I felt I owed him an explanation.

Although my family is well educated and has an understanding of Western culture, I could not tell them I am gay. In XXXX, gay people are considered criminals and the media says that gay people go to hell. My mother is semi-Westernized and is not very religious, but she does strictly follow the customs, traditions, and values that most XXXX do. I am too afraid to lose my parents' support, especially my mother's, by telling them I'm gay.

Tip: If they have divulged their SOGIE to friends, family members, or partners, explain why they have not been contacted or have not agreed to testify or provide a letter of support.

I am still friends with XXX but I think the stress of my refugee claim has affected our friendship. I asked him to be a witness for my refugee claim but he got very upset about it. XXXX is a refugee himself and I don't think he wants to go through the stress of a refugee interview like he had to go through to resettle in Canada.

7.2.3 An individual with diverse SOGIE may not have participated in LGBTIQ+ culture, organizations or events in their country of reference, nor do so once in Canada. However, evidence of such participation may be presented by the individual for the decision-maker to consider.

Clients may have limited knowledge of the treatment of SOGIE individuals in their countries of nationality because SOGIE is so taboo.

I understood more that it was unacceptable to be gay in XXXX, that gay people have the freedom to be who they are in Canada. But, I still did not know exactly what the consequences were if anyone was found out to be gay because I still didn't know of any gay people in my village and I had never heard or personally known of any gay people in XXXX. At that point, I still never had a boyfriend. I knew that I couldn't have a boyfriend, or if I wanted to hold his hand, or kiss him, it would be unacceptable.

My friends in elementary and high school used to watch straight porn. They would pay attention to and talk about the girls in the videos, but I found myself looking at the guys. I tried to research online what my feelings were. So, I went to my father's office one day, and since he had internet on his computer, I searched terms like "feelings for boys" and I found threads and blogs about girls' feelings for boys.

Their limited knowledge may be consistent with the available country condition information. For example, according to the report, "As Long They Stay Away," there was a differential outcome between Lebanese people's perception of homosexuality and their knowledge of how sexual minorities are treated, especially by the state.

Interestingly, this view of homosexuals as people afflicted with a condition that requires a remedy (physiological or religious) did not necessarily mean respondents thought homosexuals were individuals deserving of security, with 61.7% disagreeing that society should offer homosexuals some form of protection from discrimination. Indeed, half of those surveyed disagreed that homosexuals were mistreated in Lebanese society to begin with, a possible indication of limited awareness of documented and recurrent state and societal discrimination against homosexuals in present-day Lebanon.²²

Refugee claimants may not openly express their sexuality or desire same-sex partners in Canada as they may continue to suffer from PTSD or major depression due to the traumatic experiences faced in their home countries. Becoming comfortable enough to accept and express same-sex sexuality may take several years or more after arriving in an asylum country.²³

Clients may not enjoy or be interested in participating in SOGIE-related events and organizations in Canada. SOGIE newcomers have recounted experiences of racism, sexism, and xenophobia from Canadian LGBTIQ+ communities in Canada.

In practice, this conflict [deciding whether to engage with the local LGBTIQ+ population] means that being true to themselves may entail a sense of alienation rather than belonging. Precisely the clients that we might hope could draw strength from a gay identity in gay community feel disenfranchised by racism. For example, Black men who have come to Canada to escape persecution based on sexual minority status now encounter racist assumptions about their penis size, skin colour, alleged aggressiveness and the assumption that they always want sex (Wilson et al., 2009). That is, they encounter multiple oppression where least expected.²⁴

²² "As Long as They Stay Away: Exploring Lebanese Attitudes Towards Sexualities and Gender Identities" Gender and Sexuality Resource Center (2015) at 16, online: < <http://gsrc-mena.org/gsrc/wp-content/uploads/2015/12/Report-high-resolution1.pdf>>.

²³ Ariel Shidlo & Joanne Ahola, "Mental Health Challenges of LGBT Forced Migrants" 42 *Forced Migration Review* 9 at 9 [Shidlo].

²⁴ Mego Nerses, Peggy Kleinplatz & Charles Moser, "Group therapy with international LGBTIQ+ clients at the intersection of multiple minority status" (2015) 6.1 *Psychology of Sexualities Review* 99 at 102.

Other clients may simply be unaware of Canada’s reputation to protect the rights of SOGIE individuals and families due to their age, socioeconomic status, education, and religion. As previously mentioned, some may not have chosen Canada as their country of final destination.

Tip: Ask your clients what type of life they would like to live, what efforts they have made to realize that life, and the barriers and challenges they are facing.

Tip: Explain to your clients that LGBTIQ+ groups and events exist in Canada. Ask them if they have ever joined or are interested in joining. However, do not encourage your clients to attend these LGBTIQ+ groups or events simply to bolster their case. The timing of participation is a relevant consideration in determining credibility.

I also note that the Applicant’s participation with both [LGBTIQ-centered] groups immediately preceded her PRRA submission on July 16, 2015, and that there was no evidence on the record before the Officer indicating any such participation prior to this, even though the Applicant submitted that she had been open about her relationship with her same sex partner sometime between 1998 and 2001.²⁵

Tip: Mere participation may not be relevant,²⁶ but if your clients have participated in LGBTIQ+ groups, ask them why they have joined, and how their experiences attending and participating have shaped their understanding of their own SOGIE. Take the following narrative examples:

During the summer, XXXX proposed to the LGBT newcomers’ group to attend the vigil for the Orlando shooting. It was the first time that I saw such a large group of people who were so supportive of non-heterosexual people, or who were not heterosexual themselves. It was a sad occasion, but it made me feel like going to a happier one. In XXXX, I attended the pride parade in XXXX. It was nice to see people being so happy about their sexuality. I did not stay very long because it was a loud event. The only uncomfortable moment was when I was going home and saw these Jesus freaks, but I just passed by them.

It has been difficult going to social places to meet other homosexual men in Ottawa. My culture is so different from Canadians. For example, I had never heard the word “gay,” I had never heard it until I came to Canada. The English I speak is different from Canadian English.

XXXX also coordinates a monthly newcomers group for lesbian, gay, bisexual, and transgender newcomers. At first, I was reluctant to go to it, but XXX assured me that the sessions were confidential. At the beginning, I was tense, but once other people started talking, I felt more comfortable although I did not want to speak at the meeting. I have not gone to another meeting since then because I am busy working at XXX and XXX. I work night shifts so I have to miss the meetings.

²⁵ *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 at para 48; See also *Irivbogbe v Canada (Citizenship and Immigration)*, 2016 FC 710 (CanLII) at paras 5-7.

