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Interrogating the efficiency paradigm : a study of language analysis as evidence in refugee status determination

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INTERROGATING THE EFFICIENCY PARADIGM: A STUDY OF LANGUAGE ANALYSIS AS EVIDENCE IN REFUGEE STATUS DETERMINATION

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ABSTRACT

In 1993, Sweden commenced the unprecedented practice of using *Language Analysis* (LA) as evidence in refugee status determination. Since that time, Western governments trying to cope with the perceived refugee crisis have similarly adopted the tool to corroborate and undermine the nationality claims of asylum seekers crossing borders without identity documents. During this same period, language professionals, lawyers, various news media, and others across the globe have proceeded to fuel international controversy on the subject, largely challenging the linguistic integrity of the tool, while investing less energy addressing the political context of use, as well as the implications for violations of refugee rights. In 2007, Canada reflected prioritized concerns for efficiency when it made public a pilot project to address the value of this language tool in aiding status decision-making. This paper interrogates the Canadian efficiency paradigm through the Australian lens of LA in practice. In exposing the ethical and legal sites of likely disengagement should Canada proceed with implementation, this paper cautions against LA becoming the most recent assault on a Canadian protection regime already under siege.

Key words: language analysis; evidence; refugee status determination; asylum seeker; Canada; Australia; Immigration and Refugee Board

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SECTION 1: INTRODUCTION

It seems apparent that the trend of Western nations closing their doors on the world's refugee population is neither a new nor an abating one (Plaut 1985; Richmond 1993; Martin *et al.* 2003; Kumin 2004; Canadian Council for Refugees (CCR) 2005). While individuals currently residing in camps in Third World countries are consistently constructed as genuine victims deserving of protection, asylum seekers who self-determine their need for security by independently crossing borders are increasingly perceived as economic migrants and bogus[1] in nature (Castles 2002): the conflation of which is only further problematized by the increasing prevalence and Western labeling of the "undocumented"[2] refugee.

While governments of the West have seemingly embraced a politics of exclusion virtually since processes of in-land determination were first established, Canada has in many ways remained loyal to its refugee commitments[3] and has indeed helped to guide the evolution of international human rights standards by establishing protection precedents on the domestic front. But even in doing so, the country has *not* evaded the tendency to counter these inclusive practices within the state by the rapid development of exclusive measures outside it (Gibney 2003). While the mobility of asylum seekers has been limited in recent years by visa controls, interdiction measures, offshore containment policies, and a Safe Third Country Agreement, all of which have helped safeguard against easy access to protection mechanisms, more recent patterns suggest that such interventionist developments have begun to pervade not only *access to*, but also the very *process of,* status determination itself.

While the 2001 Immigration and Refugee Protection Act (IRPA) in Canada has worked to reduce the number of presiding members evaluating a claim to a single-member panel, it also

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[1] The term bogus is here akin to fraud, and refers to widespread use of the word in ways that linguistically both undermine and subvert the genuine nature of one's protection claim.

[2] The use of quotation marks around the term "undocumented" in this context reflects the negative connotations associated with the word by the publicly imposed label. The distinction between "undocumented"/undocumented in this paper is significant to note, as the latter references a more politically correct acknowledgement of individuals who reside in Western nations illegally and without proper documentation, as opposed to the former, which is negatively linked by association to images of deception and fraudulence.

[3] Canada's legal obligations are largely informed by procedural safeguards on the domestic front; namely, maintaining allegiance to the principle of *non-refoulement*, and ensuring that individuals are not returned to country contexts where "life or freedom would be threatened" (see Office of the High Commissioner for Human Rights 1951).

promised a Refugee Appeal Division that has continued to be delayed since implementation (IRPA 2001). In response to the growing numbers of claims being made in the country,[4] the ever-present burden of backlogs, long processing times and procedural delays (Immigration and Refugee Board of Canada (IRB) 2007d), Canada has seemingly rationalized these realities in the interest of efficiency and the prioritized need for timely decision-making; at the same time, however, strategically masking how such changes threaten the integrity of asylum in today's hegemonic neoliberal climate. In these respects and others, the wording of the Act itself begs the question as to whose interest the legislation is truly protecting, the nation or the newcomer. And in the context of a country that harbors an in-land protection system that has historically struggled with balancing the demands for efficiency and fairness (Auditor General of Canada 1997; Showler, 2006), it seems that the Canadian system's evident need for *greater* equilibrium in these respects is slowly being usurped by the privileged concern for a more practical, and *not* a more humanitarian, response to the displaced.

Considering the Canadian regime through such a lens of exclusion, this paper addresses the recent popularity of Language Analysis (LA) as evidence in the decision-making process, and develops the position that the potential adoption of this language tool in Canada is poised to mark the most recent articulation of a domestic assault on the nation's legal and moral commitments to asylum protection. While the IRB in Canada represents the sole tribunal responsible for determining refugee status in the country, LA has been approached as a likely tool to *assist* in the complex determination process. What has problematically not been acknowledged is how prioritized efficiency concerns have proven to subjugate to the periphery both claimant's rights and fairness in other country contexts, and what is of interest is how Canadian articulations presently mask these underlying exclusionary impulses.

[4] The growth in the number of claims is particularly relevant considering 2001 marked a record breaking year (44,500 claims made) in Canadian history, and numbers have remained consistently high in years since (see US Committee for Immigrants and Refugees (USCIR) 2002; USCIR 2008).

1.1 The Problem of Identity, Documents, and Evidence in an Anti-Refugee Climate

The consul banged the table and said,
"If you've got no passport you're officially dead":
But we are still alive, my dear, but we are still alive
Auden 1966

A Western lens of perception inherently links the notion of identity claimed and the ability to corroborate that claim with the provision of paper documentation, such as a birth certificate or passport. In refugee status determination, where appealed-to international and domestic refugee law clearly defines the boundaries of refugeehood by the "well-founded" nature of a persons fear of persecution (Office of the High Commissioner for Human Rights 1951; IRPA 2001), an individual must first make their claim to nationality: the country of origin against which their persecution claim is to be weighed. In a problematized asylum context whereby refugees have increasingly arrived in the West without papers, for both cultural and context specific reasons, Western governments have established procedures to measure the credibility of the claimant without such provisions. In a context where credibility is one hundred per cent of a claim, where "credibility is everything" (Showler 2006, p. 25), the IRB has responded to the reality of more than 50 per cent of claimants arriving without identification (Gallagher 2001) by corroborating origin claims through various methods of intervention[5] – methods that have ultimately proved both time-consuming in nature, and have largely worked against the prioritized interest of a faster and more efficient system of status determination.

While in theory the burden of proof is vested in the individual making the claim, Canada has historically bestowed upon claimants the benefit of the doubt, thereby following the recommendation of the United Nations High Commissioner for Refugees (UNHCR) (Auditor General of Canada 1997). In this way, decision-making, an inherently non-adversarial process, has yielded to decision-makers to make inferences vis-à-vis credibility determinations, including questions of national origin. But the tides in this regard have changed and undocumented claimants have been constructively molded by nations of the West as illegal migrants attempting to circumnavigate immigration streams by exploiting asylum systems as an alternative access route. The "undocumented" has thus become synonymous with the bogus claimant, the

[5] These include affidavits, witness testimony, rigorous questioning about the geography, politics and culture of a claimed homeland, interrogating claimant explanations regarding a lack of documentation, individual demeanor, among other factors (see IRB 2004a).

undeserving, and the fraudulent. Constructions of the "undocumented" have proliferated across the West in ways that have marked the paperless claimant as Other and ascribed to him or her the inferior-studded differences inherent in the East-West oppositional paradigm: a seemingly strategized reality on the part of Western governments, and one that has proven attractively difficult to reconcile with a Western notion of protection deserved.

Accordingly, in an efficiency context where a lack of paper documentation has worked to impose procedural barriers to efficient status determination, LA seems to offer a strategic and multi-purpose site of control. Under the guise of a prioritized mandate to play an assistive role in the decision-making process, the linguistic aid in this context seems to have also been employed as a means to detect and reject the fraudulent claimant (also read as politically and ideologically undesirable), exposing dire implications for the integrity of asylum in doing so. In this regard, the Western preoccupation with objectivity has paralleled a prioritized efficiency paradigm, with the subsequent employ of LA as an attempt at the "scientification" of institutional demands to corroborate identity claims (Maryns 2006, p. 225): an attempt on the part of nations of asylum to justify procedural change by exploiting the logic of a test that is seemingly rigorously validated. But given the negative context of an anti-refugee climate, combined with a documents discourse that has nourished skepticism around the legitimacy of claims being made, this paper interrogates the employ of such efficiency rhetoric by Canada and exposes a masked departure from much lauded democratic ideals of fairness and equitable and impartial access to protection. In so doing, this paper investigates the extent to which LA use in the country is likely to add a new tool in the arsenal of exclusion against the refugee interest.

1.2 Linking Canada to the Language Analysis Discourse

According to the IRB, LA "involves making a recording of the claimant's spoken language and then analyzing the claimant's speech. The underlying principle is that analyzing language provides information on the region of origin of the claimant" (IRB 2007a, para. 4). Sweden was the first country to commence the practice in 1993 to help deal with the perceived refugee crisis, and many Western nations have since adopted its use.[6] While the widespread popularity of this language tool by no means denotes a reflection of best practices, in 2007

[6] Such countries include Australia, Belgium, Denmark, Finland, Germany, New Zealand, Switzerland, the Netherlands, United Kingdom, among others (see IRB 2007a).

Canada initiated a pilot project to investigate the effectiveness, impact, timeliness and cost of using purchased LA reports in status determination.

Through the Australian lens, this paper proceeds to question the values behind the Canadian initiative, challenging the claimed evidentiary integrity, both legal and moral, as well as the claimed ideological neutrality informing the pilot project. It broaches the subject of consequence and implication should Canada follow suit of its international contemporaries by adopting what has been widely perceived as a roadblock to asylum for the undocumented claimant, and it does so in order to comment on the regressive direction in which the Western asylum trajectory seems to be headed. This investigation of the Canadian context is particularly significant because Canada's pilot project is *not* engaging in a comparative study of use, and rather, is only investigating the efficiency of the tool through the study of 60 identified cases of interest. [7] In this regard, it is necessary to interrogate and expose the present failings of the Canadian articulation of LA "reliability"[8] through a comparative lens, especially because the nation has based its pilot initiative on understandings of LA effectiveness in other country contexts.

In order to engage in this discussion, section two of this paper provides an extensive review of the literature, emphasizing the integrity of LA as a *linguistic* tool, noting limitations, while also offering a point of departure to address the evidence question in this context. Section three provides the framework for this project in terms of methodology, justifying the Australian lens of perception that is employed in the following pages, while section four yields to a theoretical discussion of the relevance of both post-colonial and critical race theories informing this study. Section five proceeds with an interrogation of Canada's efficiency rhetoric through the Australian lens of perception, working to expose how Canadian articulations of LA *effectiveness, impact, time-* and *cost-effectiveness* could have the capacity to threaten the integrity of both evidence and asylum in the near future. Finally, section six offers a brief

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[7] These include 20 cases representing the three tested refugee demographics: Somali, Sri Lankan, and Afghan claimants (see IRB 2007b).

[8] "Reliability" in the Canadian context of the LA pilot project in here referred to in quotation marks as a testament to the distinction between the IRB understanding of the word, the fact that LA is a test *trusted* by nations of the West, versus a more technical definition of the term, referring to its ability to yield *consistent* results. This visibly noted distinction is challenged and addressed throughout the following pages.

discussion and proposals for implementation should Canada follow through in this regard, followed by some concluding thoughts on the issue at hand.

The study of LA poses many questions that demand attention, especially the notion of intent, and what exactly the social, political, historical, and cultural conditions are for the production of discourse, and the consequent humanitarian concessions made when employed in the political interests of the nation. In exploring the potentially subversive motives informing the perception of LA utility in the asylum context, this paper seeks to voice the understated and less pristine realities informing Canada's pilot project initiative, and does so by first turning to what the literature has already articulated in this regard.

2.1 The Historical Function of Language as a Tool of Exclusion

> *4 Then Jepthah called together all the men of Gilead and fought against Ephraim, whom they defeated*
> *5 The Gileadites took the fords of the Jordan toward Ephraim. When any of the fleeing Ephraimites said, "Let me pass," the men of Gilead would say to him, "Are you an Ephraimite?" If he answered, "No!"*
> *6 they would ask him to say "Shibboleth." If he said "Sibboleth," not being able to give the proper pronunciation, they would seize him and kill him at the fords of the Jordan. Thus forty-two thousand Ephraimites fell at that time*
> New Jerusalem Bible *Judges*, 12, 4 – 6

Language Analysis (LA) in the refugee determination process presents a contemporary example of an ancient trend, a trend that has seen various forms of language testing and analysis used as a discriminating tool in the identification of group membership. As the Shibboleth story in the Book of Judges elucidates above, beliefs have long been held about the ability and effectiveness of using linguistic qualifiers to detect social group membership. In this case, "the Shibboleth test uses language as a means of detection through identification" (McNamara 2005, p. 352). In a socially politicized context where language has the capacity to act as a marker of group identity, the Shibboleth story reflects on an age-old trend to define and regulate belonging through linguistic intervention.

Canada has not been immune to the tendency to maximize the potential of selective group discrimination based on linguistic qualifiers. It is interesting to note a language test created for homosexuals during the Cold War, a test that was meant to detect and screen out such recruits from entry into the Royal Canadian Mounted Police. The testing process devised by Carlton University's Professor Wake combined the use of a word association test and the Palmer sweat test to analyze anxious responses to words commonly associated with homosexual culture, such as "queer," "gay," "camp," and "fruit," among others. "[I]t was thought that only those recruits familiar with the homosexual subculture in which the words were used would be sensitive to the second slang meanings" (McNamara 2005, p. 354). The test illustrates how language has long been perceived in Canada to be an exploitable tool to help detect and privilege particular social groups against others.

In the evolution of the globalized world context that defines the present, the free movement of goods has not coincided with the growth of an equally liberal attitude towards the

movement of people across borders, regardless of the motive informing individual migration intentions. Accordingly, while regulated access to social and political membership in particular nation states can be perceived in a variety of ways, most relevant to this discussion is how language controls have coincided with migration and citizenship restrictions. The Australian example is perhaps the clearest articulation of how language has been exploited effectively to exclude undesirable newcomers. In this case, language appears as the representative symbol of social difference, employed to safeguard the country's privileged value for common origin, culture, and citizenship (Piller 2001).

Between 1901 and 1957, the nation's White Australia Policy used a Dictation Test reminiscent of the Shibboleth story. The issue was less one of detection, but rather one of maintaining the privileged boundary between nationals and non-nationals, and excluding those individuals "belonging to stigmatized social categories" (McNamara 2005, p. 356). To weed out the undesirable effectively on linguistic grounds, a legal condition ensured that all immigrants were forcibly tested in any European language that guaranteed their failure. The success of the policy is most radically articulated in the experience of Egon Erwin Kisch, a German Jew and Communist who, in traveling to Australia in 1934 to attend the World Congress against War and Fascism in Melbourne, was forced to undergo the Dictation Test in Gaelic. Being a multilingual speaker of English, French, Russian, and Spanish, as well as his native Czech and German, the exclusionary mechanism of the White Australia Policy eventually managed to exploit a linguistic chasm of difference to national advantage. Mr. Kisch was promptly deported in 1935 (Piller 2001).

These examples illuminate how language has been strategically employed as a tool to detect social group differences, as well as exclude and privilege members of particular social and ethnic groups based on politicized linguistic qualifiers. The breadth and substance of literature in this field is by no means limited: Piller (2001) makes additional arguments linking naturalization language tests and their basis in ideologies of citizenship and national identity, reflecting on the tendency to "weed out non-desirable applicants" (p. 268); McNamara (2005) marks the important lineage of language tests as a site of control dating back to the Book of Judges, engaging in an important discussion of the intersection of language and the Canadian immigration points system as a social space of contemporary discrimination; and Erard (2003) makes valuable note of language tests employed during ethnic riots in Sri Lanka in 1983 in order

to detect warring factions. Even amid today's widespread digestion of a human rights discourse espousing the values of democratic equality and individual rights, refugees seeking resettlement in the West have been exposed to various forms of language tests regulating accessibility.[9]

What is clear from the literature is that language differences have been strategically manipulated to structure gate keeping environments to achieve desired exclusionary ends, both past and present (Spolsky 1997; Shohamy 1997; Piller 2001; McNamara 2005); they have provided sites of detection and deflection, as well as avenues by which it is possible to acknowledge, intercept, and control the boundaries of both real and imagined communities, whether they be defined by national borders or socially constructed ones. With such a lens into the historical function of language as an exclusionary tool established, the question begged of the literature is how LA can be interpreted as one of the more current manifestations of this age-old trend.

2.2 Language Analysis as a New Tool in Asylum Gate Keeping?

Tests are created on the central premise of discriminating between individuals and groups who harbor the requisite knowledge under scrutiny, and those who do not (Lynch 1997). The above discussion has shown that in regards to the linguistic frontier, language proficiency, aptitude, achievement, and knowledge have been evaluated in testing scenarios to advance the interest of a particular prejudice and thus define and mold the boundaries of social inclusion. In analyzing the language spoken by asylum seekers, the goal is not only to detect social group identity, but also to link that identity to a political context, with the ultimate intention of verifying the legitimacy of an individual's claim to nationality (McNamara 2005). *Unlike* the above-noted tests that detect and regulate social identity, LA seeks to detect fraudulent claims by identifying those individuals claiming a false *national* identity based on linguistic evidence (Eades *et al.* 2003; Reath 2004; Maryns 2004; Eades 2005). On the other hand, similar to the sites of linguistic intervention noted above, LA demands on-cue performance and measures the

[9] This is particularly relevant in the Canadian context of refugee resettlement policy that reflects value for English and French language abilities, and discriminates based on linguistic aptitude (see UNHCR 2004).

success of that performance based on linguistic qualifiers, also likewise linking the two is the inherent interest behind both processes to service political exclusionary aims.

