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Sin of Omission: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections

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Abstract

Refugee claimants in Canada must submit a "Basis of Claim" form to the Refugee Board before attending a hearing with the adjudicator who will decide their claim. On this form, they are expected to produce a written narrative that explains "everything that is important" about their experiences. At their hearing, many claimants encounter, for the first time, a key principle of Canadian refugee law: The omission of any "important information" from this narrative suggests that they have invented their claim. This study takes a close look at how this "omission from the narrative" inference is operating within a set of judgments by Canadian refugee status adjudicators. It provides the first quantitative overview of the role that this inference plays in a sample of Canadian decisions as well as the first in-depth analysis of this kind of high-stakes legal reasoning. Negative credibility findings were at the heart of the decision to reject a large majority of the claimants in these decisions (72 per cent; 217/303), and the adjudicators in these cases relied on an "omission from the narrative" inference in almost half of the decisions in which they concluded that the claimant was lying (49 per cent; 128/259). The major premise underlying this inference is that, in drafting their narrative, the claimant would have understood what information the Board expected them to provide. The claimants in these decisions raised strong challenges to this premise, and the adjudicators did not identify compelling support for it. At least in the context in which it currently operates in Canadian refugee hearings, adjudicators cannot, therefore, reliably infer deception from the fact that a claimant has added even important new information at the hearing. This conclusion has implications for the Canadian refugee system's administrators; for adjudicators; for appellate-level decision makers and judges; for legal aid systems; for counsel who represent refugee claimants; and for researchers who study refugee status adjudication.

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Sin of Omission: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections

HILARY EVANS CAMERON*

Refugee claimants in Canada must submit a "Basis of Claim" form to the Refugee Board before attending a hearing with the adjudicator who will decide their claim. On this form, they are expected to produce a written narrative that explains "everything that is important" about their experiences. At their hearing, many claimants encounter, for the first time, a key principle of Canadian refugee law: The omission of any "important information" from this narrative suggests that they have invented their claim.

This study takes a close look at how this "omission from the narrative" inference is operating within a set of judgments by Canadian refugee status adjudicators. It provides the first quantitative overview of the role that this inference plays in a sample of Canadian decisions as well as the first in-depth analysis of this kind of high-stakes legal reasoning.

Negative credibility findings were at the heart of the decision to reject a large majority of the claimants in these decisions (72 per cent; 217/303), and the adjudicators in these cases relied on an "omission from the narrative" inference in almost half of the decisions in which they concluded that the claimant was lying (49 per cent; 128/259). The major premise underlying this inference is that, in drafting their narrative, the claimant would have understood what information the Board expected them to provide. The claimants in these decisions raised strong challenges to this premise, and the adjudicators did not identify compelling support for it. At least in the context in which it currently operates in Canadian refugee hearings,

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adjudicators cannot, therefore, reliably infer deception from the fact that a claimant has added even important new information at the hearing. This conclusion has implications for the Canadian refugee system's administrators; for adjudicators; for appellate-level decision makers and judges; for legal aid systems; for counsel who represent refugee claimants; and for researchers who study refugee status adjudication.

YOUR BACK HAS BEEN HURTING FOR MONTHS and you have finally been referred to a specialist. Before you can have your appointment, however, you must send their office a completed Medical History Form. You are instructed to write on this form "everything that is important" about your condition, including when it started, what kinds of symptoms you have been having, and if you are taking any other medication. Since the information that you provide will help the specialist to assess you, the instructions note that it must be "complete, true, and accurate." You fill out the form and send it in.

You imagine that the specialist wants this information because they need to understand your pain in order to decide the best course of treatment. When you finally have your appointment, however, you discover that in fact this information is important—and potentially primarily important—in another way. The specialist will use this form to decide whether you are simply trying to score drugs. They will conclude that you are lying about your condition if there is any "important information" that you have left out.

Since you "omitted relevant information" from your form, the specialist concludes that "your credibility is undermined": you are inventing your symptoms. As they explain in their written report:

> You wrote on your form that your pain started in the spring. You told me in your assessment that actually you felt twinges as early as Christmas. The form clearly asks you to indicate when your symptoms started. You also told me today for the first time that your left hand sometimes tingles. This information is crucial to a diagnosis and the form clearly states that all important information must be included. I draw a negative inference from these omissions, since you confirmed on the form that the information that you were providing was "complete, true, and accurate."

Refugee claimants in Canada must submit a "Basis of Claim" (BOC) form to the Immigration and Refugee Board before attending a hearing with the adjudicator who will decide their claim.[1] On this form they are expected to produce a written

1. Refugee claims in Canada are decided by adjudicators at the Immigration and Refugee Board, which is an independent administrative tribunal. They apply the provisions of the domestic law, the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], which incorporates Canada's obligations under the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 1C(1), Can TS 1969 No 6 (entered into force 22 April 1954) [*Convention*]. The Basis of Claim form that claimants are required to submit to the Board at the beginning of the claim process asks them to list, in a series of boxes, a quantity of personal information such as name, date of birth, nationality, citizenship, past addresses, and any past visa applications to Canada. It also asks them to write on the lines provided, and on "additional sheets of paper" if needed, the answers to a series of questions under the heading "Why you are claiming refugee protection in Canada." These questions include the following: "Have you or your family ever been harmed, mistreated or threatened by any

narrative that explains "everything that is important" about their experiences. At their hearing, many claimants encounter for the first time a key principle of Canadian refugee law: The omission of any "relevant and important facts" from this narrative suggests that they have invented their claim. [2]

This study takes a close look at how this "omission from the narrative" inference operates within a set of 303 rejections written by Canadian refugee status adjudicators. By law, Canadian adjudicators must provide reasonable justification for the conclusion that a claimant is lying.[3] This study investigates the support that the "omission from the narrative" inference brings to this conclusion in the decisions under review. Part I outlines the conceptual framework that guides this work. Part II discusses the study's methodology, including the composition of its data set, its coding structure, its analytical approach, and its limitations. Part III reports the study's quantitative findings and qualitative observations, and Part IV discusses what these contribute to our understanding of the role that the "omission from the narrative" inference plays in Canadian refugee status decision making. Part V highlights the implications of this study's findings for the administrators of the Canadian refugee system, for its refugee status adjudicators, for appellate-level adjudicators and judges, for legal aid programs, for counsel who represent refugee claimants, and for researchers who study refugee status decision making.

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person or group?"; "If you returned to your country, do you believe you would be harmed, mistreated or threatened by any person or group?"; and "Did you ask any authorities such as the police, or any other organization, in your country to protect or assist you?" See "Basis of Claim Form (For Persons Claiming Refugee Protection in Canada)" (November 2012), online (pdf): *Immigration and Refugee Board of Canada* <irb-cisr.gc.ca/en/forms/Documents/RpdSpr0201_e.pdf> [perma.cc/BUQ2-DRV9] [BOC Form]. In the language of Canadian refugee law, the claimants' answers to the latter questions collectively comprise their "narrative."

2. See *Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1867 (QL) at para 33 (TD). See also (174) MB5-05577; (265) MB6-00393; (072) MB5-03883; *Hammoud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 251 (QL) (TD); *Grinevich v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 444 (QL) (TD); *Feradov v Canada (Citizenship and Immigration)*, 2007 FC 101 at para 18 [*Feradov*].

3. See *e.g. Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248 (QL) (FCA) at para 5 [*Maldonado*]. For discussion, see also Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018), ch 4 [Evans Cameron, *Fact-Finding*].

I. CONCEPTUAL FRAMEWORK

This study's focus on rejections is grounded in normative legal theory. Simply put, for reasons arising out of its obligations under the United Nations *Convention Relating to the Status of Refugees* ("*Convention*"), a refugee status determination system ought to be more concerned with avoiding mistaken rejections than with avoiding mistaken grants.[4] Moreover, the Canadian Federal Court of Appeal has established that it is a worse mistake to disbelieve a truthful claimant than to believe a liar.[5] There is therefore both a legal and an ethical obligation to submit a refugee system's rejection mechanisms to careful scrutiny.[6]

A rich literature suggests that a host of psychological and socio-political factors, at both the personal and institutional levels, may influence how

4. Evans Cameron, *Fact-Finding*, *supra* note 3.
5. Maldonado, *supra* note 3 at para 5. For a discussion, see Evans Cameron, Fact-Finding, *supra* note 3 at 90-93.
6. This study adds to a body of literature that follows a similar approach in trying to guard preferentially against this kind of mistake. See *e.g.* Douglas McDonald-Norman, "No One to Bear Witness: Country Information and LGBTQ Asylum Seekers" (2017) 33 Refuge 88; Zoe Given-Wilson, Jane Herlihy & Matthew Hodes, "Telling the Story: A Psychological Review on Assessing Adolescents' Asylum Claims" (2016) 57 Can Psychology 265; Hannah Rogers, Simone Fox & Jane Herlihy, "The Importance of Looking Credible: The Impact of the Behavioural Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum Seekers" (2015) 21 Psychology Crime & L 139; Jane Herlihy, Laura Jobson & Stuart Turner, "Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum" (2012) 26 Applied Cognitive Psychology 661; Hilary Evans Cameron, "Refugee Status Determination and the Limits of Memory" (2010) 22 Intl J Refugee L 469 [Evans Cameron, "Limits of Memory"]; Hilary Evans Cameron, "Risk and the Reasonable Refugee: Exploring a Key Credibility Inference in Canadian Refugee Status Rejections" [forthcoming in Intl J Refugee L]. For more on this body of literature, see note 8, below. In the criminal law sphere, a similar philosophy underlies The Innocence Project, for example, which "exonerates the wrongly convicted through DNA testing and reforms the criminal justice system to prevent future injustice," through an exclusive focus on wrongful convictions, not wrongful acquittals. Innocence Project, "About," online: <innocenceproject.org/about> [perma.cc/FH27-6A8B].

adjudicators decide refugee claims.[7] With credibility conclusions, in particular, there is both ample reason to doubt that adjudicators' written reasons fully reflect their thinking and ample reason to be concerned that this thinking may be influenced by bias and stereotyping.[8]

This study does not explore refugee status decision making: It does not seek to understand how the adjudicators reached their conclusions. Rather, it explores how the adjudicators justified the conclusion that the claimant was lying and whether these justifications are defensible. As such, this study does not seek to uncover whether or to what extent the "omission from the narrative" inference in fact motivated the adjudicators' reasoning. It rather takes this justification at face value and analyzes the adjudicators' reasoning within their own frames of reference; in evaluating their use of this inference, it looks only to the evidence

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7. See *e.g.* Carol Bohmer & Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (Routledge, 2008); Rebecca Hamlin, *Let Me Be A Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Oxford University Press, 2014); Jaya Ramji-Nogales, Andrew I Schoenholtz & Philip G Schrag, eds, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009); Herlihy, Jobson & Turner, *supra* note 6; Jane Herlihy, Kate Gleeson & Stuart Turner, "What Assumptions About Human Behaviour Underlie Asylum Judgments?" (2010) 22 Intl J Refugee L 351; Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21 Intl J Refugee L 1; Efrat Arbel, Catherine Dauvergne & Jenni Millbank, *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014); Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013); Norman, Steve, "Assessing the Credibility of Refugee Applicants: A Judicial Perspective" (2007) 19 Intl J Refugee L 273.
8. In addition to the literature cited above, lie detection researchers suggest that credibility decisions are often quick, intuitive judgements and that adjudicators may have little insight into the factors that have led them to their conclusions. If so, in providing written reasons, adjudicators may be engaging in a process of post hoc justification, consciously or otherwise, and an inference that they have identified as supporting their conclusion may not, in fact, have influenced their thinking. For a review, see Maria Hartwig & Pär Anders Granhag, "Exploring the Nature and Origin of Beliefs about Deception: Implicit and Explicit Knowledge among Lay People and Presumed Experts" in Pär Anders Granhag, Aldert Vrij & Bruno Verschuere, eds, *Detecting Deception: Current Challenges and Cognitive Approaches* (John Wiley & Sons, 2015) 125. See also Maria Hartwig & Charles F Bond Jr, "Why Do Lie-Catchers Fail? A Lens Model Meta-Analysis of Human Lie Judgments" (2011) 137 Psychology Bull 643; Judee K Burgoon, J Pete Blair & Renee E Strom, "Cognitive Biases and Nonverbal Cue Availability in Detecting Deception" (2008) 34 Human Communication Research 572; Marc-André Reinhard, "Need for Cognition and the Process of Lie Detection" (2010) 46 J Experimental Soc Psychology 961. See Sean Rehaag & Hilary Evans Cameron, "Experimenting with Credibility in Refugee Adjudication: Gaydar" (2020) 9 Can J Human Rights 1 (for empirical confirmation of this effect in law students acting as adjudicators in simulated refugee hearings).

that they had before them. It does not assess the strength of the adjudicators' reasoning with reference, for example, to the critical literature noted above, or to the wealth of social scientific studies that might help to explain why truthful claimants may have omitted the information in question.[9]

In short, by design, this study meets the adjudicators in the hearing room. It joins them in thinking through the use of this inference on the adjudicators' own terms and, for the sake of argument, leaves aside all other considerations. In this way, it is able to ask: At its very strongest, what support does this inference provide to the adjudicators' negative credibility conclusions?