²⁶ *X (Re)*, 2016 CanLII 102869 (CA IRB) at para 10, the Board writes “Merely having a membership card, in and of itself, is not an indication of the cardholder’s sexual orientation. The reasons for joining and the activities the claimant participates in are more reliable indicators.”

7.3.1 Questioning an individual about their SOGIE can feel intrusive and may be difficult for the individual concerned. Questioning should be done in a sensitive, non-confrontational manner. Open-ended questions should be employed where appropriate.

Tip: Create a safe and welcoming environment for your clients. Explain to them your goal is to support, advise, and represent them in making their claim for refugee protection. Ensure them that your meetings with them are confidential and that their information will not be shared with their communities and families.

Tip: Rather than delving immediately into your clients' SOGIE, spend your first meeting building your client's trust, explaining solicitor-client privilege, and gathering less intrusive information.

Tip: Ask open-ended questions to allow claimants to personally construct their SOGIE based on their own experiences. The goal is to allow claimants to situate their experiences based on their culture, gender, socioeconomic class, education, and other dimensions of identity. LaViolette writes:

It is not so much the accuracy of the actual answers that is important, as answers to these types of questions can differ from one individual to the next. Rather, the fact that the evidence elicited through this questioning will assist in evaluating the consistency and plausibility of the testimony as well as the overall demeanour of the claimant is important.²⁷

Appropriate questions to elicit your clients' SOGIE may include:

- How would you describe your gender or sexuality?
- Is it ok if I use the word 'gay' to describe you and people like you in your country, or do you prefer another word?
- When did you realize that you were maybe different from other people?
- How did you notice these differences?
- When did you first realize that you were attracted to men/women?
- How did you feel about being attracted to other men/women?
- What gender pronouns do you use to describe yourself?
- Do you identify as a man, woman, or another gender?
- How did you choose the name, XXXX, for yourself?
- Who did you trust to reveal your SOGIE to in your country?
- What is your understanding of the living conditions for SOGIE individuals in your country?²⁸

²⁷ Nicole LaViolette, "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group" (May 2004) Immigration and Refugee Board, online: Social Science Research Network <ssrn.com/abstract=2294763>.

²⁸ For more examples, see *ibid.*

7.5.1 Implausibility findings must not be based on stereotypes. For example, it may be plausible that an individual with diverse SOGIE has engaged in heterosexual encounters. It may also be plausible that an individual with diverse SOGIE has engaged in activity that might put them at risk in their country of reference.

Cameron explains that there are various psychological and cultural factors influencing claimants' decisions to engage in risky behaviors. Factors may include claimants' familiarity with given risks, the appeal of the benefits in taking such risks, perceived control of a risky situation, optimism bias, and outcome history, amongst others.²⁹

Canadian tribunals have discredited SOGIE claimants who have allegedly taken risks of exposing their SOGIE in their countries of origin. In *Jackson v Canada (Minister of Citizenship and Immigration)*, the Board found it implausible that the applicant would hug his same-sex partner in public when he was aware of the social stigmas and laws proscribing homosexuality in Nigeria.³⁰ In a 2006 RPD case, the Board doubted that the Ukrainian lesbian applicant would have shared her romantic feelings toward a female friend at their graduation dance despite widespread repression of homosexuality.³¹ These may be unreasonable conclusions if the Board erred in assessing the claimants' mindset in taking such risks. Indeed, people may act on their romantic, sexual, and emotional attractions in a moment without fully reflecting on or caring about the risks involved.

In another RPD case, the claimant testified that he used to have sex on a weekly basis with his partner of 11 years in "the car, in the woods where it was safe"³² The Board member took these responses to calculate that the claimant met his sexual partner on more than 572 occasions and that "based on common sense and reason, I find the claimant's testimony not only implausible but downright unbelievable."³³ In this case, the decision-maker opined that the woods, a possibly private place where the claimant would engage in sexual activity with his partner, was public enough for them to have been caught at least once in the 11-year time period. The claimant in this case may also have believed that if he was never caught the first couple of times having sex in the woods, than he may have perceived less of a future risk of getting caught.

Tip: Ask clients about their mindset or reasons for having taken certain risks. Ask clients what precautions they took, if any, to avoid certain risks exposing their SOGIE.

I had two friends that I really trusted, XXXX and XXX. I've known them for over half of my life. I was trying to go out less, but I kept hanging out with them. XXXX and I went to the same school, and the three of us played soccer together, went bike riding together, and we used to talk about anything, school, activities, etc. They would tell me their secrets in the past, so I felt like I could have a trustworthy relationship with them. That's why I told them I'm gay.

I used to have a diary in which I wrote that I was suffocating in a society that doesn't accept gay people like me. I kept it in the top drawer of the desk in my room. Nobody ever went into

²⁹ Hilary Evans Cameron, "Risk Theory and 'Subjective Fear': The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations" *International Journal of Refugee Law* 20. 4 (2008) pp 567-585.

³⁰ See *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098 at para 15, 45 Admin LR (5th) 27. See also *RPD File No TB1-01931* (12 April 2012) (RPD) (QL) at para 8.

³¹ *Re ERY* [2006] RPDD 270 (QL) at para 5 (IRB).

³² *RPD File No. TB009456* [2012] RPDD 30 (IRB).

³³ *Ibid.*

my room, so I assumed it was safe there. However, one day, my XXXX called and asked me if she could work at my desk because the leg on hers broke. I said yes, not thinking about the diary. When I got home, she was crying and told me she found my diary.

Tip: Ask clients what steps they have taken, if any, to conceal their SOGIE. Ask them how they have felt taking these steps.

I tried to meet other gay men on website and phone apps. It was difficult because I never put my picture or name on my profile. I was too afraid I would meet someone who wasn't gay or he was someone who worked for an intelligence agency. I did have a brief relationship with a XXXX man in XXXX, but we didn't get along well and he ended up going to XXXX.

My family has asked me why I haven't gotten married yet. I tell my family I can only afford to support them. My mother is a widow and stays at home. I have two brothers (one passed away) and they don't work enough, so I sometimes financially support them, too. So, I tell my family that I can't "open another house" (an expression meaning "to get married") if I only have enough money to spend on them. But, I still feel constantly pressured by them to find a wife.

7.6.1 Testimony about same-sex relationships that is vague and lacking in detail may support a negative credibility inference; however, decision-makers should examine whether there are cultural, psychological or other barriers that may explain the manner in which the testimony is delivered. When making a vagueness finding in a case involving an individual with diverse SOGIE, a decision-maker must, as in other cases, provide specific reasons to support a finding that the testimony is not comprehensive or fulsome.

