BLACK LAW STUDENTS' ASSOCIATION OF CANADA

L'ASSOCIATION DES ÉTUDIANTS NOIRS EN DROIT DU CANADA

Our histories never unfold in isolation. We cannot truly tell what we consider to be our own histories without knowing the other stories. And often we discover that those other stories are actually our own stories.

- Angela Davis

November 17, 2023

Dear Participants,

The Julius Alexander Isaac Moot for the 2023/2024 academic year explores racial discrimination and international borders.[1] It is a fictional appeal of the Supreme Court of Canada's ruling on the *Safe Third Country Agreement* (*STCA*) in *Canadian Council for Refugees v. Canada (Citizenship and Immigration)* (*CCR*),[2] to the Diversity High Court of Canada (DHCC). Details regarding the procedure and substance of the Moot follow.

1. Procedure

a) Overview

The Moot will consist of a fictional appeal from the Supreme Court of Canada's *CCR* decision to the DHCC. The nature of argumentation, issues, deadlines, and facta format relating to this appeal are described below.

b) Nature of Argumentation

At the DHCC, all Canadian doctrine is only persuasive, not binding (though the established hierarchy of precedents in Canadian law still inform how persuasive that doctrine is, e.g., higher court decisions are more persuasive than lower court decisions). Further, the Moot—unlike conventional courts—places equal weight on arguments rooted in doctrine and theory. To this end, parties to the appeal must include at least one argument based in doctrine (e.g., jurisprudence and

[1] The author thanks Harsha Walia, Vasanthi Venkatesh, and Vincent Wong for helpful feedback on an earlier draft of this Moot Problem and Osler students/interns Frankline George, Madison Milanczak, and Farhia Mohamed, as well as the Black Law Students' Association of Canada, for their exceptional research assistance in preparing this Moot Problem.

[2] 2023 SCC 17 [*CCR*].

statutes) and one argument based in theory (e.g., critical race scholarship) in their written and oral submissions. **Failure to follow this rule will lead to disqualification from the final rounds of the Moot.** With this in mind, parties should be clear—in both written and oral argument—regarding the classification of their various arguments as either doctrine or theory arguments. The easiest way to do this will be to label arguments in their overview (oral) and table of contents (written) as "Theory Argument 1: …" and "Doctrine Argument 1: …". Subject to this requirement of advancing at least one doctrine and one theory argument, parties can have as few or as many arguments as they consider most persuasive to advance their client's position.

Whereas "doctrine arguments" typically operate from inside the current legal system, "theory arguments" typically operate from outside the current legal system, question its underlying assumptions, and seek to reveal deeper insights into the ways in which the existing legal structure may sustain and perpetuate white supremacy. In other words, theoretical arguments in the Moot do not necessarily replicate the kinds of theoretical arguments that one might make to an actual court in the Canadian legal system. Rather, theoretical arguments are sound so long as they advance your client's position, even if they are the sort of argument that a real court would reject out of hand by virtue of it, for example, questioning the very validity of the process or governing legal frameworks at issue. In this way, theory arguments have substantial flexibility in terms of their potential for innovative and creative reasoning. Does challenging deportation to the United States specifically—but not deportation as a practice in general—legitimize the state's use of borders to sustain racial hierarchy? Are social categories such as race or gender less helpful than, for example, class or occupation, for interpreting the specific injustice (literally) shaped by borders? Could reduced border enforcement, paradoxically, exacerbate racial hierarchy by threatening the sovereignty of states resisting neocolonial influence and intervention? The sky's the limit!

To be clear, a doctrine argument need not be entirely divorced from theory, and vice versa—indeed, doctrine and theory are inseverable. However, the thrust of a doctrine argument must be rooted in reference to traditional legal authorities, whereas the thrust of a theory argument is normative, i.e., it concerns what Canadian law should be, not what it is. And, to the extent theory arguments are rooted in reference to authority, that authority is principally theoretical scholarship.

c) Issues in the Appeal

The issues in this appeal include both doctrinal and theoretical issues. The doctrinal issue is listed below, whereas the theoretical issues are determined by the mooters.

