

Federal Court



Cour fédérale

**Date: 20121106**

**Docket: IMM-993-12**

**Citation: 2012 FC 1297**

**Toronto, Ontario, November 6, 2012**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**JOSE ISABEL MARQUEZ LUGO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**INTRODUCTION**

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 5 March 2012 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

## **BACKGROUND**

[2] The Applicant is a 58-year-old male from Altamira, Tamaulipas, Mexico. He entered Canada on 28 September 2008. He remained in Canada on a valid temporary worker's visa until he made his refugee claim on 8 November 2010. The Applicant submitted a narrative outlining the basic framework of his claim (Original Narrative) in his Personal Information Form (PIF) submitted 23 December 2010, and then submitted an addition to his PIF on 20 December 2011 (Additional Narrative), which expanded significantly on his story.

### **Original Narrative**

[3] The Applicant based his refugee claim on his membership in an organization known as the "Citizen's Movement," as well as his activities as a social activist in Mexico. The Applicant worked for Mexico's Federal Electricity Commission and, after retiring, got involved in some non-governmental environmental organizations, one of which was the Citizen's Movement. The mandate of the Citizen's Movement is to protect the environment and assist communities in dealing with socio-political problems by lobbying governmental agencies and bringing awareness to different issues. Many powerful crime cartels such as "The Mana," "The Zeta" and "El Golfo" have economic interests connected to pollution-causing operations against which the Citizen's Movement lobbied. The Applicant was threatened on numerous occasions for his political actions.

[4] In May 2007, the Applicant was stopped by some people while on his way to his son's school. They asked him for money in exchange for protection. These people told the Applicant that he needed protection because he had gained lots of enemies due to his activism, including the Mana and the Zeta.

[5] On 12 June 2008, the Applicant told the Public Ministerial Agency of Altamira about the extortion he was being subjected to. This report is found at pages 322-326 of the Certified Tribunal Record (CTR). After leaving the Ministerial Agency where he made his report, he was intercepted and kidnapped for 3 days. The Applicant believes it was a member of the Mana who was responsible for the kidnapping. After escaping the kidnappers on 14 June 2008 he went immediately to the Red Cross to seek medical attention.

[6] On 15 June 2008, the Applicant left Altamira and rented a room in Rioverde, St. Louis Potosi. One month after his arrival people tried to kidnap him again, but the owner of the house where the Applicant was staying intervened and took him to the Public Ministerial Office of Rioverde to report the incident. This report is in the CTR at pages 327-329, dated 29 August 2008. At this point, the Applicant was very worried about his family's safety and decided to flee to Canada.

[7] The Applicant arrived in Edmonton on 26 September 2008. An Immigration Officer, Dave, met him at the airport. Dave told the Applicant that based on his professional credentials he would not need to make a refugee claim because he would be able to find work and get a work visa. Because Mexican refugee claimants have a very low rate of success in Canada, Dave encouraged the Applicant to focus on finding work.

[8] The Applicant found work in Edmonton at Polytubes, a company that manufactures rubber tubes. On 26 April 2010, the Applicant was injured while working and was paralyzed on the right

side of his body. The Applicant's work permit expired on 12 November 2010. He is afraid of being sent back to Mexico and murdered by one of the cartels.

### **Additional Narrative**

[9] The Applicant submitted an addition to his PIF on 20 December 2011 and added a significant amount of new detail. He explained his employment history, and how he retired at an early age and was free to focus all his time on his volunteer activities. These activities consisted of helping at senior homes, working with disabled people at a rehabilitation center in Altamira, developing evacuation plans for civilians in emergency situations, and getting services to squatters. He held a volunteer position in Altamira that was a government appointment, and it came with the power to issue tickets for environmental violations. The Applicant would also advocate for different communities by lobbying the government or trying to bring media attention to the issues they were facing.

[10] The Applicant initially joined the Citizen's Movement in order to represent his home town of Altamira in the group. The Citizen's Movement has many different branches dealing with environmental, socio-economic, and political issues. It has thousands of members, with 20 people on the executive. The Citizen's Movement has screening criteria in place to ensure that members are in no way involved in corruption. When the Applicant left Mexico he had two positions in the group: environmental inspector and counsellor. The counsellor position involved acting as a liaison between communities and the government, speaking on the radio and TV, and participating in marches. The Applicant appeared on the cartel's radar because he shed light on their environmentally harmful activities. The key project that started attracting the gangs' attention was

the Applicant's efforts to have a garbage dump moved from Isleta Zapote to El Chocolate Relleno in 2002.

[11] In April 2002, the Applicant was waiting for a government representative in Tampico to discuss a water treatment plant. A man came up to him and said "I know all about you" and then walked away. The Applicant did not pay much attention to the incident. However, in 2002 he began to realize he was being followed. He noticed things such as strangers appearing at community meetings.

[12] In May 2002, the Applicant was at his son's school when he was cut off by a truck. The truck continued on but as it went by the Applicant the windows were rolled down and someone held out a gun and pointed it at him. The Applicant was scared, but did not go to the police. Later that week he went to a Citizen's Movement meeting. He told the other members what happened to him, and they talked about similar things happening to them. Four people – Alfonso Amieba Zamora, Felipe Bracho Ugarte, Alberta Collado, Gerardo Siliceo Tavera – also said they had been threatened by gangs. The chairman of the meeting, Dr. Ricardo Guerror, said that he would find out what was going on because his brother was a brigadier in the National Defence.