The literature makes clear that LA is being digested and interpreted as a form of language testing. Erard (2003) and Maryns (2004) both situate LA within the broader testing environment facing asylum seekers; in addition to quizzing claimants about the geography, customs, and political conditions of their home countries, linguistic identification is portrayed as an additional tool in the testing arsenal being employed by countries of asylum. McNamara notes that for the past 15 years, refugee claims have been "determined in part on the basis of a language test" (2005, p. 362), and Reath (2004) engages in a discussion of the ethics and morality of this form of "testing." The fact that the terms "language analysis" and "language test" are being used synonymously across the globe (Bobda *et al.* 1999; Daley 2002a; Erard 2003; McGeough 2005) implies the very nature and entrenched perception of LA being exploited to exclusionary end, in ways similar to the linguistic sites of interception already discussed.

2.2.1 *Situating Language Analysis in the Anti-Asylum Context*

Considering the current context of a refugee crisis and the desire of Western states to curb influxes of asylum seekers into their countries, the literature has generally situated LA within the wider "anti-asylum seeker agenda" (Eades 2005, p. 514). This is particularly relevant in a global context where an evident preference exists for protecting refugees who are selectively resettled from abroad, especially in light of growing antagonism towards those undeserving individuals who self-select their right to protection by seeking asylum in First World countries of their own volition (Eades 2005). Much like the White Australia Policy that sought to use language as a site to safeguard access to the nation, the research on LA suggests that it is being employed to help handle the perceived crisis by further regulating access to protection visas (Eades and Arends 2004).

In the limited amount of research as of yet conducted on LA, language professionals have acknowledged the perceived burden of increasing refugee claims in countries like Belgium (Maryns 2004), Switzerland (Singler 2004), Germany (Bobda *et al.* 1999), the Netherlands (Eades and Arends 2004), and Australia (Eades *et al.* 2003). It is widely accepted that countries comprising the West no longer welcome refugee claimants as generously as in the past, and have become skeptical of the genuine nature of individual protection claims. In this light, Singler

(2004) frames his study of LA in the Swiss context on Western political trends to blame social and economic ills on newcomers, stressing how the "demonization" of the political asylum applicant has given birth to the "political asylum cheat" (p. 223). Blommaert (2001) extends this discussion into a contextualization of asylum within the more general issue of immigration policy in Belgium, where the asylum "problem" has become a further complication to an "already thorny issue of 'integration'/assimilation of foreigners" (p. 417).

But pertinent to this contextualization is how LA has been nourished as a solution to the problem by governments, first in Sweden in 1993 and increasingly more so since then. The literature has largely situated LA within an exclusionary asylum context because of the link between using language as a tool, and one of the major issues informing the current anti-refugee discourse, the fact that many individuals arriving in countries of asylum lack identity documents (Bobda *et al.* 1999; Eades *et al.* 2003; Maryns 2004; Singler 2004). Such realities have forced governments to question whether the lack of documentation is a lived reality and circumstance of flight, or whether it is due to individual intentions to conceal true place of origin (Bobda *et al.* 1999).

Demonstrating a widespread preoccupation with trying to identify asylum seekers making false claims about national origin in order to qualify for refugee status, LA has been adopted as a tool to verify the identity claims of these individuals and to help distinguish the economic migrant from the genuine refugee (Blommaert 2001; Eades *et al.* 2003; Maryns 2004). In a bid to address this nexus of concerns, LA has been embraced by governments as a detective tool in an exclusionary realm, and used when cases are doubted in the Netherlands (Eades and Arends 2004; Corcoran 2004) and Australia (Eades *et al.* 2003). This negative context of use is similarly reflected in Germany, where LA is employed if "misuse of the right to asylum is suspected by officials" (Bobda *et al.* 1999, p. 301); in Switzerland, where the test is imposed on all political asylum candidates who are without documents (Singler 2004); and in Sweden, as "an aid" to verifying false claims (Bobda *et al.* 1999).

The situation becomes increasingly negative and exclusionary in particular country contexts. For example, in cases where a specific refugee-producing country is seen to yield a large number of asylum seekers whose claims are being widely accepted, Western countries have responded by gradually succumbing to skepticism about whether individuals from neighboring regions have rehearsed and constructed stories that follow-suit the genuine nature of accepted

claims. Eades and Arends (2004) note the increasing number of individuals claiming to be from Sierra Leone but whom the Netherlands believe are actually from Nigeria;[10] Tolsma (2008) explores this issue with Burundian asylum seekers in the same country; Singler (2004) looks at distinctions between Liberian English, Krio, and West African versions of English in the asylum seeker context in Switzerland; while Eades and Arends (2004) look at the same issue in the Netherlands; lastly, Eades *et al.* (2003) explore the issue of Australia's increasing preoccupation with Pakistani Hazaragi speakers claiming false nationality of Afghanistan, among others.

Then UK Immigration Minister Beverley Hughes succinctly expressed her country's context of LA use in 2003, when she stated that "[i]n the light of concern that some asylum applicants from other countries are posing falsely as nationals from Iraq, I have decided to pilot LA testing for use in cases where appropriate when an individual claiming Iraqi nationality applies for asylum" (The Guardian 11 March, 2003). In most cases, it is these individuals (the perceived genuine *and* less genuine) who are *both* forced to undergo LA in the interest of detection.

LA is widely commissioned on a non-consensual basis and presented as evidence by Western countries to challenge the integrity of claims being made. As Australian Minister for Citizenship and Multicultural Affairs has noted, LA is "a valuable tool in the refugee determination process and [...] plays a valuable and continuing role in assisting in the identification of fraud" (Reath 2004, p. 214). When words such as fraud, illegal, non-consent and bogus inform the use of any tool that assists in vital decision-making processes, their inherently non-partial nature makes it difficult to perceive the likely implications to be anything but negative. As long as such terms continue to define the context in which LA is operating in refugee status determination, it seems necessary that a discussion of the *historical* function of language as a tool of exclusion acknowledge also the *current* realities that shadow the present context of use.

2.2.2 *An Emphasis in the Literature on Language Rights, not Refugee Rights*

While much of the literature *has* contextualized the study of LA within the broader climate of the public anti-refugee discourse, most of the available material has placed a greater

[10] The issue here is of distinction between various forms of West African English and Sierra Leonean Krio.

emphasis on the evolving field of sociolinguistics; in this regard, Maryns (2004) discusses LA as a new dimension of forensic linguistic analysis, while Eades (2005) situates LA within the evolving context of immigration law. The tool has indeed been interpreted as a site of ethical disengagement, but in a discussion of human rights, the dominant issue of concern has not been the political context out of which it has been adopted as evidence in status determination, but rather, the problematic practice and methodology of LA itself. While the traditional orientation of the field of linguistic human rights originally found its focus on minority language rights (Phillipson 1992) and issues of bilingualism and rights in education relating to language (Kymlicka and Pattern 2003), Patrick (2008) has incorporated a sociolinguistic perspective to the linguistic human rights discourse and his contribution to the literature has been significant in merging the broader human rights field to LA in the asylum context directly.

But even still, Patrick (2008) importantly notes that this recently drawn correlation "is a new trend, and very little direct literature exists examining its validity" (para. 2); presently, an important lacuna in the research *is* the absence of any substantial discussion regarding how LA threatens the rights of refugees and the integrity of the mechanisms in place to ensure their security. While Eades (2005) does make reference to the definition of a "refugee" as dictated by the UN Convention Relating to the Status of Refugees, Eades *et al.* (2003) do express concern that LA "may be preventing our country [Australia] from properly discharging its responsibilities under the Refugees Convention" (p. 180), and Bobda *et al.* (1999) make the contradictory comment that "the right to asylum continues to exist and the linguistic analyses in no way impinge upon this right" (p. 302), an evident gap in the literature is the neglect to address the significant and problematic implications that such comments propose. Considering how a discussion of these implications, and the integrity of LA as evidence, inherently rest on the tool's legitimacy as a language test, it is to this subject this review now turns.

2.3 The Controversial Credibility of Language Analysis as a Linguistic Tool

While there are presently vast individual differences in the ways various countries are carrying out LA, and in the methodologies being employed in this pursuit, the underlying assumptions and goals informing the use of this tool are widely shared (Eades 2005). The main problematic question thus informing the process of LA is what can language tell us about identity. While Western countries have a pressing need to corroborate the nationality of

individuals claiming asylum, language professionals have widely agreed on the fact that "the way that people speak has a strong connection with how and where they were socialized" (Language and National Origin Group 2004, Guideline 3). But what the literature has importantly drawn attention to is concern over the problematic articulations of both governments and some language professionals that national and linguistic boundaries are in cases synonymous, and thus, analyzing the spoken language of an individual can correlate with determinations regarding an individual's *country* of origin. In this regard, Bobda *et al.* (1999) have been severely criticized by Eades and Arends (2004) and Eades (2005) for emphatically asserting that "it is possible to use an interview to determine the geographic origin of the interviewee," without any qualification (Bobda *et al.* 1999, p. 301).

Similarly, Western governments have been attacked for falling prey to "folk views" about the capacity of language to bridge the chasm of difference distancing inherently political identities of nationality from membership in socio-linguistic communities (Eades *et al.* 2003). The German context reflects particularly dire interpretations of the utility of LA, as receipt of reports that contradict country of origin claims have automatically resulted in denying refugees access to status determination procedures (Bobda *et al.* 1999). Even countries like Australia, that have acknowledged the opinion of international language experts regarding the link between LA and determining an individual's region of socialization, have been accused of rejecting protection claims on the premise that LA reports challenged the nationality being claimed (Eades *et al.* 2003). The exclusionary interest informing such interpretations is only further problematized by the work of Reath (2004), who has addressed the only formal investigations of LA publicly conducted: a study that extends this discussion beyond the link between LA reports and negative protection decisions, and into the arena of how interpretations of LA in Belgium have had direct implications for the deportation[11] of individuals to their countries of origin – many of whom, as it was later exposed, were returned to the wrong country (Barnett *et al.* 2002; Reath 2004).

The experts involved in the execution of LA also reflect allegiance to such problematic assumptions. Unlike Switzerland, which demands LA reports identify "region of socialization"

[11] The use of LA in the interest of deportation has also been explored by McNamara (2005) regarding the context of use in Spain, to the detriment of Sierra Leoneans; McGeough (2005) has also made such a link in the Australian context of distinguishing between Afghan and Pakistani claimants.

and not a country specifically (Singler 2004), many reports provided to Western countries have explicitly identified the country of nationality of the individual whose voice recording was being analyzed; such reports have been produced by for-profit companies like Eqvator and Sprakab in Sweden, and their use has been publicly criticized in Australia (Eades *et al.* 2003; Eades 2005) and Germany (Bobda *et al.* 1999), among other countries. Perhaps Reath (2004) most aptly contextualizes the problematic use of LA in this way:

> Most western countries use LA because they have no documents verifying where an individual is from. The underlying message implies that LA has the capacity to support or counter an individual's claim to come from a particular country, which in turn implies that LAAP [12] is being used to determine nationality as opposed to language background (p. 213)

Such erroneous assumptions have been problematically absorbed both into the way LA is being performed and likewise during the stage of interpreting LA as evidence in status determination. At both stages of the process, the validity of inferences being made "is rendered questionable by the problematic nature of the construct underlying the test" (McNamara 2005, p. 363).

2.3.1 *The Linguistic Limitations of Linking Region of Socialization and Nationality*

Even in a case where language professionals have conceded to the notion that analyzing an individuals spoken language *can* yield clues regarding an individual's geographically localized language community, they have been clear to articulate how the often strong connection between region of socialization and nationality "is not necessarily the case" under all circumstances (Eades 2005, p. 507). This is particularly important considering the inherently complex nature of many refugee-producing regions and their linguistic and national borders. While many Western countries expect LA reports to comment on the claimed nationality of the individual in question, and as companies such as Eqvator and Sprakab have sought to cater to this need, language professionals across the globe have ardently articulated the latticework of problems informing such identification.

[12] For purposes of simplicity the acronym LA is used here, though it is relevant to note that the evolving international dialogue from the linguistics field has adopted the term LAAP (Language Analysis in the Asylum Process) (see Reath 2004).

Firstly, identifying "country of socialization" is not the same as "region of socialization" (Eades and Arends 2004). This is particularly problematized in the work of Bobda *et al.* (1999) who argue that regional differences in African varieties of English can determine "geographic origin." While the authors engage in a study of the linguistic features associated with English as spoken in East Africa, West Africa, and South Africa, their study remains one of regional distinction and provides no justification for the extent to which "linguistic clues in African varieties of English uniquely distinguish individual countries" (Eades and Arends 2004, p. 184). Bobda *et al.* (1999) have consequently been attacked for their problematic interpretation of the capacity of LA to identify region of origin, and more so for their overstated advocacy regarding the effectiveness of LA in the asylum context. Once again, the focus in the literature rests on interpretations of LA effectiveness at the linguistic, and not the decision-making, level.

While LA has been supported in situations where the distance between the language spoken and the language claimed-to-be spoken is significant enough to render clear distinction, the reality is that asylum seekers rarely present such linguistically simple repertoires[13] or personal histories (Corcoran 2004). Because many refugee claimants come from war-stricken countries where cross-border migration is common and neighboring countries speak varieties of the same language, language becomes an "extremely weak indicator of national origin" (Maryns 2004, p. 256): such is the case in attempting to distinguish between Afghan and Pakistani speakers of Hazaragi Dari, Indian and Sri Lankan Tamil speakers, and in situations of English being spoken in various West African countries, to name a few examples.

Additional factors that make specifically localized social identification based on linguistic qualifiers difficult include the limitations of linguistic research in particular nation-state contexts. Of great importance to measuring the value of LA as an effective language tool is what Eades *et al.* (2003) note as recognizing the boundaries of linguistic expertise, because although linguists may know a great deal about language, the study of linguistics remains "a relatively young discipline and there are some aspects of language about which rather little is known" (p. 182). This is particularly relevant considering the lack of significant and current linguistic research in particular geographical regions. In conditions such as those of war-torn

[13] See Maryns (2004) for a discussion of how common bilingualism and multilingualism among refugee claimants introduces complex situations of code mixing and shifting that pose significant problems for effective LA.

Afghanistan over the past 30 years, the linguistic situation has changed rapidly with refugee flows and cross-border movements, and violent conditions have failed to provide a context conducive to detailed academic study. Eades *et al.* (2003) and McNamara (2005) have acknowledged the sociolinguistic fluidity informing language use in this region, and Singler (2004) has aptly articulated the problem at hand: "so long as the fundamental linguistic work has not been done, it is not possible to determine whether Hazaragi in Afghanistan can be reliably distinguished from Hazaragi in Pakistan or in Iran, where it is also spoken" (p. 232). But while such acknowledgements have been made in the international arena, those individuals commissioned to produce LA reports, both trained and untrained (hereafter "language analyst"), continue to yield inferences that defend their ability to distinguish between these groups, thus illuminating a reality that unquestionably brings the issue of linguistic and evidentiary integrity to the fore. In this problematized context where the inconsistency of inferences made challenges the reliability of the test, it is also apparent that the validity of the tool, and whether it effectively tests what its claims to be testing, is herein compromised.

Limited research in the region under scrutiny ultimately means that analysts may not be well versed in issues of language dissemination and linguistic change, and may not be well informed of how words have been integrated and adopted, and how pronunciation and dialects have altered over time (Eades *et al.* 2003). The realities of individual migration histories of asylum seekers, issues of mixed socialization and intermarriage, as well as factors such as the Internet, television, and long-term experiences in refugee camps, can all work to neutralize local features of accent (Bobda *et al.* 1999) and thus "weaken the reliability of linguistic clues in determination of speaker identity" (Maryns 2004, p. 256). This linguistic nexus of concerns is further problematized by realities in which language socialization for individuals has occurred across borders and in multiple countries, presenting factors that, in molding the linguistic identity of an individual, inherently complicate the initiative of localizing a speech profile to a specific region or country (Singler 2004, p. 234).

2.3.2 *The Linguistic Asylum Interview*

The above discussion has sought to comment on how the research has exposed the weaknesses of LA to ensure valid, reliable, and ethically sound language-based evidence to support country of origin claims. These controversial assumptions and expectations informing

LA testing are further complicated by the attempt to extract voice recordings from asylum seekers during interviews designed for such a purpose.

LA operates on the assumption that the interview used to extract a recording of an asylum seeker's voice is useful as an item of analysis from which to yield inferences regarding the identity of an individual (Singler 2004). Language experts have challenged this belief on a number of fronts, but have largely emphasized the problematic expectation that during the interview an individual will speak one language only, uninfluenced by other language varieties in terms such as phonology, technical vocabulary and grammar. While the above discussion addresses the problematic realities of how language can become "deterritorialized" for various reasons, another important point of contention is the issue of individual susceptibility to language *accommodation*: both the conscious and unconscious likelihood that an asylum seeker will alter his or her speech to the particularities of the language spoken by the interpreter involved in the interview (Maryns 2005).

The research is clear that an individual's vernacular is ideal for linguistic asylum interviews because it reveals the "below-conscious" ways of "how we speak when we are not paying attention to how we speak;" unfortunately, the depersonalized and formal setting within which most interviews takes place mitigates against attaining such a "pure" sample (Singler 2004, p. 226). Language experts argue that the context of the linguistic interview creates psychosomatic responses making asylum seekers feel ill at ease, especially because they are likely knowledgeable of the significant potential outcome the interview may have on their asylum claim. This has led asylum seekers to "standardize language in some cases" (Reath 2004, p. 220), especially in various African contexts where an evident stigma is attached to non-standard speech: particularly pidginized and creolized language varieties (Singler 2004). Corcoran (2004), Maryns (2004), and Singler (2004) have all argued that signs of accommodation reflect the hope of asylum seekers to gain approval from the interpreters involved, while Eades and Arends (2004) note the likelihood for accommodation in cases where the interpreter does not speak the same language, or language variety, as the claimant. All of these factors problematically help to mask the "denotation tokens" and the "exotic and peculiar facts" required for successful LA (Corcoran 2004), and ultimately encourage language shifts that move "away from the type of speech that would attest to the applicant's authenticity" (Singler 2004, p. 227).

The implications of accommodation and the resulting problematically-informed recordings suggest how the individual applicant has lost agency over his or her voice – the issue has become a question not of what the individual says, but how he or she says it (Erard 2003). In an interview context within which individuals are denied the freedom to perform and communicate naturally, the result is that LA reports are being established on the basis of evidence that is often reflecting linguistic forms not consistent with the language variety being claimed (Eades 2005, p. 508), and the reports are problematically coalescing into proof of an asylum seeker's deception of country of origin. This issue is only further magnified when considering the integrity of the skills and qualifications of the experts who are performing this type of analysis.

