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NOIRS EN DROIT DU CANADA

October 26, 2023

Dear Participants,

The 2023/2024 Julius Alexander Isaac Moot explores racial discrimination and international borders.<sup>1</sup> 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)*<sup>2</sup> 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, i.e., higher court decisions are more persuasive than lower court decisions). Further, the DHCC—unlike conventional courts—places equal weight on arguments rooted in doctrine or theory. To this end, parties to the appeal must include at least one argument based in doctrine (i.e., jurisprudence and statutes) and one argument based in theory (i.e., 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 arguments—regarding the classification of their various arguments as either doctrinal or theoretical arguments. The easiest way to do this is to label arguments in their overview (oral) and table of contents (written) as “Theory Argument 1: ...” and “Doctrine Argument 1: ...”.

<sup>1</sup> The author thanks their colleagues 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.

<sup>2</sup> 2023 SCC 17 [*CCR*].



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Subject to the requirement of advancing at least one doctrinal and one theoretical argument, parties can have as few or as many arguments as they consider necessary to advance their client's position.

Whereas “doctrinal arguments” typically operate from inside the current legal system, “theoretical arguments” typically operate from outside the current legal system and may question its underlying assumptions and seek to reveal deeper insights into the ways in which the existing legal structure sustains and perpetuates white supremacy. In other words, theoretical arguments at the DHCC may not necessarily replicate the kinds of theoretical arguments that one might make to an actual court in the Canadian legal system.

Theoretical arguments are sound so long as they advance your client's position, even if they are the sort of argument that a 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, theoretical arguments have substantial potential for innovative and creative reasoning. For example, 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 class or occupation for interpreting the specific injustices literally shaped by borders? Could reduced border enforcement exacerbate racial hierarchy by threatening the sovereignty of states resisting neo-colonial influence and intervention? The sky's the limit!

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



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

Since the Supreme Court of Canada only addressed administrative law issues summarily,<sup>6</sup> 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 the moot 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 complaints 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 colonial legacies.
- Whether the *Immigration and Refugee Protection Act*<sup>7</sup> should be amended to give special consideration to migrants from states destabilized by Canada’s imperial policies.

<sup>3</sup> *Ibid* at para 4.

<sup>4</sup> *Ibid* at paras 7–12.

<sup>5</sup> *Ibid* at para 13.

<sup>6</sup> *Ibid* at paras 49–55.

<sup>7</sup> SC 2001, c 27.



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- Whether expanded immigration/refugee access—without corresponding social support in Canada—harms more than helps 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 Coordinator:

Appellant's and Respondent's factum due: **Friday, January 5, 2024.**

Moot competition: **Thursday, February 1 – Saturday, February 3, 2024.**

#### 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, the Moot's 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. However, 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. Additionally, 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. Students should in no



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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 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.<sup>8</sup> It defies narrow definition. But one could say it interrogates racial truth, i.e., that it challenges established conservative—and even liberal<sup>9</sup>—interpretations of law and society. As Derrick Bell, the “intellectual forefather of CRT”,<sup>10</sup> explains: “critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it.”<sup>11</sup>

It would be incomplete to claim that critical race theory—or, given its multiplicity, critical race theories<sup>12</sup>—does not reflect any ideological leaning (indeed, every movement does). 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.”<sup>13</sup>

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 that powerful forces (like law) assist race in playing that role.<sup>14</sup> 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.<sup>15</sup> A post-racial lens would

<sup>8</sup> Khiara M Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 7.

<sup>9</sup> *Ibid* at 12–13.

<sup>10</sup> *Ibid*.

<sup>11</sup> Derrick A Bell, “Who's Afraid of Critical Race Theory” (1995) 1995:4 U Ill L Rev 893 at 893.

<sup>12</sup> 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.

<sup>13</sup> Kimberlé Crenshaw et al., eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995) at xix.

<sup>14</sup> Bridges, *supra* note 8 at 5–7.

<sup>15</sup> See e.g. Jasmeet Bahia, “London terror attack: Canadians have become desensitized to violence against Muslims” (9 June 2021), online: *The Conversation*

[theconversation.com/london-terror-attack-canadians-have-become-desensitized-to-violence-against-muslims-162392](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.



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say that race simply describes the demographics of terrorist actors; CRT, in contrast, would say that race explains how we define terrorism.<sup>16</sup>

Simply put, if you are critically thinking about race and law, then one could say you are, in effect, doing critical race theory.<sup>17</sup> 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, which are both 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.<sup>18</sup>

CRT is not only relevant to the critique of law; it also informs a nuanced understanding of existing legal doctrine. 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,<sup>19</sup> 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.”<sup>20</sup> However, the *Canadian Charter of Rights and Freedoms*, in stark contrast, specifically permits affirmative action.<sup>21</sup> 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,”<sup>22</sup> the highest court in our country was, in a sense, doing CRT as well.