II. METHODOLOGY

A. THE DATA SET

In the context of a larger project, I requested a set of 1000 decisions from Canada's first-instance decision-making body, the Refugee Protection Division of

9. Many psychologists, for example, have contributed to the conversation about what kinds of information adjudicators can reliably expect truthful refugee claimants to include in their narratives under different circumstances. See *e.g.* Jane Herlihy & Stuart Turner, "Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making" (2015) 6 Eur J Psychotraumatology 27380 [Herlihy & Turner, "Untested Assumptions"]; Jane Herlihy & Stuart W Turner, "The Psychology of Seeking Protection" (2009) 21 Intl J Refugee L 171 [Herlihy & Turner, "Seeking Protection"]; Herlihy, Jobson & Turner, *supra* note 6; Given-Wilson, Herlihy & Hodes, *supra* note 6; Rogers, Fox & Herlihy, *supra* note 6. In addition, a significant body of literature has explored, in particular, why sexual minority claimants and claimants who have suffered sexual violence may delay in disclosing their orientation or experiences. See *e.g.* Arbel, Dauvergne & Millbank, *supra* note 7; Millbank, *supra* note 7; Spijkerboer, *supra* note 7. Indeed, the Board's Guidelines recognize that "[i] ndividuals are often reluctant to disclose their experiences of sexual violence because of feelings of shame, helplessness, shock and/or fear that by doing so they may be seen to have dishonoured their families and may be ostracized by their communities." "Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution" (2022), online: *Immigration and Refugee Board of Canada* <irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> [perma.cc/XNA4-PFWL]. The Guidelines also recognize that when a person fails to disclose "significant events or details" relating to their sexual orientation, there may be "cultural, psychological or other barriers that may reasonably explain the omission." See "Chairperson Guidelines 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics" (2021), online: <irb.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx> [perma.cc/QND5-9BMH] ["Chairperson Guideline 9"]. See also *Harry v Canada (Citizenship and Immigration)*, 2019 FC 85 at paras 33-34; *Odia v Canada (Citizenship and Immigration)*, 2014 FC 663.

the Immigration and Refugee Board.[10] These 1000 decisions were the first 1000 decisions to reject a claim made in the 2016 calendar year by the adjudicators at the Refugee Board's three offices in Montreal, Toronto, and Vancouver. The Board released these decisions to me in PDF form, with the claimants' names and any identifying details redacted. They were released in batches of 100, over a period of two years and nine months, beginning with the decisions of the Montreal office (n=316). The data set for the present study comprised these 316 decisions from the Montreal office.

Since this study focuses squarely on the question of whether a claimant meets the legal criteria to be found at risk under the *Convention*, I removed from this study's data set the thirteen decisions in which the adjudicator did not consider this question: decisions in which the finding that the claimant was excluded from refugee protection or that the claimant had not established their identity ended the adjudicator's analysis.[11] This resulted in a final set of 303 decisions, of which 194 were written in French and 109 in English,[12] representing the work of twenty-five adjudicators. Both the mean and median number of decisions per adjudicator was twelve and the highest number of decisions issued by a single adjudicator was twenty-four (8 per cent; 24/303).

As described above, the decisions for this study were collected through nonprobability sampling.[13] While the selection was therefore not random, the distribution of relevant variables is largely in keeping with the profile of the Board's decision making in the comparator years for which the most recent data is publicly available. The decisions in this set, which were all issued in the first five months of 2016, rejected the claims of citizens of sixty-seven countries. In the

10. The Immigration and Refugee Board is an independent quasi-judicial tribunal. See "Immigration and Refugee Board of Canada," online: <irb-cisr.gc.ca/en/Pages/index.aspx>. Redacted copies of its decisions, obtained pursuant to a request under the *Access to Information Act*, become a matter of public record. See RSC 1985, c A-1.
11. *IRPA*, *supra* note 1, s 98. Claimants may be excluded from protection if they have status in a safe third country or if they have committed certain kinds of crimes. The theoretical basis for distinguishing this category of decisions in a study of credibility judgments is that if assessing credibility comes down to resolving doubt, and resolving doubt comes down to deciding which kind of mistake to prefer, there are unique normative considerations at stake in deciding this question of error preference in the context of findings about a claimant's exclusion or identity that do not arise when the sole question is whether they are at risk. See Evans Cameron, *Fact-Finding*, *supra* note 3.
12. All citations from French-language decisions in this study appear in English, translated by the author.
13. See *e.g.* Jason D Rivera, "When Attaining the Best Sample is Out of Reach: Nonprobability Alternatives When Engaging in Public Administration Research" (2019) 25 J Public Affairs Education 314.

full 2021 calendar year, although the percentage of rejections is not specified, the Board heard claims from citizens of ninety-eight countries,[14] and in the first six months of 2022, from citizens of eighty-two countries.[15] The claimant or claimants in this data set were represented by counsel in 96 per cent of cases (291/303); in 2019, the claimant or claimants were represented in 94 per cent of the Board's rejections (5980/6330).[16] Although these factors were not quantified in this study, and the comparator information is not captured in the Board's statistics, the claimants in this sample identified as their agents of persecution a wide range of state and non-state actors and made claims based on the full spectrum of legal grounds.

The decisions in this data set reflect a larger proportion of single claimants than the Board's most recent cohort. Of the decisions in this set, 77 per cent (233/303) were for a single claimant, while the remaining 23 per cent (70/303) were for a pair of claimants or a family. In 2019, 58 per cent (3702/6330) of the Board's decisions to reject a claim were for a single claimant, and 42 per cent (2628/6330) were for a pair of claimants or a family.[17] In the cases under review, 68 per cent of the claimants were identified as male (159/233) and 32 per cent as female (74/233); no other gender categories were identified. No data is publicly available on the gender breakdown of the Board's rejections in a comparator year.[18] These limitations are discussed further below.

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14. "Refugee Protection Claims (New System) by Country of Alleged Persecution – 2021," online: *Immigration and Refugee Board of Canada* <irb.gc.ca/en/statistics/protection/Pages/RPDStat2021.aspx> [perma.cc/PJM8-XD9F]. The last full year for which this information is available as of the time of writing is 2021.
15. Immigration and Refugee Board of Canada, "Claims by Country of Alleged Persecution – 2022 (January to June)" (last modified 1 September 2022), online: *Immigration and Refugee Board of Canada* <irb.gc.ca/en/statistics/protection/Pages/RPDStat2022.aspx> [perma.cc/2ABL-AGJ4].
16. Sean Rehaag, "2019 Refugee Claim Data and IRB Member Recognition Rates" (12 August 2020), online: *Refugee Law Lab* <www.refugeelab.ca/refugee-claim-data-2019> [perma.cc/Y9ZU-C63L] [Rehaag, "2019 Refugee Claim Data"]. This is the last full year for which this information is available.
17. *Ibid*.
18. Statistics from the Government of Canada suggest that in 2020, the last year for which this data is available, 56 per cent of refugee claims were made by male claimants and 44 per cent by female claimants. See Sean Fraser, Immigration, Refugees and Citizenship Canada, "Gender-based Analysis Plus" (1 February 2022), online: *Government of Canada* <canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-performance-reports/2021/gender-based-analysis-plus.html> [perma.cc/ZA5K-4X5B]. This data does not record how many claimants from each category were accepted or rejected.

B. CODING

The larger project of which this study is a part aims to quantify the full set of inferences on which adjudicators rely to justify their negative credibility conclusions and to examine the assumptions that underlie them. To develop a set of codes that would capture every inference, I first ran a pilot project in which I fully coded the first 200 decisions released to me by the Board, using NVivo software.[19] The initial set of codes drew on negative credibility inferences recognized in Canadian law (*e.g.*, inconsistencies, omissions, implausibility), inferences reported in the Board's decisions reviewed by the Federal Court,[20] and others that I encountered in my clients' cases during ten years in practice. As I read the 200 cases, I refined the initial codes. As new categories and sub-categories of inference emerged, I recoded the decisions that I had previously coded, following an iterative process until I found no new categories of inference in the decisions. This work ultimately yielded a set of fifty-three codes and sub-codes.

To explore the "omission from the narrative" inference, using NVivo software,[21] I coded the 303 decisions in this study's data set under six of the codes established in the pilot study.

First, I coded for the "omission from the narrative" inference, which I defined as follows:

> The member [adjudicator] justifies the conclusion that the claimant has invented some or all of their allegations with reference to the finding that the claimant has omitted information from their Basis of Claim form narrative.

To restrict this study's scope, I left for another day exploration of a closely related justification: the drawing of a negative inference from the claimant's failure to amend their narrative to include new information that came to light after they submitted their BOC narrative but before their hearing. This study's analysis considers only inferences drawn from the omission from the original BOC narrative of information that was available to the claimant at the time of drafting.

Second, I coded for whether the adjudicator supports this finding with reference to the fact that the claimant swore or affirmed that their narrative was complete:

> The member justifies the inference from the finding of a BOC omission in whole or in part because the claimant swore or affirmed that the BOC was complete.

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19. Nvivo Qualitative Data Analysis Software, Version 12 (QSR International Pty Ltd, 2018).
20. See Evans Cameron, *Fact-Finding*, *supra* note 3.
21. See Nvivo Qualitative Data Analysis Software, *supra* note 19.

Third, to give a sense of the backdrop against which this category of inference is operating, I looked at the scope of the adjudicators' credibility conclusions. For each decision, I assessed whether the adjudicator made a negative credibility finding, defined as follows:

> The member concludes that the claimant has invented some or all of their allegations with the intention of deceiving the Board.

Fourth, scholars have long noted the central role that credibility plays in refugee status decision making,[22] but to my knowledge have not attempted to quantify how often credibility is the sole determinative issue in these decisions. To best capture this aspect, I coded the corollary: I concluded that in all cases that did *not* fall within the following definition, the negative credibility finding was determinative:

> The member provides a stand-alone basis for denying the claim that does not rest on their finding of deception. The member has made a finding of deception but makes expressly clear that they would have reached the same ultimate conclusion regardless: "Even if I had believed your allegations, which I don't, et cetera." Test: Is it clear that the claim would have been rejected even if the member had believed the claimant's allegations.[23]

Lastly, for each decision, I assessed and coded whether the adjudicator supported the "omission from the narrative" inference "with reference to the fact that the claimant had legal representation," and whether they concluded that the omission revealed "the claimant's attempt to deceive by hiding information." I identified no borderline cases in any of the codes other than the "omission from the narrative" code. In the "omission from the narrative" code, I identified one or

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22. Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" (Paper for the International Association of Refugee Law Judges, delivered at the conference "The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary," October 1998) at 158, online (pdf): <refugeestudies.org/UNHCR/97%20-%20Truth%20and%20Consequences.%20Credibility%20Determination%20in%20Refugee%20Context.%20by%20Audrey%20Macklin.pdf> [perma.cc/AHS7-F2MD]; Millbank, *supra* note 7; Anthea Vogl, "Telling Stories from Start to Finish: Exploring the Demand for Narrative in Refugee Testimony" (2013) 22 Griffith L Rev 63; James A Sweeney, "Credibility, Proof and Refugee Law" (2009) 21 Intl J Refugee L 700; Michael Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination" (2003) 17 Geo Immigr LJ 367.
23. It should be noted that the fact that this finding ended the adjudicator's analysis in a given case does not necessarily imply that they would otherwise have granted the claim, however. Had they believed the claimant, the adjudicator may, in theory, have rejected the claim on other grounds.

two cases in which I felt that it was unclear whether the adjudicator was relying on this inference. Erring on the side of caution, I did not include these in this code.

C. ANALYSIS AND EXPLORATION

For this study's quantitative analysis, I tallied the decisions coded under each of the above codes.

This study's qualitative analysis proceeds from the notion that we can judge the quality of an inference—the drawing of a conclusion from a set of premises—by asking whether and, if so, how confidently we can accept the premises that support it. Assuming that its conclusion follows, a strong inference is one whose premises we can confidently accept, while a weak inference is one whose premises we have good reason to doubt.

In analyzing the decisions in which the adjudicators draw an "omission from the narrative" inference, I considered how the adjudicators explain their reasoning. I considered the passages in these decisions in which the adjudicators explain their concerns about the omission from the narrative; in which they set out the claimants' responses to these concerns; and in which they justify why they are not persuaded by these responses. As set out below, this exploration allowed themes to emerge that shed light on my research questions: Which premises underlie this category of inference and what might reasonably increase or decrease confidence in these premises?

