



November 15, 2021

Dear Participants,

The Julius Alexander Isaac Moot for the 2021/2022 school year generally concerns race and education.¹ It centres on the extant judicial review of the decision (the “**Decision**”) of the Canadian Judicial Council (“**CJC**”) to not sanction Justice David Spiro for his intervention in the hiring process of Dr. Valentina Azarova at the University of Toronto’s International Human Rights Program, due to her prior scholarship examining the Israeli occupation of Palestinian Territories. Details regarding the procedure and substance of the Moot follow.

1. Procedure

a) Overview

The Moot will emulate the ongoing judicial review of the Decision in *National Council of Canadian Muslims, Craig Scott, Leslie Green, Arab Canadian Lawyers Association, Independent Jewish Voices, and Canadian Muslim Lawyers Association v The Attorney General of Canada*. The key documents, nature of argumentation, issues, and deadlines relating to this judicial review are described below.

b) Key Documents

For your convenience, some key documents pertaining to this judicial review are hyperlinked below, namely:

- The Decision, including:
 - The CJC’s [Decision](#)
 - The CJC’s [Press Release](#)
- The [Notice of Application](#) to the Federal Court for Judicial Review
- The Record underlying the Decision, including:
 - The [Certified Tribunal Record](#)
 - The [Cromwell Report](#)
- The Original Complaints, including:
 - The [Complaint](#) by Professor Les Green
 - The Complaint of Professor Craig Scott (available in “Annex A” of Professor Scott’s [Summary](#) of the controversy)

¹ The author thanks Power Law students Samantha Backman and Isabelle MacLean for their exceptional research assistance in preparing this Moot Problem.

c) Nature of Argumentation

The Moot emulates the ongoing judicial review of the Decision. However, the Moot will rely on different rules than the Federal Court. Those different rules are summarized below.

In the Moot, 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 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 racial hierarchy. 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, here, 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. Should judges even be the arbiters of whether or not their colleagues are removed from the bench? Should it ever be possible to remove a judge from the bench? Is the concept of “bias” within the judiciary too indeterminate to be capable of judicial resolution? 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., concerns what Canadian law should be, not what it is) and, to the extent such arguments are rooted in reference to authority, that authority is principally theoretical scholarship.

d) Issues in the Application

The issues in this application 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 application is whether the CJC’s Decision was unreasonable.

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 application are not pre-ordained. Rather, it is up to participants—both Applicants 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 the CJC should be abolished and replaced with a different body concerned with judicial accountability;
- Whether the CJC should be reformed to include representation from inside and outside the judiciary;
- Whether CJC’s procedures should be reformed to provide for greater input from applicants, respondents, or even third parties;
- Whether the test for removing a judge from the bench should be relaxed;
- Whether there should never be a process that permits the removal of a judge from the bench;
- Whether there should never be a process that permits the removal of a judge from the bench relating to “bias” because the concept is too indeterminate (and whether that indeterminacy will disproportionately be used to critique racialized judges);
- Whether we should have more processes that examine and correct for bias on the judiciary;
- Whether judges should not be restrained from political advocacy;
- Whether racialized judges should not be restrained from political advocacy;
- Whether “political advocacy” is too indeterminate a concept to be regulated in the judiciary (and whether that indeterminacy will disproportionately be used to critique racialized judges).

Ultimately, as long as an argument seeks to challenge the Decision below, it is properly advanced by the Applicant, whereas Respondents may advance any arguments seeking to uphold that Decision.

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 Memorandum of Fact and Law or oral submissions to engage with the theoretical issues that happen to be raised by the Applicants they moot against (and vice versa), though they are welcome to incorporate such a response into their oral submissions.

e) Deadlines

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

- Applicants and Respondents Memoranda of Fact and Law due: January 4, 2022
- Moot competition: February 4 and 5, 2022

f) Format

All Memoranda of Fact and Law should conform with the following formatting requirements:

- 20 page maximum
- Times New Roman
- 12-point font
- 1-inch margins
- double spacing (except indented quotes, which should have single spacing)
- Numbered paragraphs
- 8.5" x 11" pages
- **Bold** headings and sub-headings

Citations should conform with the latest edition of the McGill Guide.

The Memoranda of Fact and Law must satisfy the requirements of the *Federal Courts Rules*, [Rules 70\(1\)\(a\)-\(c\)](#). In other words, every Memoranda must include (a) a concise statement of fact ("Part 1"); (b) a statement of the points in issue ("Part 2"); and (c) a concise statement of submissions ("Part 3"). **Please do not spend time on or include the additional Parts required under the *Federal Courts Rules*, Rules 70(1)(d)-(g)**. The focus of this application will be students' doctrinal and theoretical arguments, not relief sought or other administrative requirements generally required of advocates (e.g., a book of authorities).

These form requirements are primarily for consistency. Thus, minor deviations from these requirements will not result in any penalization. Participants should not be inordinately stressed about complying with every minute detail and should instead focus on their arguments.

2. Substance

The doctrinal foundation for the Moot is a judicial review of the CJC Decision. However, the theoretical foundation for the appeal is briefly summarized here. I first discuss Critical Race Theory (CRT) generally, and then race and education specifically.