The sole doctrinal issue in this appeal is "whether the Canadian legislative regime implementing the *Safe Third Country Agreement* […] complies with constitutional … law requirements",[3] i.e., compliance with ss. 7[4] and 15[5] of the *Charter*.

Since the Supreme Court of Canada only addressed administrative law issues summarily,[6] and with a view to ensuring overlap and clarity between Appellant and Respondent arguments in the competition, administrative law issues will be excluded from the scope of this mooting competition.

Moreover, as the DHCC is particularly—though not exclusively—concerned with issues of racial justice, it is open to both sides to advance arguments, and raise social context evidence, about the racial inequalities implicated in the *STCA*, despite the initial s. 15 complaint being framed with respect to gender-based inequalities.

For maximum clarity: **No doctrinal arguments concerning standing will be entertained in the Moot.**

In contrast, the theoretical issues that may be raised in this appeal are not pre-ordained. Rather, it is up to participants—both Appellants and Respondents—to think creatively about how the existing legal system can be critiqued (positively or negatively) in a manner favourable to their client. For example, a theoretical issue on appeal could be any of the following:

- Whether reform efforts pertaining to the operation of Canadian border policy, while worthwhile in isolation, should be rejected because they ultimately undermine broader calls for the abolition of borders
- Whether race-based immigration reforms overemphasize race to the exclusion of other more pressing structural disparities such as gender, class, or disability
- Whether the central premise of immigration law—i.e., the distribution of rights based on citizenship status—should be abandoned because of its inextricable relationship with racial discrimination and neocolonial domination
- Whether the *Immigration and Refugee Protection Act*[7] should be amended to give special consideration to migrants from states destabilized by Canada's imperial policies

[3] *Ibid* at para 4.
[4] *Ibid* at paras 7-12.
[5] *Ibid* at para 13.
[6] *Ibid* at paras 49-55.
[7] RSC, 1985, c C-46.

- Whether expanded immigration/refugee access—without corresponding social supports in Canada—harm more than help migrants to Canada

Ultimately, as long as an argument seeks to challenge the constitutionality of the *STCA*, it is properly advanced by the Appellant (the Canadian Council for Refugees), whereas the Respondent (Canada) may advance any arguments seeking to uphold the *STCA*'s constitutionality.

Since the doctrinal issue is the same for all parties, arguments on those issues will be aligned. The theoretical issues, however, will be chosen by the mooters. In consequence, arguments on the theoretical issues may not be aligned in any particular moot. Do not worry about this! There will be no requirement for a Respondent's factum or oral submissions to engage with the theoretical issues that happen to be raised by the Appellants they moot against (and vice versa), though they are welcome to incorporate such a response into their oral submissions.

d) Deadlines

The following deadlines will be strictly enforced by the Moot Coordinators:

- Appellant's and Respondent's factum due: **January 5, 2024**
- Moot competition: **February 1-3, 2023**

e) Facta Format

All Facta should conform with the formatting requirements summarized in the Moot Rules.

2. Substance

The doctrinal foundation for the Moot is the *CCR* Decision. However, its theoretical foundation is briefly summarized here. I first discuss Critical Race Theory (CRT) generally, and then race and borders specifically.

The discussion below goes into some detail about CRT and borders. For clarity, though, theory arguments in the Moot need not cite extensive scholarship. Rather, they should engage with themes characteristic of critical race scholarship. There are examples of CRT scholarship cited in the footnotes below, which may be helpful. In addition, there is plenty of scholarship—much of which I would consider aligning with the CRT tradition—specifically exploring the issue of race and borders, cited in the footnotes below. Reference to some of this scholarship is sufficient for competition in the Moot, but additional research is always encouraged and students should in no way feel limited to the theoretical authorities or perspectives cited in this Moot Problem. That said, the scrutiny of theory arguments will rest principally on the extent to which they raise thoughtful

insights about race and law, while also furthering your client's case, not on a tally of how many different scholars or articles happen to be cited.

a) What is CRT?