D. LIMITATIONS

The aims of this study's quantitative analysis were modest. Nonetheless, using multiple coders to minimize subjectivity is best practice as there is always reason for concern that a single coder's unconscious bias may affect their coding.[24] As this smaller-scale project allowed for only a single coder, I selected codes that I felt minimized this risk: I chose the above codes because I felt that coding for them was straightforward, and I rejected others that may have allowed for more subjectivity. The coded data is available for review.[25]

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24. See *e.g.* Chris Barker, Nancy Pistrang & Robert Elliott, *Research Methods in Clinical Psychology: An Introduction for Students and Practitioners*, 2nd ed (John Wiley & Sons Ltd, 2002).
25. This data can be accessed online. See Hilary Evans Cameron, "Sin of Omission – Coded Data and List and Description of Immigration and Refugee Board files in Data Set" (8 August 2022), online: *Toronto Metropolitan University* <doi.org/10.32920/19642794.v1>. To facilitate review, this study refers to the decisions throughout using both the Board's file number and, in brackets, the corresponding project reference number.

The decisions in this study's data set all came from one office of the Refugee Board, which raises the possibility that its observations apply only to decisions made by that office. While there was no difference in the grant rates among the Board's three offices in 2016 (each granted 66 per cent of the claims decided on the merits),[26] it is nevertheless possible that the adjudicators may have justified their conclusions differently.

As noted above, this set of decisions also contained a larger proportion of single claimants than the most recent comparator set for the Board as a whole, and the representativeness of the gender distribution in this data set could not be verified. Either factor could affect the generalizability of the study's findings if adjudicators are significantly more or less likely to use "omission from the narrative" reasoning in rejecting one gender of claimant, or single claimants as opposed to pairs or families. In the decisions under review, while there was no significant difference in how the adjudicators used omission inferences to justify deception findings for male and female claimants, [27] the adjudicators did rely on these inferences more often in rejecting the claims of multiple claimants than single claimants.[28] The potential significance and implications of this observation should be explored in future studies of the Board's decision making.

A limitation of this study's textual analysis is that, with no access to the transcripts or recordings of the hearings, there are no means to verify or investigate further the adjudicators' reports of their exchanges with the claimants. Under Canadian law, adjudicators are required to put their credibility concerns to the claimant in the hearing and to give the claimant the chance to

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26. Sean Rehaag, "2016 Refugee Claim Data and IRB Member Recognition Rates" (8 March 2017) at para 2.6 ("Data"), online: *Canadian Council for Refugees* <ccrweb.ca/en/2016-refugee-claim-data> [perma.cc/5V75-F876]. In an earlier study, Innessa Colaiacovo found significant differences in the grant rates in the Board's Toronto, Montreal, and Vancouver offices in the 2006–2011 period (51.10 per cent, 36.30 per cent, and 39.60 per cent, respectively). "Not Just the Facts: Adjudicator Bias and Decisions of the *Immigration and Refugee Board of Canada* (2006-2011)" (2013) 1 J Migration & Human Security 122 at 128. Rehaag, however, found that for the 2006 year, the grant rates for the three offices were nearly identical (54.29 per cent, 54.43 per cent, 54.38 per cent). Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 Ottawa L Rev 335 at 350-51.

27. The adjudicators relied on these inferences in 48 per cent of the decisions for single female claimants (33/63) and 46 per cent of the decisions for single male claimants (63/138). This study analyzed the genders of only the single claimants as the decisions did not always specify the genders of the dependant claimants among claimant families.

28. The adjudicators relied on these inferences in 48 per cent of the decisions for single claimants (97/202) compared with 58 per cent (30/57) for multiple claimants.

respond.[29] In a number of decisions, however, the claimants' responses to the omission question are not recorded; the adjudicator merely notes the omission and concludes that it is significant.[30] In one case, it is clear that the adjudicator did not in fact ask the claimant for an explanation,[31] and in another, that the claimant offered explanations that the adjudicator felt were not worth recording (the claimant "got lost in confusing explanations").[32] This analysis may have benefited had I been able to review the transcripts or recordings of these hearings.

Most notably, by the date of publication, this study's data will be six years old. The guidance that adjudicators receive from the Board about how to assess narrative omissions has since changed in at least two respects, and it is possible that the adjudicators' use of this inference may also have changed, either as a result of this new guidance or for other reasons.

Shortly after these decisions were written, the Board released a new guideline for assessing claims based on sexual orientation, gender identity and expression, and sex characteristics.[33] This guideline notes that in assessing such claims, adjudicators "should examine whether there are cultural, psychological or other barriers that may reasonably explain the omission."[34] The Board has also recently published a new credibility assessment guide for its adjudicators.[35] As it relates to the "omission from the narrative" inference, the new guide's approach differs

29. See *e.g. Shaiq v Canada (Citizenship and Immigration)*, 2009 FC 149 at para 77; *Kumara v Canada (Citizenship and Immigration)*, 2010 FC 1172 at paras 3-4; *Fatih v Canada (Citizenship and Immigration)*, 2012 FC 857 at para 66; *Adewoyin v Canada (Minister of Citizenship and Immigration)*, 2004 FC 905 at para 18.
30. See *e.g.* (157) MB5-05344; (062) MB5-03637; (017) MB4-01062 MB4-01072; (240) MB6-00092 MB6-00093 MB6-00094; (037) MB5-02465 MB5-02473 MB5-02476 MB5-02477; (069) MB5-03810 MB5-03811 MB5-03812 MB5-03813 MB5-03882; (103) MB5-04560 MB5-04575 MB5-04576 MB5-04626; (121) MB5-04880 MB5-04884 MB5-04887 MB5-04888 MB5-04889.
31. (070) MB5-03835. The decision reads:

    > The panel did not ask the claimant why she did not update her BOC to provide the most recent information about her family, so the panel does not know why she has not done so. However, the panel would have expected her to do so, considering the importance of the information (*ibid*).

32. (177) MB5-05595. See also (303) MB6-01002.
33. See "Chairperson Guideline 9," *supra* note 9.
34. *Ibid* at para 7.7.
35. See "Assessment of Credibility in Claims for Refugee Protection" (31 December 2020), online: *Immigration and Refugee Board of Canada* <irb.gc.ca/en/legal-policy/legal-concepts/Pages/Credib.aspx> [perma.cc/FC23-D4XE] ["Assessment of Credibility," 2020].

from that of its predecessor.[36] The previous guide began its discussion of narrative omissions by noting that the Federal Court had "pointed out some of the pitfalls" of relying on these omissions and that they "are not always indicative of a lack of credibility."[37] The current version, in contrast, stresses that the BOC "must contain much more detailed information" than the statement given at the port of entry, and it cites the court for the proposition that "[*a*]*ll* relevant and important facts should be included"—to which it adds italics and underlining.[38]

III. FINDINGS AND OBSERVATIONS

A. FINDINGS

In 85 per cent of the decisions in the data set, the adjudicator concluded that the claimant had attempted to deceive them (259/303).[39] In 84 per cent of these decisions, this negative credibility finding was the sole determinative issue (217/259). The claimants were rejected based solely on their credibility, therefore, in 72 per cent of the decisions in the data set (217/303).

In just under half of the decisions in which the adjudicator concluded that the claimant was lying, they relied on the "omission from the narrative" inference to support this finding (49 per cent; 128/259). While this study did not aim to quantify the impact of this inference, it is worth noting that each of the adjudicators in these cases also identified other reasons for disbelieving the claimants; regardless of whether it significantly contributed to the outcome, in no decision in this data set did this inference operate alone. In more than a quarter of the cases in which the adjudicator drew this inference, they supported it with the finding that the claimant had sworn or affirmed that their story was complete (28 per cent; 36/128). In 10 per cent of the cases, the adjudicator noted that the claimant had counsel in justifying the "omission from the narrative"

36. Krista Daley, "Assessment of Credibility in Claims for Refugee Protection" (31 January 2004), online: <refworld.org/docid/4638af792.html> [perma.cc/K3U6-QWRN].
37. *Ibid* at 27-28.
38. "Assessment of Credibility," 2020, *supra* note 35 at 2-26.
39. In just over 1 per cent of these decisions that found deception, the adjudicator concludes that the claimant's claim is "manifestly unfounded" per section 107.1 of the *IRPA* (3/259). In 3 per cent, the adjudicator concludes that the claimant's claim has "no credible basis" per section 107(2) of the *IRPA* (8/259 decisions). In two cases (coded as "no finding of deception"), the adjudicator found that the claimant was not credible because they were delusional, not because they had intended to deceive the Board. (130) MB5-05013; (212) MB5-05930.

inference (13/128), and in 2 per cent, they concluded that the claimant had deliberately omitted information from their narrative in order to hide it (3/128).

Of note, of the claimants or claimant families against whom the adjudicators drew a deceptive addition inference, at least 97 per cent (125/128) were represented by counsel at their hearing.[40] Refugee claimants in Canada may be represented for a fee by a licensed lawyer, paralegal, or immigration consultant, or pro bono by "a family member, a friend or a volunteer."[41] Since all categories of legal representative appear as "counsel" in the list of participants, it was not evident from these decisions how many claimants were represented by which kind of representative.

B. OBSERVATIONS

1. DECEPTIVE OMISSIONS VERSUS ADDITIONS

On its face, there are two reasons why the addition of information to a previous statement might suggest that the speaker is lying. It might suggest that they had tried to deceive by hiding the information on the first occasion—that they had made a *deceptive omission*. A refugee claimant might make this kind of omission by failing to volunteer information that they thought might hurt their claim. A subsequent addition might also suggest, however, that the speaker is trying to deceive by inventing new information on the second occasion, by making a *deceptive addition*. After submitting their narrative, a claimant might come up with a way to improve their story, or they might fabricate new information on the spot during their hearing to try to get out from under a potential credibility challenge. The Federal Court implies this justification for the "omission from the narrative" inference when it suggests that a claimant's later addition of information is an "embellishment"[42] intended to "bolster"[43] their claim. Canadian law does

40. In three cases, it was clear that the claimant was not represented. (040) MB5-02642; (051) MB5-03167; (174) MB5-05577. In a fourth case, the adjudicator delivered their reasons orally and these were subsequently transcribed. (170) MB5-05539. At the top of the first page of the transcription, the transcriber has indicated "no counsel recorded." It is not clear whether no counsel participated in this hearing, or whether counsel participated but their information was not recorded.
41. "Claimant's Guide (Print Version)" (2018), online: *Immigration and Refugee Board* <irb-cisr.gc.ca/en/refugee-claims/Pages/ClaDemGuide.aspx#who> [perma.cc/LBU3-NFF4].
42. See *e.g. Bouarif v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 49 at para 14; *Martinez Cabrales v Canada (Citizenship and Immigration)*, 2019 FC 1178 at para 67; *Chen v Canada (Citizenship and Immigration)*, 2002 FC 969 at para 10.
43. See *e.g. Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at paras 19-20; Koky v Canada (Citizenship and Immigration), 2014 FC 388 at para 20.

not distinguish between findings drawn from "deceptive omissions" and those drawn from "deceptive additions," referring to both simply as findings based on an "omission from the narrative."

As noted above, in the cases studied, almost every "omission from the narrative" inference was of the second kind. The adjudicators identified deceptive *omissions* in only 2 per cent of these decisions, cases in which the adjudicator found, for example, that the claimant had deliberately left out of their narrative the fact that they had made an asylum claim in another country,[44] or that the allegedly gay claimant had been sponsored by an opposite-sex partner.[45] In the remainder, each of the adjudicator's "omission" findings instead reflected the conclusion that the claimant had made a deceptive *addition* at the hearing, either to make their claim more compelling or in an attempt to address a potential credibility challenge.

Given this, this study's observations will focus on the reasoning that justifies this "deceptive addition" inference. The following section explores the rationales put forward by claimants to challenge this inference and the adjudicators' responses to these challenges.

2. THE CLAIMANTS' EXPLANATIONS

The claimants in these cases put forward several categories of explanation in response to the adjudicators' concern that they had left important information out of their narratives.

A few denied that they made an omission at all, suggesting that there was no relevant distinction between the information that they had provided and the information that the adjudicator identified as missing. In one case, the adjudicator found that the claimant had failed to mention that her uncle had made a death threat against her. The claimant explained that she had addressed this point when she wrote that her uncle "had threatened her 'very forcefully.'"[46] Another claimant, who wrote in her narrative that a man had confronted her in an intimidating way, testified in the hearing that this man had been carrying a rifle. When asked why she had not mentioned the rifle in her narrative, she explained that "that is what she meant by [him confronting her in] a threatening manner."[47]

One claimant, whose claim was based on the risk that he faced as a gay man, raised an explanation that brings to mind the Board's caution about failures to

44. (229) MB6-00025.
45. (023) MB5-01644.
46. (043) MB5-02780.
47. (089) MB5-04185 MB5-04194 MB5-04227. See also (225) MB5-06097.

disclose "significant events or details" relating to sexual orientation.[48] While his narrative did note, in the adjudicator's words, that the claimant was "attacked and received death threats a number of times, and he was injured by his family, friends, strangers and even the police," it lacked any specifics about these events. It also omitted other aspects that the adjudicator found important, like the beating that the claimant received after the first time that he was "caught making love" and the fact that "he exchanged sexual favours with homosexual tourists for money." The claimant explained that his landlady had helped him to complete his narrative and that he "was embarrassed"; he "did not feel comfortable" describing these experiences to her.[49]

The remainder of the explanations recorded in these decisions fall into one or both of the two categories set out below: the claimant had not understood that they were expected to include all important information, or they had not understood that the missing information was important. In many cases, the claimants underscored these explanations with an appeal to the adjudicators to recognize the difficulty and subjectivity of the narrative drafting exercise.