Recounting personal and romantic experiences can prove elusive for SOGIE refugees afflicted with post-traumatic stress disorder [PTSD]. For instance, the credibility of a Ugandan man's gay relationship was impugned under the pretext that "the claimant did not show emotional attachment such that one would expect of the alleged extended relationship" at the RPD hearing. According to the adjudicator's summary of facts, the claimant was being sexually intimate with his same-sex partner when seven men attacked them. He was beaten to the point of unconsciousness and then woke up to find himself in a hospital. If the decision maker considered the assault to be a credible experience, then it would have been even more essential to determine whether the claimant suffers from PTSD.³⁴

Tip: Corroborate your client's mental health challenges in articulating key experiences related to their SOGIE.

Clients might feel pressured to recount their relationship experiences in a way that conforms to what they perceive to be the decision makers' expectations. In doing so, they may struggle to articulate the genuineness of their SOGIE.

"Do you have a lover?" The asylum case officer probed tactlessly. If by that he meant whether I had a live-in boyfriend with whom I slept every night, then I didn't. On the other

³⁴ Hersh, *supra* note 7 at 545.

hand, how could I explain more casual relationships to the stiff, unsympathetic interrogator sitting in front of me? ... Was I less of a gay man, by implication, if I did not have a long-term relationship? If I could be a single (read closeted) gay man in the United States, couldn't I be the same in Kenya? If I didn't have a long-term boyfriend was I really out?³⁵

Tip: In their narratives, outline your clients' struggles to explain their same-sex relationships.

Board members may assume that clients in previous or current long-term same-sex relationships would articulate experiences of love, commitment, and interdependence.³⁶ In *Kyambadde v Canada (Minister of Citizenship and Immigration)*, the Federal Court concluded:

In my view, it is reasonable for the Board to question whether this 20 year relationship existed when the applicant showed so little concern for his lover. The applicant's evidence was that he made only one attempt to contact his lover of 20 years after a beating that had left him unconscious. In those circumstances it is possible that Godfrey was severely injured or dead, yet the applicant made no efforts to find out his condition or even whether his long term lover was alive. I find that this lack of concern raises serious issues as to the credibility of the applicant and the Board's finding that there was no such relationship was reasonable.³⁷

However, culturally defined values like love and commitment manifest themselves differently across cultures in terms of SOGIE and relationship development.³⁸

Tip: Ask your clients about their past and current same-sex relationships. Focus on open-ended questions to allow clients to describe their relationships in their own words. Include any cultural context when necessary.

Even when XXXX and I began a relationship, we did not think to call ourselves boyfriends or partners or lovers, even in secret. The idea of two men in a relationship does not exist in XXXX society. We seemed like good friends. We worked together, we did everything together, we cooked, we ate, and we would sleep over at each other's place once in a while. We were sad about having this relationship because XXXX people would not understand or accept it.

XXXX and I ended our relationship in XXXX, but we didn't stop talking completely. I was afraid if we abruptly stopped seeing and talking to each other, then people would suspect that there was something wrong between us. I still travelled to XXXX with XXXX in XXXX because we were going with friends, and I did not want them to ask why I no longer wanted to go on that trip. I wanted to avoid drawing any more attention to me and XXXX like that.

Tip: Also describe your clients' experiences in opposite-sex relationships.

I really believed at the time that I was in love with her, but my thoughts were always about guys. I thought that by being in a relationship with XXXX and being in love with her, then I could change who I am and be able to have sex with her. When I met her, I thought that I would one day marry her and have children with her, and everything would be ok.

³⁵ Timothy J Randazzo, "Social and Legal Barriers: Sexual Orientation and Asylum in the United States" in Eithne Luibhéid & Lionel Cantú Jr, eds, *Queer Migrations: Sexuality, US Citizenship, and Border Crossings* (Minneapolis: The University of Minneapolis Press, 2005) 30 at 46.

³⁶ *RPD File No TA6-10532*, [2008] RPDD 292 (QL) at para 10.

³⁷ *Kyambadde v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1307 at para 10.

³⁸ Hersh, *supra* note 7 at 552-560.

Sometime after I applied to divorce XXXX, I told my family about the divorce because my family, especially my mother, had kept asking me why XXXX was not pregnant yet. I thought I would tell them about the divorce later, but in the moment, I felt pressured to tell them. They were very surprised, and my mother was upset. I explained that XXXX is a “pure Canadian,” which in Middle Eastern culture, means she is promiscuous and doesn’t respect her family, and drinks alcohol. This isn’t true, but it was the most believable reason I could tell my family.

8.3.1 Individuals may be subjected to persecution by reason of their perceived or imputed SOGIE.

Tip: Family members of SOGIE individuals may be at risk of persecution, but the ground needs to be raised to be considered.³⁹

8.5.1.1 It is well established in law that being compelled to conceal one’s SOGIE constitutes a serious interference with fundamental human rights that may therefore amount to persecution, and a claimant cannot be expected to conceal their SOGIE as a way to avoid persecution in their country of reference.

The Federal Court of Canada has largely dismissed the notion that sexual minorities can return to their countries of origin and avoid persecution by acting discreetly. Zinn J. in *Atta Fosu* writes:

I cannot accept that the Member’s decision can be reasonable in arriving at a finding which requires the claimant to deny or hide the innate characteristic which forms the basis of his claim of persecution...The Member was clearly of the opinion that the discrimination the Applicant would face was not tantamount to persecution, but it also appears that she was assessing the danger through the lens of the conditions she would impose on him – conditions that are not reasonable or acceptable.⁴⁰

The fact that clients may have kept their SOGIE discreet in the past or present does not give the Board justification to conclude your clients do not have a well-founded fear of persecution. Further, there is no required distinction between “voluntary” and “involuntary” discretion in assessing claimants’ well-founded fear of persecution.

Tip: Ask your clients what type of life they ultimately want to live and whether they could safely and comfortably carry out that life in their countries of nationality.

Tip: Review the objective documentary evidence to ascertain the repercussions for your clients if they do not modify, restrain, or conceal their SOGIE.

³⁹ *Doyha v Canada (Citizenship and Immigration)*, 2016 FC 864 at paras 5-6.

⁴⁰ *Atta Fosu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1135 at para 12.

- 8.5.10.2** This lack of information may not be indicative of a lack of persecution or a lack of problems within the country of reference. A scarcity of reporting on the situation of individuals with diverse SOGIE in a country may be due to the stigmatization or illegality of these individuals in that country. In such cases, decision-makers may wish to consider the circumstances in the country of reference that may have informed the absence of documentation of the treatment of individuals with diverse SOGIE, including fear of reporting abuses to authorities by individuals, stigmatization or marginalization of individuals in the country of reference resulting in under-reporting, the lack of a free press, or the non-existence of non-governmental support organizations operating in the country.
- 8.6.6** Evidence about the availability of state protection for individuals with diverse SOGIE in some countries can be scarce or non-existent. This scarcity may be due to the stigmatization of individuals with diverse SOGIE in a given country and a consequent under-reporting or fear of reporting abuses to authorities by individuals, all of which may indicate a lack of state protection. In such cases, decision-makers may wish to consider the circumstances in the country of reference that may have informed the absence of documentation on the availability of state protection for individuals with diverse SOGIE, including the lack of a free press, or the non-existence of non-governmental support organizations operating in the country.