The discussion below goes into some detail about CRT and education. 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 scholarship—much of which I would consider aligning with the CRT tradition—specifically exploring the issue of race and education, 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.² It defies narrow definition. But one could say it interrogates racial truth, i.e., that it challenges established conservative—and even liberal³—interpretations of law and society. As Derrick Bell, the “intellectual forefather of CRT”,⁴ explains: “critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it.”⁵

However, it would be incomplete to claim that critical race theory—or, given its multiplicity, critical race theories⁶—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.”⁷

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.⁸ 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.⁹ A post-racial lens would say that race simply describes the demographics of terrorist actors; CRT, in contrast, would say that race explains how we conceptualize terrorism.

Simply put, if you are critically thinking about race and law, then you are doing critical race theory.¹⁰ 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.¹¹

² Khiara M Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 7.

³ *Ibid* at 12-13.

⁴ *Ibid*.

⁵ Derrick A Bell, “Who’s Afraid of Critical Race Theory” (1995) 1995:4 U Ill L Rev 893 at 893.

⁶ 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.

⁷ Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: The New Press, 1995) at xix [Crenshaw et al, eds, *Critical Race Theory*].

⁸ Bridges, *supra* note 2 at 5-7.

⁹ See e.g. Jasmeet Bahia, “London terror attack: Canadians have become desensitized to violence against Muslims” *The Conversation* (9 June 2021), online: <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 2 at 1-2.

¹⁰ Bridges, *supra* note 2 at 9.

¹¹ Bridges, *supra* note 2 at 11.

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 legally sanctioned racism (e.g., racially segregated public institutions) and contemporary efforts at race-conscious anti-racist policy (e.g., affirmative action) should be subject to similar constitutional scrutiny,¹² 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."¹³ However, the Canadian *Charter of Rights and Freedoms*, in stark contrast, specifically permits affirmative action.¹⁴ 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",¹⁵ 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 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-merit¹⁶ or pro-patriotism.¹⁷ 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). As Kendall Thomas, another founding CRT thinker, writes: "we are 'raced' through a constellation of practices that construct and control racial subjectivities."¹⁸ With this in mind, participants are encouraged to reflect on the subtle ways in which race is mobilized to sort—and ultimately subjugate—certain groups within society. And, in particular, participants are encouraged to think deeply about how education—including the education they are currently undertaking in law school—is a location imbued with racial meaning and where racial hierarchy is perpetuated and sustained. How racially diverse is your faculty and what might that suggest about its understanding of knowledge and expertise? What subjects are mandatory, rather than optional—indeed, what subjects are even offered at all? How do admission standards favour particular students and what systemic impacts does this have

¹² See e.g. *Adarand Constructors, Inc v Peña*, 515 US 200 (1995). 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 7 and 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) at 32-66.

¹³ 551 US 701 (2007) at 748.

¹⁴ *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.

¹⁵ *R v Le*, [2019 SCC 34](#) at para 76.

¹⁶ Bret Stephens, "Diversity, Inclusion and Anti-Excellence", *The New York Times* (2 August 2019), online: <https://www.nytimes.com/2019/08/02/opinion/university-campus-diveristy-inclusion-free-speech.html>.

¹⁷ Sally Jenkins, "Colin Kaepernick reminds us that dissent is a form of patriotism too", *The Washington Post* (8 September 2016), online: 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.

¹⁸ Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*" (1993) 79:7 Va L Rev 1805 at 1806-07.

on the makeup of the student body? And, given those systemic impacts, what role do law schools play in operating as a gatekeeper between broader society and the legal profession, the consequently, the judiciary? In other words, how do law schools, in fundamental way, shape who makes the law in Canada, and thus, what that law ultimately is?

b) What is the Relationship between Race and Education?

Last month, Desmond Cole—an anti-racist journalist and activist—was invited to present at the Toronto District School Board to address what it had itself described as a “serious racism problem”¹⁹ within the institution. During his presentation, Cole uttered “Free Palestine”, which “incited panic, anger, and a racist backlash [he has] been dealing with ever since.”²⁰ According to Cole’s critics, “Free Palestine” can cause discomfort, has conflicting meaning, and may qualify as “hate speech”.²¹ But as Cole explains:

To say “Free Palestine” is to identify a form of settler colonial unfreedom our schools would rather not address ... statements such as “Free Palestine” and “Black Lives Matter” are about uplifting oppressed people, and that those invested in our oppression will often manipulate and weaponize our demands for freedom.²²

Cole’s description of racism in his anti-racism presentation was itself being called racist. To make sense of this seeming incoherence, a critical analysis of race is essential.

i) The Critical Race Theory Moral Panic

We reside in a moment of widespread calls for reckoning with racial oppression. And that reckoning is being met with significant resistance. In the United States, a “moral panic” has been manufactured²³—with significant media complicity²⁴—about “critical race theory” invading our schools. And this panic has resulted in various state apparatuses being marshalled to quell discussion of race and racism within educational institutions, including an Executive Order by former President Donald Trump seeking to purge critical race theory from institutions that receive federal funding.²⁵ Relatedly, in Canada, modest interest in critical race theory scholars

¹⁹ “Human Rights Update: Annual Report 2018-2020” (March 2021) at 4, online (pdf): *Toronto District School Board* https://www.tdsb.on.ca/Portals/0/docs/HRO%20Report_March%202021.pdf.