I. NOT KNOWING TO INCLUDE ALL IMPORTANT INFORMATION

The narrative section of the BOC form begins with the following instruction, in bolded text:

> When you answer the questions in this section, please explain everything in order, starting with the oldest information and ending with the newest. INCLUDE EVERYTHING THAT IS IMPORTANT FOR YOUR CLAIM. INCLUDE DATES, NAMES AND PLACES WHEREVER POSSIBLE.

Many of the claimants in these cases explained that they had understood this instruction as asking them to provide a "summary" or "synthesis" of the most important elements of their story.[50] They pointed to textual and contextual factors to support this interpretation.

Several explained that complying literally with the instruction would have been unrealistic, if not impossible. Claimants said, for example, that they "didn't want to go on for fifty pages";[51] "that if he had written all that had happened

48. See "Chairperson Guideline 9," *supra* note 9.
49. (260) MB6-00280.
50. See *e.g.* (051) MB5-03167; (028) MB5-01890; (127) MB5-04955; (040) MB5-02642; (218) MB5-06013 MB5-06021; (076) MB5-03978; (132) MB5-05046; (228) MB6-00007.
51. (218) MB5-06013 MB5-06021. See also (166) MB5-05445; (044) MB5-02847 MB5-02873; (053) MB5-03345.

to him, he could have written a book."[52] Many also explained that they had interpreted the form's instruction in the context of the narrative's role in the refugee claim process. They knew that this was only a preliminary gathering of information ahead of their hearing, where they expected to be able to tell the full story: "He thought that when he had his hearing he could explain everything."[53]

II. NOT KNOWING THAT THE MISSING INFORMATION WAS IMPORTANT

The second rationale that many claimants put forward to explain an omission was that they simply had not identified the missing information as important. They had not recognized its relevance or thought to include it.

Several explained that in their written narrative they had focused on the events that had caused them to flee their country. One, who had raised her sexual orientation during her interview with immigration officials, explained that she did not mention it in her narrative because, while she faced mistreatment as a lesbian, "her story of forced marriage is what brought her here."[54] Another claimant explained why he had described in his narrative one very serious threat that he had received but had not mentioned a previous, less serious one: because he "was only really afraid...the first time they threatened to kill him."[55] Another claimant's narrative began with an incident when she was eighteen years old, when her brother and uncle wanted to force her to marry against her will. Her claim was based on her fear of their subsequent threat to murder her for refusing this marriage. In the hearing, the claimant testified that she had "had problems with her brother for a long time," and that, in the years leading up to the attempted forced marriage, he had hit her and had kept her under watch to make sure that she "did not cause a scandal." She did not include this history on her BOC form, however. She started her narrative at the point at which the threat arose that caused her to flee.[56]

A number of claimants did not mention in their narrative the experiences of family members who remained behind in their country.[57] Several explained

52. (011) MB5-00821.
53. (127) MB5-04955. See also (132) MB5-05046; (028) MB5-01890; (247) MB6-00150 MB6-00169; (040) MB5-02642; (174) MB5-05577; (132) MB5-05046; (127) MB5-04955; (098) MB5-04494; (172) MB5-05549 MB5-05547 MB5-05548; (114) MB5-04747; (132) MB5-05046; (174) MB5-05577; (262) MB6-00319.
54. (043) MB5-02780.
55. (125) MB5-04937. See also (193) MB5-05725.
56. (296) MB6-00923. See also (228) MB6-00007.
57. See *e.g.* (191) MB5-05699; (032) MB5-02101; (203) MB5-05817. See also (132) MB5-05046; (071) MB5-03849; (119) MB5-04836.

that this was because they felt that their family members' experiences were not part of their own story. As one explained, she did not include the threats to her family back home because in writing her story "she was answering 'for herself.'"[58] Another claimant, who had been extorted by bandits targeting people working in his industry, "completely omitted from his narrative" the fact that his cousin who worked in the same industry had been killed by bandits. The claimant explained that "he did not consider this fact important and that it did not concern him personally."[59]

In other cases, claimants explained that they had not foreseen the importance—or indeed the relevance—of the missing information. It had simply never crossed their minds. One claimant testified, for example, that her father was angry with her for marrying against his wishes. Asked why her father had agreed to participate in her wedding regardless, she explained that he did so "in order to avoid the shame" because she had "had sexual relations with [her husband] before the marriage."[60] She had not included this information in her narrative, she explained, because "she did not think that this was important."[61] Another claimant's narrative "only briefly mentioned in passing" a long-term same-sex relationship. In the hearing, she testified about when the relationship started, how long it lasted, and why it ended. Asked why "she did not give any of these details in her [narrative]," the claimant explained "that she never thought of including these details."[62]

III. THE DIFFICULTY AND THE SUBJECTIVITY OF WRITING A NARRATIVE

In addition to providing the explanations discussed above, some of the claimants in these cases appealed to the adjudicators to recognize both the difficulty and the subjectivity of the narrative drafting exercise.

Many claimants stressed a range of reasons why preparing their narrative in the days after they made their refugee claim was very challenging. One explained that he had relied on his wife to write the story since "he did not know how to read."[63] Another suggested that he was "not made for writing."[64] In the words of another claimant, "When you ask me questions I can answer, but explaining

58. (191) MB5-05699.
59. (032) MB5-02101. See also (203) MB5-05817; (132) MB5-05046.
60. (172) MB5-05549 MB5-05547 MB5-05548.
61. *Ibid*. See also (050) MB5-03148 MB5-03169.
62. (261) MB6-00281. See also (106) MB5-04623.
63. (118) MB5-04834.
64. (099) MB5-04499.

everything on paper, that was a bit more difficult."[65] One noted that completing the Board's paperwork was "confusing for anyone who is not a professional."[66] Several claimants asked the adjudicator to consider the fact that they had filled out their forms while they were in detention.[67] One, living in a homeless shelter, noted that when he was filling out his forms, "other concerns" had impeded his ability "to concentrate on [his] case."[68] And many explained that when they wrote their narratives, they were simply not in a good state of mind: They were tired,[69] "stressed,"[70] "fearful and not thinking clearly."[71]

Several claimants also suggested that their forms may have been improperly interpreted,[72] and a number explained that they had received poor advice about what information to include, either from the friends or acquaintances who had helped them to fill out their forms or from their lawyer or legal representative.[73] Others asked the adjudicators to consider that they had had to choose which information to include and that, in hindsight, they may have made the wrong choice. Not recognizing that they needed to include the missing information, several claimants felt in retrospect, "was an error."[74] One explained that he "wrote down what mattered most to him";[75] another wrote that he "was completing the form alone and maybe he didn't fill it out completely or correctly."[76] Several emphasized, nonetheless, their good faith efforts; the claimant felt that "he did his best to answer the questions."[77] One suggested that it "was not up to him to judge whether [the missing information] was important."[78]

3. THE ADJUDICATORS' RESPONSES

The adjudicators in these decisions gave four categories of reasons for rejecting the claimants' explanations for the omissions from their narratives: the claimant

65. (177) MB5-05595.
66. (245) MB6-00138.
67. (071) MB5-03849; (215) MB5-05974.
68. (175) MB5-05581.
69. See *e.g.* (174) MB5-05577; (198) MB5-05776.
70. (138) MB5-05106 MB5-05107 MB5-05108.
71. (097) MB5-04436. See also (029) MB5-01944; (175) MB5-05581.
72. (182) MB5-05644.
73. (197) MB5-05759. See also (025) MB5-01817; (260) MB6-00280; (204) MB5-05818; (303) MB6-01002; (246) MB6-00149.
74. (107) MB5-04646. See also (119) MB5-04836; (303) MB6-01002.
75. (166) MB5-05445.
76. (051) MB5-03167.
77. (064) MB5-03662. See also (127) MB5-04955.
78. (101) MB5-04533.

affirmed that their narrative was complete; the Board's expectations were clear; the information was important; and the claimant had a fair opportunity to include the missing information. Before addressing each of these in turn, this section will make a preliminary observation about how the adjudicators approached this analysis.

I. SUBJECTIVE VERSUS OBJECTIVE STANDARD

When the adjudicators' reasons do not address the claimant's explanations, it is often unclear whether the adjudicators were holding the claimants to an objective or a subjective standard: whether they were concluding that the claimant had omitted information that *was*, in fact, important or whether they were concluding that the claimant had omitted information that the claimant *would have appreciated* was important. When the reasons do address the claimant's explanations, in some cases the adjudicators took the former approach, and in others the latter.

a. Using a Subjective Standard

When taking a subjective approach, the adjudicators concluded, on the facts of the case, that the claimant would have known that the missing information was important.[79] As one adjudicator wrote, "If these important events occurred, the tribunal believes that the claimants would have clearly indicated them the first time they wrote their story."[80] In some decisions, discussed in Part III(B)(3)(iv),

79. (114) MB5-04747. See also (075) MB5-03948 MB5-03951; (071) MB5-03849; (051) MB5-03167; (123) MB5-04934; (127) MB5-04955.

80. (138) MB5-05106 MB5-05107 MB5-05108. The idea that "a person's first story is usually the most genuine, and therefore the one to be most believed," has been described as "trite law" by the Federal Court. *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 13; *Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 15. See also *Chavez v Canada (Citizenship and Immigration)*, 2007 FC 10 at para 14; *Mohacsi v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 771 at para 21; *Rathinasigngam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 988 at para 21. In one recent decision, the Canadian Refugee Protection Division applied this rationale to a claimant's omission of potentially helpful information from her narrative. RPD File TB7-20134, TB8-06996, [2019] RPDD No 60 (QL). As it has been elaborated in the jurisprudence, however, this "first story" rationale does not sit squarely with the "deceptive addition" inference. It arises in cases in which the claimant has made an initial statement, typically at the port of entry, that included unhelpful or incriminating information, and then attempts in their narrative to walk it back. See *e.g.* RAD File No TB5-03664, [2015] RADD No 1761 (QL) at para 38. The Refugee Appeal Division said, "The Federal Court has stated that a person's first account of events is usually more reliable and can be considered more trustworthy (especially if it is incriminating)." In these contexts, the Federal Court

below, the adjudicators inferred that the information was so *evidently* important that the claimant simply could not have failed to recognize this.

In other cases, the adjudicators concluded that the fact that the claimant had thought to mention the missing information in other contexts showed that they knew that it was important. The fact that the claimant had included the information in his report to the police before fleeing his country, for example, reveals that he appreciated its importance: "[I]f the claimant deemed it appropriate to mention [being extorted by local criminals] in the police report, it would have been consistent on his part to mention it in his [narrative]."[81] One adjudicator applied similar reasoning to a claimant who had submitted medical documents to corroborate an injury that he had described in his narrative but who had not mentioned in his narrative that he had been to see a doctor. The claimant testified that he "did not see any reason" to mention the visit to the doctor in his narrative, but the adjudicator concluded that "he clearly saw a reason, because he submitted the medical certificate."[82] In another case, a claimant wrote in her narrative that she had fled her country because of domestic violence and did not mention facing a risk because of her sexual orientation. The claimant had, however, raised this risk in other paperwork that she had filed at the beginning of the refugee claim process. The adjudicator concluded that the omission of her sexual orientation from her narrative is *even more* troubling ("more incoherent") because she had thought to raise this element elsewhere in the paperwork.[83]

Some adjudicators also highlighted the fact that, at the hearing, the claimant expressly confirmed that the new information was important: "[T]he claimant did acknowledge that this fact was important."[84] The wording of the reasons in several of these cases suggests that the claimants did not spontaneously offer this observation but rather that the adjudicator sought it out; the claimant "admitted"

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suggests that the initial unhelpful or incriminating statement should be preferred because the claimant gave that statement "spontaneously." See *e.g. Ishaku v Canada (Minister of Citizenship and Immigration)*, 2011 FC 44 at para 52; *Canada (Minister of Citizenship and Immigration) v GBH*, [2010] IDD No 7 (QL) at para 38 (IRB, Immigration Division). In the context of omissions from the narrative, on the contrary, the written narrative is less spontaneous than the subsequent oral testimony, and here the inference is not that this initial statement is "to be believed," but rather that the addition of new information calls the entire claim into question.