Some National Documentation Packages [NDP] have few to no reports specifically on the treatment of SOGIE individuals. As such, Board members may conclude that SOGIE claimants have failed to substantiate the objective foundation of their fear of persecution.⁴¹

Such evidence may not reasonably be available for at least three reasons. Firstly, the scarcity of information on the application of criminal sanctions may be due to the reluctance of SOGIE individuals to be open in public. LaViolette writes:

Independent country information will be more useful to adjudicators and claimants if the documentation 'look[s] beyond official reports of prosecutions and persecution to cultures of silence which surround human rights abuses against sexual minorities' and examines the reasons why homophobic violence and abuses may be underreported.⁴²

Some examples of documentary information include:

Not surprisingly, few individuals in Angola are prepared to risk being open about their homosexuality...Social psychologist Carinhos Zassela explained that many Angolan gays use

⁴¹ *Sebastiao v Canada (Citizenship and Immigration)*, 2016 FC 803 at paras 36-41.

⁴² Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process" (2009) 13:2/3 *International Journal of Human Rights* 437 at 457 [LaViolette].

marriage as a way of avoiding stigma, but once married, continue to have occasional sex with other men.⁴³

Cultural attitudes don't place gay people [in the Bahamas] in high esteem and this may also be reflected in the police treatment. However, across the Caribbean, more LGBT people are turning to the police and reporting incidents of violence as governance systems improve. However, generally across the region there is a major problem of crimes going unsolved. Therefore, many LGBT people are hesitant to engage with the formal system for fear that they will never get justice, especially if their issue concerns their sexual orientation or gender identity, concepts that often elicit disdain from the public.⁴⁴

According to the US State Department 2013 Human Rights report on Jordan, many LGBT individuals face discrimination in housing, education and employment. When considering whether to use the legal system to achieve justice, some hesitate, as their sexual orientation would lead to antagonistic reactions from the police or be damaging to a court case. LGBT activist Maidan al-Jazerah told Al-Monitor, "In many cases, transgender persons stop themselves from filing suit out of the fear of being treated unjustly and harassed for the way they look."⁴⁵

Secondly, even if SOGIE individuals felt comfortable enough to disclose the mistreatment they face, it may be prohibited or dangerous for human rights organizations to properly document those abuses. The UNHCR Guidelines similarly call for caution as the new IRB Guideline:

The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remains limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations.⁴⁶

LaViolette writes, "Many organizations, for instance, those representing international trade unions, journalists, and religious groups, pay particular attention to human rights violations against their members and their observations are regularly accepted as evidence."⁴⁷

Some example passages from the National Documentation Packages:

Zeid would like to see the establishment of an official gay organization [in Jordan]. This would make it easier to receive support from nongovernmental organizations (NGOs) and private donations to fund their projects, along with better publicity for their cause. However, in 2009, the Ministry of Social Development rejected their petition. Ministry official Ibrahim Tamimi explained that if the government authorized such an organization, it "would violate the public morals and decency."⁴⁸

⁴³ Integrated Regional Information Networks, "Invisible and Vulnerable" (June 2008) online: Integrated Regional Information Networks <<http://www.irinnews.org/fr/node/241986>>.

⁴⁴ Immigration and Refugee Board of Canada, *Bahamas: Situation of sexual minorities, including treatment by society and authorities; state protection and support services available (2009-November 2013)*, online: Immigration and Refugee Board of Canada <<http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=454975&pls=1>>.

⁴⁵ Magid, *supra* note 48.

⁴⁶ UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/GIP/12/09, 23 October 2012 at para 66, online: Refworld <www.refworld.org/docid/50348afc2.html>.

⁴⁷ LaViolette, *supra* note 42 at 443.

⁴⁸ Aaron Magid, "Little protection for gays in Jordan" (August 12, 2014) online: Al-Monitor <<http://www.al-monitor.com/pulse/originals/2014/08/jordan-homosexuality-gay-lesbian-rights-lgbt-conservative.html#ixzz4fZdjAxYM>> [Magid].

According to a Freedom in the World report, Angola is a corrupt nation-state, in which the government has orchestrated acts of violence with tear gas and ammunition, arrests, imprisonment, and intimidation towards those who protest it.⁴⁹ The judiciary is corrupt and controlled by political influence of the President's party.⁵⁰ The US State Department reported that in attempts to cover up human rights concerns over the murder of women in Luanda Norte, security forces seized the property of over 345 journalists and civil society representatives in August 2012.⁵¹ Government agents have regularly vetted news stories in the state-controlled print, television, and radio media, and even exercised considerable authority over non-state media.⁵² Non-governmental organizations engaging in civil and political rights advocacy have received threats of losing their operating license if they persisted in uncovering human rights violations.⁵³

Thirdly, the governing State may have no interest in documenting abuses towards its SOGIE citizens, a particular challenge in the early case law on refugee protection.⁵⁴ Lord Hope of the UK Supreme Court writes:

Persecution for reasons of homosexuality was not perceived as a problem by the High Contracting Parties when the Convention was being drafted. For many years the risk of persecution in countries where it now exists seemed remote. It was the practice for leaders in these countries simply to insist that homosexuality did not exist.⁵⁵

Take for instance the example of the Angolan government:

According to Amnesty International, the Angolan government voted against a UN Human Rights Committee resolution to commission a study on the "extent of discrimination (both in law and practice) and violence against people on account of their sexual orientation or gender identity."⁵⁶ The dissidents of the resolution, including Angola, believed that the resolution was "an attempt to impose values that were not universally shared, and the assertion that there was no basis in international law for human rights protection on the grounds of sexual orientation or gender identity."⁵⁷

Board members may turn to reports from high profile human rights organizations, agencies, or institutions (for example, the US State Department), which may not be useful sources of information compared to SOGIE rights organizations.⁵⁸ Shore J. stated in *Ndowku v Minister (Citizenship and Immigration)*:

⁴⁹ Freedom in the World, "Angola" (2013) online: Freedom in the World <<https://freedomhouse.org/report/freedom-world/2014/angola>> [Freedom in the World].

⁵⁰ *Ibid.*

⁵¹ United States Department of State, *Angola 2013 Human Rights Report*, online: United States Department of State <<http://www.state.gov/documents/organization/220291.pdf>>.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ LaViolette, *supra* note 42 at 441.