²⁰ Desmond Cole, “Under Investigation: Anti-Palestinian racism at the Toronto District School Board” (7 October 2021), online (blog): *Yes, Everything!* <https://www.yeseverything.ca/blog/under-investigation-anti-palestinian-racism-at-the-toronto-district-school-board>.

²¹ *Ibid.*

²² *Ibid.*

²³ See e.g., Patricia Williams, “How *Not* to Talk About Race”, *The Nation* (18 October 2021), online: <https://www.thenation.com/article/society/talk-about-race/>; Brandi Collins-Dexter & Joan Donovan, “How a racialized disinformation campaign ties itself to The 1619 Project”, *Columbia Journalism Review* (11 March 2021), online: <https://www.cjr.org/opinion/1776-keyword-squatting-right-wing-media.php>.

²⁴ See generally Michael Hobbes, “The Methods of Moral Panic Journalism” (21 October 2021), online: *Substack: Michael Hobbes* <https://michaelhobbes.substack.com/p/moral-panic-journalism>.

²⁵ David Theo Goldberg, “The War on Critical Race Theory”, *Boston Review* (7 May 2021), online: <http://bostonreview.net/race-politics/david-theo-goldberg-war-critical-race-theory>; Jasmine Banks, “The Radical

and scholarship have been met with, for example, a campaign by a group of Law Society of Ontario benchers to “STOP WOKE” and “REMOVE ... critical race theory from the Law Society”.²⁶ As legal scholar Kendall Thomas explains, such attacks on critical race theory are motivated by a desire to undermine “racial literacy”—that is, by preventing discussion of race and racism, anti-racism becomes unknowable (in theory) and undoable (in practice).²⁷ Relatedly, as Cole explains, forbidding discussion of Palestine is a form of “erasure”²⁸—in other words, knowledge of racial subordination is being suppressed so that movements for racial liberation can be resisted. Whether it is in public K-12 education, or in law school, we are witnessing attempts to keep racial oppression *unsaid*, to prevent it from being *undone*.

I mentioned “seeming incoherence” above with reference to Cole’s anti-racism presentation itself being labelled racist. This idea is essential. The politics of this moment are not about consistent principles, but rather, strategic rhetoric. It is a *strategy* of Palestinian erasure that transforms Cole’s anti-racism presentation into racism itself. And it is a *strategy* of racial illiteracy that takes a K-12 education which gives inadequate attention to race—indeed, inadequate attention to basic historical facts—and turns that education into supposedly widespread indoctrination into “critical race theory”. This contradictory controversy requires engagement with two distinct points.

First, a factual point: critical race theory—that is, the academic field described above concerning law and racial inequality—is not commonly taught in K-12 education, nor is it even rampant in legal education. As a body of scholarship originating in legal education, it should be unsurprising that grade school children are not studying Harvard Law Review articles typically reserved to graduate legal studies. Some schools, as they should, discuss race and racism. But this is not “critical race theory”, *really*. Rather, “critical race theory” is being mobilized as a label that well-funded right-wing interests have been manipulating, by their own admission,²⁹ to generate opposition to racial literacy—and, relatedly, to galvanize conservative political support.³⁰

Second, a normative point. *Should* we discuss race in education?

Capitalist Behind the Critical Race Theory Furor”, *The Nation* (13 August 2021), online: <https://www.thenation.com/article/politics/charles-koch-crt-backlash/>.

²⁶ Joshua Sealy-Harrington, “A thread on the hilarious @Stop_SOP—rebranded, #FullStop—movement, and its recent email to supporters...” (18 April 2021), online: *Twitter* <https://twitter.com/joshuasealy/status/1383902400377810948>.

²⁷ “Watch Kendall Thomas give the 2020 Equality and Diversity Lecture” (25 November 2020), online: *University of Oxford Faculty of Law* <https://www.law.ox.ac.uk/news/2020-11-25-watch-kendall-thomas-give-2020-equality-and-diversity-lecture>.

²⁸ Cole, *supra* note 20.

²⁹ See generally: Samuel Hoadley-Brill, “Chris Rufo: Professional Bullshit Artist” (25 May 2021), online: *Substack: Conceptual Disinformation* <https://conceptualdisinformation.substack.com/p/chris-rufo-professional-bullshit>. And see specifically, Christopher F. Rufo, “The goal is to have the public read something crazy in the newspaper and immediately think ‘critical race theory.’ We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.” (15 March 2021 at 15:17), online: *Twitter* <https://twitter.com/realchrisrufo/status/1371541044592996352?s=20>.

³⁰ Stephanie Saul, “Energizing Conservative Voters, One School Board Election at a Time”, *The New York Times* (21 October 2021), online: <https://www.nytimes.com/2021/10/21/us/republicans-schools-critical-race-theory.html?searchResultPosition=2>.