CRT is an academic field of inquiry interested in the intersection of law and racial inequality.[8] It defies narrow definition. But one could say it interrogates racial truth, i.e., that it challenges established conservative—and even liberal[9]—interpretations of law and society. As Derrick Bell, the "intellectual forefather of CRT",[10] explains: "critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it."[11]

It would be incomplete to claim that critical race theory—or, given its multiplicity, critical race theories[12]—does not reflect any ideological leaning (indeed, every movement does). And CRT is a generally "progressive" ideological movement. In the words of one of its founding theorists, Kimberlé Crenshaw, CRT represents a "left intervention into race discourse and a race intervention into left discourse."[13]

More precisely, CRT can be understood in opposition with "post-racialism"—whereas post-racialism claims that race does not play an explanatory role in our current society, CRT counterclaims that race not only plays such a role in society, but further, that powerful forces (like law) assist race in playing that role.[14] For example, in Canada, violence committed by white men is typically characterized by initial media reporting as relating to mental health, whereas violence by Muslim Canadians is quickly characterized as relating to terrorism.[15] A post-racial lens would

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[8] Khiara M Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 7.
[9] *Ibid* at 12-13.
[10] *Ibid*.
[11] Derrick A Bell, "Who's Afraid of Critical Race Theory" (1995) 1995:4 U Ill L Rev 893 at 893.
[12] I say this because CRT is not a *scientific* theory, but rather, a *social* theory best described as "many theories" roughly united around a core "belief in an opposition to oppression." See Jerome McCristal Culp Jr, "To the Bone: Race and White Privilege" (1999) 83:6 Minn L Rev 1637 at 1638.
[13] Kimberlé Crenshaw et al., eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995) at xix.
[14] Bridges, *supra* note 8 at 5-7.
[15] See e.g. Jasmeet Bahia, "London terror attack: Canadians have become desensitized to violence against Muslims" (9 June 2021), online: *The Conversation* < https://theconversation.com/london-terror-attack-canadians-have-become-desensitized-to-violence-against-muslims-162392 >. This same distinction has likewise been noted in the United States. See e.g. Bridges, *supra* note 8 at 1-2.

say that race simply describes the demographics of terrorist actors; CRT, in contrast, would say that race explains how we define terrorism.[16]

Simply put, if you are critically thinking about race and law, then one could say you are, in effect, doing critical race theory.[17] And that is the intent of the Isaac Moot: to encourage participants to dig deeper into the ambivalence of our legal structures—how they may maintain and perpetuate racial hierarchy in some circumstances, yet mitigate against that hierarchy in others. The ultimate goal is to encourage creativity and imagination, hallmarks of CRT. With that in mind, participants should not feel pressured to follow any particular "methodology" or reach any particular "conclusion" in their arguments to remain faithful to CRT—indeed, CRT prescribes neither.[18]

CRT is not only relevant to critique of law; it also informs a nuanced understanding of existing legal doctrine itself. To be sure, American equality jurisprudence adopts the post-racial view that historic examples of racist policy (e.g., racially segregated public institutions) and contemporary examples of anti-racist policy (e.g., affirmative action) should be viewed with equal constitutional skepticism,[19] a view perhaps most famously articulated by Chief Justice Roberts' concurring opinion in *Parents Involved in Community Schools v Seattle*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[20] However, the *Canadian Charter of Rights and Freedoms*, in stark contrast, specifically permits affirmative action.[21] And when the Supreme Court in *R v Le* held that a proper s. 9 detention analysis must consider "the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society,"[22] the highest court in our country is, in a sense, doing CRT as well.