[13] In June or July 2002, the Applicant was attending a meeting in Altamira about flood prevention. He was stopped by a man who lifted his coat to show off a gun and said "we have already told you to stop because shit/hell is coming to you." The man got into a car and left. The Applicant was scared but went on with his activities.

[14] In 2003, the Applicant was involved in shutting down garbage dumps. This cost the cartels a lot of money because they were receiving contracts from the government to dump garbage and, as a result of the Applicant's efforts, they had to find new sites. In June 2003, the Applicant was approached by three members of the Gulf cartel. They identified themselves as such and were angry about the attention the Applicant was bringing to their activities. They showed the Applicant their guns and told him that they knew his family's whereabouts and that he had better stop his activities or "shit will hit the fan."

[15] Later the same month, the Applicant and another Citizen's Movement member, Cesar Fentanez Banda (Fentanez), were in the parking lot of a hotel where the Citizen's Movement regularly met. Two SUVs pulled in and six men got out. The Applicant heard them ask someone at the hotel where they could find him, so he went up to them thinking they were from a governmental agency. They grabbed him by his tie and pushed him, and told him that he was hurting their business and he had better stop putting his nose where it does not belong. Fentanez tried to intervene and they kicked him. The Applicant and Fentanez walked away and went into the meeting. Afterwards the cartel members were still in the lobby. As the Applicant was leaving, the cartel members made a gesture of pulling a gun and shooting him.

[16] In July 2003, the Applicant was in a department store parking lot with two other members of the Citizen's Movement, Patricia Bracho and Senator Bolado Salinas, when two vans pulled up. The sides of the vans opened and the men inside showed off their guns. The Applicant got into his vehicle and the vans pulled alongside him and pointed their guns at him through the window. Two men got out and approached the side of the Applicant's car where Patricia was sitting. They said

“we know what you’re doing” and hit the side of the vehicle before driving off. The men were wearing jackets of a federal agency, which made the Applicant especially worried. Patricia was very scared, and was crying. The Applicant did not report these incidents to the police because Ricardo Guerrero, the National President of the Citizen’s Movement, told him not to because the police were as corrupt as the cartels, so there was no point.

[17] In June 2004, the Citizen’s Movement held an outdoor meeting at a plaza in Altamira to discuss a water treatment plant for the area. After the meeting, the Applicant was waiting around in the plaza with another member (Alberto) to meet with community members who wanted to talk to him about the project. He was approached by men who said “it’s not convenient for you to move on this project” and “do not do anything on any project because it is the business of our boss.” The Applicant understood that by “boss” they meant the boss of their cartel, the Mana. Then the people the Applicant was waiting for showed up, the cartel members attacked them and one person was hit in the mouth with the back of a gun. The Applicant said that the violence was directed towards the community members because they were pushing for the water treatment plant. The cartels members then returned to the Applicant and Alberto and said “we’re not playing around,” and got into their vehicles and left.

[18] In early September 2004, there was a general meeting of the Citizen’s Movement in Tampico. The Applicant was headed to the restaurant beside the hotel with Amieva, Bracho, Fentanez, Senator Bolado, and Patricia when they noticed two dark Hummers and two black Navigators parked on the street outside. Four fully armed men got out of one of the Navigators and threatened Bracho and Patricia. The Applicant was between one of the men and Patricia and the

man took out a large gun and told him to get out of the way. Amieva said “you must have been following us” and the man said “if you continue like this, I’m going to bring it to you.” The Applicant was scared the man was going to shoot him, as there had been assassinations in the area that year. The man pushed the barrel of the gun into the Applicant’s stomach, and the Applicant was so scared that he urinated on himself. The men went back into their vehicles and the Applicant and the others went back to the hotel to tell Ricardo Guerrero what happened. He said that he would go to Mexico City to talk to his brother, and the Applicant was comforted that Guerrero was taking action now that the attacks had become more brazen. There had been many incidents like this reported by other members of the Citizen’s Movement and the cartels were making a point of making themselves visible when following them.

[19] At the December 2004 meeting, Guerrero said that his brother had taken action to make sure the Citizen’s Movement was given protection by the secret police. The Applicant surmised this was true because there were no incidents throughout 2005.

[20] However, in the summer of 2006, the Applicant started receiving phone calls. The first one was from a member of the Zetas who said “we need an amount of money from you for protection from the Gulf cartel. We will leave it to you to decide the amount.” The Applicant hung up. The calls continued throughout the year, on an almost daily basis. The Applicant heard the same thing was happening to other members of the Citizen’s Movement, but because everyone thought they had national protection no one worried too much about the calls.



[21] In December 2006, the Applicant was outside a café in Altamira when he was approached by a short, stocky man. The man said “Engineer? I want to assure you that we are serious about demonstrating the ability of our protection” and the Applicant replied “What’s happening? I’ve been getting phone calls.” The man said “We had given you the opportunity to choose what amount to give us, but now we are imposing upon you the amount of 2000 pesos every 14 days for protection.” The Applicant said “I don’t know why I have to give you money” and then the man left.

[22] Later in December 2006, after the Applicant had finished closing down a dump site (the one mentioned above in paragraph 14), he was leaving a meeting with Fentanez and four other members of the Citizen’s Movement when they saw members of the Mana cartel waiting for them. They knew the men were from the Mana because they were wearing shirts, belts, and boots with the letter “K” on them. One of the men had a gun with a handle made out of gold, so the Applicant assumed he was someone of power. The man moved his gun so that it was more visible to the Applicant and said “When are you going to start paying? Your little friend has already been paying. We have given you plenty of time and warning. Your movement is obstructing our business and we’re losing money. We know that your movement is beginning to support the anti-tobacco laws; therefore, we are going to lose a lot of money. Your actions are interfering in our affairs – if you don’t stop, we’ll stop you.” He then said “Your lives are now worthless.” The men stayed in the lobby and the Applicant’s group went back to their office to call Guerrero and tell him what happened. The Applicant was especially worried because these men knew about the Citizen’s Movement’s plans before they had been made public. Guerrero said not to worry and that he would find a way to protect them.