Last year, an Iowa school teacher asked students to “pretend you are a black slave.”³¹ Last month, a California school teacher thought that, to teach geometry, it would be appropriate to wear an Indigenous headdress and dance/chant in a dehumanizing mockery of Indigenous people.³² And last summer, Alabama’s Board of Education banned “critical race theory”, despite its chilling history of racial miseducation, including public school textbooks which instructed how “slavery was the earliest form of social security in the United States. It was the legal responsibility of the master to take care of aged workers.”³³ And Alabama is not unique in this respect. Indeed, history textbooks across the United States include “omissions, downright errors, and specious interpretations, particularly regarding racial issues.”³⁴

Canada, likewise, has profound issues with racism in education. Earlier this year, a high school course in Nova Scotia asked students “to list the benefits and disadvantages” of Canada’s Indian Residential Schools³⁵, despite their genocidal operation. As Cindy Blackstock and Pamela Palmater explain:

For more than a century, these schools functioned as re-education camps run by the Canadian government and Catholic church to assimilate Indigenous children. Children were raped, locked in chicken coops, shocked in an electric chair, subject to medical experiments, confined by electric fences and all too often dug the graves of other children who were buried in unmarked graves. This happened under the cover of the Bible, while the Canadian government promoted itself as a bastion of human rights.³⁶

Further, last year, a non-Black University of Ottawa Part-time Professor used the n-word in class, prompting support from 34 of her colleagues³⁷—and the Premier of Quebec³⁸—in defence

³¹ “Teacher on leave for ‘pretend you are a slave’ assignment”, *Toronto Star* (18 September 2020), online: <https://www.thestar.com/news/world/us/2020/09/18/teacher-on-leave-for-pretend-you-are-a-slave-assignment.html>.

³² Nina Golgowski, “Teacher Filmed Chanting In Fake Native Headdress, Waving Air Tomahawks”, *HuffPost* (21 October 2021), online: https://www.huffpost.com/entry/riverside-california-teacher-on-leave-native-american-video_n_6171af22e4b010d9330e5cad.

³³ Scott Morris, “Racist Textbooks Endured, Presenting Alternate ‘History’ to Alabama Students for 70 Years”, *Birmingham Watch* (2 September 2020), online: <https://birminghamwatch.org/racist-textbooks-endured-presenting-alternate-history-alabama-students-70-years/#:~:text=%E2%80%9CA%20Alabama%20History%20for%20Schools%2C%E2%80%9D%20by%20Charles%20Grayson%20Summersell%2C,for%20more%20than%20a%20decade%20in%20public%20schools>.

³⁴ Cynthia Greenlee, “How history textbooks reflect America’s refusal to reckon with slavery”, *Vox* (26 August 2019), online: <https://www.vox.com/identities/2019/8/26/20829771/slavery-textbooks-history>.

³⁵ Leyland Cecco, “Racist school course sparks outrage as Canada reckons with colonial legacy”, *The Guardian* (18 June 2021), online: <https://www.theguardian.com/world/2021/jun/18/canada-racism-high-school-outrage-residential-schools>.

³⁶ Cindy Blackstock & Pamela Palmater, “Canada’s government needs to face up to its role in Indigenous children’s deaths”, *The Guardian* (8 July 2021), online: <https://www.theguardian.com/commentisfree/2021/jul/08/canada-indigenous-children-deaths-residential-schools>.

³⁷ Laura Glowacki, “Students decry letter defending N-word use at the University of Ottawa”, *CBC News* (20 October 2020), online: <https://www.cbc.ca/news/canada/ottawa/university-of-ottawa-professor-racism-1.5768730>.

³⁸ Benjamin Shingler, “Quebec premier warns of ‘censorship police’ after Ottawa professor suspended for saying N-word”, *CBC News* (20 October 2020), online: <https://www.cbc.ca/news/canada/montreal/quebec-university-of-ottawa-professor-1.5767737>.

of her “academic freedom”.³⁹ One University of Ottawa Law Professor even claimed that it is *overreaction* to racial slurs in the classroom, rather than their *use* by non-Black professors, that has created an unwelcome environment on campus.⁴⁰

Clearly, not only students, but also teachers, need better instruction in race and racism—vital concepts to understanding our contemporary social order and its links to the legacies of enslavement and dispossession in our colonial past and present.⁴¹ And our governments—like the Region of Durham, which, for this year’s Black History Month recommended that employees “dance to a Reggae song” or “have a conversation with a Black employee”⁴²—are clearly in need of this instruction as well.

ii) Education as a Site of Racial Hierarchy

Education, like health care and criminal punishment, is a site of racial subordination. As noted, critical race theory is not running rampant in our grade schools and university seminars. But many of its central themes of analysis—the social construction of race,⁴³ white privilege,⁴⁴ intersectionality,⁴⁵ and systemic racism⁴⁶—provide an instructive lens for interrogating how educational systems participate in the construction and maintenance of racial inequality.

³⁹ For further readings on this controversy, see Jason White, “University of Ottawa professor’s use of N-word sparks heated debate”, *City News* (20 October 2020), online: <https://ottawa.citynews.ca/local-news/uottawa-professors-use-of-n-word-sparks-heated-debate-2806103>; “Students call for systemic change in wake of N-word controversy at University of Ottawa”, *CBC Radio* (23 October 2020), online: <https://www.cbc.ca/radio/thecurrent/the-current-for-oct-23-2020-1.5772694/students-call-for-systemic-change-in-wake-of-n-word-controversy-at-university-of-ottawa-1.5774034>. For an incident involving the use of the N-word by a teacher in an Ontario high school, see: Shanifa Nasser, “High school teacher who used N-word in class allowed to keep working after apologizing”, *CBC News* (15 June 2020), online: <https://www.cbc.ca/news/canada/toronto/brampton-teacher-notre-dame-n-word-1.5607961>. And for a discussion of the ways in which freedom of expression collides with the dignity of individuals experiencing racism in the context of the tort of defamation see: Katie Duke, “Calling a Racist a Racist: A Case for Reforming the Tort of Defamation” (2016) 37 Windsor Rev Legal and Soc Issues 70, online: <https://canlii.ca/t/spf9>.