CRT analysis is not easy. But this complexity corresponds to the fluidity of its subject. Racial logic is agile; it evolves over time to evade detection. Whereas state-sanctioned racism was

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[16] See e.g. Caroline Mala Corbin, "Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda" (2017) 86:2 Fordham L. Rev. 455.
[17] Bridges, *supra* note 8 at 9.
[18] *Ibid* at 11.
[19] See e.g. *Adarand Constructors, Inc. v Peña*, [1995] 515 US 200. There is extensive CRT scholarship critiquing race-neutral (or "colorblind") conceptualizations of equality. See e.g. Neil Gotanda, "A Critique of 'Our Constitution is Color Blind'" in Crenshaw et al, eds, *Critical Race Theory*, *supra* note 12; Lani Guinier & Gerald Torres, "A Critique of Colorblindness" in *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, Massachusetts: Harvard University Press, 2002) 32.
[20] [2007] 551 US 701 at 748.
[21] *Canadian Charter of Rights and Freedoms*, s 15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.
[22] *R v Le*, 2019 SCC 34 at para 76.

predominantly overt historically, changing etiquettes now redesign the modalities of racism into more subtle forms. Before, society was explicitly anti-Black. Now, one might argue we are simply pro-merit[23] or pro-patriotism.[24] Decoding these evolving forms of racism is, according to many CRT scholars, central to contemporary anti-racist projects.

Conventionally, we think of race as a concept related to identity, e.g., Black people and white people. But race is more a process (verb) than a person (noun).[25] As Kendall Thomas, another founding CRT thinker, writes: "we are 'raced' through a constellation of practices that construct and control racial subjectivities."[26] With this in mind, participants are encouraged to reflect on the subtle ways in which race is mobilized to sort—and subjugate—certain groups within society. And, in particular, participants are encouraged to think deeply about how borders are a location imbued with racial meaning and where racial hierarchy is perpetuated and sustained. What racial disparities exist in border policy? What factors contribute to those disparities? Indeed, can one understand borders—and, relatedly, the idea of the nation—without reference to race, colonialism, and white supremacy? In other words, how do borders shape not only who is considered "other", but similarly, what it means to be "Canadian"?

b) What is the Relationship between Race and Borders?

To some, Canada is a paragon of equity, specifically in the context of its border policy: historically, the storied end of the Underground Railroad; and today, a nation that has opened its heart in historic amounts to welcome new immigrants and refugees to join its multicultural mosaic.[27] Indeed, Canada's former Minister of Immigration and Citizenship recently observed that Canada resettled more refugees than any other country last year.[28]

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[23] Bret Stephens, "Diversity, Inclusion and Anti-Excellence" (2 August 2019), online: *The New York Times* < https://www.nytimes.com/2019/08/02/opinion/university-campus-diveristy-inclusion-free-speech.html >.

[24] Sally Jenkins, "Colin Kaepernick reminds us that dissent is a form of patriotism too" (8 September 2016), online: *The Washington Post* < https://www.washingtonpost.com/sports/redskins/colin-kaepernick-reminds-us-that-dissent-is-a-form-of-patriotism-too/2016/09/08/053830aa-75e4-11e6-8149-b8d05321db62_story.html >.

[25] Charles R. Lawrence II., "If He Hollers Let Him Go: Regulating Racist Speech on Campus" (1990) 1990:3 Duke LJ 431 at 443, n 52.

[26] Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick" (1993) 79:7 Va L Rev 1805 at 1806-07.

[27] Amelia Cheatham & Diana Roy, What Is Canada's Immigration Policy? (March 2023), <https://www.cfr.org/backgrounder/what-canadas-immigration-policy>.

[28] John Tasker, "Supreme Court upholds agreement that lets Canada send refugees back to U.S." CBC News (16 June 2023), online: <https://www.cbc.ca/news/politics/supreme-court-ruling-safe-third-country-agreement-1.6878870>.