81. (228) MB6-00007. See also (125) MB5-04937.
82. (230) MB6-00027. See also (119) MB5-04836; (043) MB5-02780.
83. (043) MB5-02780.
84. (245) MB6-00138. See also (075) MB5-03948 MB5-03951; (076) MB5-03978; (268) MB6-00432.

or "agreed" to this characterization of the evidence.[85] In one case, the adjudicator described first asking the claimant to confirm the importance of the missing information before then "confronting" him with its omission.[86]

b. Using an Objective Standard

In many other decisions, the adjudicators applied a purely objective standard in drawing a "deceptive addition" inference. They did not conclude that the claimant *would have* included the missing information in their narrative if they were telling the truth. They concluded that the claimant *should have* included it: Important information "must appear"[87] in the narrative as the instructions "require" it.[88] This information therefore "should have been mentioned."[89] Indeed, the claimant should not have declared that their narrative was "complete, true, exact and up-to-date" if this information was missing.[90] As one adjudicator concluded, ensuring compliance with this requirement was the claimant's "responsibility": "[D]espite the claimant's young age, the tribunal is of the opinion that it was his responsibility to see that all of the relevant elements of his asylum claim were in his narrative."[91]

In reaching either of these kinds of conclusions, the adjudicators found support for their use of the "deceptive addition" inference in the four following rationales.

II. THE CLAIMANT AFFIRMED THAT THEIR NARRATIVE WAS COMPLETE

As noted above, in more than a quarter of these decisions (28 per cent), the adjudicator supported their use of the "deceptive addition" inference with

85. (097) MB5-04436; (075) MB5-03948 MB5-03951. See also (268) MB6-00432; (287) MB6-00696.
86. (029) MB5-01944.
87. (064) MB5-03662. See also (099) MB5-04499.
88. (145) MB5-0518. See also (202) MB5-05813 MB5-05814 MB5-05815 MB5-05816; (228) MB6-00007; (099) MB5-04499; (144) MB5-05180; (165) MB5-05404; (229) MB6-00025.
89. (269) MB6-00446. See also (283) MB6-00618. See generally (132) MB5-05046; (144) MB5-05180; (145) MB5-05181; (165) MB5-05404; (229) MB6-00025; (228) MB6-00007; (145) MB5-05181; (119) MB5-04836.
90. (044) MB5-02847 MB5-02873; (126) MB5-04938.
91. (100) MB5-04531.

reference to the fact that the claimant had declared under solemn affirmation that their narrative was a true and complete statement.[92]

III. THE BOARD'S EXPECTATIONS WERE CLEAR

The adjudicators in these cases regularly found that the claimant would or should have understood to include the information because the Board's expectations were clear. They supported this finding with reference to the wording in the instructions in the form and the accompanying Claimant's Guide; the role of the narrative in the refugee claim process; the claimant's level of education; and the fact that the claimant had legal representation.

a. The Text of the BOC Form's Instructions

The adjudicators regularly referenced the text of the BOC form's instructions. The claimant would or should have known to include the missing information because "the instructions in the BOC and the Claimant's Guide are clear: the refugee claimant must explain in detail all of the facts that are important for their refugee claim."[93] One decision highlighted the fact that this instruction appears in bolded text.[94] Another pointed out that, in addition to indicating "very clearly" that the claimant "should put down as much information as possible," the form "even says that if you need to, you can add sheets."[95]

Moreover, where claimants had not included information about threats made to their non-accompanying family members or to third parties, the adjudicators noted that they would or should have been alerted to the importance of this

92. The BOC form requires claimants to declare that the information that they have provided is "complete, true and correct." BOC Form, *supra* note 1. At the beginning of the hearing, the claimants again affirm that the information in their narrative is "true, complete and correct." See *e.g.* (204) MB5-05818; (284) MB6-00647 MB6-00654. See also (230) MB6-00027; (267) MB6-00402; (309) MB6-01082; (025) MB5-01817; (125) MB5-04937; (100) MB5-04531. (182) MB5-05644. See also (197) MB5-05759; (255) MB6-00195; (284) MB6-00647 MB6-00647 MB6-00654. See also (230) MB6-00027; (267) MB6-00402; (309) MB6-01082; (025) MB5-01817; (125) MB5-04937; (100) MB5-04531.
93. (182) MB5-05644. See also (197) MB5-05759; (255) MB6-00195; (284) MB6-00647 MB6-00654; (247) MB6-00150 MB6-00169.
94. (255) MB6-00195.
95. (284) MB6-00647 MB6-00654. See also (006) MB4-05323 MB4-05324 MB4-05326.

information by the language on the form.[96] The form's instructions "specifically ask the claimants to explain in detail if they or their family has ever been mistreated or threatened,"[97] and are likewise "clear" that a claimant "must mention 'whether persons in situations similar to yours experienced such harm, mistreatment or threats.'"[98]

b. The Role of the Narrative

In several decisions, the adjudicators explained that the need to include all important information would or should have been evident, regardless, from the role that the claimant's narrative plays in the refugee claim process. The narrative is "not just some document."[99] It is, on the contrary, "the fundamental document at the basis of a refugee protection claim."[100] The claimant therefore would or should have understood that such a document needed to contain all important information.

c. Level of Education and Language Fluency

In several cases, the adjudicators referenced the claimant's level of education—"the claimant is educated at the university level"[101]—or their fluency in English or French[102] in concluding that the claimant would or should have had no trouble understanding the form's instructions.

d. Legal Representation

As noted above, in 10 per cent of these cases, the adjudicator supported their deceptive addition finding with reference to the claimant having legal representation.[103] In many of these decisions, the adjudicator specified that the

96. After the general instruction, the form asks, "Have you or your family ever been harmed, mistreated or threatened by any person or group?" Below this question, the instruction reads, "If 'YES' explain in detail" and lists five follow-up questions, including "What happened to you and your family" and "Whether persons in situations similar to yours experienced such harm, mistreatment or threats." BOC Form, *supra* note 1.
97. (089) MB5-04185 MB5-04194 MB5-04227; (132) MB5-05046; (191) MB5-05699.
98. (032) MB5-02101.
99. (283) MB6-00618. See also (229) MB6-00025; (202) MB5-05813; (228) MB6-00007.
100. (202) MB5-05813. See also (283) MB6-00618; (229) MB6-00025.
101. (051) MB5-03167; (022) MB5-01478; (106) MB5-04623; (132) MB5-05046; (247) MB6-00150 MB6-00169; (309) MB6-01082; (269) MB6-00446; (303) MB6-01002.
102. See *e.g.* (051) MB5-03167; (246) MB6-00149.
103. See *e.g.* (132) MB5-05046; (106) MB5-04623; (247) MB6-00150 MB6-00169.

representative in question was a lawyer,[104] and in some decisions, they noted that the claimant's representative was "experienced."[105]

IV. THE MISSING INFORMATION WAS IMPORTANT

At times, the adjudicators did not explain why the missing information was important, presumably on the grounds that this was self-explanatory. The date of an attack is important by implication,[106] as are the names of the agents of persecution and other important players in the claimant's story.[107] Claimants simply would or should have known to include this information.

In other decisions, the adjudicators explained that the missing information added an important element to the claim. In a number of cases, the claimants' narratives described an occasion on which they had been attacked, assaulted, or threatened but did not specify that the person responsible had used a weapon or had made a death threat.[108] The claimant would or should have known that the weapon was important: that it was important to specify that the man who threatened her "in an intimidating manner" was carrying a rifle at the time,[109] or that her attacker had used a knife during an attack.[110] The claimants would or should have understood that "death threats are an important element of an asylum claim."[111]

Information is important if it would help to establish a forward-looking risk. A break-in at the claimants' old residence after they had fled was important "because the incident would suggest that there was interest in the claimants' matters even after they left" and that "the people that they claim to be fleeing would have the ability to find them."[112] For the same reason, events that happened after the claimants left the country are important—they "show a continued interest" in the claimant by the agents of persecution.[113]

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104. See (309) MB6-01082; (026) MB5-01848; (132) MB5-05046.
105. See *e.g.* (309) MB6-01082; (026) MB5-01848; (242) MB6-00113 MB6-00118; (022) MB5-01478; (106) MB5-04623; (028) MB5-01890.
106. See (215) MB5-05974.
107. See (182) MB5-05644. See also (170) MB5-05539; (237) MB6-00066; (229) MB6-00025.
108. See (029) MB5-01944; (011) MB5-00821; (106) MB5-04623; (089) MB5-04185 MB5-04194 MB5-04227; (043) MB5-02780.
109. (089) MB5-04185 MB5-04194 MB5-04227.
110. See (106) MB5-04623.
111. (043) MB5-02780. See also (228) MB6-00007; (011) MB5-00821; (182) MB5-05644; (228) MB6-00007; (247) MB6-00150 MB6-00169; (307) MB6-01030.
112. (218) MB5-06013 MB5-06021.
113. (203) MB5-05817; (039) MB5-02605 MB5-02692; (177) MB5-05595; (265) MB6-00393.

Similarly, information is important if it is relevant to a question that the adjudicator has identified as requiring an answer. The fact that the claimant's uncle helped him to flee is important because it helps to explain how the claimant was able to leave despite "being sought by his country's authorities."[114] Since the adjudicator needed to assess whether the claimant was genuinely afraid, the claimant needed to explain why he had waited a year before bringing his claim. The explanation that he gave at his hearing—that he waited because he followed bad legal advice—should have been included in his narrative.[115] One claimant described her long-term same-sex relationship in her narrative but did not mention a previous short-term relationship because she "did not find it important."[116] On the contrary, since the adjudicator needed to know whether the claimant was really lesbian, "a first lesbian relationship when one is seeking protection based on sexual orientation is important for the claim."[117]

V. THE CLAIMANT HAD A FAIR OPPORTUNITY TO PROVIDE THE MISSING INFORMATION

Lastly, the adjudicators in these cases found that being tired, stressed, afraid, homeless, detained, illiterate, or poorly advised could not reasonably explain the claimants' omissions from their narratives. Several noted that it would not have taken much for the claimant to include the missing information. The claimant "could very easily have mentioned that [the man] carried a rifle when he confronted her."[118] If the claimant had written that he had handed out fliers as well as putting up posters, his story "would not have been much longer."[119] Even if the claimant had thought that she could provide the information at the hearing, "she could not explain how this would have prevented her from also writing this information in her [narrative]."[120]

4. CONCLUSION

The finding that the claimant had a fair opportunity to provide the missing information is not, in itself, a reason to have confidence in the "deceptive addition" inference. This fair opportunity is rather a precondition to any proper use of this

114. (099) MB5-04499. See also (145) MB5-05181.
115. See (309) MB6-01082.
116. (106) MB5-04623.
117. (261) MB6-00281. See also (106) MB5-04632.
118. (089) MB5-04194 MB5-04227. See also (225) MB5-06097.
119. (053) MB5-03345.
120. (250) MB6-00156.

inference. It would, of course, be unsound to draw a negative conclusion from missing information if the claimant had *not* had a fair opportunity to provide it. Since this study is concerned with the strength of this inference, rather than the preconditions for its use, it will not explore this finding further—beyond noting that in some of the decisions under review, it evidently required more careful consideration. This category of explanation was raised repeatedly, for example, by the claimant who stressed that he had not felt comfortable discussing the details of his sexual history with his landlady. The adjudicator noted this explanation on four occasions in the decision but did not once address it to explain why it was not a relevant consideration.[121]

The following section will consider what support the adjudicators' other three rationales contribute to their finding that they could confidently infer deception from the claimant's addition of new information.

IV. DISCUSSION

The above findings and observations bring to light the single major premise that underlies the adjudicators' use of the "omission from the narrative" inference. This, in turn, helps to evaluate the support that this inference brings to their rejections.

A. THE ADJUDICATORS' MAJOR PREMISE: IN DRAFTING THEIR NARRATIVE, THE CLAIMANT WOULD HAVE UNDERSTOOD WHAT INFORMATION THE BOARD EXPECTED THEM TO PROVIDE

The adjudicators' responses to the claimants' allegations reveal that a single major premise supports the "deceptive addition" inference. To draw this inference confidently, one must have confidence that this premise holds.

The claimants in these cases explain that they did not know to include all important information and that they did not appreciate that the missing information was important. The adjudicators, in response, identify three reasons for disbelieving these explanations: the claimants declared that they would give a complete account, the missing information was important, and the Board's expectations were clear.

Despite the prevalence of the first consideration in these decisions, in none of them do the adjudicators articulate how or why the claimants' declaration would support the "deceptive addition" inference. Yet if affirming that the story was "complete" would have put the claimant on notice that they were expected to

121. See (260) MB6-00280.

include all important information, then this declaration could help to clarify this expectation. This factor, then, may help to strengthen the claim that the Board's expectations were clear. At its strongest, the second consideration also collapses into the third. According to this rationale, since the claimant would have known to include all important information, they would have known to include the missing information because it was important. Put another way, if the missing information was important, then the Board's clear expectations on this point would have alerted the claimant to the need to include it. In sum, the first two reasons identified by the adjudicators draw their strength from the third. Each one rests on the notion that it would have been sufficiently clear to the claimant what was expected of them.