[23] In January 2007, the Applicant was walking down the street when a man grabbed his arm. The man turned him around and said “Remember that we’ve been phoning? So that we can protect you.” The Applicant replied “I don’t need protection – I need protection from you.” The man said “Now we’re going to need 3000 pesos every 14 days for protection. We know the names of your children and the schools they go to. We know what your wife looks like and what she does. We know all of the movements of your family. We are the Mana. Today you see me, tomorrow you’ll see someone else.” The Applicant left quickly.

[24] In February 2007, the Applicant was leaving his bank when he was intercepted by three men who showed him their weapons. They said “Don’t make any moves because you will be putting your family in danger.” They recounted intimate details about the Applicant’s life, such as the year his daughter started university and the faculty his son was in. It was this that made the Applicant realize the gravity of his situation and that he was being followed. The Applicant expected to have to get money for them, but the men left.

[25] About two weeks later, the Applicant was leaving the bank when three men approached him. They were not the same men as before. They pushed the Applicant to where the ATM machines were and said “You have to start paying now”. The Applicant took out 2000 pesos, but the men said he must pay 3000, so he took out more. The Applicant was aware the bank probably had a camera, so he tried to stay visible on it. He gave the men the money and they said “We expect you here in 14 days... don’t try and be a hero.” The Applicant said “This is the only money I’m going to pay you.” The men replied “No, it’s every 14 days. Starting today, we are not going to look

for you. Don't think that it will be us, it could be anybody." The men left and the Applicant went to talk to the bank manager. The bank manager said that the cameras were not working.

[26] After that, the Applicant started receiving phone calls on his cell phone 2-3 times per week. He did not change the number because it was the number he used for community organizing, and he would, in any case, have to make any new number available to the community. The calls were to remind the Applicant that the cartel would be coming for their money. He paid them 3000 pesos every 14 days for over a year – until May, 2008. Sometimes they would increase the amount from 3000 pesos to 4000, and occasionally even as high as 6000 pesos. It started to affect the Applicant financially, and his wife became concerned. He had never told her what was going on with the cartels because he feared for his family's safety.

[27] On 12 June 2008, the Applicant made an application to the Director of Public Ministry (an agency that protects the public) about the extortion. A copy of this report is found on pages 322-326 of the CTR. In Mexico, the common procedure is to file a complaint with the agency and they will contact the police about it. After making his complaint the Applicant was on his way to his son's school when he was intercepted by members of the cartel. They grabbed him and covered his head, and then hit him with the back of a gun and broke all his teeth. They put the Applicant in the back of a truck and told him not to move. They drove him around and then took him to an isolated location, where he was tied up for three days and two nights. They kept asking the Applicant for 2 million pesos, but he had trouble talking because all his teeth were broken and he could not pay because they had extorted all his money. After three days the Applicant could no longer hear anyone so he managed to uncover his head and free himself. He realized he was in a house and managed to crawl

out through a hole in the wall. He recognized where he was, and walked to a highway where he flagged someone down for help. The Applicant did not tell the man who picked him up what had happened, but he got the man to drive him to the Red Cross for medical help. The Red Cross did not ask for details because they did not want to get involved. The Applicant had money hidden in his pants so he called his wife and told her to leave their home and stay with her sister. He then got on a bus and went to St. Luis Potosi, the neighbouring state.

[28] The Applicant arrived at the central bus station in Rio Verde on 15 June 2008. He hid in a hostel until 29 August 2008. During this time, the Applicant called Amieva who arranged to get travelers cheques to the Applicant and his family. The Applicant also made phone calls to his wife and to other members of the Citizen's Movement.

[29] On 29 August 2008, the Applicant got up and saw two black trucks pull up outside the place where he was staying. Men all in black and wearing balaclavas got out. One man cut the telephone line. The person the Applicant was renting from knocked on his door and said "They're asking for you downstairs." The Applicant left all his belongings and escaped through the back to his landlord's apartment. The landlord (Hilario) drove the Applicant to an equivalent agency of the Public Ministry in Rio Verde because Hilario knew someone there. A copy of the report filed at this agency is found on pages 327-329 of the CTR. Hilario then sent the Applicant to stay with his cousins two and a half hours away from Rio Verde, in Laguna, Media Luna. The Applicant stayed there for two days. From there, he travelled to Valles. While in Valles he phoned Jorge Cantu and Cesar Fentanes, other members of the Citizen's Movement. They recommended that he leave the

country. The Applicant stayed in Valles for a few more days, and then went to Tampico because it was the only place in the region with a major airport.

[30] From Tampico the Applicant phoned his wife and told her to collect his documents because the cartels had found him again. His wife told him that Patricia had been kidnapped and the ransom had been paid, but she had still been killed. At this point the Applicant concluded that he would not be safe in Mexico. He decided to come to Canada because he did not need a visa to enter the country. He wanted his wife and children to come with him, but they did not have enough money. The airline ticket cost about 8000 pesos.