⁵⁵ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom Supreme Court at para 2, online: Refworld <<http://www.refworld.org/docid/4c3456752.html>>.

⁵⁶ Amnesty International, *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa*, (June 2013) at 68, online: Amnesty International USA <https://www.amnestyusa.org/sites/default/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf>.

⁵⁷ *Ibid.*

⁵⁸ Nicole LaViolette, "Sexual Orientation, Gender Identity, and the Refugee Status Determination Process in Canada" (2013) Immigration and Refugee Board: Refugee Protection Division Working Paper at 34, online: Social Science Research Network <ssrn.com/abstract=2276049>.

The notion that evidence from a particular advocacy group or, for that matter, any advocacy group is consistently or uniformly less objective than country condition evidence prepared by diplomats, must be examined carefully in light of information from those closest to the situation, including diplomats, themselves, when and where they are privy to first-hand knowledge. This is to ensure that findings be considered as objectively as possible in light of tests of corroboration.⁵⁹

Tip: Review the IRB's National Documentation Package and other research databases to determine if there is enough information on the treatment of SOGIE individuals in your clients' countries of nationality. Other useful sources may include Refworld, ILGA news alerts, Google News alerts, Erasing 76 Crimes, ORAM, among others.

Tip: If cases where evidence of treatment of the SOGIE population is scarce or absent, turn to other pieces of information that may explain for lack of evidence such as stigma surrounding sexual orientation and gender identity; capacity of human rights defenders to document abuses, particularly towards SOGIE individuals, in the country of reference; and the State's attitudes towards recognizing and protecting the fundamental rights of SOGIE individuals.

Tip: If necessary, link the research on gay and bisexual men to your lesbian, bisexual, and transgender clients' cases.

8.5.11.1 An individual with diverse SOGIE may reasonably delay making a claim for refugee protection based on SOGIE out of a fear of reprisal for themselves or family members. A reasonable delay may also arise out of an individual's reluctance to reveal their SOGIE to a spouse or other family member, or in their realizing or accepting their SOGIE.

SOGIE refugees may delay making a claim for various reasons. Unlike other forced migrant groups, SOGIE individuals rarely benefit from the support found in their ethno-cultural populations.⁶⁰ As such, they may fear making a refugee claim, as their SOGIE may be exposed to their communities.

I lived in XXX, in the United States from XXXX to XXXX. I did not feel safe living there. The local population did not like black people, gay people, or foreigners, and I was all three. I have read stories in the news about gay people getting harassed and attacked, or the police rounding up illegals and deporting them. I also did not know anyone in XXXX except the people I saw at church every week. I assumed they were homophobic like the churchgoers in my country. I did not know who I could trust in XXXX.

I first arrived in XXXX on a visitor visa on XXXX. When I arrived, I stayed with my friend, XXXX, and her family. I told XXXX I wanted to stay in Canada but only because of the general fears of XXXX in XXXX. I never told XXXX, and still haven't told her, that the real reason why I want to stay in Canada because she is XXXX. In general, I didn't know who I could trust to tell why I really did not want to return to XXXX. At that time, I had never known what it's like to have a friend I can trust.

⁵⁹ *Ndowku v Canada (Minister of Citizenship and Immigration)*, 2013 FC 22, FCJ No 40 (QL) at para 2.

⁶⁰ *Shidlo*, *supra* note 22 at 9.

Psychological barriers may impede clients from processing and articulating their experiences. Shidlo writes:

In the absence of a safe environment, many LGBT individuals are not able to work through the internal processes necessary to allow them to integrate the multiple aspects of their sexuality. Instead, these processes may slow down or become 'frozen' until they reach the relative safety of a new host country. Because the coming-out process may only begin to unfreeze many years after arrival in the host country, some individuals may have difficulty convincing adjudicators that they are LGBT.⁶¹

Clients suffering from internalized homophobia may not immediately flee from their countries and lodge refugee claims because they feel undeserving of protection.

I still felt depressed and disgusted about myself, especially considering my parents' reaction. I still tried having sex with other girls, and I was drinking, smoking weed, and abusing my friend's prescription drugs. I planned to stay in Canada and pray for a miracle to occur before my study permit expired. I hoped that either I was mistaken about my orientation or my parents would suddenly change their mind.

Clients may even return to their country of nationality, aware of the dangerous living conditions for SOGIE individuals in their countries, because of familial and societal pressures.

I returned to XXXX twice in 2016. I wanted to maintain the respect of my family and support them financially. If ever they found out I am gay, they would disown me. I could not deal with the pressure of lying to my family about why I needed to stay in Canada. Now that I found a job, I can tell them that I am here working and can continue sending them money.

Other clients may simply be unaware that Canada protects the rights of SOGIE individuals, or that they can claim refugee protection based on their SOGIE.

Although I was attacked twice by XXXX, I did not think I could flee from XXXX to somewhere safer until my father's cousin, XXXX, visited our family from Canada. She was in Lebanon visiting family and she said she overheard conversation about me being attacked. When she asked if the stories about why I was attacked were true, I told her yes because I trusted she was open-minded about sexuality since she lives in Canada. She said I could apply for a visitor visa and once I was in Canada, she would help me apply for protection.

Tip: Ask your clients why they did not claim in another country before arriving in Canada. Ask them why they did not claim refugee protection earlier. Follow up questions may include:

- Who did you trust to reveal your SOGIE to in [country of transit]?
- What was your understanding of the safety for SOGIE and/or refugees where you lived in [country of transit]?

Tip: Refer your clients to a psychologist, psychotherapist, or another qualified professional who may determine if your clients' mental health may have impacted their delay in claiming refugee protection.

⁶¹ *Ibid.*

Tip: Explain your clients' delay in claiming in their narrative. Omitting such information may undermine their credibility.

In any event, while claimants coming from countries where sexual orientation is highly stigmatized or unlawful may understandably be reluctant to disclose their sexual orientation to the authorities when arriving in Canada, the Applicant does not state in her affidavit that this was the reason why she did not previously raise her sexual orientation, nor does she provide any reason for not having done so....⁶²

Tip: Explain the timing of your clients' decision to flee and claim refugee protection.

I started reading and hearing stories about XXXX threatening and actually killing gays. By XXXX, XXXX was getting closer to XXXX, where I was living, so I felt I was becoming more and more at risk of actually getting killed since I appear so visibly different from other people. It makes me very upset to talk about XXXX and what XXXX has been doing to people like me.

Since arriving in Canada, I have returned to XXXX two times. I want to maintain the respect of my family. If ever they found out I am gay, they would disown me. I know it is dangerous to be gay in XXXX but I cannot imagine losing their respect. If I am allowed to stay in Canada, I will need to think of an excuse to tell my family about why I am staying here.