The next section considers this proposition. It explores the factors that the adjudicators identify as supporting it and the challenges raised by the claimants.

B. FIRST JUSTIFICATION: THE BOARD'S MATERIALS MAKE ITS EXPECTATIONS CLEAR

The claimants in these cases put forward a contextual interpretation of the BOC form's instruction to "explain everything that is important." Given the difficulty, if not the impossibility, of complying with a literal interpretation, and given that they knew that they would have the opportunity to tell their full story in detail at their hearing, they explain that they thought that what the Board required on this preliminary written form was a "summary" of "the most important information." The adjudicators, in turn, respond that the instructions on the form "are clear: the refugee claimant must explain in detail all of the facts that are important for their refugee claim."[122] They further point out, on occasion, that the claimants were educated or had good language skills.

Could an educated person who speaks the language plausibly understand the meaning of this instruction in a way that is inconsistent with the Board's expectations? If so, this instruction is not in fact clear, and bolding and capitalizing it does not make it any clearer. Were the instructions, then, sufficiently unequivocal? How confident can we be that a truthful claimant would have understood them in the same way as the adjudicator?

122. See Part III(B)(3)(iii)(a), above.

1. CHALLENGE: THE PHYSICAL LAYOUT OF THE BOC FORM SUPPORTS THE INTERPRETATION THAT ONLY A SUMMARY OF THE MOST IMPORTANT INFORMATION IS REQUIRED

The BOC form's instructions do not merely ask the claimant to include "some" or "most" of the important information. They instruct the claimant to include "everything." The form follows this general prompt with seven substantive questions, each of which directs the claimant's attention to a particular aspect of their evidence. For example, the first question it asks is

> Have you or your family ever been harmed, mistreated or threatened by any person or group?
>
> If "YES" explain in detail:
>
> What happened to you and your family.
>
> When the harm or mistreatment or threats occurred;
>
> Who do you think caused the harm or mistreatment or threats;
>
> What do you think was the reason for the harm or mistreatment or threats that occurred;
>
> Whether persons in situations similar to yours experienced such harm, mistreatment or threats.
>
> (Indicate dates, names and places, wherever possible.) [123]

Following this question, the form provides claimants with ten numbered lines on which to write their answers.

Under this question is the following: "[I]f you need more space, use additional sheets of paper the same size as this form."[124] Since this conditional phrase suggests that more pages may *but may not* be required, it must indeed be possible to explain to the Board's satisfaction, in ten lines of text, how a claimant or their family was "harmed, mistreated, or threatened," with all the required details. Explaining "[e]verything that is important" in this amount of space could only ever be possible if what the Board was expecting was a summary of the most important information.

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123. BOC Form, *supra* note 1.
124. *Ibid.*

2. CHALLENGE: THE BOARD'S MATERIALS DO NOT HELP CLAIMANTS TO UNDERSTAND HOW THE ADJUDICATOR WILL USE THE INFORMATION IN THE BOC NARRATIVE

The BOC form's instruction hinges on the word "important." "Important" is a word that we necessarily understand instrumentally. Important to what end? To understand *that* something is important, we need to understand *why* it is important. In deciding what information is important for their narrative, claimants will necessarily be guided by their understanding of the purpose of this exercise. The inference that they would have understood "important" in the same way as the adjudicator will be stronger, therefore, the more confidently we can conclude that both would have had a shared understanding of how and why the adjudicator will be using this information.

I. CLAIMANTS AND ADJUDICATORS MAY UNDERSTAND THE PURPOSE OF THE INFORMATION IN THE BOC NARRATIVE DIFFERENTLY

If accepted as genuine for the sake of argument, the claimants' explanations in the cases under review shed light on how they understood the purpose of the information that they were to provide in this initial written statement. The purpose of this information, their explanations suggest, was to help the adjudicator to understand that they needed protection. The "missing" information was not important, because, from the story as they wrote it in the narrative, the adjudicator would have had no trouble understanding that they could not return home. In fact, since their story makes it amply clear that they have crossed the line that divides "safe enough" from "too dangerous," the "missing" information was entirely superfluous. If the claimant's family beat him badly on one recent occasion, and are threatening to do it again, what does it matter that they had also beaten him previously?[125] If her brother is threatening to kill her for refusing a marriage, what does it matter that he used to hit her when she was a child?[126] If the claimant will be jailed if she returns, what does it matter that her family who remained behind has also been threatened?[127] If the claimant is a lesbian, and lesbians are persecuted, what does it matter how many relationships she has had?[128] And why would the adjudicator ever need to know when a particular relationship started or why it ended?[129]

125. (126) MB5-04938.
126. See (296) MB6-00923.
127. See (191) MB5-05699.
128. See (106) MB5-04623.
129. See (261) MB6-00281.

The adjudicators' responses reveal that they, being naturally better acquainted with the legal context, understand this exercise differently. They understand the purpose of the information in the narrative differently because they have a different understanding of how the refugee status determination process operates. For a start, adjudicators know that to decide a claim, it is not enough that they know *that* the claimant is at risk. They need to know precisely *why* the claimant is at risk. The process of judging whether the elements of the *Convention* definition have been met is not merely about assessing danger but also about deciding whether the relevant aspects of the narrative fit into the right legal categories.[130] Therefore, when legally relevant elements are missing from the narrative, the account is missing (legally) important information. Moreover, and crucially, when it comes to assessing risk, adjudicators know that by law the question of whether the claimant is telling the truth "is always an issue in every refugee claim."[131] They know that the information that the claimant provides in their narrative will be central to their decision about whether to believe the story—and in particular, they know that they may draw a negative inference if the claimant has omitted any important information.

To those working within this system, this legal framing may come to seem intuitive. But there is no reason to think that it would be obvious to a layperson. If a claimant were to approach the narrative with a layperson's understanding—that they are supposed to explain why it is too dangerous for them to go home—would anything in the supporting materials help them to understand this process differently? Would anything in the sources that the adjudicators identify—the form and the accompanying Claimant's Guide—help the claimant to understand how the adjudicator will be using the information in their narrative?

II. THE BOARD'S MATERIALS DO NOT HELP CLAIMANTS TO UNDERSTAND HOW THE ADJUDICATOR WILL USE THE INFORMATION IN THE BOC NARRATIVE *IN ASSESSING RISK*

The first page of the Appendix that follows the BOC form explains this document's function in one sentence: "The purpose of your Basis of Claim Form (BOC Form) is to present your claim for refugee protection to the Refugee Protection Division of the IRB." It explains, in a further sentence, how the form will be

130. See *e.g.* James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge University Press, 2014).

131. *Talukder v Canada (Citizenship and Immigration)*, 2007 FC 668 at para 20.

used: "[It] will be used as evidence in your claim for refugee protection, and you will be asked questions about the information you give in the form."[132]

The Claimant's Guide explains that "[t]he RPD member will decide whether you are a Convention refugee or a person in need of protection" and reproduces the legal definitions. It adds the following about how the adjudicator will use the claimant's information: "[A] member may ask you questions about anything you have included in your BOC Form and may ask you other questions about things not included in your BOC Form. The RPD will use the information in your BOC Form when it makes a decision about your claim."[133]

Even if a claimant were to parse these supporting materials carefully, which may be doubtful given the circumstances in which many find themselves during the narrative drafting process, nothing here would help them to understand more clearly how the adjudicator will be using their information to reach a conclusion. Nothing would help the claimant to understand, for example, that there is a legally relevant difference between "they beat me, told me to stop making trouble, and left" and "they beat me *with a bat*, told me to stop making trouble *or they would kill me*, and left."[134] Nothing would help the claimant to understand that, whatever they have experienced in the past, whatever brought them to Canada, the question, "how do you know that they are still interested in you?" will be a threshold question in almost every case. It is not enough that the agent of persecution hurt them in the past and has threatened to do so again if they return. The adjudicator also needs to know why the claimant takes that threat seriously: a question that many claimants could doubtless answer but might not know to anticipate when writing their narrative.

Moreover, even if the claimant carefully reads the supporting materials, nothing would cause them to question the basic lay assumption that the purpose of the information that they are providing is to help the adjudicator to understand *that they need protection*. Claimants can therefore be expected to

132. BOC Form, *supra* note 1.

133. *Ibid*.

134. See Part III(B)(3)(iv), above. Similarly, if their personal identities are irrelevant, "two of my creditors have sworn to kill me" and "two of my creditors *named X and Y* have sworn to kill me" are functionally identical from a risk assessment perspective. See *e.g.* (182) MB5-05644. See also (170) MB5-05539; (237) MB6-00066; (229) MB6-00025. The fact that the form instructs claimants to include "dates, names and places, wherever possible" hardly signals that this is a foundational legal requirement for a preliminary statement before a full oral hearing. It does nothing to make clear that these names are so important that their omission can lead the adjudicator to conclude that the claimant is lying, that this kind of omission, in fact, can be "perhaps the major point where this asylum claim hits a stumbling block." (229) MB6-00025.

bring this understanding not only to their interpretation of the general prompt to include "everything that is important," but also to their interpretation of the rest of the form's specific prompts, which likewise state what information the adjudicator wants without explaining why they want it or how they will use it.

The form asks claimants, for example, "[h]ave you or your family ever been harmed, mistreated or threatened by any person or group?" The adjudicators find that this would or should have made clear to the claimant that it was important to include the experiences of the family members that they left behind. Yet if the claimant thinks that they are "answering for themselves"[135] and that the purpose of this information is to help the adjudicator to assess the risk that *they* face, the words "or your family" will likely not be sufficient to correct this understanding.[136]

The adjudicators likewise expect that claimants will have had no trouble understanding and appreciating the relevance of the fifth subpoint under the form's first specific prompt: "whether persons in situations similar to yours experienced such harm, mistreatment or threats." As a cue, however, "similar" suffers from the same limitations as "important." To adjudicators, well aware of the legally relevant considerations, it is clear what makes a situation similar: when similar agents of persecution pose similar threats for similar reasons. In one decision, for example, the adjudicator found that the claimant's cousin was in a similar situation because he was working in the same industry as the claimant and was killed by bandits targeting people who worked in that industry. In that decision, the reasons why the claimant "did not find this fact important"[137] were not recorded, but one could perhaps imagine the kinds of differences that might seem relevant to a layperson: if the cousin had worked in a different aspect of the industry, if he was living in a different province, if it was many years ago, or if it was very likely a different group of criminals. If a claimant does not know how refugee status decisions are made, they will be making a best guess at what is or is not a similar situation.

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135. (191) MB5-05699.
136. Consider coming home from a business trip abroad and filling out a customs form. The form asks, "Have you or your family visited a farm within the last 14 days?" You happen to know that while you were away, your partner and children visited a local farm. You would presumably check the "no" box regardless. You would understand that "your family" here refers to the family members with whom you are travelling. Since you are travelling alone, these words simply do not apply to you.
137. (032) MB5-02101.

III. THE BOARD'S MATERIALS MISLEAD CLAIMANTS ABOUT HOW THE ADJUDICATOR WILL USE THE INFORMATION IN THE BOC NARRATIVE *IN ASSESSING THEIR CREDIBILITY*

Crucially, and fundamentally, the form and the Claimant's Guide give claimants a grossly distorted sense of how the adjudicator will use their narrative to assess their credibility. People often trust that if they tell the truth they will be believed.[138] The Board's materials do not warn claimants that in the refugee claim context this is categorically false; they may be disbelieved if they tell the truth *but not enough of it*. The materials, on the contrary, specifically warn claimants that there are *two reasons* why the information that they provide in their narrative could lead the adjudicator to disbelieve them: if they lie or if they make *deceptive omissions*. The form contains the following caution:

> WARNING: It is a serious offence to provide false or misleading information. Your claim may also be rejected - and any favourable decision, if already given, revoked, *if you give information that is not true or is misleading*, or *if you try to hide important information*.[139]

The form cautions claimants on three occasions not to provide "false or misleading information" and not to "hide important information." Neither the form nor the Claimant's Guide warns claimants that if they add new information at their hearing, they may be accused of making a *deceptive addition*. It gives them no reason to suspect, in other words, that there is *a third reason* why they might be disbelieved: because their narrative provides only a summary of the most important information.