[31] The Applicant came to Canada on 26 September 2008. He took a flight from Tampico to Mexico City and then from Mexico City to Edmonton. As soon as the Applicant arrived in Canada he spoke with an Immigration Officer named Dave to explain his situation. The interpreter used for the interview was Luis Garay. Dave told the Applicant that refugee claims from Mexico are rarely successful in Canada, but based on his credentials he should be able to find work. Dave told the Applicant that it would be better to try and stay in Canada by getting a work visa than by making a refugee claim. Dave gave the Applicant a ten-day visitor's permit and told him to look for work. The Applicant looked for work for ten days, and stayed at the Hope Mission in Edmonton during this time. After ten days, the Applicant went back to Dave, who extended his visa for one month in order to give him more time to find a job.

[32] On 13 November 2008, the Applicant found a job with Polytubes Company. He signed a two-year contract with them. That night, Luis Garay called him and told the Applicant to go to the

airport because Dave wanted to talk to him. Dave told him to go to the Coutts, Montana office to pick up his work permit because he would have to leave the country and re-enter with the permit. The Applicant took the bus from Edmonton to Calgary, and then to Lethbridge. He walked to the border in a snowstorm, and crossed the border without knowing it and ended up in the American border office. The officer at that office wrote a note verifying that the Applicant was in the U.S. The Applicant then went to the Canadian office, paid a \$150 fee, got his work permit, and then went back to Lethbridge.

[33] The Applicant worked as a “Coiler Designer” at Polytubes. Basically, he adjusted the rubber tube making machine when it malfunctioned. On 26 April 2010, the hydraulic arm of a machine struck the Applicant on the head. The Applicant went unconscious and woke up in the Royal Alexandria Hospital. The Applicant was vomiting a lot and unable to move the right side of his body. He was told he had “conversion disorder” and that a connection from the accident to his injuries could not be found. Following the accident the Applicant was very forgetful, and even wrote his name on his arm so that he would not forget it. One test that the doctors performed was to put the Applicant under heavy sedation to loosen his mind to see if the right side of his body was indeed paralyzed. They questioned him while he was sedated, and Luis Garay was in the room while this was going on. The doctor also asked him to walk and do other things while sedated. The Applicant later read a medical report that said he could not do the things the doctor asked him to do.

[34] In June 2010, two people from Polytubes came to see the Applicant at the hospital. One person was the company interpreter. A friend of the Applicant, Iris Camacho, was also there. She became concerned that Polytube’s interpreter was not impartially interpreting what the Applicant

was saying. This made the Applicant suspicious. He became even more suspicious of the interpreter because the hospital records said that he told them how the accident happened even though he had been unconscious when the accident happened. The records also said that he had feeling in his right arm but no pain. This did not make sense to him.

[35] Later in June 2010, two people from the hospital came to see the Applicant. One was a social worker named Mary. She told the Applicant to get ready because the next day someone from Polytubes was going to take him to the airport and they had a plane ticket for him back to Mexico. When they left, a social worker from the Mennonite Centre, Nancy Villegas, came in. She said that she thought it was ethically wrong what Polytubes was doing. Nancy called Amy Wilson from the Mennonite Centre, who spoke with members of the hospital and told them that the Applicant had to stay there because he was physically unstable and that he had a Workers Compensation Board issue with Polytubes. Mary called Polytubes and told them that the Applicant was going to stay in the hospital longer. The issue of making a refugee claim was not brought up at this point because the Applicant's worker's visa had been extended until 12 November 2010.

[36] On 8 November 2010, the Applicant made his refugee claim. The Applicant did not make a claim earlier that summer because of his poor mental state after the accident. He also remembered what Dave had told him about his chances of success as a Mexican refugee claimant, and that he had told Dave he would try to work rather than make a refugee claim.

[37] Since his arrival in Canada the Applicant learnt of the assassinations of other members of the Citizen's Movement. These include:

- a. Felipe Bracho Ugarte - he was shot at a community meeting in 2008. He was decapitated and on his body was pinned a message addressed to the Citizen's Movement from La Mana and Los Zetas.
- b. Alberto Collado died in September 2008. He was kidnapped from Altamira by the Zetas. His sister paid them a ransom of 3 million pesos, but they burnt his body, cut off his head, and left a note saying this would happen to other members of the Citizen's Movement.
- c. Alfonso Amieva Zamora was shot in his vehicle in September 2009. He was killed with bullets with the Zetas symbol on it. American media took photos of the incident.
- d. Cesar Banda died in September 2010. He was found dismembered in front of a bank near a centre where the Citizen's Movement used to have meetings in Tampico.

The Applicant fears that if he is returned to Mexico he will be assassinated like other members of the Citizen's Movement.

### **The Applicant's Refugee Claim**

[38] The Applicant submitted numerous documents along with his refugee claim. A list is available on page 148 of the Certified Tribunal Record (CTR). These documents include: information about his professional credentials; newspaper articles about the Citizen's Movement and its activities; minutes from Citizen's Movement meetings; letters and certificates recognizing the Applicant's volunteer activities; articles about the kidnapping of Citizen's Movement members;



reports to the Red Cross and Public Minister; and letters from the Applicant's wife and the President of the Citizen's Movement.

[39] The Applicant also submitted a letter dated 23 December 2011 from German Villegas, a Mental Health Therapist (page 343 of the CTR). In the letter, Mr. Villegas explained that he has been working with the Applicant since 9 May 2011, and that the Applicant is suffering severe depression due to the paralysis he suffered in the accident at Polytubes. Mr. Villegas states that he views all the Applicant's symptoms as being directly related to the accident. He states that he is aware that the Applicant has been deemed a "non-credible" patient by doctors, but he interprets this as meaning that the doctors have been unable to find neurological lesions connected to the Applicant's symptoms. Mr. Villegas states that the title of "non-credible" means that a neurological connection has not been established, but it does not mean that the disability does not exist. He further states that the Applicant's "psychological symptoms and signs appear credible in sessions."