⁴⁰ Stéphane Sérafin, “Et pourtant, c’est bien votre réaction à l’usage d’un mot, dans un contexte qui ne suggérait aucunement une intention impropre, qui a transformé notre campus en un environnement moins accueillant qu’il ne l’a jamais été.” (18 October 2021), online: *Twitter* <https://twitter.com/finseraste/status/1450150923272065030>.

⁴¹ Nathan J Robinson, “Why Critical Race Theory Should Be Taught In Schools”, *Current Affairs* (27 July 2021), online: <https://www.currentaffairs.org/2021/07/why-critical-race-theory-should-be-taught-in-schools>.

⁴² Dilshad Burman, “Region of Durham faces backlash after organizing ‘Black History Month scavenger hunt’ for employees”, *City News* (10 February 2021), online: <https://toronto.citynews.ca/2021/02/10/region-of-durham-faces-backlash-after-organizing-black-history-month-scavenger-hunt-for-employees/>.

⁴³ Ian F Haney Lopez, “The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994) 29:1 Harv CR-CLL Rev 1.

⁴⁴ Cheryl I Harris, “Whiteness As Property” (1993) 106:8 Harv L Rev 1707.

⁴⁵ Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1989 U Chicago Legal F 139.

⁴⁶ Joshua Sealy-Harrington, “The Charter of Whites: Systemic Racism and Critical Race Equality in Canada” in Emmett Macfarlane & Kate Puddister, eds, *Constitutional Imperatives: Contemplations on Charter Rights, Reconciliation, and Constitutional Change* (forthcoming; UBC Press).

Various writers explore the complex terrain of race and education in Canada, especially with respect to anti-Black and anti-Indigenous racism.⁴⁷ But how does this intersect with *law*, specifically? There are several ways.

There is explicit legislation applicable to combatting racism in the educational sphere.⁴⁸ Despite that legislation, however, systemic discrimination persists in various school boards, including,

⁴⁷ See e.g. Tanitia Munroe, “How to curb anti-Black racism in Canadian schools”, *The Conversation* (27 February 2021), online: <https://theconversation.com/how-to-curb-anti-black-racism-in-canadian-schools-150489>; Carl James & Tana Turner, “Towards Race Equity in Education: The Schooling of Black Students in the Greater Toronto Area” (April 2017), online (pdf): *York University Faculty of Education* <https://edu.yorku.ca/files/2017/04/Towards-Race-Equity-in-Education-April-2017.pdf?x60002>; Nan DasGupta, Vinay Shandal, Daniel Shadd, Andrew Segal & in conjunction with Civil Action, “The Pervasive Reality of Anti-Black Racism in Canada” (14 December 2020), online: *BCG* <https://www.bcg.com/en-ca/publications/2020/reality-of-anti-black-racism-in-canada>; Robyn Maynard, “Canadian Education Is Steeped in Anti-Black Racism”, *The Walrus* (29 November 2017), online: <https://thewalrus.ca/canadian-education-is-steeped-in-anti-black-racism/>; Tana Turner, “Dealing with Incidents of Racism in Ontario Public Schools” (2019) 2 Turner Consulting Group Research & Policy Brief 1, online: https://www.turnerconsultinggroup.ca/uploads/2/9/5/6/29562979/policy_brief_-_2019_no_2.pdf; Emma Stirling Cameron & Keisha Jefferies, “Anti-Black Racism in Canadian Education: A Call to Action to Support the Next Generation” (2021) 1:1 Healthy Populations Journal 11, online: <https://ojs.library.dal.ca/hpj/article/view/10587/9652>; Black Learns Advisory Committee, “BLAC Report on Education: Redressing Inequity – Empowering Black Learners” (1994), online (pdf): *Government of Nova Scotia Department of Education and Early Childhood Development* <https://www.ednet.ns.ca/docs/blac-report-education-redressing-inequity.pdf>; Natasha Henry, “Anti-Black Racism in Ontario Schools: A Historical Perspective” (2019) 1 Turner Consulting Group Research & Policy Brief 1, online (pdf): http://www.turnerconsultinggroup.ca/uploads/2/9/5/6/29562979/policy_brief_-_no_1_may_2019.pdf; Beverly-Jean Daniel, “Teaching while Black: racial dynamics, evaluations, and the role of White females in the Canadian academy in carrying the racism torch” (2019) 22:1 Race Ethnicity and Education 21, online (pdf): <https://www.tandfonline.com/doi/pdf/10.1080/13613324.2018.1468745>; Frances Henry et al, “Race, racialization and Indigeneity in Canadian universities” (2016) Race Ethnicity and Education 1, online (pdf): https://www.ufv.ca/media/assets/race-antiracism-network-ran/Henry-et-al_RaceRacializationIndigeneity_CanadianUniversities_2017.pdf; Ann E Lopez & Gaëtane Jean-Marie, “Challenging Anti-Black Racism in Everyday Teaching, Learning, and Leading: From Theory to Practice” (2021) 31(1-2) Journal of School Leadership, online (pdf): <https://journals.sagepub.com/doi/pdf/10.1177/1052684621993115>; Joanna Newton, “Anti-Black Racism, Resistance, and the Health and Well-Being of Black Bodies in Public Education” in Joana Newton & Aezou Soltani, eds, *New Framings on Anti-Racism and Resistance: Volume 2- Resistance and the New Futurity* (Rotterdam, The Netherlands: Sense Publishers, 2017) 45, online: https://link.springer.com/chapter/10.1007%2F978-94-6351-131-5_4.