If claimants do not understand how the adjudicator will assess their credibility, they will not be able to anticipate the adjudicator's concerns. If they do not anticipate the adjudicator's concerns, they will not know to include in the narrative the information that addresses them. The adjudicators in these cases often find that claimants are inventing new information on the spot in order to address a credibility concern that the adjudicator raised in the hearing. Yet if the claimants did not anticipate this concern, they would have had no reason to include this information in their narrative. The claimant would have had no reason to mention the fact that he had received bad advice from a lawyer that led to him delaying his claim, for example, unless he could anticipate that the question "Why did you delay in making a claim?" was going to be relevant.[140]

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138. See Part IV(B)(3), below.
139. BOC Form, *supra* note 1 [emphasis added].
140. (309) MB6-01082.

If the claimant could not foresee that the adjudicator would find her father's actions implausible, she would have no reason to think it important to include the fact that she had slept with her husband before their marriage.[141]

The fact that adjudicators rely on the "deceptive addition" inference to assess credibility helps to explain what to many claimants must seem a mystery. Since they are heading into a full, hours-long oral hearing at which they will be questioned in detail, why would a summary of the most important information *not* suffice? In response, the adjudicators note the narrative's "fundamental" role in the refugee claim process, and they are certainly correct that it is the "central document" in a Canadian refugee claim.[142] What many claimants discover only at the hearing is why: because it will help the adjudicator to decide whether they are telling the truth. If credibility were not an issue, the adjudicator would hardly require more than a summary of the most important information in order to prepare adequately for the full oral hearing.

C. SECOND JUSTIFICATION: THE CLAIMANT'S AFFIRMATION REINFORCES THE BOARD'S EXPECTATIONS

If affirming that their narrative is "complete" puts the claimant on notice that they are expected to include all important information, then this declaration would alert them to be careful not to leave anything out. As noted above, the adjudicators rely on this factor in more than one decision out of four (28 per cent).

3. CHALLENGE: THE AFFIRMATION REINFORCES THE EXPECTATION THAT CLAIMANTS SHOULD NOT MAKE DECEPTIVE *OMISSIONS*; IT DOES NOT TURN THEIR MIND TO THE POSSIBILITY OF DECEPTIVE *ADDITIONS*

When a legal system asks participants to raise their hand and swear or affirm to tell "the truth, the whole truth and nothing but the truth," it seeks to bind their conscience by drawing their attention to three possible ways that their testimony could fall short. It wants them to promise not to lie, not to tell half-truths, and not to make *deceptive omissions*. "Tell the whole truth" means "do not hide information in an attempt to mislead." It is perfectly fair to ask a person to swear not to hide information that they recognize is important. It is completely meaningless to ask a person to swear to tell everything that someone else recognizes is important.

In short, if a claimant is adding deceptive information at their hearing, they are breaching their affirmation by *lying*—by failing to "tell the truth"—not by having failed to "tell the whole truth" in their initial written statement. The fact

141. See (172) MB5-05549 MB5-05547 MB5-05548.
142. (283) MB6-00618. See Part III(B)(3)(iii)(b), above.

that the claimant declared that their narrative was "complete" could support a *deceptive omission* inference. It lends no support to a *deceptive addition* inference.

D. THIRD JUSTIFICATION: COUNSEL WOULD HAVE CLARIFIED THE BOARD'S EXPECTATIONS

Where a diligent legal representative, experienced enough to be familiar with the Board's expectations, plays a central role in helping the claimant to draft their narrative, the claimant will not need to interpret the form's instructions on their own. They will have expert guidance.[143] Yet when claimants are represented by experienced counsel when they submit their narrative, there are nonetheless good reasons to be cautious about concluding, as a result, that if they were telling the truth they would have included all important information.

1. CHALLENGE: DILIGENT COUNSEL MAY MISS IMPORTANT INFORMATION OR MAY HAVE A DIFFERENT IMPRESSION THAN THE ADJUDICATOR OF WHAT INFORMATION IS IMPORTANT

If claimants themselves do not clearly understand what makes information "important" for the purposes of a refugee claim narrative, the task of identifying the relevant aspects of their experiences falls to their counsel—a person whom they have just met and to whom they are expected to confide all, quickly and without reservation. In questioning their clients about their experiences, often under difficult circumstances and always under tight time constraints,[144] even veteran counsel may miss relevant information. They may also fail to anticipate each of the adjudicator's potential concerns. Indeed, the Federal Court has

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143. Indeed, the difference that such guidance can make is profound. In Canada as elsewhere, "counsel is a major factor affecting outcomes in refugee determinations." See Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71 at 92; Craig Damian Smith, Sean Rehaag & Trevor CW Farrow, *Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System* (Canada Excellence Research Chair in Migration and Integration, Centre for Refugee Studies & Canadian Forum on Civil Justice, 8 December 2021), online: *SSRN* <ssrn.com/abstract=3980954> [perma.cc/QW9T-DAHW]. In the United States, "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case." See Ramji-Nogales, Schoenholtz & Schrag, *supra* note 7 at 45. I have argued that this is in large part because counsel may help the claimant to anticipate the adjudicator's credibility concerns. See Evans Cameron, *Fact-Finding*, *supra* note 3 at 199-202.

144. Those claiming at a port of entry typically have just over two weeks to submit their BOC form ("not later than 15 calendar days after the day that the Officer refers your claim to the Refugee Protection Division"). BOC Form, *supra* note 1.

noted as a reason for excusing an omission that, even among professionals with refugee law experience, such assessments can differ: "It is well understood that these documents are often prepared by representatives or on the advice of representatives with different views of materiality."[145]

2. CHALLENGE: EXPERIENCE IS NOT A RELIABLE PROXY FOR DILIGENCE

Moreover, "experience" is a measure of how often a person does this work, not how well they do it. It is a notorious fact that, in Canada, some lawyers and consultants who represent large numbers of refugee claimants represent them very badly.[146] As a result, too many claimants who are able to retain "experienced counsel" before the filing deadline will have been left largely, or even entirely, to their own devices in preparing their narratives.

V. CONCLUSION

Negative credibility findings are at the heart of the decision to reject a large majority of the claimants in these decisions (72 per cent; 217/303). This is in keeping with the observations of scholars and practitioners about the central role of credibility assessment in refugee status decision making.[147] The adjudicators in these cases relied on an "omission from the narrative" inference in almost half of the decisions in which they concluded that the claimant was lying (49 per cent; 128/259). They very rarely concluded that the claimant had tried to conceal true information in writing their narrative. Instead, in nearly all of the cases in

145. *Feradov*, *supra* note 2 at para 18.

146. A recent case study of Roma claims made this brutally clear. See Sean Rehaag, Julianna Beaudoin & Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) 52 Osgoode Hall LJ 705. The lawyers who represented a large number of Roma claimants in Canada had markedly lower success rates than those who represented fewer, and among the many corners these "experienced counsel" cut, the most concerning "related to the claimant narratives" (*ibid* at 755). Among other things, this study found credible evidence that these lawyers prepared "brief boilerplate narratives that failed to address central aspects of the claims....frequently left claimants to prepare their own narratives without adequate instruction...and failed to review narratives with clients prior to submitting them" (*ibid* at 755-56). Moreover, from their own first-hand review of a quantity of files, these researchers note that "many of these narratives appear to have been prepared with complete disregard for what would need to be established at a refugee hearing in order for a claimant to succeed"; "contain allegations that are vague and incomplete"; and, despite having been prepared by "experienced counsel," "were inadequate to the task that any experienced counsel should have known would be central to success in the claim" (*ibid* at 766).

147. See Macklin, *supra* note 22; Millbank, *supra* note 7; Vogl, *supra* note 22; Sweeney, *supra* note 22; Kagan, *supra* note 22.

which they drew this inference, they found that the claimant had added false information at their hearing (98 per cent; 125/128).

Sound use of this "deceptive addition" inference rests on a single major premise: The Board made sufficiently clear to claimants what information it expected them to include in their narrative. The claimants in these cases dispute this proposition and the adjudicators identify no compelling support for it. This suggests that many truthful claimants may not understand what the Board expects of them when they are writing their narratives. If this is the case, then as a rule, adjudicators cannot reliably infer deception even from the fact that a claimant has added important new information at their hearing.

A. RECOMMENDATIONS

This study's findings do not suggest that the claimants in these cases were telling the truth, of course. Neither do they suggest that the adjudicators could never confidently draw this inference. They do suggest that the adjudicators in these cases often had little cause to be confident in this reason for disbelieving the claimants. Recognizing this has implications for the Canadian refugee system's administrators, for adjudicators, for appellate-level adjudicators and judges, for legal aid systems, for counsel and others who assist refugee claimants in drafting their narratives, and for researchers who study refugee status decision making.

1. THE BOARD'S ADMINISTRATION MUST MAKE ITS EXPECTATIONS CLEAR

The Canadian Immigration and Refugee Board needs to do a much better job of communicating its expectations to claimants.

Adjudicators are regularly expecting claimants to identify as "important" information that the claimants would have no reason to think is even relevant, let alone important, if they do not understand how these decisions are made. The Board's materials do nothing to clarify for a layperson how the adjudicator will assess the danger that they face. And crucially, they do nothing to convey the risk of a "deception addition" inference to a person who thinks that if they

tell the truth they will be believed. The Board must fundamentally rethink these materials and should do so with the help of a trained "plain language" editor.[148]

2. BEFORE DRAWING A "DECEPTIVE ADDITION" INFERENCE, ADJUDICATORS MUST FULLY INVESTIGATE THE CLAIMANT'S REASONS FOR ADDING NEW INFORMATION

To undertake a proper investigation of the claimant's reasons for adding new information, an adjudicator must apply a fully subjective standard, assess their own countertheory, and look to social science for an informed understanding of what is reasonable to expect of a person providing this kind of information under these kinds of circumstances. Given the general weakness of the "deceptive addition" inference, however, adjudicators should simply think twice before using it. As noted above, in no decision in this data set was this inference the only justification for the negative credibility finding. If a "deceptive addition" inference is superfluous, this is all the more reason not to rely on it.

I. USE A SUBJECTIVE TEST

The conclusion that the claimant is not telling the truth follows from the finding that they *would* have known to include all important information and *would* have appreciated that the missing information was important. It simply does not follow from the finding that they *should* have. Implicit in the "deceptive addition" inference is the need for a fully subjective analysis.

The notion that a negative decision can rest on a claimant's failure to follow the Board's instructions carefully reflects a broader temptation within Canadian refugee law to reframe the claimant's assertion of a right to protection under the *Convention* as a request for a benefit. On this reasoning, if the claimant is seeking a benefit from the refugee system, they "must uphold their end of the

148. To communicate its expectations effectively, the Board must change both the content and form of its materials. Information as important as this should not be conveyed to a lay audience in dense paragraphs of text in small font, using composite sentences such as this one: "If the Officer or the IRB, as the case may be, has not received your completed Basis of Claim Form (BOC Form) by the dates mentioned above, the IRB will have a special hearing and may decide to declare your claim abandoned which means you would not be allowed to continue with your claim." BOC Form, *supra* note 1. See *e.g.* Christine Mowat, *A Plain-Language Handbook for Legal Writers*, 2nd ed (Carswell, 2015); Martin Cutts, *Oxford Guide to Plain English*, 5th ed (Oxford University Press, 2020) at 253. For an example of a tribunal effectively communicating legal information in plain language, see "Social Security Tribunal of Canada," online: <sst-tss.gc.ca/en> [perma.cc/GMU8-2XRK].

bargain" by complying responsibly with the system's requirements.[149] This notion is misplaced anywhere in refugee law—a feckless refugee is just as entitled not to be sent home to persecution as a diligent one[150]—and transparently so in the context of credibility assessment. As any emergency room nurse will tell you, even in life and death contexts, a person's attention to detail in filling out the system's paperwork is a poor proxy for how sincerely they need the system's help.[151]

When adjudicators find that the addition of new information at the hearing is suspicious, they must exercise their "theory of mind"; they must put aside what they themselves know about refugee law and the refugee status determination process and try to imagine what the claimant would have known, felt, and thought when they were drafting their narrative. They must do this in order to undertake a fully subjective investigation of the claimant's credibility. And they must firmly resist the temptation to substitute for this complex task the simpler objective assessment of the claimant's diligence.

Accurately naming the "deceptive addition" inference might help to maintain adjudicators' focus on this subjective analysis. This inference, as it is currently framed in Canadian law, asks adjudicators to consider whether the "omission" of information reflects badly on the claimant. The first two definitions of "omission" in the Merriam-Webster online dictionary are "something neglected or left undone" and "apathy toward or *neglect of duty*."[152] If some adjudicators are asking whether this "omission" reflects badly on the claimant's diligence rather than on their credibility, this may be in part because this language begs that question, as the term "omission" often connotes a lack of diligence.