However, a critical lens—and, in particular, a lens that pays specific attention to race—paints a different picture: an understanding of "immigrant" as an inherently racialized concept,[29] and where "citizenship has figured as an institution of domination, functioning as a mechanism of elimination, a site of subjectivation, and an instrument of race making."[30] For example, Canada's historical immigration policies were specifically designed to welcome white immigrants,[31] while excluding "Asiatic" and Black migrants presumed to be undesirable, unassimilable, and unsuited to the climate of Canada.[32] Indeed, groups on the peripheries of whiteness had to specifically argue that they did not fall within these undesirable groups—for instance, by dropping their Armenian names—in order to be accepted as immigrants to Canada.[33] And more recent articulations of border policy—for example, with respect to "economics" or "skill"[34]—simply illustrate how CRT's long-standing critique of superficially neutral principles[35] resonates in the context of substantively discriminatory border policies. It is no surprise, for example, that seemingly race neutral immigration policies disparately impact the Global South (more likely to seek asylum and contend with the *STCA*) in comparison with the Global North (less likely to require visas to enter Canada).[36]

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[29] See e.g. Vasanthi Venkatesh, "'No Status, No Race': Toussaint and the Erasure of Race in Immigration Judicial Making" (presented at the Windsor Law conference "Locating RDS in the 21st Century: Critically revisiting the SCC decision in *R. v. S. (R.D.)*").

[30] Lana Tatour, "Citizenship as Domination: Settler Colonialism and the Making of Palestinian Citizenship in Israel" (2019) 27:2 8 at 10.

[31] G. Dirks, "Immigration Policy in Canada" (2020), online: *The Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/immigration-policy>.

[32] Credit to Vincent Wong for this crucial point. See e.g. Immigration Act: Prohibiting Asian Immigrants P.C. 2115 and P.C. 4849 (1930), online: Nikkei National Museum <https://nikkeimuseum.org/www/item_detail.php?art_id=A40840#:~:text=The%20first%20order%20is%20P.C.,%E2%80%9D%20dated%20November%2026%2C%201947>; Tom Flanagan, "Finding Freedom: Black Oklahomans in White Alberta" (2023), online: *C2C Journal* <https://c2cjournal.ca/2023/08/finding-freedom-black-oklahomans-in-white-alberta/>.

[33] Credit, again, to Vincent Wong for this crucial point. See e.g. Jan Raska, "Resettling Child Refugees: Canada and Armenian Orphans, 1923-1927 (2020), online: *Pier 21* <https://pier21.ca/blog/jan-raska-phd/resettling-child-refugees-canada-and-armenian-orphans-1923-1927>.

[34] Anna Katherine Boucher, "How 'skill' definition affects the diversity of skilled immigration policies", (2020) 46:12 Journal of Ethnic and Migration Studies, pp. 2533-2550 <https://www.tandfonline.com/doi/full/10.1080/1369183X.2018.1561063>.

[35] Charles L. Black Jr., "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421.

[36] See e.g. Government of Canada, "Entry requirements by country or territory", online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/entry-requirements-country.html>.

In light of recent Canadian controversies, Rinaldo Walcott asks provocatively: "Do Black migrant lives matter in Canada?" Yet this is an understandable—indeed, necessary—question when confronted with the actual social context of Canadian immigration policy and practice,[37] laid out in stark terms by Walcott who juxtaposes Canada's recent treatment of white vs. racialized migrants:[38]

> It has been relentlessly pointed out by many that the federal and provincial governments have urgently and immediately opened pathways for Ukrainians to not just enter Canada but to attain permanent residency as needed. Canada imagines itself as a white nation, so the Ukrainians get to inherit Canada with a certain ease. The same cannot be said for Black people. To take just one example, the Ontario government created a $300 million fund for Ukrainian settlement in the province. Similarly, the federal government has waived immigration requirements and created new ones that can be exercised well into 2024.
>
> Peter Street in Toronto has become a kind of shame, evidence of the lie that Canada is a benevolent and welcoming place. It is of course welcoming for white migrants. Canada has already brought over more than 160,000 Ukrainians in little over 17 months, yet just over 30,000 Afghans have arrived in Canada since the fall of Kabul, and barely 43,000 Syrians have been resettled here in eight years. Meanwhile, three levels of government squabbled about paying the meagre cost of settling desperate and destitute Black refugees on the streets of Toronto. Failure to see the comparative difference here amounts to complicity in the violence the state is imposing on Black people.