⁴⁸ See e.g. *Human Rights Code*, [RSO 1990, c H.19](#); *Anti-Racism Act*, 2017, [SO 2017, c 15](#).

for example, the Peel District School Board,⁴⁹ the Essex County School Board,⁵⁰ the York Region District School Board,⁵¹ and the Lester B. Pearson School Board.⁵²

Legislation aside, discrimination in educational settings can take on various forms, which establishes the social context behind race and education. Those discriminatory forms include, but are not limited to:

- harassment of racialized students;⁵³
- institutional barriers against racialized faculty;⁵⁴

⁴⁹ “Minister’s Directions to the Peel District School Board” (26 March 2020), online (pdf): *Ontario Ministry of Education* <http://www.edu.gov.on.ca/eng/new/minister-directions-pdsb-review.pdf>; Arlene Huggins, “Investigation of the Peel District School Board” (15 May 2020), online (pdf): *Ontario Ministry of Education* <http://www.edu.gov.on.ca/eng/new/PDSB-investigation-final-report.pdf>; Ryan Rocca, “Peel school board ending litigation against Black advocacy Twitter accounts amid criticism”, *Global News* (22 June 2020), online: <https://globalnews.ca/news/7093394/peel-district-school-board-litigation-black-advocacy-twitter-accounts/>; Caryn Ceolin, “Community demands answers on progress to dismantle anti-Black racism at the PDSB”, *City News* (22 July 2021), online: <https://toronto.citynews.ca/2021/07/22/community-demands-answers-on-progress-to-dismantle-anti-black-racism-at-the-pdsb/>.

⁵⁰ Jennifer La Grassa, “Windsor-Essex Black leaders request diversity audit of public school board, citing history of racism”, *CBC News* (16 June 2021), online: <https://www.cbc.ca/news/canada/windsor/black-council-windsor-essex-letter-diversity-audit-1.6067814>; Sarah Mushtaq, Editorial, “Mushtaq: Greater Essex County school board can’t fake racial equality”, *Windsor Star* (24 July 2021), online: <https://windsorstar.com/opinion/letters/mushtaq-greater-essex-county-school-board-missing-mark-on-anti-racism>.

⁵¹ Muriel Draaisma & Chris Glover, “York Region school board unveils anti-Black racism strategy to be rolled out over 5 years”, *CBC News* (8 March 2021), online: <https://www.cbc.ca/news/canada/toronto/york-region-district-school-board-dismantling-anti-black-racism-strategy-parents-1.5941825>.

⁵² “Executive Summary & Final Report of the Task Force on Equity, Diversity, and Inclusion of the Lester B. Pearson School Board” (29 June 2021), online (pdf): *Lester B. Pearson School Board* <https://www.lbpsb.qc.ca/Modules/FileManagement/files/Root/Council/Task%20Force/Reports/2021-Task-Force-Final-Report.pdf>; Phil Carpenter, “Report following recent racist incidents at Lester B. Pearson School Board considered first step”, *Global News* (29 June 2021), online: <https://globalnews.ca/news/7991035/report-racist-incident-lester-b-pearson-school-board/>.

⁵³ Joyita Sengupta, “‘I get nightmares’: How racial violence in high schools is taking a mental toll on students”, *CBC News* (31 October 2019), online: <https://www.cbc.ca/news/canada/school-violence-racism-bullying-1.5328735>; Sean Boynton, “Human rights complaint filed against Vancouver School Board over student’s racist video”, *Global News* (23 November 2019), online: <https://globalnews.ca/news/6209970/vancouver-racist-video-lord-byng-complaint/>; Meera Bains, “Vancouver student settles human rights complaint over anti-Black video circulated by fellow student”, *CBC News* (29 January 2021), online: <https://www.cbc.ca/news/canada/british-columbia/vancouver-student-settles-human-rights-complaint-over-anti-black-video-circulated-by-fellow-student-1.5894594>; “Human Rights Commission awards Quebec mother \$65K over racism, bullying at kids’ school”, *Global News* (7 December 2020), online: <https://globalnews.ca/news/7507698/quebec-racism-bullying-school/>; Emily Campbell, “Quebec mother awarded damages for school racism says board has changed nothing”, *CTV News* (16 December 2020), online: <https://montreal.ctvnews.ca/quebec-mother-awarded-damages-for-school-racism-says-board-has-changed-nothing-1.5234888>; *Karam v Ottawa-Carleton District School Board*, 2016 CanLII 107942 (ON SCSM); Kerrisa Wilson, “National anti-Black racism reporting tool launches for educators to disclose racist incidents at schools”, *CTV News* (2 March 2021), online: <https://toronto.ctvnews.ca/national-anti-black-racism-reporting-tool-launches-for-educators-to-disclose-racist-incident-at-schools-1.5330386>.