8.5.6.3 The existence of laws of general application that are used to target individuals with diverse SOGIE are important to consider. Even where same-sex relations or sexual or gender non-conforming behaviours are not criminalized, laws of general application, such as public morality or public order laws, that are selectively applied and enforced against individuals with diverse SOGIE in a discriminatory manner may amount to persecution in the particular circumstances of a case.

73 countries and five entities continue to formally prescribe various criminal penalties targeting sexual and gender minorities. In 13 of these States, sexual minorities may be put to death on account of their sexual orientation.⁶³ The wording of these laws may be formulated as prohibiting 'acts against nature,'⁶⁴ 'carnal knowledge,'⁶⁵ 'improper acts,'⁶⁶ 'acts of gross indecency with another person,'⁶⁷ 'laws against debauchery,'⁶⁸ and other similar wording.

Remember that the Federal Court of Appeal in *Cheung v Canada (Minister of Employment and Immigration)*, in reviewing forced sterilization under China's one-child policy, explains that a law is not of general application if the practice "affects a limited and well-defined group of people"; is "not universally applied" and may be "conducted by local authorities"; the claimant's fear "extends beyond the consequences of the law of general application to include extraordinary treatment"; and

⁶² *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 (CanLII) at para 46.

⁶³ International Lesbian, Gay, Bisexual, Trans and Intersex Association, "Sexual Orientation Laws in the World – Overview" (June 2016), online: ILGA <http://ilga.org/downloads/03_ILGA_WorldMap_ENGLISH_Overview_May2016.pdf>.

⁶⁴ International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State Sponsored Homophobia 2016 - Angola*, online: ILGA <http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf> at 58.

⁶⁵ *Ibid*, Botswana, at 59.

⁶⁶ *Ibid*, Comoros, at 60.

⁶⁷ *Ibid*, Kenya, at 70.

⁶⁸ *Ibid*, Egypt, at 62.

the law is “so Draconian as to be completely disproportionate to the objective of the law [and so is] viewed as persecutory.”⁶⁹

Tip: Review the countries’ criminal laws to determine if there are laws in place criminalizing consensual same-sex relationships. ILGA’s annual State-Sponsored Homophobia report outlines the various laws curtailing and protecting the rights of SOGIE individuals worldwide.⁷⁰

Tip: Review the country condition documentation to determine if SOGIE individuals may face prosecution under other laws.

In 2001, Egyptian police officers charged 52 men with “performing immoral acts; the use of perverted sexual practices as part of their rituals; contempt and despite of heavenly religions, and fomenting strife” after raiding the Queen Boat, a popular gay club on a boat in the Nile River.⁷¹

In Turkey, police have used traffic regulation laws to stop, search and fine or detain transgender women.⁷²

In Lebanon, men frequenting a bath house were charged for committing acts against nature, prostitution, and immoral behavior in a public space.⁷³

In Saudi Arabia, authorities behead sexual minorities following a conviction of “corruption on earth” offense under Sharia law.⁷⁴

Russia and Lithuania have criminally sanctioned SOGIE individuals convicted of promoting “non-traditional relations”⁷⁵ or “encouraging the sexual abuse of minors, sexual relations between minors and other sexual relations.”⁷⁶

⁶⁹ *Cheung v Canada (Minister of Employment and Immigration)*, [1993] 2 FCR 314, 1993 CanLII 2946 (FCA).

⁷⁰ ILGA, <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>

⁷¹ Khaled Dahwoud, “50 Egyptian gays in court for ‘fomenting strife’” (18 July 2001) online: The Guardian <<https://www.theguardian.com/world/2001/jul/18/1>>.

⁷² Amnesty International, ‘Not an Illness or a Crime’ Lesbian, Gay, Bisexual and Transgender People in Turkey Demand Equality (London: Amnesty International, 2011) at 14-15, online: Amnesty International <<http://www.amnesty.org/en/library/asset/EUR44/001/2011/en/aff47406-89e4-43b4-93ed-ebb6fa107637/eur440012011en.pdf>>.

⁷³ Joe Morgan, “Cops raid second Lebanon bathhouse in gay crackdown” (15 August 2014) online: GayStar News: <<http://www.gaystarnews.com/article/cops-raid-second-lebanon-bathhouse-gay-crackdown150814/#gs.jGZt3Is>

⁷⁴ Amnesty International, “Love, Hate, and the Law: Decriminalizing Homosexuality” (London: Amnesty International, 2008) at 48, online: Amnesty International <<https://www.amnesty.org/download/Documents/56000/pol300032008eng.pdf>>.

⁷⁵ Miriam Elder, “Russia passes law banning gay ‘propaganda’” (June 11, 2013) online: The Guardian <<https://www.theguardian.com/world/2013/jun/11/russia-law-banning-gay-propaganda>>.

⁷⁶ Jessica Geen, “Homophobic Lithuanian law comes into power next week” (February 26, 2010) online: Pink News <<http://www.pinknews.co.uk/2010/02/26/homophobic-lithuanian-law-comes-into-power-next-week-2/>>.

8.6.1 As in all cases, in considering whether state protection is available to an individual with diverse SOGIE, decision-makers must focus on the personal circumstances of the claimant, in conjunction with a fact-based analysis of the operational adequacy and effectiveness of state protection in the country of reference.

8.6.5 The decriminalization of same-sex relations or sexual or gender non-conforming behaviours, or the introduction of a new law, program or other government action designed to improve the situation of individuals with diverse SOGIE in a country, need to be carefully assessed to determine whether state protection is adequate at the operational level. In these cases, decision-makers need to examine the degree of actual implementation, the effectiveness, and the durability of these legislative or other improvements in light of how state actors and general society continue to treat individuals with diverse SOGIE.

The IRB SOGIE Guideline seems to reject the “adequate efforts to protect” test that has plagued many refugee claims, and instead calls for a fact-based analysis of operational adequacy. Nevertheless, SOGIE individuals may struggle to rebut the presumption of state protection, especially where the countries of reference are functioning democracies.⁷⁷

Remember, the presumption of state protection is rebutted if the state is an agent of persecution.⁷⁸

Tip: Review the country condition documentation to determine the operational adequacy of state protection. Explain that government efforts to improve the living conditions for SOGIE individuals have not translated into actual protection for them. For example, a government has established a human rights commission that is mandated to investigate human rights violations, including on the basis of SOGIE. However, does the report outline the steps the human rights commission must take to uncover human rights violations? Have investigations actually been conducted? If so, what has been the result? Has it lead to any consequences for any human rights abusers?