2.3.3 *Defining the Expert Analyst*

The relationship between language, dialect and national borders is undoubtedly complex (Eades 2003) and this fact has nourished serious concern regarding who is being hired to perform LA. At present, there is no standard informing the qualifications necessary for those individuals analyzing language in this context: the Netherlands specifically prefers that the analyst be a native speaker of the language(s) in question (Corcoran 2004), while Australia, Britain, New Zealand, Austria, Finland, and Norway are among those countries who export voice recordings for analysis in Sweden, where no requirement for linguistically-trained and technically-versed language professionals is demanded (Eades *et al.* 2003; Reath 2004). While Belgium performs a number of language analyses inside the country, demonstrating a preference for trained linguists, a lack of local skilled professionals means many cases are similarly exported to Sweden (Maryns 2004). Presently, Switzerland is heralded as an example of best practices as the country is the lone nation recognized internationally for enforcing that only individuals with postgraduate training in linguistics be hired to perform such analyses.[14]

While it is widely accepted that native familiarity with the language(s), or language varieties, in question is necessary (Maryns 2004), the limitations of using mere lay people to draw important inferences about regional identity on the basis of language has been widely

[14] Although the Swiss firm Lingua does prioritize academically informed linguistic expertise, Eades (2005) and Singler (2004) note the important qualification that exceptions have been made to this policy.

attacked as farcical.[15] The fact that some analysts are themselves former asylum seekers has introduced new complexities to the discussion of integrity, where not only issues of bias are here presented, but also issues of how such individuals could possibly have "currency" in a range of dialects, customs and geopolitical intricacies of the areas in which they claim expertise, especially if they have been removed from the region, without the right of return, for prolonged periods of time (Daley 2002a). The fact that a principle of non-disclosure largely protects the anonymity of language analysts in most country contexts, largely on security grounds, further problematizes the legitimate concern over how to verify the identity, qualifications, and thus the integrity of LA as an expert test (Reath 2004; Eades and Arends 2004; Eades 2005). Again, the nascent discussion of linguistic inequalities at play here has largely overshadowed recognition of the detrimental implications for evidentiary integrity, an evident gap that demands bridging.

2.3.4 *Language Analysis Reports: a Question of Quality*

The fact that no standards exist informing the employment of language analysts in this context has had a direct impact on the integrity of the reports produced. Some reports have been composed merely of a single sheet of paper containing approximately 15 lines of text, reflecting a lack of thoroughness yielding to "low quality analysis [...] obviously performed by an amateur" (Hyltenstam and Jason 1998, as cited in Reath 2004, p. 225). Reports out of Sweden suggest similarly superficial analytical techniques, a tendency to succumb to "stereotyping verbal repertoires," and a preponderance for basing arguments of pronunciation differences on features that are "emblematic" of a regional identity, instead of engaging in scientific descriptions of accent and pronunciation (Ross 2001, as cited in Eades *et al.* 2003, p. 185). These realities not only implicate the untrained analyst, but problematically yield to inadequately informed judgments that are often being made in such reports: judgments that not only linguistically problematize the link between distinct neighboring language varieties and the linguistic

[15] Especially relevant is that native speakers can not distinguish between "close and mutually intelligible languages" that only clear phonological and grammatical features can identify (Bobda *et al.* 1999); while native speakers may be able to list linguistically relevant findings, they lack the training to interpret findings and to appropriately contextualize them in order to engage in "linguistically responsible argumentation" (Eades and Arends 2004, p. 194); language reports from untrained analysts also reflect vacant interpretations of language spread and linguistic change (Eades *et al.* 2003), as well as a lack of familiarity with technical linguistic tools such as standard transcription methods (Maryns 2004; Eades and Arends 2004).

identification process, but also erroneously inform decision-makers of the capabilities of LA to provide valid linguistic evidence (Eades 2005).

While Bobda *et al.* (1999) note the "rate is not binary" and analysts have the freedom to grade the certainty of assessment (p. 30) – a factor that in theory would help enhance the integrity of results inferred – Eades *et al.* (2003) have reflected on reports that yield judgments framed largely in terms of "absolute identification" instead of more appropriately in "terms of probability" (p. 186). This bias towards certainty and the lack of standards informing how analysts *should* (or that they even *must*) qualify the certainty of their decisions has yielded to questions regarding the validity and ethics of the form of analysis in question (Bobda *et al.* 1999; Piller 2001; Eades *et al.* 2003). In this regard, Eades *et al.* (2003) have even gone so far as to replace the term "Language Analysis" with "Linguistic Identification," arguing that it is not thorough analysis that is being performed. Together, the for-profit nature of many of the institutions performing LA, combined with issues of certainty and recurring distortion, and the frequent "omission of relevant facts speaking in favor of the asylum seeker" (Eades and Arends 2004, p. 194), all serve as a reminder of just who exactly is commissioning LA reports, and the exclusionary political interest they seem to be serving.

The lack of standards informing the execution of LA has, perhaps unsurprisingly, nourished a growing trend in the evolution of contra-analysis (Corcoran 2004), and perhaps best justifies the growing ethical discourse surrounding the linguistic validity of LA as a detective tool as currently used. Problematically, as of yet, no discussion has addressed the negative implications for asylum by the mere presence of contradictory reports, nor has there been any public discussion around what this implies regarding whose interests are being privileged by interpreting LA as effective.

2.3.5 *A Response From the Field: "Guidelines for the Use of Language Analysis in Relation to Questions of National Origin in Refugee Cases"*

What has evolved from the growing discourse on the subject is the motivation to raise awareness about the problems informing the execution of LA. Accordingly, June 2004 witnessed the release of Guidelines for the Use of Language Analysis in Relation to Questions of National Origin in Refugee Cases (hereafter "Guidelines") (Language and National Origin Group 2004).

Signed by 19 linguists from 6 countries,[16] the Guidelines are a list of instructions for standard setting in the field, to help encourage more accurate interpretations of LA reports in the refugee context; ultimately, they are a reflection of what language professionals hope can be achieved. Evolving out of the Australian context of discontent around this issue, they have been made available across the globe to governments, lawyers, refugee advocacy groups, and linguistic organizations alike to raise awareness (Eades 2005). While the "need to be cautious about assuming that awareness can lead to justice" is apparent, the Guidelines do present a significant attempt to bridge this debilitating information gap (p. 514).

2.4 A Lacuna in the Literature on Procedural Issues

> *[I]nvestigating the construct validity of interpretations without also considering values and consequences is a barren exercise inside the psychometric test-tube, isolated from the real-world decisions that need to be made and the societal, political, and educational mandates that impel them*
>
> Bachman 2000, as cited in Piller 2001, p. 274

Refugee protection is inherently a moral and legal commitment to which countries of asylum have ceded a degree of sovereignty in order to uphold. It is an issue of human rights, and Western countries have acknowledged this in their international commitment to protect the sanctity of the human spirit through asylum. The literature on LA suggests that the issue at hand is a linguistic problem and that it presents an ineffective solution to the problems facing the asylum systems of the West. The reality, on the other hand, is that LA has been controversially perceived and employed as effective practice, and it has become evident that the problematic consequences of such actions need to provide better information regarding the discourse on subject. There is a strong need to broaden the discussion to one of evidentiary integrity and look at the values for efficiency informing government allegiances to the tool. There is also a need to address the implications of LA for the quality of asylum; a reminder seems required vis-à-vis commitments that have been made and how LA reflects an attack on them.

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[16] The number of language professionals is represented geographically as follows: Netherlands (4), Belgium (2), United States (7), Australia (4), Sweden (1), United Kingdom (1). It is worth noting in the context of this paper that Canada has not been engaged internationally in this discussion.

The literature reveals limitations on a variety of fronts. Firstly, in terms of contextualization, and more importantly, in terms of subject, prioritizing the linguistic over the procedural, the language tool over the evidentiary one. This can largely be explained by who has written on the subject and where, especially considering that the discussion has been predominantly embraced by language professionals who have accordingly published in journals of their discipline: Forensic Linguistics; Speech, Language and the Law; Language and Communication; and Applied Linguistics, to name a few. Considering how language professionals have adopted central ownership over the human rights discussion related to LA, the problem remains an essential void in discussing this issue from other perspectives, such as those of international relations, legal studies, political science, among other fields.

The limitations in the literature are likely a reflection of the largely covert nature within which LA operates: how institutions protect the anonymity of experts and the methodology informing procedure, as well as how government practices of confidentiality and a lack of procedural transparency mask how LA is being applied to decision-making. This has left many questions open to speculation and has denied the potential for exhaustive research on the subject; in a linguistic context where ample research has advocated against LA and the importance of cessation of use, government persistence in exploiting this test leave especially open to question the motives and prioritized values informing its use. It is this very lack of acknowledgement within the international sphere regarding the negative implications of LA vis-à-vis life-or-death decision-making that demands arguments be articulated through a new lens. This is especially pertinent considering Canada's present contemplation of adopting this tool.

In the end, the issue of LA seems to be very much at the heart of a global trend towards prioritizing the interests of efficiency over the inherently humanitarian pulse of status decision-making, and while no one has of yet adopted this perspective, it seems increasingly evident that such a voice must be raised, if only to prevent the politics of asylum from justifying the use of such a problematic tool in this context. While Maryns (2004) leaves open to question the extent to which the logic of management and efficiency threatens the quality of the procedure, it is to this subject this paper now turns, in an attempt to address implications for a Canadian context of LA use.

SECTION 3: METHODOLOGY

This paper is composed in such a way as to yield insight into the dual problematic of Language Analysis (LA), including both perceptions and practices informing its use. The literature review of the preceding pages has worked to establish the unethical latticework of convention upon which LA as a controversial linguistic tool rests. This paper now turns to its main subject of interest; departing from a sociolinguistic emphasis to engage in a contextual and operational analysis of LA use in Australia, and how such evidence proposes to threaten the integrity of refugee status determination in Canada, and more explicitly, how the possible adoption of this tool is likely to reflect the most recent articulation of Canada's evolving retreat from its commitment to asylum protection.

3.1 Framework of Discussion: Appealing to an Efficiency Paradigm

The methodology of the following discussion rests on the framework of what is here referred to as the seemingly hegemonic efficiency paradigm informing asylum practices in Canada. Since the adoption of in-land determination procedures, Canada has particularly struggled with constant backlogs of claims, expensive determination procedures and lengthy processing times, and in result has advocated in the interest of the effective management of refugee migration into the country (Plaut 1985; IRB 2007d). While this logic of efficiency has coincided with the strategic manipulation and control of who exactly has been able to gain access to in-land determination systems, it has more recently threatened the process of status determination in Canada through the Immigration and Refugee Protection Act of 2001 (IRPA), which has worked to deny refugees the right to appeal, reduced the number of decision-makers from two to one, and paralleled reductions in legal aid, among other harmful effects. Undoubtedly, the value of quicker processing times, expediting claims, and added interventions to curb system abuse inherently favour both the nation and individual claimants, but this paper instead expresses fear regarding how the logic of management informing the Canadian pilot project could very likely prove to mask legal and ethical concessions against the refugee interest.

While Canada is currently engaged in a pilot project to evaluate the *effectiveness*, *impact*, *timeliness* and *cost* of LA to assist in status determination, this paper interrogates the Canadian efficiency logic through the Australian lens, and in so doing, undermines its integrity. While

exposing how a prioritized efficiency paradigm is likely to encourage problematic rights concessions in an asylum system already operating in the interest of exclusion, this paper unveils how LA is not an ideal measure through which to work in the interests of these goals, and exposes the legal and ethical sites of disengagement to caution against pursuing implementation on the basis that it is.

3.2 Canada through the Australian Lens: Justifying the Comparative

An Australian lens of perception to render insight into the potential Canadian implications of use is relevant and practical on a number of fronts. Legally and morally both countries have pledged allegiance to the values inherent in refugee protection: they are signatories to the 1951 UN Convention Relating to the Status of Refugees (hereafter "Refugee Convention" or "Convention") and its 1967 Protocol; they have written the Convention definition of a "refugee" into domestic law and thus qualified their sovereignty in doing so; and both countries have similarly reaffirmed their commitment to the cornerstone of refugee protection, the Refugee Convention, in December of 2001 – the Convention's 50th anniversary (Kumin 2004). While the Convention provides limited guidance on "how states should determine refugee claims" (Gibney 2003, p. 36) and gives no attention to the process of how status decisions should be reached (Showler 2006), both Australia and Canada have established legally complex, world-renown, rights-honoring institutions of status determination to honour and uphold the values to which they have pledged allegiance: Australia, through its Department of Immigration and Multicultural and Indigenous Affairs (DIMIA); Canada, through the Immigration and Refugee Board (IRB).

While both countries have created such institutions of repute they have similarly responded to the increasing demands of asylum[17] in recent years in ways that have countered the integrity and values of established protocol, reflecting an exclusionary impulse in doing so. Both

[17] Such increasing demands emanate largely from a Western discourse of a refugee crisis, and both Australia and Canada have reflected waning enthusiasm to welcome asylum newcomers, especially as the numbers of asylum seekers crossing their borders have increased so dramatically since the 1980s (see Martin *et al.* 2003).

nations have been accused of encouraging a shift from permanent to temporary protection,[18] and barricading their borders in ways that inhibit access to protection systems, and do so discriminately; in this regard, Australia's "Pacific Solution" (Wazana 2004) has similarly paralleled some of the negative implications resulting from the Canada-USA Safe Third Country Agreement (CCR 2005; CCR 2006a). While Australia and Canada are geographically isolated from refugee-producing nations, both countries have likewise joined the worldwide trend toward molding constructions of the hordes and masses of refugees as undeserving of protection; reconstructions of the nation as victim to the abusive motives informing asylum claims have led both nations to justify and rationalize various mechanisms of intervention to safeguard the national interest, and subvert the integrity of asylum protection in doing so. A shared colonial "white script" complemented by race-based narratives defining a history of national belonging have also covertly helped legitimize methods of interception and detection that regulate access to protection on both fronts.

While this paper does acknowledge the politics of protection and the realities of the need for a system that is structurally efficient *and* fair, as well as a country's right to regulate membership, it contends that the politics of asylum cannot justify the use of a tool that reflects a regression from established precedents. In such a light, the comparative of the Australian and Canadian asylum contexts in this study is particularly relevant because of the similarities in perspective informing LA use: procedurally, in how LA reports are, or would be, commissioned, and on an evidentiary basis, respecting how such reports are, or will be, applied to decision-making in practice. Importantly, Canada has cited Australia as an example of LA working effectively in status determination (IRB 2007b). In regards to the application of LA to decision-making, the two countries also share a nationally articulated belief that LA is not determinative of nationality alone, as perceived in some European countries, and both nations approach its usefulness from the perspective that LA provides only one piece of information a decision-maker may consider to determine geographic origin (DIMIA 2005 in Eades, personal communication, August 11, 2008; IRB 2007b). While inherent uniqueness informs how status determination operates in both countries, common contextual, ideological, practical, moral and legal

[18] See Wazana (2004) for a discussion of the implementation of the Temporary Protection Visa (TPV) in Australia; see Razack (2002) for insights into how Bill C-86 has fostered legal limbo and denied certain refugees permanent residency in Canada.

orientations help provide an attractive site in which to engage in a comparative discussion of how this tool subverts the integrity of the efficiency paradigm in operation at the IRB.

3.3 Under the Microscope: Research and Data Used in this Study

Textually, this paper is informed by secondary research that has already commented on this issue in Australia (Eades *et al.* 2003; Reath 2004), and is further developed through the use of on-line reports published by the country's Refugee Review Tribunal (RRT). The RRT is the refugee division that hears refugee appeal cases in Australia after the DIMIA has rejected an individual's protection claim. Each year, the RRT publishes online 20 per cent of its caseload considered to be "of particular interest" (Commonwealth of Australia 2008), and these reports lend invaluable insight into how LA has been interpreted and applied by decision-makers in Australia. The availability of such information is a significant factor in the efficacy of using Australia as the lens of perception in this study. The fact that published research in Australia was the catalyst for international interest and inquiry into the field of LA,[19] especially its linguistic failings, as well as the availability of English language literature, further suggest the fitting nature of using Australia as the site of contextual analysis. In regards to the Canadian context, the IRB has published two online statements (IRB 2007a; IRB 2007b) regarding its pilot project, and it is from these documents that the Canadian articulation is here developed.

3.4 Acknowledging Limitations

Considering the largely covert nature informing how LA reports are produced and how they are applied to decision-making, this paper is framed on an exploratory premise. Its aim is to mold perspective, raise questions, and theorize potential damaging implications for the Canadian context, and it does not claim to do so along conclusive or exhaustive lines of defense. This paper is unavoidably limited by the lack of full transparency informing decision-making in Australia and thus relies on the published material available; the discussion consequently and inherently fails to provide a definitive grasp of the lived experience playing out in the asylum context in the country. The fact that the reports giving insight into the use of LA are from appeal

[19] While Bobda *et al.* (1999) write of the German context of use before the dawn of the new millennium, in 2003, Eades *et al.* established an unprecedented interrogation of the utility of LA as an effective language tool.

cases makes it important to note the inability to comment on how LA is applied and interpreted in the initial DIMIA hearing. Innately, this paper *does not seek* to generalize the effect of LA in the Australian context. It should be remembered throughout that the emphasis in the following pages is to explore problematic sites of engagement in the Australian example *in order to expose* issues that might be exacerbated by the uniqueness of Canada's refugee determination system, should implementation ensue.

Because the Australian case is primarily being used as a lens into the potential Canadian implications of use, any particular case examples illustrated here are not intended to constitute a conclusive examination of the use and impact of LA in Australia, but rather, are posited as a reflection of potential sites demanding Canadian discretion. In this light, more research is evidently needed in these regards, and this paper only seeks to *assist* in the much bigger project of filling in this gap. Lastly, it is also important to note that the present writer recognizes her positionality within this discussion as neither a language professional with linguistic expertise nor as an individual who has been exposed to such a test of identification. Such acknowledged emotional, professional, and linguistic detachment from the subject in question is perceived as an advantage in expanding the impartial scope of subjectivity, though necessarily the following discussion appeals to expert interpretations where necessity demands.

3.5 Qualifying *Exclusion*

The primary necessary qualification demanded of this project is how *exclusion* is not defined solely on drawing a direct correlation between LA reports and rejected claims alone, but also how the process of LA, and the discriminatory nature upon whom it is imposed, provide added sites of ethical disengagement that render questionable the fair, legal, and impartial integrity of the test as supporting evidence; exclusion, in this sense, thus alludes to the intersecting ways that LA reflects a likely retreat from established standards by increasing the barriers to proving identity claims for specified group members.