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149. Evans Cameron, *Fact-Finding*, *supra* note 3 at 108.
150. *Ibid*, ch 2.
151. See *e.g.* Angela Wai et al, "Accuracy of Patient Self-administered Medical History Forms in the Emergency Department" (2020) 38 Am J Emergency Medicine 50; Manuela M Bergmann et al, "Agreement of Self-Reported Medical History: Comparison of an In-Person Interview with a Self-Administered Questionnaire" (2004) 19 Eur J Epidemiology 411; Gustav Kjellsson, Philip Clarke & Ulf-G Gerdtham, "Forgetting to Remember or Remembering to Forget: A Study of the Recall Period Length in Health Care Survey Questions" (2014) 35 J Health Economics 34; Natasha Kareem Brusco & Jennifer J Watts, "Empirical Evidence of Recall Bias for Primary Health Care Visits" (2015) 15 BMC Health Services Research 381; Matthias Hunger et al, "Official Statistics and Claims Data Records Indicate Non-Response and Recall Bias Within Survey-Based Estimates of Health Care Utilization in the Older Population" (2013) 13 BMC Health Services Research 1. See generally Roger Tourangeau, Lance J Rips & Kenneth Rasinski, *The Psychology of Survey Response* (Cambridge University Press, 2000).
152. Online: <merriam-webster.com/dictionary/omission> [perma.cc/2P97-Y225].

II. ASSESS THE COUNTERTHEORY

Moreover, when adjudicators find that the addition of information at the hearing raises doubts, they must also assess the plausibility of their own countertheory. In other words, if they reject the claimant's explanation for this addition, what account are they necessarily accepting in its place? Some of the countertheories on evidence in these decisions are good examples of the broader problem of adjudicators focusing narrowly on the plausibility of the claimant's account and failing to interrogate their own conclusions.[153]

As noted above, for example, one adjudicator drew a negative inference from the claimant's failure to mention her sexual orientation in her narrative, and found that the fact that she had raised this to Canadian authorities earlier in the process simply made this omission "all the more incoherent."[154] The adjudicator's countertheory in this case was unclear. Was the adjudicator concluding that the claimant was not really a lesbian and that she was inventing this claim at the hearing? Or that she was a lesbian but that she was not really afraid? In either case, why then would she have mentioned her sexual orientation in the context of her initial claim for protection? In this case, adjudicators failed to assess how either of these countertheories is more plausible than the one that the claimant put forward: She thought that her narrative was supposed to explain why she had fled, and she had fled because of domestic violence.

III. LOOK TO SOCIAL SCIENTIFIC EVIDENCE

A wealth of social science research can help adjudicators to understand what to expect from truthful testimony. In addition to the general literature discussed above,[155] several areas of study are particularly relevant to a decision about whether to draw a "deceptive addition" inference.

Research that explores how people fill out forms may have crucial insights to offer the field of refugee law. For example, a robust body of research considers factors that influence the accuracy of patients' recall of their own medical history on self-administered questionnaires.[156] Indeed, survey methodologists have long

153. For discussion, see Evans Cameron, *Fact-Finding*, *supra* note 3 at 199-202.
154. (043) MB5-02780.
155. See Herlihy & Turner, "Untested Assumptions," *supra* note 9; Herlihy & Turner, "Seeking Protection," *supra* note 9; Herlihy, Jobson & Turner, *supra* note 6; Given-Wilson, Herlihy & Hodes, *supra* note 6; Rogers, Fox & Herlihy, *supra* note 6; Arbel, Dauvergne & Millbank, *supra* note 7; Millbank, *supra* note 7; Spijkerboer, *supra* note 7.
156. See Wai et al, *supra* note 151; Bergmann et al, *supra* note 151; Kjellsson, Clarke & Gerdtham, *supra* note 151; Brusco & Watts, *supra* note 151; Hunger et al, *supra* note 151.

observed that some kinds of recollections are not reliably brought to mind by the prompts on self-administered questionnaires,[157] and researchers in many domains have noted that inconsistencies in testimony increase when subjects are questioned using inconsistent cuing methods (*e.g.*, first giving a person a "free recall" self-administered questionnaire to fill out with minimal prompting, and then inviting them to a face-to-face interview and questioning them in detail).[158] The latter observation was echoed in the testimony of one of the claimants in this study: When asked whether the information that he was mentioning in his testimony was included in his narrative, he responded, "No, not all of it, because you are asking me new questions."[159]

It has also been suggested that truthful claimants often enter the refugee status determination process expecting that the adjudicator will believe them.[160] Researchers in psychology note the "illusion of transparency," our common tendency to assume that our "inner states are visible to a higher degree than is really the case" and that "innocence will shine through."[161] Claimants may therefore have "a simple view of the asylum process: 'I will just tell them the truth and that should be enough.'"[162] If so, a truthful claimant may not suspect that their narrative will play a key role in allowing the adjudicator to test their credibility. Instead, they may think that they are simply being asked to tell their story. As noted above, if truthful claimants do not anticipate the adjudicators' credibility concerns, they will not know to include in the narrative the information that addresses these concerns in the narrative. There is real irony in the fact that the "deceptive addition" inference will hit honest claimants hardest because they least suspect that the adjudicator may doubt them.

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157. For discussion, see Hilary Evans Cameron, "Limits of Memory," *supra* note 6 at 507-508.
158. *Ibid* at 505-508.
159. (218) MB5-06013 MB5-06021.
160. For discussion, see Evans Cameron, *Fact-Finding*, *supra* note 3 at 202.
161. *Ibid* at 201, citing Maria Hartwig, Pär Anders Granhag & Leif A Strömwall, "Guilty and Innocent Suspects' Strategies During Police Interrogations" (2007) 13 Psychology Crime & L 213 at 220. See also Thomas Gilovich, Kenneth Savitsky & Victoria Husted Medvec, "The Illusion of Transparency: Biased Assessments of Others' Ability to Read One's Emotional States" (1998) 75 J Personality & Social Psychology 332; Saul M Kassin & Rebecca J Norwick, "Why People Waive Their Miranda Rights: The Power of Innocence" (2004) 28 L & Human Behavior 211.
162. Miriam H Marton, "Beyond Expert Witnessing: Interdisciplinary Practice in Representing Rape Survivors in Asylum Cases" in Benjamin N Lawrance & Galya Ruffer, eds, *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press, 2015) 102 at 104, cited in Evans Cameron, *Fact-Finding*, *supra* note 3 at 202.

3. APPELLATE-LEVEL ADJUDICATORS AND FEDERAL COURT JUDGES MUST HELP TO ADDRESS THE OVERBROAD USE OF THIS WEAK INFERENCE

Many of the adjudicators' weakest findings in these cases would seem to run afoul of the law. If these decisions were appealed to the Board's Appeal Division or brought before the Federal Court on judicial review, these higher authorities might find that in many cases, the omissions were "minor" or "peripheral," or that the claimants had provided a reasonable explanation.[163]

However, the fundamental weakness of the "deceptive addition" inference has escaped notice because both appeal and judicial review are mechanisms that look to identify discrete instances of poor decision making. At best, this kind of individual analysis recognizes the effects but not the cause. And crucially, the effects of the underlying problem will be visible on appeal or review only in those cases in which the claimants fall into the two categories of exception that the law recognizes: where their omissions were minor or where they had good explanations to offer. Yet the "deceptive addition" inference will also hurt honest claimants whose omissions were material and who had no better explanation to offer than "I misunderstood."

To address this problem, appellate-level adjudicators and judges will need to significantly broaden their understanding of what constitutes a reasonable explanation for the addition of new information at a refugee hearing. And they will need to be alert to the possibility that a misplaced objective analysis may be hiding in plain sight.

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163. In several decisions, for example, the Board drew a negative inference from the omission of details about the claimant's previous same-sex relationships. In one, the claimant stressed repeatedly that he had not felt comfortable discussing the details of his sexual history with his landlady. The adjudicator notes this explanation on four occasions in the decision, but does not once address it, to explain why this was not a relevant consideration. (260) MB6-00280. The Court has overturned several decisions in which adjudicators had relied on the claimant's omission of information about their previous same-sex relationships. See *Strugar v Canada (Citizenship and Immigration)*, 2013 FC 880; *McKenzie v Canada (Citizenship and Immigration)*, 2019 FC 555. Significant variances in these bodies' decision making, however, make it difficult to predict how the Appeal Division and the Federal Court will decide cases. See *e.g.* Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 Queen's LJ 30; Rehaag, "2019 Refugee Claim Data," *supra* note 16.

All Canadian adjudicators must justify their negative credibility conclusions, but some find that they need to do this much more often than do others.[164] For anyone looking to justify a negative credibility judgment, the "deceptive addition" inference is an extremely useful tool. Look hard enough, probe deeply enough, define "important" broadly enough, and there will always be a deceptive addition. It is telling that Steve Norman, an Australian refugee law judge, and I—two people working within refugee determination systems on opposite sides of the planet—both independently identified as resonant this quote, attributed to Cardinal Richelieu: "If you give me six lines written by the hand of the most honest of men, I will find something in them which will hang him."[165]

It is therefore incumbent on appellate-level adjudicators and judges, in reviewing the use of this inference, to look behind the reasons to the substance of the decision. Is this a genuine, fully subjective investigation into what the claimant understood or is it an objective assessment dressed up to look like one? It may not be easy to tell, and if these adjudicators and judges are left in serious doubt on that question, they should err in the claimant's favour.[166] Put another way, unless it is clear that the adjudicator has undertaken a fair and fully subjective investigation, the use of the "deceptive addition" inference should be rejected.

4. LEGAL AID SYSTEMS MUST ENSURE THAT CLAIMANTS HAVE ACCESS TO COUNSEL WHO CAN PREPARE THEM TO ADDRESS THIS INFERENCE

Given the prominent role that the claimant's narrative plays in the Board's credibility judgments and the difference that counsel can make in the outcomes of these cases,[167] legal aid systems across the country should ensure that refugee claimants have access to competent legal representation at the narrative drafting stage.

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164. Researchers have for many years noted the "vast disparities" in the grant rates of Canadian refugee status adjudicators. See *e.g.* Sean Rehaag, "2021 Refugee Claim Data and IRB Member Recognition Rates" (21 October 2022), online: <refugeelab.ca/refugee-claim-data-2021> [perma.cc/5W62-SZFQ].
165. See Evans Cameron, *Fact-Finding*, *supra* note 3 at 170; Norman, *supra* note 7 at 274.
166. Evans Cameron, *Fact-Finding*, *supra* note 3.
167. See Part IV(D), above.

5. COUNSEL AND OTHERS WHO ASSIST REFUGEE CLAIMANTS IN DRAFTING THEIR NARRATIVES MUST ANTICIPATE THE USE OF THIS INFERENCE

Counsel and others who assist claimants in drafting their narratives should do so bearing in mind the potential for a deceptive addition inference. For example, they should ensure that the claimant's narrative makes clear when an event that it describes is merely one instance of a problem that was ongoing or repeated,[168] and they should prepare their clients to answer inevitable questions about missing information, even when they themselves have not identified that any information is missing. Until these studies are part of the Board's standard disclosure packages, counsel should also provide the adjudicators with the social science research that they need to understand what to expect from truthful testimony.

6. RESEARCHERS SHOULD EXPLORE FURTHER THE INFERENCES THAT SUPPORT CREDIBILITY REJECTIONS

While this study's findings suggest that many truthful claimants may not understand what the Board expects of them when they are writing their narratives, ethnographic research into this question would be invaluable.

As noted at the outset, this study did not investigate how adjudicators use the "deceptive addition" inference in the context of amendments to the claimant's narrative, which warrants further consideration. Other categories of inference that are closely related to the "deceptive addition" inference also merit careful attention. Refugee claimants are interviewed initially by an immigration officer and "omissions" from their statement to this officer also regularly lead adjudicators to draw a negative inference.[169] In addition, by law, adjudicators may infer that claimants are lying if they provide incomplete information in the sections of the Board's form that ask them for their biographical data. For example, the form asks claimants to list each of their residences for the previous ten years. The adjudicator may infer deception if the claimant explains that they went briefly into hiding at a relative's house before leaving the country but fails to list that relative's address (choosing to include only the address of the home

168. See *e.g.* "Making Clear When an Answer is an Example or Does Not Tell the Full Story" online: *Meet Gary* <meetgary.ca/12-things-that-have-helped/just-an-example> [perma.cc/NQC7-UDE9].

169. See *e.g. Mongu v Canada (Solicitor General)*, [1994] FCJ No 1526 (QL) (TD); *Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 586.

"where they were still paying rent").[170] Researchers should look closely at these and other common credibility inferences to explore whether, like the "deceptive addition" inference, they may be typically unreliable reasons for concluding that a claimant is lying.

170. (039) MB5-02605 MB5-02692. See also (069) MB5-03810 MB5-03811 MB5-03812 MB5-03813 MB5-03882; (125) MB5-04937; (124) MB5-04936; (028) MB5-01890. For other applications of this kind of inference, see generally (254) MB6-00165 MB6-00162 MB6-00167 MB6-00168; (184) MB5-05648 (work history); (269) MB6-00446; (040) MB5-02642; (197) MB5-05759; (075) MB5-03948 MB5-03951; (021) MB5-01313 (detention).