[40] The Applicant had an oral hearing before the RPD on 26 January 2012. The RPD asked the Applicant a number of questions about why so many important details of his story were missing from his Original Narrative (pages 397-400 of the CTR). Generally, the Applicant replied that he had only been allocated a small amount of time when he first met with the Legal Aid lawyer who helped him fill out his Original Narrative, and he had forgotten some of the details due to his head injury. The RPD focused a large amount of questions on the Applicant's temporary visas and his interactions with Dave (pages 401-406, 415-417 of the CTR). Applicant's counsel stated that she had tried to get the translator, Luis Garay, to testify on this issue, but that he did not want to because he works for the RPD and feared a conflict of interest.

[41] The RPD delivered oral reasons that same day, and found the Applicant not to be credible. The RPD determined that the Applicant was not a refugee under section 96 of the Act, nor a person in need of protection under section 97.

### **DECISION UNDER REVIEW**

[42] The Decision consists of Reasons rendered orally 26 January 2012, and in writing on 1 March 2012. The RPD determined the Applicant is not a Convention refugee, nor a person in need of protection, and rejected his refugee claim.

[43] The RPD identified the critical issue as being credibility. The RPD found reason to doubt the Applicant's truthfulness based on contradictions, inconsistencies and omissions in his evidence. It further found the explanations offered by the Applicant to resolve the contradictions were not satisfactory. There were two main sources of concern to the RPD: the multiple omissions from the Applicant's Original Narrative as compared to his Amended Narrative; and the believability of the Applicant's interactions with Dave.

[44] The RPD pointed out that the Amended Narrative includes seven incidents involving guns that were not included in the Applicant's Original Narrative, and that some of the excluded events were very serious: one involved the Applicant being so scared that he urinated himself, and another involved a civilian who was beaten with a gun.

[45] The RPD reiterated that when the Applicant was asked why these incidents were not included in his Original Narrative, he said that he could not remember whether he told his social

worker about them or not. He also said he might have forgotten at the time due to his head injury. The RPD stated that it did not accept these explanations as credible because the Applicant was represented by counsel at the time who would have been able to answer any questions about what information he should include in his PIF.

[46] The RPD pointed out that the Applicant was assisted in the preparation of his Original Narrative by his social worker. The RPD stated that “Although she is not an expert in immigration law, her profession dictates that she is educated and capable.” The RPD thought it was unreasonable that the social worker would not think that incidents involving guns would be significant enough to be included in the PIF. Further, the RPD stated that it should be assumed that the social worker would contact Legal Aid for advice. It found that it “is simply not plausible” that the social worker would not have included these numerous gun incidents in the Original Narrative if the Applicant had told her about them. The RPD concluded that the Applicant did not advise his social worker of these events.

[47] Having determined that the Applicant did not tell his social worker about the omitted events, the RPD looked at whether there was a reasonable excuse for omitting these incidents in the first place. The RPD pointed out that the only evidence it had about the Applicant’s head injury was a letter dated 23 December 2011 from German Villegas. The RPD pointed out that the letter states that the Applicant is viewed as a non-credible patient by medical doctors because they could not find a neurological explanation for his symptoms, but that Mr. Villegas believes that the Applicant presents with credible psychological symptoms. The RPD concluded that based on this evidence there has been no damage to the Applicant’s brain or memory. The RPD stated as follows, at

paragraph 16 of the Decision: “I take it from this letter that there has been no damage identified to the claimant’s brain. I have no evidence that his memory would have been affected at the time he submitted his first PIF. I find that the claimant was not memory impaired when he filed his first PIF. I also do not find it credible that he remembered these many incidents as he reflected back and told his story...” The RPD stated that the Applicant’s omissions from his Original Narrative “are far from minor and go to the heart of his claim.” It found the fact that they were not included at first instance damaged the Applicant’s credibility, and the fact that there were so many omissions of such a significant nature further damaged his credibility.

[48] The RPD pointed out that the Applicant did not seek refugee protection for over two years after his arrival in Canada. The RPD did not find the Applicant’s story about his interactions with Dave credible; immigration officers are “duty bound to follow a process when an alien claims refugee protection. Claimants do not ask for refugee protection, they claim it. The process does not include bargaining with the claimant to see if they will accept another form of status as the claimant alleged occurred in this case.” The RPD found that the Applicant’s story about Dave was illogical and that the Applicant could not produce the visitor’s visa he claimed he was issued; thus, a negative credibility finding was made on this issue.

[49] The RPD found that, based on its negative credibility findings, the Applicant was not a refugee under section 96 of the Act. Further, there was nothing in the evidence to demonstrate that the Applicant faced a personal risk as described under section 97 of the Act. The RPD therefore rejected the Applicant’s refugee claim.

## STATUTORY PROVISIONS

[50] The following provisions of the Act are applicable in this proceeding:

### Convention refugee

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

[...]

### Person in Need of Protection

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual

### Définition de « réfugié »

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

[...]

### Personne à protéger

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou

treatment or punishment if	peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[...]	[...]

## ISSUES

[51] The Applicant raises the following issue in this proceeding:

- i. Did the RPD err in making an adverse credibility finding primarily based on the amendment of the narrative of the Applicant's PIF?

Essentially, this boils down to the question of whether the RPD's negative credibility finding was reasonable.

## STANDARD OF REVIEW

[52] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[53] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review applicable to the issue in this case is reasonableness.