According to sources, homosexuality is legal in Brazil and has been since 1823. Sources state that in 2013 the National Council of Justices passed a resolution mandating all notary publics to register same-sex marriages. *The New York Times* reports that notary publics certify and carry out marriage ceremonies in Brazil... the US Department of State's *Country Reports on Human Rights Practices for 2014* states that social discrimination, especially against transgendered persons, "remained a problem" and violence against LGBT persons "remained a serious concern." Freedom House similarly indicates that "[a]lthough Brazil has a largely tolerant society, violence against members of the LGBT ... community continued during 2014."⁷⁹

Sources indicate that authorities [in Mexico] did not always investigate and punish those who are complicit in human rights abuses against sexual minorities. Sources indicate that crimes committed against sexual minorities are often characterized by authorities as

⁷⁷ See for example Jamie Liew, “Creating Higher Burdens: The Presumption of State Protection in Democratic Countries” (2009) 26:2 *Refugee* 207.

⁷⁸ *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 1993 CanLII 105 (SCC).

⁷⁹ Immigration and Refugee Board of Canada, *Brazil: Situation and treatment of sexual minorities, including legislation, state protection, and support services (2012-April 2016)*, online: Immigration and Refugee Board of Canada <<http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=456454>>.

"crimes of passion" (*crímenes pasionales*) and that these types of crimes are investigated less. *Proceso* reports that, according to the CCCOH report, homicides motivated by homophobia run the risk of becoming [translation] "'invisible'" due to the "'violence, impunity and corruption' that are present during the investigation of these crimes"*Excelsior* quotes a physician at the López Mateos Hospital in Mexico City as stating that many LGBT persons who arrive at the hospital as victims of violence and abuse refuse to file a complaint with the Public Ministry, arguing that these authorities [translation] "do not do anything and they make fun of their sexual preferences."⁸⁰

Tip: Ask your clients if they have ever reported transphobic/homophobic attacks against them to the police. Why did they decide to go or not go to the police? What happened when they went? What are the experiences of other SOGIE individuals interacting with the police?

The next morning, my dad drove me to the police station in XXXX, the village next to ours, because there was no police station in XXXX. When we arrived at the police station, my dad told me to let him talk, that I shouldn't say anything. When I asked him why, he told me I could go to jail if I tell them I'm gay. This was the first time I had ever heard that gay people could be put in jail, let alone on how gay people are treated in XXXX. I know my dad would not lie to me, so I got really scared when he said this. We entered and saw a 'XXXX', which is an agent of the XXXX. My father explained what happened to me, leaving out the fact I was targeted for being gay. The XXXX asked me if I knew who attacked me, and I said no, and that I could not see their faces. The XXXX said there was nothing that could be done since there was no evidence of who assaulted me, and that they couldn't come to my village and just investigate everyone. I was a bit relieved the police wouldn't investigate and that I couldn't recognize the assailants. Because if I did and I told the police, they would've found out why I was attacked and maybe arrest me. I hadn't really thought through the consequences of a police investigation until we were already at the station.

I went to a lawyer to start a criminal case for us. I decided to initiate a criminal case because I already had my visa to come to Canada and apply for asylum and I wanted to prove that I was experiencing assault and didn't feel that I could be protected by the police. The authorities came to the house and took my statement. I told them everything but I did not say that the problems were because of the discovery of my sexual orientation. If I told them they would not help me. In the end, they didn't do anything anyway.

10.2 Relationships involving individuals with diverse SOGIE may not evolve along the same trajectory as non-SOGIE relationships; therefore, preconceived notions about how partners should behave with one another, or with their friends and family, should be avoided when evaluating the genuineness of the relationship. For example, a person in a relationship with a trans or intersex partner may decide not to disclose the gender identity of the partner to friends and family. As set out under section 6, decision-makers are to avoid relying on stereotypes regarding individuals with diverse SOGIE or drawing comparisons with non-SOGIE individuals.

The Supreme Court of Canada set out seven characteristics in *Molodowich v Penttinen* to assess

⁸⁰ Immigration and Refugee Board of Canada, Mexico: Situation and treatment of sexual minorities, particularly in Mexico City, Cancún, Guadalajara, and Acapulco; state protection and support services available (2012-July 2015), online: Immigration and Refugee Board of Canada <<http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=456051&pls=1>>.

whether conjugal relationships mirror marriage-like ones: cohabitation; sexual and personal behavior; division of family-type responsibilities; shared social activities; financial interdependence; children; and societal perception.⁸¹ These factors were adopted to assess conjugality for same-sex couples in *M v H*,⁸² and have been cited in appeals of spousal sponsorship applications for binational couples.⁸³ While the Federal Court and IRB Guideline require decision makers to flexibly apply the *Molodowich* factors in SOGIE cases, applicants must still ultimately demonstrate a strong enough degree of interdependence to satisfy the decision-maker they qualify as conjugal partners.⁸⁴

SOGIE couples at the IAD may face the same evidentiary challenges as those presenting claims before the RPD or RAD.⁸⁵ They may also avoid family-sharing activities or financial interdependence to conceal their relationship.⁸⁶ They may also hesitate to share stories of their past or families.

I have to hide the fact I am bisexual and in a relationship with XXXX because XXX people would discriminate against us and harm us. Usually, when XXX gets attacked, he becomes more distant because he's doesn't want to talk about negative experiences. As our relationship has become stronger, he has told me more about what has happened to him, but I still do not know much many details about his life before we met. I can tell it makes him uncomfortable to talk about his past. I try to comfort him as much as I can, but it is hard because XXXX is a dangerous country for us.

Some couples reject the traditional expectations of interdependency to prove their conjugal relationship:

The models [relationships] that we were forced into by the department [of Immigration] caused a lot of stress. Joint bank accounts, cohabitation, etc. There are other ways to have a relationship! It feeds off and enforces dependency.⁸⁷

Other clients may have simply never considered the opportunity to get married or live with their partners due to their upbringing, cultural background, and experiences of discrimination and oppression. These factors may more generally influence clients' interpretation of relationship development.⁸⁸ For instance, a survey taken by Taiwanese gays and lesbians reveals that there is an indirect correlation between the sense of love or care that respondents felt they were receiving from their partners and their level of commitment to their relationship. The authors of this study pointed to specific cultural values that could explain this finding: Taiwanese society generally upholds maxims such as "no gain without pain" or "tolerance is a virtue".⁸⁹ In other words, intimate partners do not necessarily need to gain love, care, or social status from partners to feel satisfied with their relationships.

⁸¹ *Molodowich v Penttinen* (1980), 17 RFL (2d) 376, 2 ACWS (2d) 486 (Ont Dist Ct).

⁸² *M v H* [1999] 2 SCR 3 at para 59, 171 DLR (4th) 577.