3.6 Expectations

This paper acknowledges and concedes to the notion that Canada must create mechanisms of intervention to assist in efficient claims processing and to corroborate claimants'

origins, but it ultimately argues that LA, in all its herein exposed faults, fails to present an ideal procedural solution. As language professionals have thus far engaged in related research in the interest of pursuing linguistic justice, they have articulated recognition of the "need to be cautious about assuming that awareness can lead to justice" (Eades 2005, p. 514). In the Canadian environment where injustice as a consequence of LA has yet to occur, it is in the interest of prevention, and avoiding embarking on a path of regressive asylum integrity, that this paper works to expose the failings of the efficiency paradigm in this context.

4.1 Identity and Exclusion Through the Lens of Post-Colonial and Critical Race Discourses

This paper employs both post-colonial and critical race perspectives to provide insight into not only the identity politics informing the exclusionary context of the international asylum regime, but also to help inform a perception of Language Analysis (LA) as a more recent articulation of the exploitative and subordinating impact of a still very much hegemonic imperial gaze. Post-colonial and critical race theories share both a definitional predication on a subject of oppression as well as a common emphasis on "race" and identity (Valdes *et al.* 2002); while the former implies the "persistence of colonial legacies in post-independence cultures, not their disappearance or erasure" (Sugars 2004, p. xx), critical race theory analyses the impact of such legacies on intersecting race, class, and gender relationships, in an attempt to gauge how identity constructions inform contemporary forms of injustice and subordination (Alyward 1999; Valdes *et al.* 2002). Both theories advocate in the interest of an activist approach to voicing relationships between, and within, individual and group identities, and the two also importantly provide spaces for "making visible" the various lattice-works of oppression that have structured unequal systems of privilege, in both historic and contemporary contexts (Alyward 1999, p. 46-49). Together, these commonalities help provide the theoretical pulse of this paper, and work to situate LA within an operational context that exploits identities of Otherness.

4.2 Constructing the "Undocumented:" Identity Politics and Privileged Belonging in the Canadian Nation-State

If identity is inherently a social construct (Valdes *et al.* 2002) then identity politics can be considered the digestion and interpretation of identity in ways that are not mere "innocent reflections of the real," but rather, "constructions that are constitutive of it" (Barker 2005, p. 503). In this light, while Canada may wish to portray to the world a post-colonial national image of racial and cultural tolerance, a multicultural nation that is a "mecca for the oppressed of the world" (Alyward 1999, p. 46), lines of discrimination have long been demarcated by racialized hierarchies of privilege informing a national narrative of belonging (Bannerji 2000). Inheriting the colonial discourse of white/settler privilege, both Australia and Canada have engaged in

constructing the racialized Other as outsider in ways that cater to both the inclusionary and exclusionary nature of what Anderson (1991) has aptly framed the "imagined community."

With the enhanced racialization of human migration in the latter half of the 20th century, displaced peoples across the globe have not managed to evade various forms of First/Third world oppression and discrimination based on the "inherent particularism" of nation-state ideologies of "whiteness" informing ideal membership (Jopkke 2005, p. 44). In parallel with such processes has been the evolving strategic tendency toward naming the Other in ways that brand difference with inferiority and negativity (Bannerji 2000): this has included imposing such identities as criminal, fraud, bogus, alien, terrorist, illegal, and economic migrant, to name a few. Constructing the refugee as other than honorable has allowed for the manipulation of humanitarian rhetoric so as to mold an image of the genuine in ways that privilege the Canadian nation. Perhaps the most recent construction of refugee Othering lies in the widely-adopted term, the "undocumented" refugee, which has come to represent a problematic amalgamation of the above-noted labels: the conflation of the illegal migrant and the Convention refugee through the term "undocumented" has only further yielded to justified processes of imposing safeguards and controls to protect the victimized Canadian state, and its imaginary.

While Canada has acknowledged that the majority of persons who arrive without documents are genuine refugees, "who are unable, through no fault of their own, to obtain an identity document from their country of origin" (Morgan 1995, as cited in Brouwer 1999, p. 5), the reality remains that many of the undocumented upon whom the nation places added burdens are from countries whose linguistic, racial, and class profiles rest beyond the pages of the dominant white script informing Canadian identity.[20] Critical race theory demands consideration for the structures of inequality at play in how the notion of satisfactory[21] identity documents is being defined, especially in such African contexts where it is common for various cultures, including nomadic tribes, to be less dependent on print documents and written records to confirm identity (Brouwer 1999). It also forces consideration for which countries have lacked institutions

[20] Such ideological discriminations have been seen in practice: see Razack (2002) for a discussion of how over 5,000 refugees from Kosovo evaded identity document provisions and were fast-tracked through permanent residency processing, while all such benefits were denied to Somalis in a similar state of emergency.

[21] The notion of satisfactory documents is further problematised when we consider how many refugee claimants are in fact with documents, but rather, the issue has become one of officials deeming them "insufficient for the purposes of establishing identity" (see Razack 2002).

and central governments in place, such as Afghanistan and Somalia, even to issue identity documents to individuals fleeing persecution, and how this has in turn limited certain groups from satisfying the identity requirements and document standards presently demanded by nations of the West.

Since Canada began bearing witness to the increasing preponderance of asylum-seekers arriving without identity documents in the 1990s, a Western lens informed by perceptions of bogus claims yielded to Bill C-86, a 1993 amendment to the Immigration Act that legally and publicly sanctioned the idea that "a refugee who arrives at the border without appropriate identity documents has a greater burden of proving that he or she is a Convention Refugee" (Razack 2002, p. 200). As the logic of defending Canada through the detection and penalization of those without identity documents has proliferated, the result has meant that while some bodies may in fact be guilty of the crimes suggestive of the imposed label, *all* individuals claiming asylum are marked by the problematic stories and stereotypes that abound in the identity documents discussion; thus, all undocumented asylum-seekers are being painted, to borrow Razack's metaphor, without distinction and with the same brush (Razack 2002). In an environment where Canada has strategically constructed the racialized body as a subject of danger likely to besiege and betray the country through asylum abuse (Campbell 2000; Razack 2002), a privileged logic of principled in/exclusion has become rationalized, and the asylum seeker no longer the victim, but the perpetrator.

In such a context of asylum where LA has been embraced as a means to intervene and assist in the identity question, and in an environment whereby Canada and other Western nations have so effectively nourished an Us versus Them dichotomy of the un/deserving through the documents discourse, it becomes imperative that the study of LA as evidence be broached with caution and "skepticism toward dominant legal claims to neutrality, objectivity, color blindness and meritocracy" (Matsuda *et al.* 1993, as cited in Schneider 2003, p. 91). In the quasi-judicial institution of the Immigration and Refugee Board that makes decisions on refugee status in Canada, LA as a legitimate tool of integrity must be perceived and deconstructed through the very paradigm of exclusion that is presently being justified by the hegemonic Western discourse of the document problem. In so doing, it must question how hierarchies of privilege continue to colour access to protection, and thus to residency and membership in the Canadian community, through the avenue of asylum. It must evaluate the extent to which discriminating words of

common parlance negatively permeate the world of status decision-making in practice, and whether LA represents an expression of this trend.

4.3 Expanding Scope, Articulating "Harm:" Linking Theory to Evidence to Exclusion

Critical race theory was born out of a growing concern that traditional legal and critical theories lacked a "multidimensional" and "intersectional" approach to legal equality by not accounting for the complex layers of individual and group identity (Valdes *et al.* 2002). In this light, critical race theory innately rests on the motive to "protect the humanity of individuals [and] collectively discourage harming another human being" (Schneider 2003, p. 94). In a global humanitarian context of protection which inherently, and similarly, rests on the value and sanctity of the human spirit, and the need to honour and safeguard that spirit, LA must be situated within the growing discourse of a contemporary Western assault on asylum protection and a retreat from the values of protection informing the regime's mandate.

While critical race theory works in the interest of articulating how "harm" is perpetuated and imposed through doctrine, rule, principle or practice (Alyward 1999), this paper approaches the study of LA by engaging with, challenging, and working to expand "existing rights analysis" (p. 34). Harm is thus not only defined by questioning the exclusionary link between LA and rejected claims, but also by investigating the various sites of impact where such evidence presents an added discriminatory hurdle for certain claimants. In a context where status protection is rightfully both legally and procedurally individualized, this paper questions how LA as evidence may threaten the neutral subjectivities of decision-makers to impartial status consideration. It also questions how the imposition of this test on negatively framed undocumented claimants may stigmatize asylum-seekers in general, and those individuals undergoing analysis specifically.

4.4 Language Analysis and Identity: Interpreting Race, Nationality, and Language through the Imperial Gaze

While society has seemingly moved into a contemporary era where discrimination is no longer overtly race-based, but rather exists more covertly in the form of stereotyping and assumptions (Aylward 1999), it has likewise been argued that the West presently resides within

the realm of "xenoracism," where racism is now marked more by "cultural difference" than by race alone (Bonilla-Silva 2000; Fekete 2001). It is in this sense that this paper approaches language as a signifier of difference, and as a site of manipulation employed by nations of the West to detect and articulate identities of belonging. While construction of the "undocumented" undoubtedly finds a degree of premise in the land-origin claims of individuals, it is also a discourse that can be likewise located around the cultural markers of inferiority-studded difference such as language, custom, behavior, and others, that have helped shape the East-West oppositional paradigm.[22] It is in this light, and precisely because of the link between refugee law and policy, historic and contemporary narratives of belonging, and negative identity constructions, that domestic racial and cultural sensibilities have been molded, and it is precisely because of these factors that the exclusionary interest inherent[23] in the imperial gaze is seemingly perpetuated through the use of LA.

The gaze views the centre of power distribution in the world through a Eurocentric colonial and imperial lens, thus this paper accordingly employs the "postcolonial" as an "ideological orientation" that continues to shadow contemporary processes of cultural domination through hierarchical and hegemonic practices (Mishra and Hodget 1994, p. 284). Recent research has already shed light on how expectations of evidence at the Immigration and Refugee Board operate within a power dynamic favouring the perspective of the viewer to that of the viewed (Razack 1998; Smith 2007; Dicks 2007), and this study of LA aims to develop this theoretical underpinning. In addition to struggling to combat the debilitating effects of imposed labels, claimants upon whom LA is forced must also perform, and satisfy standards of conformity, as expected of subjects under the gaze.

The very expectation that the language spoken by an asylum-seeker can be linked to a geographic area of origin yields insight into the problematic Western assumption informed by "one language, one nation" constructions of national identity (Anderson 1991). It also shows weakness for the Eurocentric concept of *homogenism:* how the "genesis of the notion of language and borders lies in the shared 'imagining' of spatially bounded, linguistically homogeneous nations" (Urciuoli 1995, p. 527). In countries of the West where a synonymous

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[22] See Edward Said's *Orientalism* for a deeper discussion of the evolution of the East/West paradigm.

[23] Although not always consciously imposed (see Phillipson 1992).

understanding links linguistic commonality and national identity, the consequently charged and politicized nature of cultural identity has had the effect of forging a distinctive community of belonging (Cohen 1993) – the borders to which, Western nations defend, linguistic qualifiers can help make near completely im/porous.[24]

If we take language as a basic component of culture, then we can begin to deconstruct how "issues of cultural representation are 'political' because intrinsically they are bound up with questions of power [...] [and] the power of representation lies in its enabling some kinds of knowledge to exist while excludes other ways of seeing" (Barker 2005, p. 503). The asymmetrical power relationship inherent in the imposition of LA on prescribed groups, and the expectation of claimants to reveal linguistic repertoires synonymous with a Western view of cultural speech practices, suggest how it is not only the controversial integrity of LA as a linguistic tool, but also the underlying expectation of conformity to Western dictate, that yields to structures of inequality informing status decision-making. In order to gain asylum protection, claimants should ideally receive LA reports that complement Western stereotypes of language and culture, the very premise to which undermines the cultural and linguistic authenticity, as well as the uniqueness of individual experiences, that demarcate identities of belonging outside the boundaries of the Western world. In all its expectations, this paper thus departs from an awareness of LA as an articulation of *linguicisim*, what Phillipson (1992) has aptly referred to as the "ideologies, structures and practices which are used to legitimate, effectuate, and reproduce an unequal division of power and resources [...] between groups which are defined on the basis of language" (p. 47).

Such problematic assumptions informing LA demand that to articulate ones nationality claim successfully without documents is to conform to Western standards informing interpretations of identity. In this regard, LA then becomes essentially transformed from a site of cultural racism to one of discrimination based on origin. Even in countries such as Australia that uphold the notion that an area of language socialization is not determinative of nationality, the reliance of such countries on Western linguistic scholarship, Western understandings of language, culture, and geopolitical identities, as well as the politicized function of LA in status

[24] Eades (2005) relevantly notes: "While an important consequence of this homogenism is that it ignores the realities of language variation and bilingual speech, these realities have been shown to be central to understanding the language practices of asylum seekers' (p. 511); see also Blommaert (2001).

determination itself, all inform the expectation of asylum seekers either to corroborate their origin claim through such analyses, or fall victim to how and where the lines of power are drawn, and their consequences.

In these ways, the imperial gaze of the West seems to propagate belonging across a spectrum of imprisoning identity constructions that distance Us from Them, and as long as "control of the representations of reality" remains in the hands of the powerful (Gal 1989, p. 348), it seems that asylum seekers are likely to remain servant and victim to the crown. In such a way, postcolonial theory provides an illuminating context for interpreting how LA as text reflects on Western neocolonial efforts to reconstruct the geographies of linguistic and national borders in order to exploit power inequalities to advantage. While the land being occupied in this sense may rest in an imagined space, and not a literal one, an assault on asylum can be proposed through the very nature of the assault on individual and cultural identities that LA encourages. While critical race and post-colonial theories inform how "the Other can only be known on the colonizer's terms" (Valdes *et al.* 2002, p. 211), the question of how the efficiency paradigm endangers masking concessions to refugee rights through LA is the subject to which this paper now turns.

> *The Immigration and Refugee Board is Canada's largest independent administrative tribunal. Its mission is to make well-reasoned decisions on immigration matters, efficiently, fairly, and in accordance with the law*
> IRB 2008

What the above mandate denotes is a problematic concern informing the orientation of IRB decision-making; what is problematic is *not* that these values are espoused to rest seemingly on equal footing with respect to status determination in the country, but the fact that in reality they do not, and partially because the lauded values of what is efficient, what is fair, and what is legal are in many ways confrontational and not complementary goals. In an extremely intimate domestic context where practical, altruistic, legal, ethical, and inter/national values and goals collide, refugee status determination so articulated seemingly advocates an attempt to bridge these many chasms. But while the above statement acknowledges the noble and righteous values here expounded, it also silences the social and cultural dichotomies prevailing in many asylum systems of the West, where inherent power structures and hierarchies of privilege are realized. The noted verbiage above similarly masks the political and ideologically charged biases that inform the mandate's execution.

While the IRB has articulated difficulty in balancing the concerns for maintaining efficiency and fairness (IRB 2006), the following discussion uses Language Analysis (LA) to expose how the adoption of such evidence in Canada would implicate the nation in concessions to various forms of legal and ethical disengagement in the prioritized Canadian interest of the efficient processing of status determination, whether consciously or unconsciously so informed. By addressing the issues of *effectiveness*, *impact*, *timeliness* and *cost*, the following interrogates the efficiency rhetoric informing the Canadian perspective regarding these concerns, and follows with illustrations of the Australian case example. In an asylum context where the reality of undocumented claims problematically impinges on the efficient processing of status determination, this paper exposes the undocumented claimant as a vulnerable subject likely to be prone to victimization through a Canadian efficiency discourse, should implementation proceed.

It is important to note that the proceedings of the Refugee Protection Division (RPD) of the IRB are not "bound by any legal or technical rules of evidence," and it can thus base

decisions on evidence that is "*considered* credible or trustworthy in the circumstances" (IRB 2003) (my emphasis). But in a context where legal and quality decisions of the IRB are bound by the institution's perception of the integrity of evidence, both its reliable and replicable content and its likewise digestion by decision-makers, the following discussion illuminates the controversial distinction between what evidence in status determination *should be*, and the departure from this standard that LA use in Canada is likely to reflect.

5.1 Interrogating Language Analysis as *Effective* Evidence

This discussion begins by addressing the subject of Language Analysis (LA) *effectiveness* in status decision-making. For refugee status determination to be efficiently executed in ways that honor legal and moral commitments to asylum seekers, the following represents the first argument in a broader articulation of how LA is likely to undermine the right to asylum for undocumented claimants in Canada.

5.1.1 *A Canadian Articulation*

While the IRB does acknowledge that LA is only "one of the methods that may assist in determining a claimant's origin" (IRB 2007a), this caution of possibility is immediately tempered by a statement assertion on the IRB website: one that explicitly voices how LA has been "in use for approximately 14 years by many different states," thus speaking to "the reliability of language analysis in refugee determination" (IRB 2007b, answer 11). With such preconceived positive notions regarding the historical utility and validity of LA as evidence here attested to, neither of the two IRB online statements (IRB 2007a; IRB 2007b) acknowledges the problematic and controversial practices that have been widely criticized in the many countries Canada claims have used LA "reliably," of which Australia is one.

While *it is* one of the main aims of the pilot project to explore the in/effectiveness of LA as evidence in decision-making and weigh its "potential value" (IRB 2007a), it cannot be expected for all issues to be fully addressed in the brief online statements by the IRB. But importantly, what is very clear is that Canada has looked to its international counterparts for an example of LA working as valuable evidence in a prioritized efficiency context – at least it has *claimed* to have done so. In this regard, the IRB has either consciously or unconsciously articulated effectiveness in ways that silence the negative implications for claimant origin determinations realized in practices abroad. The following discussion exposes the harsh realities that inform LA use in Australia – the very ones that are presently being masked by Canada's articulation of LA as "reliable."

5.1.2 *Language Analysis in Australia: Subverting a Canadian Perspective of Ethical and Fair Evidence*

While the preceding literature review has addressed the various linguistic issues that pose a site of ethical disengagement for Western governments, the following discussion exposes how LA in Australia has largely failed in its goal of providing effective, here defined as credible, evidentiary testimony, and essentially because of the problems inherent in perceiving it as such. Three major issues of concern in this national context include: 1) the failures of LA to provide definitive expert evidence; 2) the presence and prevalence of conflicting LA reports; and 3) the variation in decision-maker perspective regarding LA effectiveness.