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[37] See e.g. Joshua Freeman, "'I feel like I'm not welcome here': Refugees and organizations speak out as officials meet to address 'crisis' on Toronto streets" (July, 2023), Online: *CP24* <https://www.cp24.com/news/i-feel-like-i-m-not-welcome-here-refugees-and-organizations-speak-out-as-officials-meet-to-address-crisis-on-toronto-streets-1.6480145>; Noushin Ziafati, "'A huge shame': Asylum seekers sleeping on the streets of Toronto as city, feds argue over who should foot the bill" (2023), online: *CTV News* <https://www.ctvnews.ca/canada/a-huge-shame-asylum-seekers-sleeping-on-the-streets-of-toronto-as-city-feds-argue-over-who-should-foot-the-bill-1.6471231>; Alyshah Hasham, "Olivia Chow says Ottawa to blame for Toronto's refugee housing crisis" (2023), online: *Toronto Star* <https://www.thestar.com/news/gta/olivia-chow-says-ottawa-to-blame-for-toronto-s-refugee-housing-crisis/article_7e7e8aad-ffb4-5011-be8b-9d07ba50af4d.html>.

[38] Rinaldo Walcott, "Do Black migrant lives matter in Canada?" (2023), online: *Canadian Dimension* <https://canadiandimension.com/articles/view/do-black-migrant-lives-matter-in-canada>.

And more broadly, myriad scholarship examines the relationship between borders and race.[39] Crucially, Harsha Walia explains how putatively "progressive" countries—like Canada—maintain racial hierarchy through border imperialism:[40]

> Even in vaguely social democratic countries such as Canada, Sweden, and Denmark, ideological shoring up of the nation-state targets migrants and refugees for "welfare tourism," restricting them from full access to social services. These restrictions operate as a de facto wealth test, as well as a nationalist form of exclusion against "undesirable" immigrants.

Even direct parent/grandparent sponsorship, previously separated from income- and wealth-based exclusion, is now subject to minimum necessary income tests, which disproportionately impact negatively racialized immigrant communities, many of which heavily rely on extended family for care work and support.[41]

This social context—that is, racial disparities in Canadian border policy and Canada's manufacturing of vulnerability for precarious migrants[42]—is reflected in the *CCR* appeal itself. Canada argued, successfully, that various "safety valves" in its border policy ensure that the s. 7 rights of the appellants would not be compromised. Yet migrants themselves tell a very different story. They explain, for example, that the *STCA* forces migrants to make dangerous journeys between Canada and the United States. Further, migrant rights organizers argue that this injustice is *specifically racialized*. As the Migrant Rights Network explains:

> Even though it was announced on Friday, the STCA extension was negotiated in secret over a year ago. It came as a response to increased anti-refugee

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[39] See e.g. Brettell, Caroline, *Constructing borders/crossing boundaries: race, ethnicity, and immigration* (Lanham, Md: Lexington Books, 2007); Longenecker, S. Gettysburg, *Religion: Refinement, Diversity, and Race in the Antebellum and Civil War Border North* (2014) Fordham University Press, New York, USA <https://doi.org.proxy1.lib.uwo.ca/10.1515/9780823255214>; Mary Romero "Crossing the immigration and race border: A critical race theory approach to immigration studies" (2008) 11:1 Contemporary Justice Review, 23-37 <https://doi.org/10.1080/10282580701850371>; Alpa Parmar, "Borders as Mirrors: Racial Hierarchies and Policing Migration" (2020) 28 Critical Criminology <https://doi.org/10.1007/s10612-020-09517-1>; E. Tendayi Achiume, "Race, Refugees, and International Law" (2021) The Oxford Handbook of International Refugee Law, Oxford Academic <https://doi.org/10.1093/law/9780198848639.003.0003>.

[40] Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Haymarket Books: 2021) at 202.

[41] See e.g. *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181, where a constitutional challenge to these provisions was dismissed by the Federal Court of Appeal, with leave to the Supreme Court of Canada denied.