⁸³ See e.g. *Dalumay v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1179 at para 29, 221 ACWS (3d) 972. See also *Keo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456 at para 20, 215 ACWS (3d) 493.

⁸⁴ Citizenship and Immigration Canada, Overseas Processing Manual (OP), Chapter OP 2, Processing Members of the Family Class (14 November 2006) at 20, online: <www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf>. See more recently *Njoroge v Canada (Citizenship and Immigration)*, 2017 FC 261 (CanLII) at para 21.

⁸⁵ See notes on para 3.2 of the *SOGIE Guideline*, above.

⁸⁶ Hersh, *supra* note 7 at 554.

⁸⁷ John Hart, *Stories of Gay and Lesbian Immigration: Together Forever?* (New York: Harrington Park Press, 2002) at 85-86.

⁸⁸ Hersh, *supra* note 7 at 556-560.

⁸⁹ Wen-Yi Shieh, "Gay and Lesbian Couple Relationship Commitment in Taiwan: A Preliminary Study" (2010) 57:10 J Homosexuality 1334 at 1346.

Remember that couples that have not cohabitated for at least 12 months may still qualify as common-law partners if they can demonstrate the reasons for not cohabitating are due to "persecution or any form of penal control."⁹⁰ They must nevertheless establish that they are in a conjugal relationship.

Tip: Use open-ended questions to elicit your clients' interpretation of their SOGIE relationships. Ask them to describe in what ways they are interdependent; who and the reasons why they have or have not disclosed their relationship to other people; what type of life they envision for themselves if they are both in Canada.

Tip: Explain why your clients have not cohabited with their partners in their affidavits.

XXXX and I cannot safely or legally live together. It is illegal to be gay or transgender in XXXX. If the police found out about our relationship, we could be put in jail. I am also living with my family in XXXX. It's culturally unacceptable for me to live outside the family home unless it is with my husband. So, I don't have an excuse to live outside the family home unless I am getting married.

⁹⁰ *Immigration and Refugee Protection Regulations*, SOR 2002-227 s 1(2); LaViolette writes, "Neither "persecution" nor "penal control" is defined in the IRPA nor the IRP Regulations. But in the refugee context, persecution has been interpreted by the courts to mean "repeated or systemic infliction of serious harm or treatment which compromises or denies basic human rights." "Penal control may refer to "punishment usually state sanctioned or tolerated which constricts the liberty of the person.""" Nicole LaViolette "Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act" 49 *McGill Law Journal* 49 (2003-2004) 969 at 989.

SUMMARY OF RECOMMENDATIONS

Create a safe and welcoming environment for your clients. Explain to them that your goal is to support, advise, and represent them in making their claim for refugee protection. Ensure them that your meetings with them are confidential and that their information will not be shared with their communities and families.

Rather than delving immediately into your client's SOGIE, spend your first meeting building your client's trust, explaining solicitor-client privilege, and gathering less intrusive information.

Do not obligate your clients to describe their SOGIE in ways that match our understanding of SOGIE.

Ask your clients to describe their experiences, struggles, and feelings surrounding their SOGIE. The goal is to allow claimants to situate their experiences based on their culture, gender, socioeconomic class, education, and other dimensions of identity. Fully explain them in their narratives. Be consistent in the terminology used in the narrative to match the clients' SOGIE.

Ask your clients what type of life they would like to live, what efforts they have made to realize that life, and the barriers and challenges they are facing. Ask your clients whether they could safely and comfortably carry out that envisioned life in their countries of nationality.

Explain the reasons why your clients have not divulged their SOGIE to close friends, family members, or others. If they have divulged their SOGIE to friends, family members, or partners, explain why they have not been contacted or have not agreed to testify or provide a letter of support.

Explain to your clients that LGBTIQ+ groups and events exist in Canada. Ask them if they have ever joined or are interested in joining. However, do not encourage your clients to attend these LGBTIQ+ groups or events simply to bolster their case. The timing of participation is a relevant consideration in determining credibility.

Mere participation may not be relevant, but if your clients have participated in LGBTIQ+ groups, ask them why they have joined, and how their experiences attending and participating have shaped their understanding of their own SOGIE.

Ask clients about their mindset or reasons for having taken certain risks. Ask clients what precautions they took, if any, to avoid certain risks exposing their SOGIE.

Ask clients what steps they have taken, if any, to conceal their SOGIE. Ask them how they have felt taking these steps.

Refer your clients to a psychologist, psychotherapist, or another qualified professional who may determine if your clients' mental health may have impacted their capacity to articulate experiences tied to their SOGIE, or their delay in claiming refugee protection.

Ask your clients about their past and current same-sex relationships. Focus on open-ended questions to allow clients to describe their relationships in their own words. Include any cultural context when necessary. Also describe your clients' experiences in opposite-sex relationships.

Family members of SOGIE individuals may be at risk of persecution, but the ground needs to be raised to be considered.

Review the objective documentary evidence to ascertain the repercussions for your clients if they do not modify, restrain, or conceal their SOGIE.

If cases where evidence of treatment of the SOGIE population is scarce or absent, turn to other pieces of information that may explain the lack of evidence such as stigma surrounding sexual orientation and gender identity; capacity of human rights defenders to document abuses, particularly towards SOGIE individuals, in

the country of reference; and the State's attitudes towards recognizing and protecting the fundamental rights of SOGIE individuals. If necessary, link the research on gay and bisexual men to your lesbian, bisexual, and transgender clients' cases.

Explain the timing of your clients' decision to flee and claim refugee protection. Ask your clients why they did not claim in another country before arriving in Canada. Ask them why they did not claim refugee protection earlier. Explain your clients' delay in claiming in their narrative.

Review the countries' criminal laws to determine if there are laws in place criminalizing consensual same-sex relationships. ILGA's annual State-Sponsored Homophobia report outlines the various laws curtailing and protecting the rights of SOGIE individuals worldwide.

Review the IRB's National Documentation Package and other research databases to determine if there is enough information on the treatment of SOGIE individuals in your clients' countries of nationality. Other useful sources may include Refworld, ILGA news alerts, Google News alerts, Erasing 76 Crimes, ORAM, among others.

Review the country condition documentation to determine the operational adequacy of state protection. Explain that government efforts to improve the rights living conditions for SOGIE individuals have not translated into actual protection for them.

Ask your clients if they have ever reported transphobic/homophobic attacks against them to the police. Why did they decide to go or not go to the police? What happened when they went? What are the experiences of other SOGIE individuals interacting with the police?

Use open-ended questions to elicit your clients' interpretation of their SOGIE relationships. Ask them to describe in what ways they are interdependent; who and the reasons why they have or have not disclosed their relationship to other people; what type of life they envision for themselves if they are both in Canada.

Explain why your clients have not cohabited with their partners in their affidavits.