<sup>16</sup> While not the focus of this particular moot, other critical fields would likewise interrogate how we conceptualize violence. Critical Disability Theory, for example, would challenge the common misconception of disabled people as more violent, while Feminist Legal Theory would push us to examine patriarchal patterns that emerge in our analysis of gender-based violence.

<sup>17</sup> Bridges, *supra* note 8 at 9.

<sup>18</sup> *Ibid* at 11.

<sup>19</sup> 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.

<sup>20</sup> [2007] 551 US 701 at 748.

<sup>21</sup> *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.

<sup>22</sup> *R v Le*, 2019 SCC 34 at para 76.



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CRT analysis is not easy. 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-merit<sup>23</sup> or pro-patriotism.<sup>24</sup> 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).<sup>25</sup> As Kendall Thomas, another founding CRT thinker, writes: “we are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”<sup>26</sup> With this in mind, Moot participants are encouraged to reflect on the subtle ways in which race is mobilized to sort—and subjugate—certain groups within society. In particular, participants are encouraged to think deeply about how borders are a location imbued with racial meaning 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, it has been hailed as the storied end of the Underground Railroad; and today, a nation that has opened its heart to welcome new immigrants and refugees to join its multicultural mosaic.<sup>27</sup> Indeed, Canada’s former Minister of Immigration and

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

<sup>24</sup> Sally Jenkins, “Colin Kaepernick reminds us that dissent is a form of patriotism too” (8 September 2016), online: *The Washington Post* <[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](http://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)>.

<sup>25</sup> 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.

<sup>26</sup> Kendall Thomas, “The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*” (1993) 79:7 Va L Rev 1805 at 1806–07.

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



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Citizenship recently observed that Canada resettled more refugees than any other country last year.<sup>28</sup>

A critical lens, however—and, in particular, a lens that pays specific attention to race—paints a different picture. Canada’s historical immigration policies were specifically designed to welcome white immigrants.<sup>29</sup> More recent articulations of border policy—for example, with respect to “economics” or “skill”<sup>30</sup>—simply illustrate CRT’s long-standing critique of seemingly neutral policies perpetuating substantively discriminatory border policies.

In light of recent events, Rinaldo Walcott asks provocatively: “Do Black migrant lives matter in Canada?” Yet this is an understandable—indeed, necessary—question. Walcott juxtaposes Canada’s recent treatment of white vs. racialized migrants<sup>31</sup> to demonstrate the actual social context of Canadian immigration policy and practice in stark terms<sup>32</sup>:

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 obtain 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

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

<sup>29</sup> Gerald E Dirks, “Immigration Policy in Canada” (7 February 2006), online: *The Canadian Encyclopedia* <<https://www.thecanadianencyclopedia.ca/en/article/immigration-policy>>.

<sup>30</sup> 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 <[www.tandfonline.com/doi/full/10.1080/1369183X.2018.1561063](http://www.tandfonline.com/doi/full/10.1080/1369183X.2018.1561063)>.

<sup>31</sup> Rinaldo Walcott, “Do Black migrant lives matter in Canada?” (26 July 2023), online: *Canadian Dimension* <[canadiandimension.com/articles/view/do-black-migrant-lives-matter-in-canada](http://canadiandimension.com/articles/view/do-black-migrant-lives-matter-in-canada)>.

<sup>32</sup> 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 <[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](http://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* (July, 2023), online: CTV News <[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](http://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* (July 2023), online: *Toronto Star* <[www.thestar.com/news/gta/olivia-chow-says-ottawa-to-blame-for-toronto-s-refugee-housing-crisis/article\\_7e7e8aad-ffb4-5011-be8b-9d07ba50af4d.html](http://www.thestar.com/news/gta/olivia-chow-says-ottawa-to-blame-for-toronto-s-refugee-housing-crisis/article_7e7e8aad-ffb4-5011-be8b-9d07ba50af4d.html)>.



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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.

More broadly, myriad scholarship examines the relationship between borders and race.<sup>33</sup> Notably, Harsha Walia astutely explains how even putatively “progressive” countries—like Canada—maintain racial hierarchy through border imperialism.<sup>34</sup>

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.

This social context—that is, racial disparities in Canadian border policy and Canada’s manufacturing of vulnerability for precarious migrants<sup>35</sup>—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

<sup>33</sup> 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: <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 <doi.org/10.1080/10282580701850371>; Parmar, Alpa, “Borders as Mirrors: Racial Hierarchies and Policing Migration” (2020) 28 *Critical Criminology* <doi.org/10.1007/s10612-020-09517-1>; Tendayi Achime, E., ‘Race, Refugees, and International Law’ (2021) *The Oxford Handbook of International Refugee Law*, Oxford Academic <doi.org/10.1093/law/9780198848639.003.0003>.

