



The Status of Lesbian, Gay, Bisexual and Trans-identified Rights in Canada  
Submission to the Human Rights Council for the Universal Periodic Review  
(4<sup>th</sup> session)

## Introduction

Egale Canada<sup>1</sup> is a national organization committed to advancing equality, education, diversity and justice for lesbian, gay, bisexual and trans-identified people (LGBT), and their families, across Canada. Egale has members in every province and territory of the country. Egale has intervened before the Supreme Court of Canada in every gay rights case that has reached the Court, including *Egan v. Canada*, *Mossop v. Canada*, *Vriend v. Alberta*, *M v. H & Ontario*, *Little Sisters Book and Art Emporium v. Canada Customs*, *B.C. College of Teachers v. Trinity Western University*, *Chamberlain v. Surrey School Board*, and most recently the *Reference re Same-Sex Marriage*. Egale has also participated in numerous lower court cases, including the marriage cases in B.C., Ontario and Quebec.

The human rights situation of the LGBT people in Canada has improved drastically during the last 39 years. Same-sex practices between consenting adults were decriminalized in 1969. In the early 1980's Canada adopted the *Canadian Charter of Rights and Freedoms*. Although sexual orientation is not listed as a ground for discrimination in the *Canadian Charter of Rights and Freedoms*, it has been deemed by the Supreme Court of Canada (*Egan v. Canada*, [1995] 2 S.C.R. 513) to be an analogous ground on which claims of discrimination may be based. In 1996, the *Canadian Human Rights Act* was amended to explicitly include sexual orientation as one of the prohibited grounds of discrimination. Most provinces and territories have included sexual orientation in their human rights legislation as a prohibited ground of discrimination. In 2004, Bill C-250 amended the *Criminal Code* to include sexual orientation as an identifiable characteristic for protection from hate propaganda under the Hate Propaganda Sections 318<sup>2</sup> and 319<sup>3</sup>. Only the Northwest Territories currently protects Canadians explicitly from discrimination on the basis of gender identity in its human rights code. It should be noted that courts and tribunals in several jurisdictions including Ontario and British Columbia have held that transgendered and transsexual people are protected under the ground of 'sex' and in cases where transitioning, the ground of 'disability.' Both these grounds are included in all human rights legislation in Canada. On July 20, 2005, the *Civil Marriage Act* was passed by Parliament permitting same-sex couples to legally marry across Canada.

Although the legal status and protection of the LGBT people has improved in Canada, some significant concerns remain. On February 06, 2006, a new minority government led by Stephen Harper of the Conservative Party was formed in Canada. On December 6, 2006, the government brought in a motion asking if

<sup>1</sup> For further information, visit [www.egale.ca](http://www.egale.ca)

<sup>2</sup> *Criminal Code* R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1.

<sup>3</sup> *Criminal Code* R.S., 1985, c. C-46, s. 319; R.S., 1985, c. 27 (1st Supp.), s. 203; 2004, c. 14, s. 2.

the issue of same-sex marriage should be re-opened to support the traditional definition of marriage. This motion was defeated, however the current government has introduced over its term, a varying number of guidelines and policies, which erode, and question Canada's international human rights law commitments.

### **Right to Equality and Non-discrimination**

#### The Right to Security of the Person (Trans-identified People)

While significant advances have been made in human rights protections for lesbian, gay and bisexual people in Canada over the past 20 years, trans people have in many ways been left behind. People with a “non-traditional” gender identity or gender expression have very few legal protections against violations of their basic human rights. Article 26 of the ICCPR<sup>4</sup> which recognizes that “All persons are equal before the law and are entitled without discrimination to the equal protection of the law, as well Article 2(2) of the ICESCR<sup>5</sup> stipulates that “the rights enunciated in the present Covenant will be exercised without discrimination of any kind [...]” The current legislation in Canada does not guarantee all persons have equal and effective protection against discrimination, in particular in the enjoyment of economic and social rights. The lack of protection against discrimination based on gender identity and gender expression constitutes a failure of the State to take all necessary legislative measures to guarantee equality before the law for everyone.<sup>6</sup> We recommend that the State consider expanding the definition of “identifiable groups” under the *Criminal Code of Canada* and the *Canadian Human Rights Act* to include gender identity and gender expression.