⁵⁴ Jason Warick, “Canada’s only First Nations pharmacy professor leaving University of Saskatchewan over racism concerns”, *CBC News* (20 May 2021), online: <https://www.cbc.ca/news/canada/saskatoon/canadas-only-first-nations-pharmacy-professor-leaving-university-of-saskatchewan-1.6034386?cmp=rss>.

- hair discrimination (e.g., dreadlock⁵⁵ and durag⁵⁶ removal);
- disparate punishment/expulsion rates;⁵⁷
- perceptions of Black students as “aggressive” by school staff and police;⁵⁸
- policing in schools (e.g., the harm of “school resource officers” on Black youth,⁵⁹ the harm of campus security on Black students,⁶⁰ and the school-to-prison pipeline⁶¹);
- gentrification;⁶²
- academic streaming;⁶³ and

⁵⁵ Roman Stubbs, “A wrestler was forced to cut his dreadlocks before a match. His town is still looking for answers”, *The Washington Post* (17 April 2019), online: <https://www.washingtonpost.com/sports/2019/04/17/wrestler-was-forced-cut-his-dreadlocks-before-match-his-town-is-still-looking-answers/>; Roman Stubbs, “Referee who told wrestler to cut dreadlocks before match is suspended two years”, *The Washington Post* (19 September 2019), online: <https://www.washingtonpost.com/sports/2019/09/18/referee-who-told-wrestler-cut-dreadlocks-before-match-suspended-two-years/>.

⁵⁶ Rachele Elsiufi, “Edmonton school faces backlash for asking child to remove durag”, *City News* (15 October 2019), online: <https://edmonton.citynews.ca/2019/10/15/edmonton-school-faces-backlash-for-asking-child-to-remove-durag/>.

⁵⁷ James & Turner, *supra* note 47; DasGupta et al, *supra* note 47.

⁵⁸ *AA v PRYDE Learning Centres Inc*, 2020 HRTO 1020; *JKB v Peel (Police Services Board)*, 2020 HRTO 172.

⁵⁹ Olufunke Oba, “For a fairer education system, get the police out of schools”, *The Conversation* (21 July 2020), online: <https://theconversation.com/for-a-fairer-education-system-get-the-police-out-of-schools-141552>; “Framework for change to address system racism in policing” (29 July 2021), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/framework-change-address-systemic-racism-policing>; see step 6 – “Review School Resource/Liaison Officers provincially”.

⁶⁰ Krystalle Ramlakhan, “Black student carded, cuffed at University of Ottawa, prompting review”, *CBC News* (14 June 2019), online: <https://www.cbc.ca/news/canada/ottawa/university-human-rights-office-student-twitter-carding-1.5175864>; Idil Mussa, “Race was a factor in uOttawa carding incident, report finds”, *CBC News* (19 May 2020), online: <https://www.cbc.ca/news/canada/ottawa/race-was-a-factor-in-u-of-o-carding-incident-report-finds-1.5575998>; “uOttawa Reaffirms its Commitment to Combatting Racism” (10 June 2020), online: *uOttawa* <https://www.uottawa.ca/respect/en/combating-racism-on-campus>.

⁶¹ Wanda Thomas Bernard & Holly Smith, “Injustice, Justice, and Africentric Practice in Canada” (2018) 35:1 *Canadian Social Work Review* 149, online (pdf): <https://www.erudit.org/en/journals/cswr/2018-v35-n1-cswr03948/1051108ar.pdf>; African Legal Clinic, “Civil and Political Wrongs: The Growing Gap Between International Civil and Political Rights and African Canadian Life – A Report on the Canadian Government’s Compliance with the *International Covenant on Civil and Political Rights*” (June 2015), online (pdf): *UN Treaty Body Database* https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAN/INT_CCPR_CSS_CAN_20858_E.pdf at 36-37. For a discussion of how sentencing of African Canadian offenders could take into account the broader context of the school-to-prison pipeline see: Maria C Dugas, “Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders” (2020) 43:1 *Dal LJ* 103, online: <https://canlii.ca/t/svmj>. For a decision which discusses the link between systemic racism in education and encounters with the criminal justice system: see *R v Morris*, 2018 ONSC 5186 at para 74.

⁶² Kfir Mordechay & Jennifer B Ayscue, “School Integration in Gentrifying Neighbourhoods: Evidence from New York City” (March 2019), online (pdf): *The Civil Rights Project* <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/school-integration-in-gentrifying-neighborhoods-evidence-from-new-york-city/NYC-031019.pdf>; Kfir Mordechay, “Gentrification, Demographic Change, and the Challenges of Integration” (2021) 30:1 *Poverty & Race* 7, online (pdf): <http://www.prrac.org/newsletters/jan-apr2021.pdf>.