5.1.2.1 An Issue of Qualifying Certainty

Perhaps one of the most problematic articulations expressed by Canada is the desire for the pilot project to determine "the proportion of language analysis reports that will provide a definitive result by either supporting or not supporting the claimed region of origin" (IRB 2007b, answer 18). While both Canada and Australia have recognized the Guidelines and the linguistic assertion that LA reports should use qualifying terms of probability, for example, it is unlikely, possible, likely, or highly likely that an individual was socialized in a given country (Language and National Origin Group 2004, Guideline 4), Australian LA reports have reflected a problematic tendency to yield assertions of "certainty rather than likelihood" (Patrick n.d., as cited in Cleary 2005).

Not only is the concerning issue the fact that Canada has expectations for the linguistic process to provide conclusive determinations regarding the origin claim, but Canada has also articulated the intention of following Australian's example by exporting LA services to companies of international repute in Western Europe (IRB 2007b, answer 12) – for-profit organizations such as Eqvator and Sprakab in Stockholm that have sought to cater to the Western need for such analyses, and in the process have reflected motives that inherently threaten the integrity of the procedure and its application. Accordingly, in order to be effective in aiding in the determination of claimant origin, "the conclusions [have been] framed in terms of unrealistically definite identification" (Eades 2003, p. 187), as appeal case reports have repeatedly reflected.

The evidence of one LA report was re-articulated in the Refugee Review Tribunal (RRT) decision of Short (2000), denoting the analyst's certainty that "the applicant originates from Pakistan." In another case, the analyst concluded that the applicant's language background was "with certainty from: Pakistan" (Younes 2004). Interestingly though, not all analysts succumb to this tendency, and some better qualify their determinations than others. Instead of commenting on origin conclusively, Mullin (2004b) has suggested, rather, one analyst's determination that the "[a]pplicant most probably lived for a long time in an area where Urdu is spoken, most likely in Quetta, Pakistan;" another more recent Sprakab LA report reflects the better qualified determination that the individual "most probably has his language background in Afghanistan" (McIntosh 2006). While one could perhaps argue that growing international criticism has paralleled a general improvement for such companies to qualify more accurately their determinations in terms of probability, there is no conclusive evidence or research defending such a theory. What *is* clear though is that the problematic varying degrees to which certainty has been qualified in Australia implicates the range of both trained and untrained analysts performing such analyses, as well as the lack of standards informing such reporting: realities that together usurp the integrity of such evidence as credible.

A final thought in this regard is what the companies themselves have articulated as within their capacities to achieve. In a context where Eqvator has boasted success rates of 90 per cent and lower *and* publicly acknowledged that "[l]ike all analyses [...] ours are not always 100 per cent reliable" (Daley 2002a), complemented by the fact that Sprakab has similarly acknowledged the "chance we may be wrong" (Barnett and Brace 2002, as cited in Reath 2004, p. 212), Canada should be concerned with the limitations of LA to be depended upon as a credible tool in making origin determinations. It is also relevant and interesting to note that the company Eqvator has recently been incorporated into the communications firm Semantix, which provides a range of consulting and language-based services, but which *no longer* includes LA. This fact raises many issues regarding the tool's integrity, and renders questionable whether services in this interest have ceased in any part due to the negative public discourse and controversy on the subject.

5.1.2.2 A Problematic Prevalence of Contra-Analysis

A second issue of concern is the presence and prevalence of contesting language analyses – a fact that is nowhere acknowledged on any of Canada's statements articulating the

"reliability" of LA. An evident threat to the integrity claims of the test, made by both Australia and producing companies respectively, and perhaps the best example of the ineffectiveness of the tool, are two facts: 1) the reality that contra-analysis reports exist, and 2) the fact that companies presently advertise and profit off of such services, and have in fact experienced an increased demand for this expertise.

On a first note, the very fact that contradicting LA reports are present in this context is a testament to the linguistic failings of LA as credible testimony. But also important is what the presence of conflicting reports implies about the effectiveness of LA as an assistive tool. The evidentiary/integrity nexus of concern is well reflected in the RRT report of Blount (2002), who notes the stark contrast between two analyses presented: one that concludes "the applicant's Hazaragi dialect is *Pakistani*" and "may with considerable certainty be said to originate from Pakistan," while the second opposingly states that "the Applicant speaks the Hazaragi dialect of Dari spoken by Hazaras within *Afghanistan* [...] [and does] not agree that the Applicant has a Pakistani accent or that he pronounces many words with a Pakistani pronunciation," as the first report argues (my emphasis). In Australia, specifically, such examples proliferate throughout the RRT database (Boddison 2000; Eades *et al.* 2003), not only exposing the dangers of the unqualified expressions of certainty noted above, but also how the confrontational nature of such conflicting evidence works to *complicate* further, instead of simplify, the decision-makers' weighing of the evidence.

But what is perhaps most essential to this discussion, however, is the direct correlation between conflicting LA reports and the common disregard for such evidence by decision-makers, who in many cases have demonstrated a preference for depending on alternative, more trusted, evidentiary factors present in the case. Australian RRT online reports are replete with examples that effectuate results similar to the one noted here, in the appeal case presided over by Mullin (2004a):

> [T]he second language analysis indicates that the Applicant has not lived for any significant time outside the Hazarajat [geographic region of Afghanistan]. While the Tribunal was not involved in the commissioning of this report, which was obtained by the Applicant's advisor, it is prepared to accept it to the extent that it refutes the findings of the first language analysis report.

In similar instances, conflicting reports have not only quashed the articulations of the other, but have provided justification for decision-maker confirmations regarding how "difficult [it is] to

rely on language analysis as a determining factor by itself" (Blount 2002). Also noteworthy is the assertion that such situations demand the claimant is given the benefit of the doubt in his or her origin claim (Duckmanton 2002).

Additionally of relevance is the reality that companies like De Taal Studio in Amsterdam are now advertising engagement in "contra-expertise," marketing online that they provide "language analysis, contra-analysis or a second opinion by professional linguists in all languages" (De Taal Studio Homepage 2008) – a reality that only brings to bear more ethical and competency questions vis-à-vis the LA process, and only posits added sites of complication for those assessing the integrity of evidence widely espoused to *ease* the decision-making burden. With the evidently growing frequency with which contradictory analyses have been presented in the Netherlands (Eades and Arends 2004), in Australia during the early years of the new millennium (Eades *et al.* 2003), and generally across the West, Canada must question with what degree of skill, competency, and "highly tuned accuracy" a company like Sprakab can claim that "a language analysis provides a *very clear* guide to determine an individual's language background" (Sprakab Homepage 2008) (my emphasis).

5.1.2.3 Variation in Decision-Maker Perspective

A third and final note regarding the effectiveness debate, and compounding the issue of contra-analysis, is the as of yet unacknowledged link between the IRB context, wherein "the intention of the Board is solely to determine whether this tool assists decision-makers in rendering a decision" (IRB 2007b, answer 14), and the evident need for a common perception of LA effectiveness as a central component to its operational capacity to assist. Working against this logic, though, is the Australian example that sheds light on the problematic variation of opinion informing the digestion of such evidence by decision-makers. While the LA technique is largely flawed as presently performed, even if one assumes some assisting capacities of the tool to aid in decision-making, evidentiary integrity seems ultimately compromised by the methodology informing its application, and the fact that Australia ensures "no uniform standard for evaluating the tests as evidence" (Erard 2003).

This lack of uniformity is illustrated in countless controversial ways in RRT decisions in Australia, and inherently threatens the notion of equality informing the probative integrity of LA; the major issue here being the distinction between those who challenge the value of LA, and

those who are less adamant in this regard. Respecting the former, decision-makers have addressed with vehemence the issue of *anonymity* (Younes 2004), a practice advocated in the interest of analyst protection, even though it inherently challenges the demand for transparency needed to justify analyst qualifications, skills, and professional capacity. This issue has paralleled a wide spectrum of concerning observations, including also the *poor quality* and *distortion* that some argue pervade the analyses in question, and, as Short (2000) notes here, also problematically yield to unjustified and unqualified determinative conclusions respecting claimant identity:

> The analysis notes that the Applicant speaks the Hazaragi dialect of Dari which is mainly spoken in central Afghanistan but also in Pakistan and Iran [...]. He also used the Urdu word for 'rice' when asked what he had had for dinner the previous night [...]. The analysis states that the Applicant also pronounces some words with a slight Urdu accent. The analysis proceeds to state that '[t]he above mentioned points indicate that the applicant originates from Pakistan' although it does not indicate which, if any of the above-mentioned points the analyst believed were logically probative of this conclusion. The analysis concludes with the statement that the dialect used by the Applicant 'may with considerable certainty be said to originate from the Quetta region' of Pakistan. No explanation is provided for this conclusion.

Regarding the integrity of LA there are countless examples where the reports as evidence have been rejected or challenged in similar ways, either because of a lack of substantiating documentation (White 2003), being "inadequate" (Younes 2004), or seeming both biased and partial to contradicting the individual's origin claim (Jacovides 2001). To the contrary, though, there are also examples whereby decision-makers have conceded to the certainty assertions of analysts, without question, and have privileged the DIMIA analyses over the contra-analysis provided by the claimant's legal representative (Eades *et al.* 2003; Reath 2004).

In the end, the fact that a range of interpretations regarding LA effectiveness exists inherently exposes the tools' often lethargic effect in significantly assisting in reputable decision-making in many cases: especially when decision-maker articulations range from LA as "an *important* investigative tool" (Duckmanton 2002), "*reliable*" (McIntosh 2006) and "an *expert* report" (Blount 2002), to opposing views of LA being of "*some* evidentiary value" (Boyd 2002), an "*imprecise* tool" (Smyth 2004), and "*dangerous*" (Layton 2001) (my emphasis). When decision-makers themselves have expressed a range of varying allegiances to the predictive capacities of an LA report to yield inferences beneficial to the determination process,

governments adopting and employing such tools in the interests of efficiency must acknowledge the ethical values being compromised in the process of doing so. Even more so should be the case when one considers the more recent general trend represented in RRT published reports, whereby LA is largely referred to by decision-makers in "negative terms" – the general impression being that the tool "now carries little weight" (Eades 2005).

5.1.3 *A Discussion of Canadian Implications: Weakening the Moral Pulse?*

The utility of LA is inherently relative to the perception of its functional capacities to assist in decision-making. A discussion of implications, if one were to translate the Australian example to the North American frontier, would likely have many significant ramifications that could implicate Canadian asylum stakeholders in processes that challenge the moral fabric of status determination, and work in an exclusionary interest against the undocumented asylum seeker.

Respecting the certainty determinations noted above, Canada must acknowledge that LA, when performed in the qualified context that linguistic capacities allow, can provide neither the definitive nor the conclusive determinations that the West expects and should continue to demand of expert evidence. While LA could be considered truly effective, and thus working in the interest of efficiency, *if* it could do so, the fact that inherently it cannot, and yet companies have repeatedly articulated findings in such a way, exposes how evidentiary digestion in Canada is likely to be threatened through the accuracy assertions informing origin determinations in LA reports.

The mere presence of contradictory evidence inherently questions the validity of testing methods and standards safeguarding the quality of LA as both language tool and evidence – a factor that should clearly inform the extent to which such information leads to inferences vis-à-vis an individual's nationality. Were Canada to proceed on the notion that LA is effective, one would be reminded that the country, like Australia, bestows upon decision-makers the right to weigh evidence based "on the circumstances of each individual case" (Commonwealth of Australia 2006, p. 133) and "in consideration of all available evidence" (IRB 2007a). While this is not new to either context, the discussions above describe how variations in attitude towards the interpretation of LA reports will have likely implications for its inconsistent effect on the weight of decisions. In yielding to the inferences of decision-makers in this regard, concessions may be

made that reflect the Australian example of inconsistent, non-credible, and unreliable LA reporting directly influencing decision outcomes. In an IRB context where evidence represents the "vehicle through which facts in issue are proved or disproved" (IRB 2003), the encouraged dependency of decision-makers on such a tool poses to undermine due process protections presently established to protect the refugee interest.

Considering, finally, the fact that Canada has specific guidelines outlining the factors to consider when determining the admissibility and weight of expert evidence, and also how these guidelines draw particular attention to the issue of "evidence from other respected experts in the field [who] hold a different opinion on the subject" (IRB 2003, sec.6.7.1), the present author questions whether such realities should perhaps negate a Canadian discussion of LA effectiveness altogether. In light of the fact that Canada has in many ways set precedents on creating guidelines to assist in status decision-making, even if some form of standardized LA methodology was encouraged for the interpretation of such evidence, decision-makers are not legally bound by such texts nor held accountable for deviating from them (Showler 2006). Given political pressure for low acceptance rates, individual biases, and the fact that guidelines produced to address evidentiary concerns do not "prevent" problems from occurring (Smith 2007), it seems probable that the variation in opinion informing the Australian context would likely translate to the Canadian one as well.

Ultimately, if the IRB were to ignore the problematic conclusive determinations being made by language analysts, and were to similarly ignore the significance of contradictory reports and diverging decision-making opinions regarding LA effectiveness, all in the prescribed interest of assisting in the decision-making process, what is becoming increasingly evident is that the undocumented claimants upon whom the tool would be imposed could very likely fall prey to an exclusionary pulse, and be less protected by a humanitarian one. In so doing, it remains quite plausible that such actions could lead to unethical and unfair correlations between evidentiary digestion and *impact* – the subject to which this discussion now turns.

5.2 Talking *Impact*, Exposing Inequality

In order for the efficiency rhetoric espoused by the IRB to balance all interests concerned, perhaps most paramount to the discussion of Language Analysis (LA) is the correlation between perceived effectiveness and ultimate consequences. In a context where the undocumented claimant is the identified target to be exposed to this form of testing, this paper now questions the unequal and partial impacts of the tool to selective group dis/advantage.

5.2.1 *The IRB and Claimed Impartiality*

To ensure that LA works effectively in the interest of improving the efficient processing of claims on domestic soil, both an ethical and legal interrogation of use should yield to the application of such evidence in ways that guarantee "all refugees are protected" (CCR 2004a); thus, an impact analysis should inherently yield to consequences that complement Canada's mandated values. Especially important in this regard is the country's commitment to impartial decision-making premised on a legal mandate of equality for all – values to which the nation is particularly bound by both the non-discrimination clause of Article 3 in the Refugee Convention, and also under section 15(1) of the Canadian Charter of Rights and Freedoms.

While the IRB may claim that it "does not have a preferred position on the outcome" of the project underway, an issue of concern is what the pilot project has not publicly addressed, how the imposition of LA could likely have very clear implications for the unequal treatment of undocumented asylum seekers in their plight for protection, and whether there might be prejudicial motives informing this initiative. Furthermore, the Canadian articulation remains sufficiently devoid of acknowledging how other countries, like Australia, have publicly articulated the value of LA in exposing fraudulent claimants, negative connotations that speak to a degree of partiality informing the desired impact of LA. While the Canadian initiative is presently measuring the consequences of the test based on "the impact that [it] will have in decision-making" (IRB 2007b, answer 18), the project is *not* analyzing what the Australian example illuminates as of concern – the controversial ramifications that LA could have not only on decision-makers and decision-making (i.e. the eventual decision outcome), but more importantly, on the *applicant individuals themselves*, and their respective engagement with the status determination process.

5.2.2 *A Problem of Quantifying Effective Consequences in Australia*

While LA has been employed rather covertly in Australia, with limited government attention to the public controversy, it has been more recently established that LA use in the country has yielded two major results. In a national context where the majority of undocumented individuals upon whom LA has been imposed have claimed Afghan nationality, LA reports have corroborated roughly 78 per cent of Afghan claims made.[25] A second observation is that approximately 1805 of the 1900 asylum seekers from Afghanistan exposed to LA between 1999 and 2005[26] "were ultimately successful applicants, regardless of the results of LA" (Eades, personal communication, August 11, 2008). Accordingly, the DIMIA has heralded LA use as "particularly helpful" in working in both the Afghan *and* national interest of addressing identity questions, and secondly, as *not* having had the adverse effect of excluding claimants from protection (DIMIA 2005, as cited in Eades, personal communication, August 11, 2008).

But there are some necessary qualifications to make here. Firstly, one must question whether a 78 per cent corroboration rate is satisfactory enough when dealing with life or death consequences. A second note of import is the lack of a statistical narrative informing the impact of LA on claimants who are not from Afghanistan, but who have also undergone LA in Australia: Daley (2002b) notes that between December 1999 and July 2002 alone approximately 2500 asylum seekers were exposed to LA in the country, and Eades (personal communication, August 11, 2008) notes an awareness of Algerian, Burmese, and Sri Lankan individuals among this group. Such evidence suggests that more than 600 claimant experiences of LA have gone publicly unaccounted for. What this ultimately means is that there is likelihood that more than just the 22 per cent of Afghans (285 individuals) have been forced to defend their origin claim against the inferences made by language analysts. What this also implies is that the Australian government has, perhaps strategically, defined effectiveness quantitatively in terms of a *majority benefit*.

The evident need here is to lift the blinding veil of the statistical narrative. In so doing, it is necessary to consider also the presently prevailing discourse of the "undocumented" that has

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[25] It is relevant to note that 1482 out of a total 1900 Afghan claimants exposed to LA between 1999 and 2005 were granted visas by the DIMIA, presumably on the basis that LA did not contradict their nationality claim (Eades, personal communication, August 11, 2008).

[26] This time period is relevant because it reflects the most recent Australian Government details held in possession by the present author.

helped yield an Us versus Them mentality in the West, and also ideologically and politically helped justify various forms of principled in/exclusion – factors which have ultimately played a role in informing LA practices in Australia. What is relevant here is exposing the story behind the numbers in the Australian context and revealing how LA practices have indeed reflected a discriminatory burden for claimants in the country; the primary difference between the Australian and Canadian context being that the asylum system of the former has provided an accessible forum for claimants to challenge in many ways the oppressive context within which LA has operated. The following discussion works in the interest of articulating how the IRB would problematically deny a similar stage for confronting the discriminating impacts of this tool.