A recent report released by Statistic Canada<sup>7</sup>, failed to cover instances of victimization affecting people in Canada on the grounds of “gender identity” and “gender expression”. It is widely accepted that although, victims may self-identify as gay, lesbian or bisexual, the motivation of the crime perpetrated is most times if not always dependent upon ones gender expression, i.e. masculinity or femininity.

It should be noted also that there is considerable provincial variation in the level and quality of treatment and support for trans-identified and intersex people, especially gender variant and trans-identified children. Trans-identified people in Canada do not have equal access to essential health care services, and are often denied access by medial professionals. Health Canada is the Federal department responsible for helping Canadians maintain and improve their health, but they have failed in taking the leading role on health matters affecting trans people. The State should ensure that everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity.<sup>8</sup> It is recommended that a consultation process and feasibility study be conducted to develop regional treatment/car centers for trans people.

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<sup>4</sup> *International Covenant on Civil and Political Rights*

<sup>5</sup> *International Covenant on Economic, Social and Cultural Rights*

<sup>6</sup> See the Yogyakarta Principles (Principle 20) at <http://www.yogyakartaprinciples.org/>

<sup>7</sup> <http://www.statcan.ca/english/research/85F0033MIE/85F0033MIE2008016.htm>

<sup>8</sup> See the Yogyakarta Principles (Principle 17) at <http://www.yogyakartaprinciples.org/>

### Health Canada Guidelines

As of December 2007, Health Canada secretly implemented a new set of guidelines that excluded men who have sex with men from donating their organs. The current guidelines and policies by Health Canada excluded men who have sex with men from donating blood, semen, organs and bone marrow. The current policies unfairly discriminate against gay and bisexual men, making no distinction between men who engage in high-risk sexual behavior with multiple partners in comparison to men who engage in safe sexual practices. The Canadian Blood Services is a not-for-profit charitable organization that manages the blood supply in all provinces and territories outside Quebec, their current policies says it will reject blood from any man "if he has had sex with another man, even once since 1977" The guidelines for organ donation programs excludes donation if men have had sex with another man in the last 5 years. The piecemeal guidelines set by Health Canada discriminate against men solely on their sexual preference, rather than on unsafe sexual activity. Other countries like Spain, Italy and Portugal have changed their policies to exclude donors who have engaged in risky sexual behavior, rather than rejecting them because of their sexual preference. The current guidelines also prevent women without a male, sexual partner from seeking accessible fertility services to use known sperm donors, including gay men. We recommend the State immediately review Health Canada's guidelines and regulations by seeking further scientific consultations. The State has to ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities, and are equally available to all without discrimination.<sup>9</sup>

### The Right to Seek Asylum

The Immigration and Refugee Board of Canada (IRB) is Canada's largest independent administrative tribunal. It is responsible for making decisions on immigration and refugee matters, efficiently fairly and in accordance with the law. The integrity of Canada's immigration and refugee systems have recently come under scrutiny as cases based on sexual orientation or gender identity under the humanitarian and compassionate category, saw an increase in decisions based on bias and stereotypes. Recent cases have been denied on the ground that homosexuality is a choice and that an applicant could have lived clandestinely as a heterosexual. At best, the Board's conclusions reflect uninformed views of sexuality and at worst they demonstrate a reliance on preconceived ideas about homosexuality and gender expression. To fulfill Canada's international legal obligations with respect to refugees, the State must ensure that everyone has the right to seek asylum from persecution, including persecution related to sexual orientation or gender identity. Flowing from this right, the State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment.<sup>10</sup>

It is our recommendation that the State conduct an immediate review of the IRB's policies, to ensure that no policy or practice discriminates against an asylum

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<sup>9</sup> See the Yogyakarta Principles (Principle 17 (f) ) at <http://www.yogyakartaprinciples.org/>

<sup>10</sup> See the Yogyakarta Principles (Principle 20) at <http://www.yogyakartaprinciples.org/>

seeker on the basis of sexual orientation or gender identity. Where instances of bias and stereotypes emerge, cases should be re-opened and Board members trained and required to sit on a 3 member panel, rather than alone. In particular, we recommend the implementation of the Refugee Appeal Division (RAD) according to the express wishes of Parliament as was included in the *Immigration and Refugee Protection Act* (IRPA). This would give refugee claimants the right to an appeal on merit against a negative decision from the Refugee Protection Division of the IRB. As it stands, there is no right to appeal before the IRB, this is inconsistent with the recommendations of the United Nations High Commissioner for Refugees (UNHCR).<sup>11</sup>