<sup>34</sup> Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Haymarket Books: 2021) at 202.

<sup>35</sup> See e.g. Weiler, Anelyse M., and Janet McLaughlin. “Listening to Migrant Workers: Should Canada’s Seasonal Agricultural Worker Program Be Abolished?” (2019) 43:4 *Dialectical Anthropology*, pp. 381–88.



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story. They explain, for example, that the *STCA* forces migrants to make dangerous journeys between Canada and the United States. Further, migrant rights organizers explain 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 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 Ukrainians, 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 and even death. Just two months ago, a group of Jamaican migrant workers were returned to the Caribbean for protesting their working conditions, including unsanitary living conditions and abusive management.<sup>36</sup> Last year, a migrant worker died in a farming incident.<sup>37</sup> Earlier this year, two migrants died while crossing Roxham Road,<sup>38</sup> a border crossing left open by the legal framework that preceded the *SCTA*.<sup>39</sup> 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.”<sup>40</sup>

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 courts declined to even analyze the inequality apparent in the *SCTA*, let alone rule in favour of those impacted. The Supreme Court of Canada remitted the decision on the question of unequal treatment, but only in respect of gender-based discrimination.<sup>41</sup> The Supreme Court’s focus on gender can be understood in the context of the

<sup>36</sup> Hannah Alberga, “Jamaican migrant workers sent back from Ontario farm after exposing conditions” (22 August 2023), online: *CTV News* <[toronto.ctvnews.ca/migrant-workers-sent-back-from-ontario-farm-after-exposing-conditions-jamaican-government-says-1.6528212](https://toronto.ctvnews.ca/migrant-workers-sent-back-from-ontario-farm-after-exposing-conditions-jamaican-government-says-1.6528212)>.

<sup>37</sup> Tegan Versolatto, “Migrant worker killed in Norfolk County farming incident” (19 August 2023), online: *CTV News* <[kitchener.ctvnews.ca/migrant-worker-killed-in-norfolk-county-farming-incident-1.6034699](https://kitchener.ctvnews.ca/migrant-worker-killed-in-norfolk-county-farming-incident-1.6034699)>.

<sup>38</sup> Verity Stevenson, “Closing Roxham Road will lead to ‘humanitarian catastrophes,’ immigration experts warn” (24 March 2023), online: *Radio Canada International* <[ici.radio-canada.ca/rci/en/news/1965955/closing-roxham-road-will-lead-to-humanitarian-catastrophes-immigration-experts-warn](https://ici.radio-canada.ca/rci/en/news/1965955/closing-roxham-road-will-lead-to-humanitarian-catastrophes-immigration-experts-warn)>.

<sup>39</sup> 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>>.

<sup>40</sup> “Bad + Bitchy Briefing: Global Migration via Roxham Road” at 04m:07s–04m:18s, online (podcast): <[www.badandbitchy.com/p/bad-bitchy-briefing-global-migration#details](https://www.badandbitchy.com/p/bad-bitchy-briefing-global-migration#details)>.

<sup>41</sup> *CCR* at para 13.



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initial challenge, which was, similarly, based on gender.<sup>42</sup> That said: what does it say about our legal institutions—and our law and 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, should 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?<sup>43</sup>

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.”<sup>44</sup> What role can—and should—the law 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.”<sup>45</sup> This Moot, relatedly, is dedicated to the production of politically engaged lawyers. 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. 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,

<sup>42</sup> *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 at para 151.

<sup>43</sup> Migrant Rights Network, “Regularize Everyone: It's time.” (last visited 17 September 2023), online: <[migrantrights.ca/events/sep17/?link\\_id=5&can\\_id=f10b3f9df18acf1ae30c6d54553a07cd&source=email-correction-parliament-went-on-holiday-now-what-3&email\\_referrer=email\\_1992507&email\\_subject=ending-the-inequality-crisis](https://migrantrights.ca/events/sep17/?link_id=5&can_id=f10b3f9df18acf1ae30c6d54553a07cd&source=email-correction-parliament-went-on-holiday-now-what-3&email_referrer=email_1992507&email_subject=ending-the-inequality-crisis)>.

<sup>44</sup> 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:

<[ccrweb.ca/sites/ccrweb.ca/files/2023-06/Open%20letter%20to%20Prime%20Minister%20on%20STCA.pdf](https://ccrweb.ca/sites/ccrweb.ca/files/2023-06/Open%20letter%20to%20Prime%20Minister%20on%20STCA.pdf)>.

<sup>45</sup> Bridges, *supra* note 8 at 14.



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and active creativity, that deeper insights about racial hierarchy can be generated and explored. Ultimately, the goal of 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,

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