[54] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

## **ARGUMENTS**

### **The Applicant**

[55] The Applicant submits that the RPD’s credibility findings were unreasonable. The RPD stated that it doubted the Applicant’s credibility based on “contradictions, inconsistencies and omissions in his evidence,” but it did not cite any examples besides the fact that the Applicant submitted an amended PIF in order to expand on his Original Narrative. The Applicant stated at the outset of his Additional Narrative that it was an expansion on the original one submitted with his PIF. No other contradictions, inconsistencies, or omissions were discussed.

[56] The Applicant says the RPD made unreasonable assumptions about the interaction between the Applicant and his social worker in paragraph 14 of the Decision. The RPD said “It is simply not plausible that the claimant would have told his social worker about these numerous gun incidents and that, if aware of them, that she could not have included them in his original PIF narrative.” The Applicant submits that it was unreasonable for the RPD to make this assumption. As Lorne Waldman states in his book *Immigration Law and Practice*, 2<sup>nd</sup> Edition, LexisNexis Butterworths at paragraph 8.64 “Plausibility findings should only be made in the clearest of cases – where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by



the claimant.” The Applicant asserts that his explanation of the help received from his social worker does not fall into this description, and the RPD’s findings of implausibility were unreasonable.

[57] The Applicant further points out that the RPD contradicted itself by stating that the Applicant was represented by counsel when drafting his Original Narrative, but then accepting that the Applicant was assisted by his social worker. In fact, the RPD engaged in a substantial discussion about what actions it believed a reasonable social worker would take to assist a potential refugee claimant in drafting a PIF. It stated at paragraph 13 of the Decision that the Applicant’s counsel “logically would have been available to answer any questions he might have had as to the information required in the PIF.” This is an incorrect statement of the facts and directly contradicts the RPD’s earlier statements in regards to the help the Applicant received from his social worker.

[58] The Applicant points out that the Original Narrative was prepared with the help of a social worker, who would not have legal training, while the Applicant was medicated in the hospital. The RPD accepted the Applicant suffered a serious head injury at work. There was clear evidence that the Applicant was hospitalized for two months. It was unreasonable for the RPD not to take this into account. Further, the RPD selectively read parts of the letter from Mr. Villegas in a misleading and inappropriate way. It deduced from the letter that “there has been no damage identified to the claimant’s brain,” but ignored the parts of the letter that said that Mr. Villegas did not doubt the Applicant’s credibility, that the Applicant was suffering a disability and his symptoms appeared real, and that the Applicant’s mental health was in very poor condition. The Applicant submits that the RPD’s assessment of his medical condition was unreasonable.

[59] The Applicant further submits that the RPD was unreasonable in analyzing his interactions with Dave, the Immigration Officer. It was reasonable for the Applicant to interpret an immigration officer allowing him to enter and remain in Canada as having issued him a “visitor’s visa,” and it is not uncommon that foreign citizens are asked to return to the airport for follow-up. The Applicant must have been given some type of documentation or else he would not have been issued a work permit at the American/Canadian border. The RPD’s treatment of this issue was not reasonable.

[60] The Applicant submits the RPD’s findings do not fall within the range of possible and acceptable outcomes. *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA) at page 357 establishes that the test used to assess credibility “must reasonably subject [the applicant’s] story to an examination of its consistency with the probabilities that surround the current existing conditions.” The Applicant submits that his explanations for the significant additions to his Narrative are consistent with the events that were unfolding in his life at that time, and these circumstances were not properly considered in the Decision.

[61] The Applicant provided reasonable and plausible explanations as to why he submitted an expanded PIF narrative. This is not a situation such as that in *Shulha v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1191, where the applicant did not offer any explanation as to why she submitted amendments to her PIF. The Applicant also did not add new grounds or alter the essence of his refugee claim as occurred in *Larios-Garcia v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1162, he simply expanded on his story. The Applicant submits that it is very reasonable that a person, who had recently suffered a very serious head injury, and who was in

the hospital and facing the threat of being sent back to Mexico by his employer, might not do the best job of describing the details of his claim.

[62] The Applicant states that he did not expand on his Narrative in order to fabricate a story; he expanded on it because the Original Narrative was prepared under very stressful circumstances by a social worker. The RPD did not take these circumstances into consideration, and its findings in regards to the Applicant's credibility were not made in a reasonable and intelligible way. The Applicant submits that the RPD's Decision does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" as required by *Dunsmuir*, and that the Decision ought to be quashed and sent back to a differently constituted RPD for re-determination.

### **The Respondent**

[63] The Respondent submits that it is within the purview of the RPD to make credibility determinations, and it did so in a reasonable manner in this case. The Applicant's omissions from his Original Narrative were both multiple and significant, and he did not offer a reasonable explanation for his delay in making his refugee claim. It was reasonable for the RPD to make a negative credibility finding on this basis.

[64] In preparing his PIF, the Applicant was assisted by a social worker who would have either realized the incidents should have been included, or would have been able to contact other resources for advice on what should be included. It was reasonable for the RPD to consider that the Applicant had the social worker's help in preparing the PIF, and that it is both immaterial and not an error (see

*Rohm and Haas Canada Ltd v Canada (Anti-Dumping Tribunal)*, (1978) 22 NR 175 (FCA)) that the RPD referred to the social worker as “counsel” at one point. Considering how many omissions of a significant nature there were, it was reasonable for the RPD to conclude that these omissions damaged the Applicant’s credibility.