The Conservative government's recent amendments to the *Immigration and Refugee Protection Act* (Bill C-50) reforms the immigration system in Canada and gives the Minister of Citizenship and Immigration wide powers that could politicize the system, by allowing some applications to be fast tracked over other categories. The lack of transparency and accountability in the new process could allow for discriminatory and biased decisions to impact cases based on humanitarian and compassionate grounds (sexual orientation and gender identity categories) from being filed from abroad.

## **Economic, Social and Cultural Rights**

### The Right to Education

Canada's international and domestic legal obligations ensure that everyone has a right to education without discrimination on the basis of, and taking into account, their sexual orientation and gender identity. In May 2008, Egale released Phase One results of its Safe Schools Survey. The results reflected the assumptions that children who self-identified as lesbian, gay, bisexual, transgender and Two-Spirit, queer and questioning (LGBTQ) face high levels of homophobia and transphobia in school which is linked to their poor performance, higher drop-out rates and teen suicides. Out of the ten provincial and three territories, only the Ministry of Education in Newfoundland and Labrador have issued official letters requesting the inclusion of the survey within the school system. The lack of Federal and Provincial support for the survey impedes Egale's ability to poll a large pool of LGBTQ students in Canada. The lack of adequate support by the government seriously impedes equal access to education and equal treatment of LGBTQ students, students of same-sex partners, staff and teachers within the school system, who face daily instances of discrimination on the grounds of sexual orientation, gender identity and gender expression.

It is our recommendation that the Government of Canada needs to "take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of LGBTQ students, students of same-sex partners, staff and teachers within the education system". The Government shall also "ensure that education is directed to the development of each student and responds to the needs of students of all sexual orientations and gender identities".<sup>12</sup>

<sup>11</sup> <http://www.ccrweb.ca/unhcrRAD.html>

<sup>12</sup> See the Yogyakarta Principles (Principle 16) at <http://www.yogyakartaprinciples.org/>

These would include the Government conducting its own survey and research about the instances of homophobia and transphobia in the Canadian school system. Making information available which outlines the risk of suicide amongst LGBT people in Canada, as well as implementing a strategy to address any results.

#### **Other recommendations and concerns**

- Implementation of a uniform national process to change one's sex on a birth certificate and other government issued forms of identification
- Supporting the implementation of the Yogyakarta Principles, a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply. The State should also develop and implement a foreign policy to promote and protect the human rights of LGBTI people overseas. This will allow Canada to reflect progressive national laws into human rights foreign policy and development aid.
- An express commitment or timeline to increase Canada's foreign aid to the UN-agreed target of 0.7 percent of the GDP to go towards the advancement of the Millennium Goals Project, resources that would help in the response to AIDS in the developing world by reducing poverty, tackling women's inequality and gender-based violence and the disproportionate lack of programs addressing sexual minority rights.
- Implement a uniform age of consent for anal and vaginal sex. Legal disparity, higher age of consent discriminates against gay men and violates the *Canadian Charter of Rights and Freedoms*.
- Extending the permit of the Vancouver Safe Injection Site, in line with WHO recommendations. Scientific results and data show positive outcomes in lowering HIV infection and drug use among marginalized groups, which included, IV drugs users, LGBTI, and sex workers.
- Use of the term "visible minority" from the Employment Equity Act has become a large part of Canadian vernacular. Use of the term could further marginalize LGBTI people, by placing an additional barrier, as an additional distinction and exclusion within the law. It is recommended that Canada revisit the use of the term, as census reports indicate that the "traditional" so called "visible minority" ethnic groups already outnumber so called "non visible" people in some Canadian cities.
- **As of August 26, 2008, in correspondence with the Department of Foreign Affairs and International Trade (DFAIT), only one small meeting had been organized by the State to inform the public of the UPR process. No consultations have taken place and in verbal communication, Egale has been informed a broad consultation will take place in October/November 2008, after the NGO deadline submission date of the 9<sup>th</sup> September 2008.**

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