[42] See e.g. Anelyse M. Weiler & Janet Mclaughlin, "Listening to Migrant Workers: Should Canada's Seasonal Agricultural Worker Program Be Abolished?" (2019) 43:4 Dialectical Anthropology at 381–88.

> demands from racist politicians. Depending on which government source you believe, there were between 20,000 and 40,000 refugees, almost all of whom were racialized, who crossed on foot into Canada from the US in 2022. In that time period, over half a million Ukranians, almost all white, were issued permits to come to Canada without any of the backlash.

These racial disparities are not simply unfair; they exact exploitation, even death. The Seasonal Agricultural Worker Program is infamous in this regard, by operating as a "permanently temporary" program that extracts essential labour without providing status regularization to countries that Canada has a neocolonial relationship with in Latin America and the Caribbean[43]—what Vasanthi Venkatesh describes as a "paradigmatic example" of how immigration law "perpetuate[s] colonial violence and maintain[s] a racist neocolonial order."[44] Earlier this year, a group of Jamaican migrant workers were deported as reprisal for holding a one-day strike to protest their working conditions, including unsanitary living conditions and abusive management.[45] Last year, a migrant worker died in a farming incident.[46] And earlier this year, two migrants died while crossing Roxham Road,[47] a border crossing left open by the legal framework that preceded the *STCA*.[48] As Walia explains, the *STCA* functions as "Canada's border wall … It is a way of ensuring that asylum seekers cannot make it to Canada … It effectively is a fortress."[49] And an effective

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[43] Again, credit to Vincent Wong for this important point. See e.g. Migrant Worker Solidarity Network, "A brief on the Temporary Foreign Worker Program" (2016), online: Migrant Rights Network <https://migrantrights.ca/wp-content/uploads/2016/06/MWSN-Submission-to-TFWP-Review-Final.pdf>.

[44] Vasanthi Venkatesh, "Radical Resistance in the Penumbra of the Law: Legal Mobilization for Migrant Farmworkers under Neo-colonial Racial Capitalism" (forthcoming) Journal of Law & Social Policy.

[45] Hannah Alberga, "Jamaican migrant workers sent back from Ontario farm after exposing conditions" (2023), online: *CTV News* <https://toronto.ctvnews.ca/migrant-workers-sent-back-from-ontario-farm-after-exposing-conditions-jamaican-government-says-1.6528212>; Sheena Goodyear, "Jamaican workers expelled from Ontario farm after protesting poor conditions: advocates (2023), online: *CBC News* <https://www.cbc.ca/radio/asithappens/jamaican-farm-workers-sent-home-1.6947997>.

[46] Tegan Versolatto, "Migrant worker killed in Norfolk County farming incident" (2022), online: *CTV News* <https://kitchener.ctvnews.ca/migrant-worker-killed-in-norfolk-county-farming-incident-1.6034699>.

[47] Verity Stevenson, "Closing Roxham Road will lead to 'humanitarian catastrophes,' immigration experts warn" (2023), online: *CBC News* <https://ici.radio-canada.ca/rci/en/news/1965955/closing-roxham-road-will-lead-to-humanitarian-catastrophes-immigration-experts-warn>.

[48] Muzaffar Chishti and Julia Gelatt, (April 2023) *Roxham Road Meets a Dead End? U.S.-Canada Safe Third Country Agreement Is Revised.* <https://www.migrationpolicy.org/article/us-canada-safe-third-country-agreement>.