[65] The Respondent claims the Applicant’s statement that he did not remember whether or not he told his social worker about the incidents in the Amended Narrative was not a reasonable explanation for the omissions. The RPD rejected the Applicant’s contention that he might not have remembered the incidents until later on, noting that the omissions were significant and relevant. The RPD also rejected the possibility that the Applicant’s memory had been impaired by his head injury. The letter from Mr. Villegas stated that the Applicant was viewed as a “non-credible patient by medical doctors, given that they could not find any neurological lesions connected to his symptoms.” While the letter stated that the Applicant presented with credible psychological symptoms, it did not specify memory loss. The Applicant has not shown that it was unreasonable for the RPD to disbelieve that he did not remember multiple incidents of being threatened with weapons.

[66] The Respondent further submits it was reasonable that the RPD did not consider the Applicant’s explanation for the lengthy delay in claiming refugee protection credible. The RPD pointed out that immigration officers are duty bound to follow a certain process when refugee status is claimed. As the RPD pointed out, “...claimants do not ask for refugee protection; they claim it. The process does not involve bargaining with a claimant.” Further, the Applicant would not have

required a visitor's visa to enter Canada. Thus, he could not have been given a visitor's visa, nor could it have been extended. The Applicant also could not produce the permit.

[67] The Respondent further points out that the interpreter was not summoned to testify by the Applicant. The Applicant's counsel said that this was because the interpreter did not want to testify because he felt it could cause a conflict of interest. This was not a reasonable explanation because his appearance could have been compelled and would have provided important evidence. No objective evidence was provided by the Applicant to substantiate his assertions about his interaction with Dave, nor about how he got his temporary workers visa. As stated by Justice Near in *Garcia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 412 at paragraph 20, delay in claiming refugee protection "may, in the right circumstances, constitute sufficient grounds upon which to dismiss a claim."

[68] It is recognized by the Court that the RPD has a well-established expertise in evaluating credibility (see *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7; *Rahaman v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1800 at paragraph 38; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 at paragraph 13). As Justice Max Teitelbaum said at paragraph 13 of *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, "The jurisprudence is clear in stating that the RPD's credibility and plausibility analysis is central to its role as trier of facts and that, accordingly, its findings in this regard should be given significant deference."

[69] The Respondent also points out that failure to include relevant and important incidents in a PIF, which are then revealed at a later stage in the refugee proceeding, can negatively affect the Applicant's credibility if a reasonable explanation is not provided (see *Adewoyin v Canada (Minister of Citizenship and Immigration)*, 2004 FC 905 at paragraph 18; *Santillan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1297 at paragraph 29). The additions to the PIF do not have to constitute an entirely new ground for the refugee claim for a negative inference to be drawn from the omissions.

[70] It was reasonable that all of the above factors negatively affected the Applicant's credibility. The Respondent cites the Federal Court of Appeal decision in *Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, where the Court said at paragraph 3 that "where the RPD makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim." In the present case, there was "no independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim", and thus the RPD was entitled to rely on its negative credibility finding as being sufficient to dispose of the Applicant's claim (see *Alakozai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 266 at paragraphs 36-37). It was reasonable for the RPD to determine that the delay in claiming refugee status demonstrated a lack of a subjective fear, and that there was insufficient credible evidence upon which to make a positive finding. The Applicant's arguments are nothing more than disagreement with the RPD's assessment of his credibility. The Court must be careful not to substitute its own opinion as to credibility (*Ankrah v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 385 (TD)), and in this case the RPD committed no

reviewable error. The Decision falls within the range of acceptable outcomes and ought not to be disturbed.

## **ANALYSIS**

[71] The determinative issue in the Applicant's refugee claim was credibility. The parties agree that the applicable standard of review is reasonableness and that the RPD must be afforded considerable deference in deciding credibility issues which involve findings of fact and the exercise of the RPD's discretion. See *Khosa*, above, at para 61. The jurisprudence of this Court is clear that the RPD's credibility findings are central to its role as a trier of fact and that it is not the role of the Court to re-weigh the evidence. See *Lin*, above, at para 13. Notwithstanding this general jurisprudence, the Applicant says that this is one of those exceptional situations where the Court should intervene and find a reviewable error.

[72] First of all, I think it has to be said that the RPD was entitled to question the Applicant's credibility based upon the significant differences in his PIF narratives. As the Respondent points out, the failure to include relevant and important details in a PIF narrative, which are then revealed at a later stage of the proceedings, can negatively impact credibility if a reasonable explanation is not provided. See, for example, *Santillan*, above, at para 9.

[73] In the present case, the Applicant's additional PIF included seven incidents not previously disclosed in which he had a gun pulled on him, as well as other acts of violence. There is no doubt that these were important incidents that went to the heart of his refugee claim. Inevitably, the RPD asked for an explanation as to why they had been omitted from his original PIF narrative.

[74] The Applicant had no clear explanation for these omissions. He could not remember whether he had related them to the social worker who had assisted him in completing his original PIF, and he then went on to speculate that the new incidents may have come back to him later, or that his being struck on the head in an industrial accident in Canada could have affected his powers of recall.

[75] The Applicant now says that it is entirely plausible that a “person who suffered a serious head injury, and while in hospital, with the threat of being sent back to the very place he feared, might not mention every little detail in his claim.” This argument, however, is fully dealt with by the RPD in its Decision.

[76] There was evidence before the RPD that the Applicant was viewed as a non-credible patient by medical doctors and that no neurological lesion connected to his symptoms had been found. It is equally important that the RPD found that there was “no evidence that his memory would have been affected at the time he submitted his first PIF.”