5.2.3 *Disguising Discrimination? Cautioning Against Canadian Implications for Unequal Treatment*

> *Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability*
> Canadian Charter of Rights and Freedoms, sec. 51.1 in Constitution Act, 1982

In a context where the IRB is legally obliged to safeguard against discriminatory[27] practices, this discussion proceeds forth to expose how LA use in Australia, if translated to the Canadian domain, is likely to subvert Canada's commitment to the above-referenced legal and ethical tenet. In so doing, and because we cannot expect that LA reports commissioned in Canada are likely to corroborate equally such a high number of claims, this discussion must necessarily precede the receipt of LA reports, whether in the applicant's favour or not, and first address the initial stage at which LA proves discriminatory: the stage at which certain asylum seeking groups are first identified and labeled as being "undocumented."

[27] The term "discrimination" is here employed loosely in the interest of exposing unequal and unfair experiential differences imposed by LA, and not understood solely within the boundaries of a strictly legal interpretation.

5.2.3.1 "Equal Before and Under the Law:" a Case of Selective Group Discrimination?

This discussion of discrimination is inherently marked by the distinction between what *should* be the case respecting equal access to protection, and how LA challenges procedural safeguards "in cases where identity is an issue" (IRB 2007a, answer 14). While the essential problematic here is one of *which* identities are being privileged above others and why, it is more than simply an issue of who is able to arrive in the West with documents and who without them, but also, which groups of undocumented have been publicly labeled as being so.

During the 1990s, Somalia and the former Yugoslavia both experienced a refugee-producing crisis that yielded to thousands of displaced peoples in need of protection; Canada responded to the latter with speed and vigor, while initially largely ignoring the Somali plight. While neither group had any documents to uphold their identity claims, the Canadian response reflected a privileged hierarchy of identities favouring certain groups above others (Razack 2002). Such realities of selective discrimination proliferating across the West have led Richmond (1993) to propose the issue of a "global apartheid," wherein a Western narrative of belonging inherently favours that the "huddled masses should preferably be white, if they are to receive much help at all" (p. 10). While such a race narrative has informed historic processes of discrimination in both Australia and Canada, the imposition of LA on certain prescribed groups is here argued to be perpetuated along lines of socio-cultural difference – a more covertly articulated form of discriminatory group privileging.

In Australia, LA has been largely imposed on boatloads of individuals claiming Afghan nationality. Largely ignoring the legitimacy of their lack of documentation – the fact that no central government has existed to issue any such documents – Australia has worked throughout the 1990s and the new millennium to diminish Afghan moral credibility based on their smuggled entry into the nation. Castigated as undeserving and jumping the queue, Australia has used the "tropes of security and cultural difference to marginalize the credentials of migrants seeking refuge" in the country (Kampmark 2006, p. 1). The documents discourse has been employed in Australia to mark the un/deserving migrant, likewise marred by images of the bogus and fraudulent claimant. It is in this exclusionary context that this paper argues LA has been employed: "not a blanket dismissal of their applications on purely racial grounds, but a careful exclusion based on an apparently scrupulous application of culturally sensitive criteria" (p. 2). As documents have become the "criteria" by which to identify and perpetuate belonging,

Afghans in Australia have been discriminately exposed to added burdens of proof in the determination process by the imposition of LA.

The Canadian context has paralleled a similar trajectory of labeling in ways that have challenged the identity claims of certain groups through the imposition of LA. Canada has publicly articulated why Somali, Afghan, and Sri Lankan claimants are being tested in the pilot project, as all three are nationals of countries that have had limited capacities by which to retain "reliable" identity documentation (IRB 2007b, answer 7). What Canada has *not* articulated is a national history of confrontation with such individuals that has encouraged policies and initiatives by which to exclude these groups from the Canadian nation, most recently through the documents discourse: Somalis in the country have not only been publicly linked to welfare fraud and system abuse but have also been denied permanent residency in Canada based on a lack of identity documentation (Razack 2002). Afghans and Sri Lankans have likewise had any documentation they *have* arrived with often discriminately and frequently discounted, while they have also been publicly linked with racial profiling, and discourses of insecurity, terror, and threats to national security (Dua *et al.* 2005). Finally, while there "has been a blurring in the popular imagination of Muslims to include those who are South Asian, Middle Eastern, and North African" (p. 7), all three groups have been publicly labeled in their Otherness, constantly victims of interventionist security certificates, "intrusive interviewing," and public suspicion regarding migration motives (CCR 2004b).

Given the exclusionary context within which asylum presently operates, it is perhaps unsurprising that these groups have been targeted for the pilot project. While in theory LA *could* prove to provide the identity corroboration needed to bestow status procedurally more efficiently, we must consider the unjust and unfair burdens that the tool imposes on selected groups in Australia, and whether these realities, in the end, may expose the "undocumented" label as merely an affront to a more covertly nourished desire to expose and exclude in Canada, should implementation proceed.

In a context where the IRB's Refugee Protection Division "cannot disbelieve a claimant merely because the claimant presents no documentary or other evidence to confirm his or her testimony" (IRB 2004a), this has proven exactly the case in Australia where the imposition of LA on specified groups has directly correlated with a desire to "undermine the credibility" of the individual (Australian Immigration Minister, Phillip Ruddock, as cited in Heinrichs 2001). In

Australia, one might also raise the extent to which the imposition of LA on certain individuals has pre-informed judgments of credibility, especially in cases where DIMIA-sanctioned evidence has been privileged over claimant testimony and witnesses. In so postulating, refugees in Australia have been exposed to harsher pressures of judgment, especially in light of the general skepticism abounding in the documents discourse and the correlation to imposed LA. Claimants have also been forced not only to *state,* but also *defend,* their claim against the DIMIA, an institution that has seemingly taken on the role of prosecutor in a process that has always claimed to be non-adversarial. In contrast to other groups of undocumented claimants not likewise exposed to the added evidentiary burdens of non-consensual LA testing, claimants upon whom the tool *has* been imposed have endured the added challenges of a re-imposed burden of proof not faced by others; a removed benefit of the doubt; an unfair tendency for decision-makers to use LA as only one piece of evidence to challenge the origin claim; and the exclusionary capacity of LA to justify lack of credibility determinations. These added burdens are well articulated in the RRT report of Jacovides (2002) who notes, in the context of conflicting LA reports, that "if the evidence contradicts the applicant's claims, regarding identity and country of origin, the Tribunal must *rigorously* investigate such claims" (my emphasis).

While it is obvious that a lack of documents threatens the efficiency of the process of status determination, and LA *could* aid in this regard, the pending question is one of compromise, as well as the potential implications for unfair and unequal treatment that need to be acknowledged in the Canadian context. In Australia, skepticism has led to a negative and unequal impact on the decision-making process for identified claimants, and has also yielded to a harsh correlation between those exposed to the tool and "the conclusion that many people claiming to be from Afghanistan [are] not genuine" (Mercer 2002). In this regard, there has been a very public acknowledgement that LA has been linked to "a major immigration racket" justifying "large-scale rejection of visas issued to people claiming to be Afghan refugees." It has also been connected with the decision "to cancel a batch of nearly 50 visas granted to people" believed to have been given protection on "false pretenses" (Mercer 2002).

For many reasons, Canada should be concerned with the project under consideration. Firstly, widespread skepticism regarding applicant identities that inform LA use threatens the values of natural justice and the demand for the impartiality and neutrality of decision-makers. This is a concern especially where it may lead to biases and pre-informed judgments that

applicants would be unable to challenge legally, and especially considering that IRB members continue to be politically appointed to their posts, and thus, implicated in perpetuating government exclusionary motives. Secondly, in a context where status determination is necessarily individualized, the imposition of LA on prescribed groups offers potential for discriminatory consequences, as generalizing group norms through the imposition of the tool could coincide with "the deconstruction of heterogeneity in the procedure" (Maryns 2006, p. 341). In an IRB context where patterns are often observed by decision-makers and "word spreads instantly" (Stoffman, 2002, p. 168), there is cause for concern that certain individual experiences of LA will perhaps be used as a "barometer of experience" (Valdes *et al.* 2002, p. 3), and thus stigmas and problematic generalizations may yield to unequal decision outcomes – a form of "guilt by association" reminiscent of the McCarthy era (Richmond 1993) with likely potential to yield to unjust and unfair burdens on the applicants part. Indeed, based on the Australian reflection of variable opinion in this regard, LA use appears to reflect well concerns noted in IRB guidelines where "there may be cases where the evidence should not be admitted at all," especially considering the potential for prejudicial values to outweigh probative ones (IRB 2003).

What these inconsistencies and inequalities all speak to, in the end, is how LA in Canada proposes to encumber discriminately the determination process for those undergoing this form of testing, while simultaneously advantaging those who are not. It also presents the capacity for the un/deserving nature of a claim to be pre-conditioned before the hearing begins, and thus, possibly, to be unfairly viewed and evaluated by decision-makers when it comes to the application of the law.

5.2.3.2 *"Equal Protection:" a Question of Equitable and Fair Access to Protection Resources*

The question of equitable and fair access to protection resources is a necessary one to raise, especially since the imposition of LA suggests that the traditional means by which claimants have supported their origin claims (affidavits, witnesses, answering geographical and cultural questions, etc.) have become, in the context of the "undocumented" claimant, no longer sufficient. In this regard, the Australian example has demonstrated that lawyers play an integral role in challenging LA in the asylum context, and many have reflected an adept capacity to provide intelligent counter-argumentation in the interests of undermining the value of LA

evidence: often demonstrated in the form of verbal challenges to its integrity (Short 2000); providing the RRT with supporting documentation questioning the validity of LA in determining national origin (Younes 2004); legally challenging the competency and qualifications of the analyst providing such expert evidence (Reath 2004); and finally, in providing contra-analysis (Mullin 2004b).

While Eades *et al.* (2003) have demonstrated that appeal cases involving the presence of contradicting LA evidence are likely to result in decision-makers overturning the original DIMIA decision (in cases where identity is an issue), what is problematic to note is that the legal representative is one *inconsistent* variable in this chain of events: they play a controversial role in that there is significant variation in perspective regarding the utility of LA, and the willingness, and perceptiveness of the need, to challenge such evidence. In a context where the ability to provide counter-argumentation via a legal representative is often paramount to the decision-outcome (Kagan 2006), Reath (2004) has noted the variation in lawyer perspective as a site of unequal protection, as "some lawyers at the RRT question the authority of LAAP[28] and others do not, [and] therefore the outcome of the appeal process for an asylum-seeker can vary drastically depending on the kind of lawyer who handles their case" (p. 219). Other discriminatory barriers informing access to protection include access to contra-analysis resources, especially considering the already acknowledged difficulty in finding specialists in many of the language varieties in question (Eades 2005). Furthermore, precisely because the claimant cannot hold the analyst in question directly accountable, the only solution is either to prepare an expert witness or provide contra-evidence, a complex and unfair challenge considering the need for not only legal resources, but financial ones as well.

In addition to the varying degrees of depth by which lawyers have addressed the LA question is the significance of how decision-makers have responded to the tool. Precisely because of the already noted lack of a uniform standard for evaluating LA as evidence in Australia, there is considerable inconsistency in the ways in which LA has been applied (Eades *et al.* 2003). Addressing the issue of credibility determinations vis-à-vis origin claims, there has been significant divergence between decision-makers, where some have "disallowed the

[28] LAAP represents Language Analysis in the Asylum Process. It is an acronym synonymous with LA with a meaning similar to "language analysis," though it has been preferentially adopted by language professionals in the field (see Reath 2004).

LingID[29] evidence altogether on the basis of linguistically sound concerns and objections" (Eades *et al.* 2003, p. 181), while others have made explicit decisions on nationality, and *not* region of language socialization, on the basis of LA results alone (Reath 2004).

Most problematic to this discussion is the direct link that has been observed between LA and status decisions. While Australian LA reports have, in majority, corroborated the origin claim being made, positive origin determinations in such texts have not always yielded in direct determinations favouring the origin claimed. This was precisely the result in the appeal case of Blount (2001), where the analyst supported the claim to Afghan nationality, though, in also identifying additional speech patterns consistent with a Pakistani origin, Blount ultimately ruled against the claimant on credibility grounds. It is realities such as these that necessarily raise the question of how such reports are to be digested as expert evidence when even their *corroborating* determinations fail to yield consistent results. The controversy only deepens when one considers that upon receipt of LA reports contradicting the claimed origin, the DIMIA has, perhaps rightly, used such evidence to challenge the credibility of the claimant (Eades *et al.* 2003), but the DIMIA has *also* accepted nationality claims under such negative conditions, particularly in cases where the "caliber of the applicant's evidence at hearing" has outweighed the value of the LA report (Boyd 2002).

Considering the discussion thus far, it is unsurprising that the Australian context has yielded to such a vast and controversial debate regarding the integrity of this tool to assist in status determination, especially in light of evident inconsistencies in its application. There is little doubt that the Canadian context would also yield to similar discussions, especially considering contextual differences. One such difference is the inconsistent nature of legal assistance for claimants in the country, where approximately 15 per cent are unrepresented at hearings and "only four provincial legal aid programs currently pay for legal counsel" (Showler 2006, p. 228). This is particularly significant bearing in mind the role of counsel in achieving a successful decision in Australia. A second issue of concern is the fact that IRB cases are now presided over by a single-member panel, with a greater preponderance for "miscommunication, misunderstanding, and uncorrected error" (p. xii), and offering the greater possibility for

[29] The term "LingID" has been adopted by Eades *et al.* (2003), who refer to language analysis as a form of linguistic identification, arguing against the tool as a thorough form of analysis.

negative and potentially exclusionary links to be drawn between LA and status outcomes, without ramification.

The limited accountability of decision-makers is further threatened by already addressed problems informing interpretations of evidence at the IRB, whereby decision-makers have historically struggled to "consider all evidence in its entirety" and "rely on trustworthy evidence to make adverse findings of credibility" (IRB 2004a). When one considers that the weighing of evidence at the IRB rests largely on "the application of common sense" (IRB 2003), it is not difficult to foresee some potentially damning implications of this tool when common sense could prove to be permeated by bias or skepticism (Smith 2007). This is particularly of concern in light of the fact that "it is not a reviewable error for the Board to rely on some documents and not others" (IRB 2003, sec 6.8.4). Considering these issues, as well as the noted IRB prejudice against non-institutionally sanctioned evidence (Smith 2007), it does not take much postulating to envision how LA use in Canada could work to compromise the rights of undocumented claimants and threaten the value of impartiality to which the nation has pledged allegiance.

5.2.3.3 *"Equal Benefit of the Law:" "Righting" LA "Wrongs" Through Appeal*

While the Australian context of use presents some complex legal and ethical challenges to the evidentiary integrity of LA, what is essential to this discussion is that the presence of an appeal alternative for many claimants has provided the valuable site at which negative status determinations based on the use of LA have been corrected by the Refugee Review Tribunal (RRT). For more than 22 per cent of the Afghan claimants in Australia exposed to such testing, the RRT has played as essential role in "righting the wrongs" of many initial DIMIA decisions, reminding the reader that it has only been after extensive engagement with the system that claimants have eventually been rewarded with status in the country.

In addition to publishing case reports and providing a site to observe and challenge such evidence in practice, the RRT has been responsible for providing a protection visa to 133 Afghan claimants, where "presumably some of these had LA which contradicted their nationality claim, but there could have been other grounds for initial DIMIA refusal" (Eades, personal communication, August 11, 2008). Likewise important is that while 78 per cent of Afghans have received visas by DIMIA and 7 per cent on appeal, of the 15 remaining per cent whose LA contradicted the claimed origin, two-thirds (190) were granted protection regardless of the report,

and a further one-quarter (48) of these individuals were granted visas following RRT decisions (Eades, personal communication, August 11, 2008). What this narrative lends insight into is not only the fact that "a large number of RRT decisions have the effect of overriding the nationality assertion being made by LingID" (Eades *et al.* 2003, p. 190), thus alluding to its limited credibility as a tool, but furthermore, in how the RRT division has been essential in providing a necessary site to challenge and correct some of the exclusionary impacts that LA has had at the initial DIMIA level.

What this discussion has thus attempted to shed light on is how LA has been used in Australia both to exclude at the DIMIA level *and* provide differing levels of access to protection for various groups of claimants. While the appeal mechanism has provided the means by which to ameliorate *some* of the problematic realities associated with LA, and has played a valuable role in doing so, not all Australian claimants have had equal access to resources needed to amend initial DIMIA decisions, and indeed, in some cases, LA has appeared to help expose the less genuine nature of some asylum claims. What is obvious though, regardless of individual experiences, is that without such multi-level engagement with the system, asylum seekers in Australia would likely be denied equal access to protection, and be discriminately excluded systematically, more like the European trend reflects.

On this note, it is cause for concern that LA may be adopted in a Canadian asylum system wherein no appeal mechanism exists. In such a context where there is no independent review tribunal to offer the corrective capacities of the RRT to challenge, expose, and reverse problematic impacts of LA on decision-making, there is no avenue available to challenge the merits of the claim legally. Additionally of concern is the fact that unlike the RRT that publishes 20 per cent of its caseload, the IRB in Canada does not engage in a similar act of publication. While the RRT only deals with appeal cases, the Tribunal has all the same provided a lens through which to monitor the integrity of LA in practice – a reality that would be denied in the Canadian context of a more covertly-executed system of status determination, and would likely yield to such concessions and unequal impacts going unhindered by review.

In a Canadian environment where "massive disparities in grant rates already exist" (Rehaag 2007), and without legal recourse to decision and decision-maker reviews, human fallibility, bias, and partiality based on the inconsistent use of LA as evidence will likely go unheeded by critique, and thus the tool more likely to infringe on the non-discrimination clauses

to which the country is bound. In the process of doing so, LA could very likely yield to potentially harmful repercussions for the individual/s involved, and while the interests of efficiency *may* be met to some degree in the adoption of this tool, the question demanding further consideration necessarily remains, at what expense, and whose?

5.3 A Question of *Time:* Saved or Wasted?

While the "undocumented" claimant rests in the shadow of Western suspicion, both partly justified and yet exploited, the imposition of Language Analysis (LA) reflects how this group of claimants is very likely to fall victim to the guise of an efficiency rhetoric in the Canadian nation; a reality only further exposed through analysis of the prioritized concerns for fast and effective decision delivery – the subject of *time* to which this paper now turns.