⁶³ James & Turner, *supra* note 47; Muriel Draaisma, “Report on academic streaming brings back painful memories for black students schooled in Toronto”, *CBC News* (27 April 2017), online: <https://www.cbc.ca/news/canada/toronto/black-students-streamed-report-memories-1.4088061>; “Ontario to end

- sports (e.g., the racism inherent in transphobic sporting regulations⁶⁴ and racist team names and mascots⁶⁵).

Lastly, racism also manifests in educational spaces based on what is—or is not—taught. So often, what cannot be said in the classroom is linked to suppressing racial literacy. Emerging attempts to incorporate greater reference to racial topics in education are routinely met with resistance,⁶⁶ including the denial of tenure to prominent journalists (such as Nikole Hannah-Jones at UNC Chapel Hill⁶⁷) and academics (such as Cornel West at Harvard⁶⁸). And it is this particular manifestation of racism that connects race and education to this year’s Isaac Moot on the aborted hiring of Dr. Valentina Azarova, Justice Spiro’s intervention, and the implications of that intervention on his standing as a judge.⁶⁹

3. A Parting Note

Khiara Bridges writes that “CRT is dedicated to the production of politically engaged scholarship.”⁷⁰ This Moot, relatedly, is dedicated to the production of politically engaged lawyers.

‘discriminatory’ practice of academic streaming in Grade 9”, *CBC News* (6 June 2020), online: <https://www.cbc.ca/news/canada/toronto/ontario-streaming-high-school-racism-lecce-1.5638700>.

⁶⁴ Derrick Clifton, “Anti-Trans Sports Bills Aren’t Just Transphobic – They’re Racist, Too”, *them.* (31 March 2021), online: <https://www.them.us/story/anti-trans-sports-bills-transphobic-racist>.

⁶⁵ Simon Little & Grace Ke, “Anti-racism protests reignite debate over changing SFU’s athletic team name”, *Global News* (10 June 2020), online: <https://globalnews.ca/news/7052871/sfu-clan-team-name-debate/>.

⁶⁶ Jula Hughes, “Critical Race Theory in Legal Education”, *Slaw* (15 June 2021), online: <http://www.slaw.ca/2021/06/15/critical-race-theory-in-legal-education/>; Joshua Sealy-Harrington, “Show Not Tell: Why I am Declining to Participate in a Runnymede Society Debate”, *Slaw* (21 August 2020), online: <https://www.slaw.ca/2020/08/31/show-not-tell-why-i-am-declining-to-participate-in-a-runnymede-society-debate/>; Adelle Blackett, “Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill” (2017) 62:4 McGill LJ 1251, online (pdf): <https://www.erudit.org/en/journals/mlj/1900-v1-n1-mlj03399/1043165ar.pdf>; Rakhi Ruparelia, “Guilty Displeasures: White Resistance in the Social Justice Classroom” (2014) 37:2 Dal LJ 815, online: <https://canlii.ca/t/t0x2>.

⁶⁷ Paul Butler, “Nikole Hannah-Jones just proved the correctness of critical race theory”, *The Philadelphia Tribune* (16 July 2021), online: https://www.phillytrib.com/nikole-hannah-jones-just-proved-the-correctness-of-critical-race-theory/article_7efe9501-b81d-593b-bef0-69d3b381aa6c.html.

⁶⁸ Alison Flood, “Cornel West accuses Harvard University of ‘spiritual bankruptcy’”, *The Guardian* (16 July 2021), online: <https://www.theguardian.com/books/2021/jul/16/cornel-west-accuses-harvard-university-of-spiritual-bankruptcy>.

⁶⁹ See generally: Masha Gessen, “Did a University of Toronto Donor Block the Hiring of a Scholar for her Writing on Palestine?”, *The New Yorker* (8 May 2021), online: <https://www.newyorker.com/news/our-columnists/did-a-university-of-toronto-donor-block-the-hiring-of-a-scholar-for-her-writing-on-palestine>; “Censure UofT – In support of the CAUT censure of the University of Toronto”, online: <https://censureuoft.ca/>; Vincent Wong, “What the IHRP Hiring Scandal Tells us About Intersectional Privilege in Canadian Legal Institutions” (6 April 2021), online (blog): *Opinio Juris* <http://opiniojuris.org/2021/04/06/what-the-ihrp-hiring-scandal-tells-us-about-intersectional-privilege-in-canadian-legal-institutions/>; Canadian Judicial Council, Press Release, “Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro” (21 May 2021), online: <https://cjc-cm.ca/en/news/canadian-judicial-council-completes-review-matter-involving-honourable-de-spiro>; Abigail B Bakan et al, “Fighting anti-Semitism (and those who cry ‘wolf’ about it) at the University of Toronto”, *Canadian Dimension* (9 October 2021), online: <https://canadiandimension.com/articles/view/fighting-anti-semitism-and-those-who-cry-wolf-about-it-at-the-university-of-toronto>; Censure UofT, “CAN’T STOP, WON’T STOP” (21 October 2021), online (video): *YouTube* <https://www.youtube.com/watch?v=FRyUImlvzQ>.

⁷⁰ Bridges, *supra* note 2 at 14.

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.



Warmly,

Joshua Sealy-Harrington, B.Sc. (Mathematics), LL.M.
Assistant Professor — Lincoln Alexander School of Law at [X University](#)
J.S.D. Candidate — Columbia Law School
Lawyer — Power Law