[77] The Applicant now says that the letter from the Mental Health Therapist confirmed that he had been dealing with self-esteem issues, mood disorders (depression), lack of sleep and despair. However, this does not undermine the RPD’s finding that there was no evidence of memory loss at the time he completed his original PIF. The Applicant was asking the RPD to speculate that his injuries could have affected his memory, and he is now asking the Court to intervene on the grounds that the RPD should, reasonably, have accepted such unsupported speculation about memory loss as an explanation for the differences in his PIF narratives. There is nothing unreasonable about the



RPD's conclusions on this issue. In terms of the *Dunsmuir* test, there is "justification, transparency and intelligibility within the decision-making process," and, on this point, the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[78] It does not matter that it is possible to argue with the RPD's finding, as the Applicant does, or even that other reasonable conclusions that favored the Applicant might have been possible on the facts. The RPD's findings clearly fall within the *Dunsmuir* range, and the Court cannot intervene on this basis.

[79] Nor are these findings rendered unreasonable by the RPD's saying that the Applicant was represented by counsel at the time who could have answered his questions. It is not clear whether by "counsel" the RPD means the social worker who assisted the Applicant to complete his original PIF or a lawyer but, more importantly, the Decision on point is not based upon the fact that counsel may have been available; the Decision is based upon the Applicant's inability to explain the lack of significant details in his original PIF and his unsupported speculations about why he had failed to include that detail originally but had no trouble remembering it later and adding it to his PIF narrative. Nor is this finding affected by the RPD's general statement about "contradictions, inconsistencies and omissions in his evidence." The justification for the Decision is clear from the reasons. As the RPD makes clear, and as the evidence shows, the Applicant was assisted by his social worker in completing the claim forms which give precise instruction, at paragraph 31, concerning what the PIF narrative must contain. As the RPD points out, "one does not need to be an expert in immigration law to recognize that having a gun pulled on you once would be significant information in a refugee claim, let alone having a gun pulled on you on seven different occasions."

[80] The Applicant's second major argument is that the RPD's conclusions about his interaction with the immigration officer are unreasonable. Once again, the Applicant asks the Court to speculate about possible explanations:

We furthermore respectfully submit that the right granted to the Applicant by an immigration officer to enter Canada, on condition, that he return, can very easily and plausibly be interpreted by a foreign citizen as a "Visitor's Visa."

[81] This is an invitation to the Court to substitute another interpretation of the situation for that of the RPD, and the jurisprudence is clear that the Court simply cannot do this.

[82] This aspect of the Decision is relevant to the Applicant's delay in making a claim for refugee status after coming to Canada. Delay is a well-recognized factor that can be taken into account by the RPD, when assessing a claimant's subjective fear. See *Davila v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1116 at para 31; and *Csonka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056 at para 62.

[83] The RPD gives several reasons for rejecting the Applicant's explanation on this point:

- a. Immigration officer's take an oath to uphold the laws of Canada and are not in the business of offering other favours of status;
- b. The Applicant was asked to produce the alleged visitor's permit, but he could not do this;
- c. The Applicant did not need a visitor's permit at that time;

- d. The Applicant failed to corroborate his story by calling the interpreter who was present during the interview with the immigration officer.

[84] Once again, it is possible to take issue with these findings, and the Applicant invites the Court again to speculate about other possible explanations that could be used to interpret the situation to his advantage. But the Applicant's own evidence is that the immigration officer dissuaded him from applying for refugee status and, instead, issued him with a visitor's visa, which the Applicant could not produce or corroborate. It is also very telling, in my view, that the immigration officer himself was not called as a witness and that no explanation was offered as to why not. There is justification, transparency and intelligibility in the RPD's handling of this point, and the conclusions fall within an acceptable range. Even if other conclusions were possible, this does not render the Decision unreasonable. The Court cannot interfere on this basis.

[85] At the hearing of this matter, the Applicant also raised an additional reviewable error with regard to the RPD's handling of section 97 of the Act. The RPD found that "there is nothing in the evidence, whether in person or documentary, that would provide a foundation for establishing a personal risk to the claimant pursuant to subsection 97(1) of the Act." The Applicant points to evidence that was overlooked in the form of his own PIF narrative, the Mexican Red Cross report of 14 June 2008 concerning medical treatment he received, and his protestation to the public investigator of 29 August 2008.

[86] The Applicant's own narrative evidence is dealt with under the RPD's general non-credibility finding. The Red Cross report simply confirms injuries and treatment, but says nothing

about the cause of those injuries. As regards the accusations against Ernesto Cruz made to the public investigator in the State of San Luis Potosi about alleged kidnapping and threats, counsel for the Applicant advises that there was no follow-up. We do not know why. The filing of the complaint does not confirm the truth of the allegations, and the RPD found the Applicant's narrative not to be credible. In my view, then, the failure to mention any of this evidence specifically does not render the RPD's conclusions on section 97 risk unreasonable.

[87] In the end, this Decision was based upon the evidence that was placed before the RPD. It may be, for instance, that if the RPD had heard from the immigration officer, the social worker, or the interpreter that the result would have been different. But the RPD can only act on the evidence that was placed before it, which in this case was fairly incomplete. However, the Applicant was represented by counsel at the hearing and there may well have been good reasons, not favourable to the Applicant, why counsel chose not to call that additional evidence.

[88] Counsel agree there is no question for certification and the Court concurs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed.
2. There is no question for certification.

“James Russell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-993-12

**STYLE OF CAUSE:** JOSE ISABEL MARQUEZ LUGO V THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Edmonton, Alberta

**DATE OF HEARING:** October 15, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** RUSSELL J.

**DATED:** November 6, 2012

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