[49] Bad + Bitchy, "Global Migration via Roxham Road" (2023), online (podcast): <https://www.badandbitchy.com/p/bad-bitchy-briefing-global-migration#details> at 4:07-4:18.

fortress, clearly: since 2017, over 100,000 asylum claimants had used Roxham Road until its recent closure due to the *STCA*.[50]

But how do our courts respond to these clear racial disparities? In the *CCR* decisions at the Federal Court and Federal Court of Appeal, the court declined to even analyze the inequality apparent in the *STCA*, let alone rule in favour of those impacted. And the Supreme Court of Canada remitted the decision on the question of unequal treatment, but only in respect of gender-based discrimination.[51] The Supreme Court's focus on gender can be understood in the context of the initial challenge, which was, similarly, based on gender.[52] That said: what does it say about our legal institutions—about our law, about our advocacy—when a circumstance of such clear racial inequality cannot be named as such through legal argument? Is border policy so intrinsically racialized so as to foreclose the possibility of labelling it as racially discriminatory, lest the Canadian border itself be struck down as discriminatory? Conversely, while the border may cause untold suffering, do progressive political actors want control of the Canadian border to be negotiated principally amongst the relatively elite judiciary? Rather than turn to courts, should activists, instead, turn to the streets—what Vasanthi Venkatesh calls a "praxis of refusal"?[53]

This past summer, a group of over 130 organizations wrote an open letter to the Federal government on World Refugee Day pleading for Canada's withdrawal from the *STCA*. Those organizations noted "the racism inherent in policies that restrict access to safety by specifically targeting people fleeing from the Global South."[54] Relatedly, the Migrant Rights Network has led the #StatusForAll campaign, seeking permanent resident status for all undocumented people,[55] in part, due to how the *STCA* coerces unsafe border crossings.[56] What role can—and should—the law

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[50] Morgan Lowrie, "RCMP demolish last structure at Quebec's Roxham Road migrant crossing" (2023), online: *CTV News* <https://montreal.ctvnews.ca/rcmp-demolish-last-structure-at-quebec-s-roxham-road-migrant-crossing-1.6575998>.

[51] *CCR*, at para 13.

[52] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 at para 151.

[53] Vasanthi Venkatesh, "Radical Resistance in the Penumbra of the Law: Legal Mobilization for Migrant Farmworkers under Neo-colonial Racial Capitalism" (forthcoming) Journal of Law & Social Policy.

[54] Canadian Council for Refugees et al, "Open letter from over 130 organisations on World Refugee Day regarding the Safe Third Country Agreement" (20 June 2023), online: <https://ccrweb.ca/sites/ccrweb.ca/files/2023-06/Open%20letter%20to%20Prime%20Minister%20on%20STCA.pdf>.

[55] "Act Now: Let's win Regularization!" (2023), online: *Migrant Rights Network* <https://migrantrights.ca/actnow/>.

[56] "Release: Migrant Organizations Condemn 'Unprincipled and Dangerous' Roxham Road Closure, Call on PM Trudeau to Ensure Safe Access and Equal Rights for Migrants" (2023), online: *Migrant Rights Network* <https://migrantrights.ca/roxhamroadclosurerelease/>.

play in disrupting this raced, gendered, and colonial order? That complex question is what Isaac Moot competitors will tackle in this year's competition.

3. A Parting Note

Khiara Bridges writes that "CRT is dedicated to the production of politically engaged scholarship."[57] This Moot, relatedly, is dedicated to the production of politically engaged lawyers. And, more specifically, lawyers who are politically engaged with respect to questions regarding law and racial inequality.

The structure of this Moot may make some participants uneasy, or uncomfortable. Law schools often emphasize doctrine over theory, and law over justice. But certain forms of oppression simply cannot be fully understood by the limited imagination of traditional legal discourse. The law, by its very nature, demands clear dispositions: a winner and a loser. Human thought and activity, in contrast, is anything but clear. Racism is subtle. And race is vague. While this Moot is unconventional, I encourage participants to lean into their discomfort and begin to think more critically—and imaginatively—about race and law. It is only through critical theoretical thought, and active creativity, that deeper insights about racial hierarchy can be generated and explored. Ultimately, the goal with this Moot is for participants to work hard, think deeply, and enjoy engaging with complex questions at the forefront of Canadian political and legal discourse. So, thank you for competing in the Isaac Moot. Your mere participation is a significant commitment to driving forward Canada's racial discourse in law.

In solidarity,

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[57] Bridges, *supra* note 8 at 14.