5.3.1 *The Voice of the IRB*

The recent IRB shift to a single decision-maker panel and the move to ignore implementation of an appeal mechanism, as guaranteed in Canada's Immigration and Refugee Protection Act, are both a testament to the Canadian government's present operational context focused on a neoliberal climate of cutting costs, routinely exhibited through the avenue of reducing the expense of resources and most importantly, timely proceedings. In the process, the asylum seeker has in many ways been on the losing end of the discourse of efficiency, especially in such contexts where procedural safeguards have been removed, challenged, or at some level compromised. The imposition of LA in this context is particularly relevant to the present state of the undocumented claimant in Canada, where the inability to quickly corroborate identity claims has yielded to aggressive IRB interrogations of the nationality being claimed, ultimately resulting in procedural delays and lengthy questioning periods in order to make country of origin and credibility determinations – realities that have together undermined the IRB prioritized concern for procedural efficiency.

In the context of the Canadian pilot project, the IRB is presently evaluating "whether the use of language analysis will result in significant delays to the determination process" (IRB 2007b, answer 18), suggesting that the tool could ultimately work in the claimant's interest of either simplifying the hearing process or possibly expediting procedures. While speeding up status determination has the capacity to favour both the nation and the claimant, effectiveness and impact must be evaluated based on the type of interventionist mechanism being proposed. In the case of LA, the Australian lens makes it clear that the tool has indeed paralleled significant time-consuming demands in the determination process, especially in cases where linguistic and

evidentiary procedures have been necessarily, and rightly, granted the timely latitude to be executed with high degrees of integrity under DIMIA and RRT conditions.

5.3.2 *A Case of Multiple Procedural Delays: Australian Realities and Canadian Implications*

In looking to its Australian counterpart, Canada must necessarily weigh how a practiced belief in the time-saving nature of LA to work efficiently, and consequent pressure placed upon actors involved in this regard, could very likely challenge the ethical pulse of the process. The following discussion voices some of these concerns.

5.3.2.1 LA Companies Claim Fast and Effective Delivery: Adequate Caution or Compromise?

> *Save time – commission Sprakab to do the analysis.*
> *Commissioning Sprakab to carry out a language analysis will save you time. You can trust our reliability and cost-effectiveness. Our analyses reduce the turnaround times needed by public authorities who need further information to establish an individual's language background*
> Sprakab Homepage 2008
> http://www.sprakab.com/english/sprakanalys.htm

This discussion necessarily begins with the issue of what companies claim lies within their capacity to accomplish. Calling to mind the for-profit nature of LA enterprising institutions in Europe, and their desire to cater to Western expectations in complex determination processes, the above text from an online advertisement reflects how companies like Sprakab have sought to provide a solution to the identity problems facing countries like Canada. While many questions still remain unanswered regarding LA and status decision-making, what is clear is the correlation between the length of time taken for a report to be produced and the integrity of the results inferred – dependent also, of course, on the qualifications and abilities of the analyst performing the analysis. Ironically though, the prioritized value for quick, expedited status decision-making directly counters the degree of accuracy and effectiveness marking LA as a credible linguistic tool.

Not only has Sprakab stated aims of delivering 80 per cent of cases within one month (Reath 2004), but the company webpage also provides a convenient order form making explicit its unique ability to offer "express delivery" of LA reports within only 3 days (Sprakab

Homepage 2008). Similar to the problem of LA companies making origin determinations based on unqualified degrees of certainty, one must question whether here too is another example of how claimed capabilities threaten the integrity of the tool. On its website, Sprakab fails to acknowledge that certain language varieties may demand more time, research preparation, or multiple analysts working in tandem – resources which may not be immediately available; there are also no cautions expressed regarding particular criteria that must be present (or absent) in the case in order to provide professionally and adequately informed "express" results. In such a context where the need for speed is shared by both the commissioning country and by companies providing the service, the reliability of analysis is herein compromised by the time restrictions and pressures for speed imposed, whether explicitly or implicitly.

What should be demanded of such proceedings is that analysts are provided ample time to address all factors involved in the applicant's speech repertoire systematically, and be accorded the necessary liberties to produce as accurate and detailed reports as possible (Reath 2004). Indeed, Eades *et al.* (2003) have questioned whether LA is perhaps not "appropriate" to be used in the determination of nationality of refugee applicants at all, precisely because it is so "time consuming to obtain" (p. 187). But contrary to what should be standard procedure is the reality that analysts are not only being pressured to provide hastily drawn conclusions, but as RRT decisions have illuminated, there is also a seeming urgency to draw determinate conclusions of certainty regarding origin, as mentioned previously. If the controversial integrity represented by LA reports is not a direct result of motivators in the interest of time, as seems likely, then such realities only further implicate the lack of analyst expertise in providing inferences of a credible and linguistically sound nature.

As countries like Australia, and potentially Canada, demand time-effective results implicitly in the widespread discourses they mold regarding asylum inefficiencies, and perhaps explicitly in the purchase of "express" orders, companies working in the for-profit nature of responding to such demand seem to be throwing caution to the wind, and as such, companies and countries alike are seemingly both willing and implicated in compromising the refugee interest for the efficiency one. Even if Canada did not impose time restrictions on report delivery in the future, and instead were to encourage thorough analyses – a fact that is perhaps likely, considering the average of 1 year it takes for individuals to go through the process (IRB 2008) – there are additional issues of concern here.

5.3.2.2 LA as Time-Consuming? a Question of Thorough Engagement with the Evidence

Another site of warranted procedural delay respecting LA use is the amount of time taken to engage with the evidence. The reader is here reminded of the earlier discussion regarding both lawyer and decision-maker attention to detail in addressing the evidentiary integrity of LA in Australia. In an asylum context where actors involved in DIMIA decisions have proven to be inconsistent variables in the digestion and application of related evidence to origin determinations, it seems apparent that there is a correlational relationship between the thoroughness of the evidentiary investigation (read as "time taken") by engaged stakeholders, and the integrity of decisions both bestowing and denying protection.

In these regards, LA should inherently be considered a time-consuming element in the determination process. This is apparent by the procedural delays that have been associated with LA in Australia, and have included additional time requirements for interviewing the claimant to make a voice recording, waiting for the analysis, decision-maker caution in weighing each piece of evidence independently, time taken to address applicant and lawyer concerns regarding LA evidence, delays in the commissioning of linguistic experts to provide contradicting evidence, and the presentation of contra-analysis and oral expert testimony during the hearing, among others. Even more suggestive of the time-consuming nature of the introduction of LA to the status context is the extent to which LA has been cause for review of the merits of DIMIA decisions, thus leading to lengthy and costly appeal hearings. In this context, while the RRT has reflected the capacity to remedy some hastily and problematically drawn determinations of origin based on LA, it has also provided insight into the necessity for full and thorough engagement with the tool to ensure its value and effectiveness are maximized in the interests of the claimant and asylum integrity.

The implications for the Canadian context in this regard are clear. If an argument for efficiency demands the necessity for speed, LA inherently works against this interest. Not only is it time-consuming to commission and for reports to be drawn, but its digestion as evidence should likewise be thorough, and appeal mechanisms, and a second review of evidence, claims, and argumentation only strengthen this fact. While LA is a product of timely consumption, one must query whether it not only works against the efficiency variable, but subverts it altogether, especially in cases where LA has eventually been ignored altogether, where claimants have challenged and disproved the value of analyst determinations, or in cases where both LA and the

identity question have proven irrelevant to the issues of concern in particular cases (Eades *et al.* 2003). In these ways and more, LA in Australia has provided various sites which have not only threatened the desire for timely decision-making, but it has also brought to the fore the reality that in many ways the tool has been a *waste* of time, proving much less valuable than expected.

While the efficiency argument could still be advanced and defended in a Canadian context without a system to review or appeal rejected cases based on merit, rightfully, language analyses are, in ideal form, a necessarily lengthy addition to the asylum process. In denying its time-consuming nature, and thus masking the negative potential consequences of the test by prioritizing the quick and efficient processing of claims, undocumented asylum seekers are likely to become even more vulnerable to Western whim, and in the process likely to lose agency in controlling their voices, their stories, and thus, quite plausibly, also their futures without persecution.

Considering that the recommended IRB hearing time is approximately three hours (Showler 2006), as well as the plethora of additional issues of import needing to be addressed during this time, there is good likelihood that the time imperative informing the LA issue here discussed will not be addressed as necessity demands, leaving open the possibility that the negative potential impacts of use will go denied or ignored. While interrogating the adoption of LA in Canada under the guise of an efficiency interest does expose the potentially exclusionary impulse and impact of the tool, it also illuminates how LA would likely only further diminish the standards of intervention that the IRB has already facilitated to deal with the identity question for those who are without papers. In such a context, then, Canada may *not only* be sacrificing some of the advantages of the current system, but also wasting precious time in doing so.

5.3.2.3 LA Relevance to Expediting Claims

A final thought regards the issue of expediting claims – an articulation of which Australia and Canada have both made by linking LA with the refugee interest. In this light, both countries have historically shared a common desire to improve the speed at which status is determined for newcomers in the country – an issue recently restored to national dialogue in the two nations:

Canada, for its extreme backlog of claims;[30] Australia, especially due to widespread criticism for its policies of mandatory detention, and the horrific conditions in which claimants have been forced to live while awaiting their hearings (Palmer 2005). This subject is particularly relevant because Canada has made public the desire "to minimize the growing backlog of pending claims" by increasing the "use of fast track and expedited processes" (Treasury Board of Canada 2008). Expedited cases are considered straightforward, and thus require only that the claimant be interviewed by a refugee protection officer, instead of needing a full hearing with an IRB member as decision-maker. While the "inability to provide acceptable documentation establishing identity [...] may disqualify a claim for consideration" under this type of fast-track processing (IRB 2005), the LA pilot project has been proposed as a potential solution to undocumented claims, where the only barrier to otherwise simple cases has been the lack of corroborating identity evidence. While this proposal overtly seems plausible to benefit the claimant who performs to expectation on the respective LA test, there are issues of concern here.

Firstly, while it is not clearly known how long it takes Australia to commission and receive LA reports, nor if the country is engaging in any form of "express" delivery, as noted above, what seems to be clear is that LA is *not* providing the fast and effective results needed to improve the speed at which claims have been processed in the country in recent years. Interesting to note is that while 2005 marked the beginning of a program to accelerate rapidly the processing of asylum claims in Australia (Eades, personal communication, August 11, 2008), expediting has failed to coincide with the use of LA. In a context where roughly 5,000 individuals in the country on temporary visas were being assessed for permanent protection, the Australian government went ahead with paper applications, instead of through an interview process. While this project does not recommend for Canada a process of status determination based only on paper applications, especially in a system without appeal, it is curious to note how LA has *not* paralleled international articulations of a link to expediting claims. Indeed, after reading much of the literature available on the subject, the present author has no awareness of any other country context in which such a link *has* been made. Opposingly, the Australian example shows that if speed in the refugee and national interest is truly the concern, the

[30] In 2006/2007 there were approximately 26,200 claims waiting for a decision, representing 31 per cent more than was forecasted for the year, and 30 per cent more than in 2005/2006 (see IRB 2007d).

controversial employment of a time-consuming process of evidentiary application is not the solution. More controversial to this discussion, and also demanding note, is that while LA has not worked in the interest of expediting claims to claimant advantage, it *has* been strategically employed as justification for the quick removal and exclusion of undocumented claimants from protection in the country (McGeough 2005).

Finally, while one could postulate that services like Sprakab's "express delivery" could appear attractive in the interest of improving the time to process status claims, the above discussion has already exposed the noted limitations likely to inform such a move. While LA could perhaps be fast enough to offer some assisting capacities in a fast-tracked IRB environment, the reader is once again cautioned about the problematic assumptions herein exposed. Particularly worthy of mention is the fear that decision-makers might fall prey to drawing a direct correlation between an analyst's determination of origin and the origin claim being made: such a linear relation is problematic in that a corroborated claim may suggest an easier shift to focus on other issues of relevance in expediting the case, whereas an analysis that contradicts the claimant may encourage greater skepticism where before there was none, accompanying other negative connotations that may work to impose stricter interrogations and unfair burdens, both procedural and otherwise, on individuals now forced to endure a greater defense obligation in their protection claim.

In this regard, while LA could beneficially work to benefit some undocumented claimants, here again is presented the discriminatory and problematic potential of the tool to demarcate lines of dis/advantage based on receipt of LA reports. The exclusionary links already reflected in the Australian context make this *possibility* seem *probable*. Thus, the sites of disadvantage are likely to become marked by *more than* just the disparities inherent in who is with and without documents, which groups are labeled as such, and which undocumented claimants prove successful in their language test, *but also* which individuals succeed in accomplishing the right to expediting their claims, compared to those who are relegated to a lengthy hearing, based on the use of LA.

In the context of serious concern in Canada over processing times that are too long and backlogs that have been increasing since the early days of the IRB (Campbell 2000; IRB 2006), one might easily question with what likelihood Canada would go forth with the implementation of LA without sanctioning the procedural delays warranted to maintain the integrity of the

process. If the country proceeds forth from the pilot project working in the hopes of speeding up the process, the Australian example demonstrates that there is one alternative, and perhaps better, way of doing so. In a context where the language test here in question necessarily and rightly demands various sites of unattractive procedural delay, in performing and interpreting LA as evidence and in weighing its value in expediting claims, one is left to ponder whether, in the Machiavellian spirit, the procedural interest of faster processing times might not only prove to justify the means, but also the compromises, that may yield to unequal impacts on the undocumented claimant in Canada's future.

5.4 The Economy of LA: a *Cost*-Benefit Analysis

While the preceding section addresses the time requirements that Language Analysis (LA) demands of both the process and engaged stakeholders, this interrogation of the efficiency paradigm is here drawn to a close by addressing one final concern, the money issue.

5.4.1 *Economy at the IRB*

Of interest to both the IRB and this study is the subject of budget forecasts for LA services, and whether, as Canada is presently evaluating, "the use of language analysis is justified as a tool in consideration of its cost" (IRB 2007b, answer 18).

It is necessary to note here a reminder of the contextual climate within which the IRB has historically existed, and does so presently; particularly worthy of mention is the fact that since the Board was first established by Parliament in 1988, Canada has consistently struggled to provide better management of the country's procedurally elaborate and time-consuming determination process (Campbell 2000). In its failure to do so, the "Cadillac" of refugee systems has gained an international reputation as being the "most expensive" in the world (Showler 2006, p. 218). More recently, the Canadian context of increasing resource constraints has paralleled a shift in RPD budgeting from $104.4M in 2004/2005 (Treasury Board of Canada Secretariat 2006) to an estimated only $80.8M for 2008/2009 (Treasury Board of Canada Secretariat 2008). As such, the IRB continues to be under extreme pressures to reconcile resource limitations with demands for efficiency, as was clearly illuminated by then IRB Chairperson Jean-Guy Fleury in 2004, when he succinctly stated that "there is no more new money." Accordingly, the need to balance concerns for efficiency, fairness, and cost-effective interventions are debates being held everyday at the Board (IRB 2004b).

It is within this climate that LA has been tabled as a potential aid in the determination process, but it is also through such a prioritized lens for cost-effective interventions that the Australian example of use challenges an understanding of LA in such a way. Importantly, in our "economically rational" societies where "the most convincing arguments are those which rely on number crunching, and ultimately show that the returns are higher than investment" (Colic-Peisker 2005, p. xvii), the following discussion exposes how articulations of a cost-benefit

analysis working in the interest of IRB efficiency poses to parallel and perhaps mask very real losses for the undocumented in Canada.

5.4.2 *LA as Cost-In/Effective in Australia?*

In addition to exposing LA in/effectiveness, the discriminatory impacts of use, and the problematic discourse of time-wasted, the Australian lens here provides added insights that work to undermine the Canadian hope for LA services that will not only satisfy demand, but will do so to cost advantage. The Australian example exposes three major realities that should caution against Canadian articulations of LA coinciding with the country's prioritized efficiency paradigm: namely, the high costs Australia has incurred to engage LA experts; the paralleled and problematic logic of use that the expense seemingly has justified in some cases; and finally, the fact that the country has reflected a decreasing trend in use – very likely a partial result of the limited capacity of government to continue to rationalize the expense.

5.4.2.1 Quantifying Costs

Of primary interest and import is the fact that Eqvator and Sprakab LA reports are not cheap. While companies and governments alike have largely covertly sought to protect such information, a recent Australian House of Representatives Report (Commonwealth of Australia 2006) valuably illuminates that individual Eqvator and Sprakab analyses have been commissioned for $1,133 and $686, respectively (p. 134). On a national level, it is reported that the country spent over $4M on LA reports between July 2000 and July 2002 alone (Mercer 2002) – a reality only more costly when one considers how these numbers reflect merely the expense of commissioning LA, and do not account for added expenses incurred by the DIMIA or RRT for extra administrative services associated with the tool, such as costs involved in interviewing the claimant, added interpreter fees, hearing delays, extra legal services, among others.

5.4.2.2 A Past Trend: Expense and Use Symbiotically Rationalized

The efficiency logic and high expense of employing language analysts in Australia in the interest of detecting true origin has seemingly helped justify a large-scale national, albeit problematic, logic of using it to advantage, regardless of impact, and especially in cases where

LA has challenged the origin claimed. In this respect, LA has yielded significant practical effects justifying the fiscal expense (Reath 2004). While LA has supported more claims than was initially expected, and perhaps hoped for, one result has been the deployment of a strategy to deny access to protection based on LA results that did in fact reject the claim – interestingly, this has taken place both inside and outside the hearing room. In fact, the reality that more than 20 per cent of Afghan claims have gone *uncorroborated* by LA has been employed as proof that fraudulence has been rampant in the country and thus costs seemingly justified in order to expose and address the "undocumented" *as* the illegitimate claimant (DIMIA 2003, as cited in Reath 2004). Accordingly, in 2002, the federal government planned to begin large-scale rejection of temporary visas issued to Afghan refugees based on language tests that were exposing fraudulent identity claims (Mercer 2002). Also of concern was the deportation of the Bakhtiari family, a family of seven who claimed Afghan nationality in Australia, but whose credibility was challenged and ultimately rejected by decision-makers on the basis of an LA report that confirmed that the family came, "with considerable certainty," from Baluchistan in Pakistan (McGeough 2005).

After much public defense of the family in the complex battle over the identity question, and as the Australian government sought assistance from both Pakistan and Afghanistan to confirm country of nationality, Australia persisted in resting largely on received language reports to reject the asylum claim, and ultimately deport the family to Pakistan, even as the group of 7 continued to demand that if they were indeed to be returned home, it should be to their native country of Afghanistan. In this context, the cost of LA and the logic informing its use (i.e. its validity as strongly determinative of nationality) seemingly helped justify the means to use it. Especially relevant here is the issue of deportation, and the large-scale "embarrassment" (McGeough 2005) that the nation would have undergone had Australia returned them to the country they claimed to herald from; a move that would have essentially undermined the entire LA project and the costly expense that the nation had so strongly come to depend on in its status proceedings up until that point.

5.4.2.3 A Shifting Tide as Losses Overshadow Benefits

The logic of negative use justifying the expense of LA has not reflected a linear or consistent trend, and indeed the above examples of such justification have been challenged by

the complex and contradictory uses of the tool in determining status in varying case contexts, as discussed throughout these pages. In these regards, a final issue of interest in the Australian setting is that many of the inconsistencies noted throughout this paper have been widely criticized in the country, by those directly and indirectly involved in status determination, including decision-makers, lawyers, language professionals, the media, and others. Accordingly, it is very probable that the growing debate since 1999 has helped to undermine the logic of investing in such expensive resources when the outcome has indeed been both problematic and unpredictable, and in a context where the expert nature of the evidence has been repeatedly called into question. While there *have* been various policy changes and shifts in migration trends in the country that have likely also contributed to the decreasing relevance and employ of LA services,[31] realities of growing contra-analysis and successful challenges to the legitimacy of the tool have undoubtedly helped to undermine the expense, especially when the advantages of a report determination have not been consistently applied to effective end, and have often been ignored.

In these regards, it is significant to note that not only does LA appear much more rarely in RRT reports in recent years,[32] indeed it has not yet been mentioned in any 2008 report presently online, but decision-makers have also received it more poorly (Eades, personal communication, August 11, 2008). Adding to such observations is the fact that so many LA reports have *not* contradicted the origin claims being made by asylum seekers, suggesting the wasted expense in attempting to expose something that is seemingly largely not being hidden. While it does indeed and rightfully remain at the discretion of Western governments to determine how LA results are quantifiably justified or not given the country context, the fact that many of those upon whom language tests have been imposed, based on their suspected claims, have ultimately received status in large numbers (Wazana 2004), is yet another testament to the illogic informing the use and expense of LA to assist in the identity issue at hand.

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[31] Such changes include the fact that undocumented Afghan claimants are no longer entering onto Australian territory in large numbers due to recent deterrent measures. Also of note is the shift towards expedited processes of determination where LA has not been utilized.

[32] When searching under "Language Analysis" and "Linguistic Analysis" in RRT published decisions, the following numbers of reports mention use of the tool: 2000 (11), 2001 (89), 2002 (60), 2003 (6), 2004 (35), 2005 (16), 2006 (2), 2007 (2), 2008 (zero at present).

In these regards and more it remains unsurprising that the Australian example reflects a decreasing trend in use, a fact best reflecting a cost-*loss* analysis of implementation, and best illuminated by the reality that the most recent data available suggests that a mere $24,363 was spent on LA in the 12 months preceding October 13, 2005, as compared to the multiple millions of dollars invested in years prior (Commonwealth of Australia 2006, p. 134). While it is presently confirmed by the Australian Government that LA continues to be used "in cases where it is considered that it will assist in evaluating and substantiating claims made by visa applicants about their origin" (DIMIA 2005 in Eades, personal communication, August 11, 2008), it has become clear from a linguistic, procedural and statistical perspective that the controversial integrity and impact of the tool largely fails to justify its cost in this context.

5.4.3 *Implications of an IRB Perception of LA Cost-Effectiveness*

While it is hoped that the IRB pilot project exposes the limited cost-effectiveness of the tool, as the preceding discussions of effectiveness, impact, and timeliness have all spoken to on some level, this section necessarily concludes with a final warning of the dangers should this not be the case. It is necessary to note that considering the nature of the test and the breadth of controversy discussed throughout the pages here, it seems evident that LA should not be considered worthy of the funds required to commission such reports as evidence. But granting that Western governments across the globe have embraced claims of its beneficial link to the process, this discussion makes specific reference to the Canadian context in order to expose added particularities of why the tool is not likely to provide good value for money.

In the context of a fiscally restrained IRB system, where the cost of processing one claim ranges from $1,600, to upwards of $5,700 for complex cases (IRB 2007d), one must caution against the danger that expense might prove to correlate in justified negative uses, as the Australian example raises. While Canada has only stated that LA is being tested in the context of *assisting* in the decision-making process for undocumented cases, there is concern that a high investment of funds will parallel the desire and the logic of digesting such information as truth, especially since Canada has already embraced the notion that the international community has been "reliably" using the tool for years. Considering the illogic of investing large sums of money for services that do not render effective and useful results, there is fear that while the IRB states it "does not have a preferred position on the outcome" (IRB 2007b, answer 14), received

reports that challenge the origin claim being made *could* justify practical ramifications following the Australian lead. In this regard, rationalizing the high expense of LA may yield to the ethical and legal concessions against the undocumented interest discussed throughout these pages.

It also seems clear that the IRB should not easily be able to justify the ability to afford such a tool, especially in some cases where the commissioning of LA could nearly double the cost of an individual claim altogether, and in the process, ultimately yield to inconclusive results. In this regard, going ahead with the grossly expensive tool in this context would very likely challenge the integrity with which the country has engaged in the pilot project (i.e. its assisting capacity) and instead possibly expose some of the more plausibly subversive desires informing the tool's use (i.e. to expose the fraudulent). This would become especially evident considering the non-consensual nature of use, its imposition on only certain discriminately selected groups, and the already financially exhausted system. Combined, these factors could implicate a perceptive shift from LA as a helpful tool to a weapon of identification and exclusion.

This discussion brings another vital issue to the fore. If Canada decides that LA is a valuable tool worthy of use than the cost issue becomes an added discriminatory burden imposed on identified claimants. Considering that Canada avoids significant procedural expense from not maintaining complex multi-level appeal options for claimants, LA could quite easily be employed as expert evidence against the undocumented claimant, with limited decision-maker accountability for problematic applications, and little reason for lengthy engagement with the evidence when superficial interpretations could very quickly aid in making, albeit problematically, an origin and/or credibility determination. Complicating the matter, if Canada were to implement use of the tool on a cost-effective assertion, then inherent in this notion would also appear a nationally sanctioned removal of procedural safeguards leading to unequal treatment and protection for those involved.

Because LA is an expensive tool and forced upon claimants, a likely impact may mean many individuals being denied the ability to provide contra-analysis and defense argumentation, either from a lack of funds and/or legal aid. This is particularly relevant considering there exists no appeal stage upon which to voice these concerns in Canada. Because analysts remain anonymous and contra-analysis has proven the ideal way in Australia to challenge the integrity of such evidence, LA in Canada could very likely provide a site within which the IRB could undermine claimant testimony, knowing all the while that expertise to challenge such

articulations would likely remain largely absent. In this case, a cost-benefit analysis of LA could prove to justify the use of the tool and its digestion and application as truth, with limited intervention to counter this interest.

Given the unpredictable nature of LA reporting and resulting determinations, the problematic assumptions and methodologies informing its execution, and what should perhaps be a right to subsidized contra-analysis, as is the case in the Netherlands, the expensive service of LA should be considered beyond both the budget *and* the humanitarian conscience of the sole Canadian institution making protection decisions. If decreasing investment in such services in Australia is not alone the best proof of this, than the *inefficiency logic* illuminated in the preceding pages, and the legal and moral prerogatives likely to be compromised by articulations of cost-effectiveness, should be. In an environment where Western states constantly "lament the high costs of maintaining individual refugee status determination mechanisms" (Kumin 2004, p. 3), LA offers one site of potential engagement where rightful avoidance could help eschew future discussions of wasted IRB dollars, and potentially also, threatened refugee lives.

6.1 A Final Interrogation of Language Analysis in the Canadian Context

To borrow from Shohamy (1997), "there is a public story and then a real story," the latter of which is frequently "revealed by tests [...] pushed by bureaucrats and often not known to the public" (p. 347). In marking the harsh distinction between what evidence in status determination should be, and the departure from this standard that LA use has reflected, these pages have sought to expose the story behind the Canadian articulation of LA "reliability," attempting to do so by raising the curtain on procedural narratives in Australia: narratives of proven discrimination, exploitation, and injustice that have largely covertly been subsumed within the prevailing Western discourses of efficiency and fraudulence. Interestingly though, more current manifestations in the Australian context reflect a shift away from these negative implications, and while the government has not articulated the failings of the tool through an efficiency lens, the preceding pages reflect on how these values seemingly no longer justify LA with the same fervor that informed early use in the country.

While the IRB has claimed to be investigating the potential utility of LA to assist in decision-making, such an articulation seemingly implicates the nation in either fraudulently or naively claiming innocence of the problematic realities yielded by the use of this tool abroad. This study has revealed through analyses of both *effectiveness* and *impact* that LA in practice has nourished contexts of status determination that have provided inconsistent, unequal, and unfair correlations in the experiences of the undocumented, and ultimate status decisions. Interrogations of the *time* and *cost* variables explored in these pages have not only exposed how prioritized concerns for the practical efficacy of such a tool has threatened the noted legal and moral values, but also how, in the end, the pragmatism informed by LA use in Australia has ultimately failed to justify both the rights concessions and the significant investments that have so evidently been made in the LA interest in recent years.

The stark dichotomy between the lived Australian experience of LA tried, tested, and largely rejected, and the stated Canadian ideal for the future, seems very likely to mar the latter nations reputation as humanitarian leader should implementation proceed. Indeed, one may question how the global dialogue Canada maintains with its First World contemporaries has failed to attract public acknowledgement and controversy in the Canadian state; or whether,

perhaps, this is exactly the type of "story" being silenced in the stated aims of the project, and in the seemingly covert nature with which the study is taking place in the country. In many ways, it simply appears as though Canada is contemplating joining the Western trend at too late an hour, at least to pursue this avenue honorably and with intentions well informed.

In an asylum context where the credibility of the claimant is 100 per cent of the issue at hand (Showler 2006), and where the sole question of interest before the IRB is "whether the evidence is credible or trustworthy" (IRB 2003), the logic of Canada proceeding forth on the claimed utility of LA, especially in a global context where other countries have reflected such opposing narratives of use, suggests an attempt on the part of the nation to deny the exclusionary and unfavourable contexts within which it has been imposed in nearly every nation in which it has been commissioned. Thus, cloaked in the rhetoric of attempting to help identify place of origin, seems to be the underlying interest to detect and expose the Other, and do so in ways that demarcate belonging along the culture line and in the political interests of the nation. By undermining the efficiency mask coloring the orientation of the pilot project objectives in this way, it seems as though the IRB is perhaps already guilty of subversive motive – and this before implementation has yet to take effect.

6.2 Proposals for Implementation: Cautioning Against a Pre-Mediated Mis-Step

While the notion of reconstruction through "counter-storytelling" lies at the heart of critical race theory (Schneider 2003), this paper now addresses how some of the harmful ramifications of LA use in Australia could be cushioned by much warranted procedural cautions in the Canadian context. The following are some proposals for better guiding the use of LA in ways that might help restore equilibrium to seemingly dangerous understandings of pragmatic humanitarianism in Canada.

Firstly, it should be considered necessary that the IRB avoid the discriminatory imposition of LA on identified groups. In this regard, if the objective standard is not to shift away from an expectation and demand for identity documents confirming nationality, then LA should be imposed on *all* undocumented individuals equally, without privileged group distinction or discriminatory objectiveness. While this option is likely to prove unattractive through the IRB lens, it is also here suggested that the identification and imposition of LA on particular groups be altogether avoided, and LA prescribed for certain individuals whose identities are in question –

such a shift would avoid homogenizing applicant identities based on shared origin, and might also work to reduce the debilitating effects of skepticism and group bias.

Should Canada avoid forgoing implementation, the IRB should also clearly define administrative and procedural regulations guiding the interpretation and application of LA reports specific to the Canadian context. These must be complementary to the international guidelines already established, but relevant to the Canadian legal and administrative framework. While they would not be "legally binding on members," it is hoped that they might help guide more consistent practices (IRB 2004a), alongside member training and consultations regarding appropriate LA use. This professionalization of the field on the IRB front should equally parallel similar standards for reliable and credible *linguistic* practices; thus, Canada has a responsibility towards undocumented claimants to demand that analysts better qualify their origin determinations and provide their professional qualifications. In these regards, Canada could go one step further and follow the practices of Switzerland and other Western European countries and create its own independent LA department on the domestic stage. This would allow the IRB to regulate the service and the quality of reports produced, and also provide the opportunity to hold accountable to a higher degree those individuals whose skills are being used to influence life or death decisions.

While a lack of sufficient resources, both linguistic and financial, makes the creation of a domestic LA bureau less plausible, decision-maker accountability remains vital, as Board members are involved in complex case analyses equally significant to the work engaged in by doctors, lawyers, and judges – who are all held responsible by the public. Transparency is one avenue to ensure that decision-makers credibly evaluate evidence and weigh decisions with caution (CCR 2004a). While already legally mandated to provide written reports for all decisions, as per IRPA (sec. 169), accountability can be better accomplished by following the RRT example and publishing a certain percentage of IRB case reports, and also by ensuring that an evaluation of the application of LA be publicly performed after use commences, in order to expose, monitor and address any controversies evident in IRB practices.

In closing, and perhaps most importantly, Canada should follow the international trend and implement the already legislatively promised Refugee Protection Division right to an appeal. The Australian example undoubtedly reflects the imperative of appeal procedures to help safeguard against rights violations silenced at the initial stage of decision-making, including LA

issues as well as others. While Canada has not yet ensured this vital safeguard, there was hope that this deficiency would soon be remedied, especially when the Senate voted to honour the appeal by passing Bill C-280 in June of 2008 (CCR 2008). Unfortunately, "the day the House of Commons was to ratify it, the session ended" (Taylor, 2008). While the long fight for an appeal based on the merits of the claim continues, such a prorogue is paralleled by the reality that the IRB has made it publicly known that the appeal would only be a paper process, without oral hearings, oral submissions or new evidence (IRB 2007c). Thus, while the adoption of any form of review may represent one step forward in the future, LA implementation in the nearer future *and* the denied ability to present further arguments and evidence against LA reports, through a paper appeal process, is more likely to represent two steps back.

> *I can assure everyone concerned that our initiatives will not jeopardize fairness against the benefits of efficiencies. This is not a new mantra; these have been our values since the beginning*
> IRB 2004b

In 2004, then IRB Chairperson Jean-Guy Fleury made the above statement, reflecting on an IRB history of institutional loyalty toward balancing domestic and international interests, pragmatic and humanitarian ones. While alluding here to a "mantra" of historic precedent, Fleury seems to have been reclaiming a past narrative in an attempt to cushion then oppositional voices facing the IRB. While indeed the mantra may not have been "new" at the time, it seems that its failures were becoming more evidently so, as has clearly been the case since.

Shortly following the above affirmation, Justice Edmond Blanchard of the Federal Court of Canada ruled that the implementation of "reverse-order questioning" in the hearing room, which encouraged decision-makers to interrogate claimants before legal representatives were able to present the claim, was not only a "procedural violation" but also an illegal retrenchment of refugee rights in the interests of economy (CCR 2006b). Later, in May of the same year, Fleury felt compelled to repeat his allegiance to the notion that "efficiency and creativity need not and cannot come at the expense of fairness" (IRB 2006), only to be followed the coming January with implementation of the controversial Language Analysis Pilot Project: an initiative advocated by the IRB for its value to assist in status decision-making, while at the same time silencing the tool's controversial international track record, and its likely potential to jeopardize the institution's long-heralded protection mandate.

If the interest of equilibrium has truly existed at the heart of the IRB, then the institution would have by now addressed the fact that it is presently short more than one-third (46) of the decision-makers it requires, and it would have also overcome the challenge of consistently high decision-maker turnover rates: two realities that have plagued the system by encouraging backlogs and procedural delays, and have done so since the early days of status decision-making (CCR 2007). But these more obvious, and less controversial, ways of addressing the inefficiency crisis at the IRB have not reflected the approaches taken, and it is becoming increasingly more evident that beneath the cloak of the efficiency rhetoric lays an exclusionary pulse.

Undocumented claimants by no blatant means present the greatest efficiency barriers inhibiting IRB decision-making, but the seemingly strategic targeting of LA on these groups under the guise of efficiency, is poised to veil underlying and less pristine exclusionary interests. Given the nation's historic precedent of struggling to balance humanitarian and practical motive, the country's complicity in nourishing Western ideologies of exclusion, as well as its engagement in processes that have helped contain the refugee problem to the global South, it seems that protection mandates manipulated through the language of efficiency represent more a means to protect the nation from the newcomer, and less the newcomer from the persecution they have fled.

While we do not yet know the results of the IRB study, nor whether implementation is to proceed in the country, this investigation has informed upon the likely effects LA may have on the quality of asylum should this be the case. In doing so, it has exposed two contradicting notions: firstly, the illogic of the efficiency paradigm in this context, should ethical and legal values remain rightly on their pedestals; and secondly, the mask that the efficiency paradigm will likely represent, should Canada proceed forth to subvert the humanitarian pulse of status determination and encourage the efficiency illusion to be honored.

In forcing added burdens of proof on the undocumented, the IRB is already guilty of relegating certain claimants to positions of public inferiority and disadvantage through the pilot initiative. In denying the legitimacy of their papers, the truthfulness of their stories, and undermining the claim that their spoken languages are those of their homelands, Western nations have employed LA to exploit a linguistic chasm of difference through a problematic and seemingly imperial logic, one that has proven to demarcate belonging through a Western lens of perception, and not a humanitarian one.

While the IRB hearing room may be said to present a non-adversarial domain, proving victimhood no longer seems to be enough. Through the lens of LA it seems that one must be both a genuine *and* desirable victim; hence, one must conform to the Western dictate of belonging, however the borders be demarcated. In an asylum context where discretion largely informs decision-making, the test in question seems likely to represent but another articulation of historic attempts to regulate the un/welcome Other, another attempt to ensure a better management of the turnstile of asylum that regulates entry to the nation, and ultimately,

membership in the Canadian community. Ignoring the Australian illogic of use will perhaps prove to be the best testament of this.

Based on the notion that if a claimant is telling the truth, they will pass the test, it seems that much more than a mere mantra is at stake, and only time will tell if the need for speed proves to undermine further a right to asylum evermore under siege in the Canadian nation.

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