Dear participants,

The Julius Alexander Isaac Moot (the "Moot") for the 2024-2025 academic year concerns the legal standard for racial profiling and whether it must be re-evaluated and arguably modified to better accord with modern understandings of the social context and issues with the existing framework.

The rulings used as the foundation for this problem are the majority and dissent rulings of the Saskatchewan Court of Appeal in *R v Ali*.[1]

This moot is an opportunity for in-depth discourse of the issues underlying the test for racial profiling to inspire legal development. The following outlines the procedure and substance of the Moot.

1. Procedure

a) Overview

The Moot will consist of a fictional appeal from the Saskatchewan Court of Appeal (SKCA) to the Diversity High Court of Canada (DHCC). Information pertaining to the nature of argumentation, issues, and deadlines relating to that appeal can be found in the following sections.

b) Nature of Argumentation

The DHCC is a fictional court, which does not view Canadian legal doctrine as binding, but rather views it as persuasive. It appreciates the persuasiveness of Canadian doctrine according to its established hierarchy of precedents in Canadian law. Additionally, the DHCC solely recognizes arguments supported by existing legal sources. Therefore, using a critical race approach, both parties must present: (1) *at least* one argument scoping the impracticality of the

[1] 2023 SKCA 127. [Ali]

current legal definition of racial profiling[2] and its associated test with regards to police interactions[3] and (2) *at least* one argument with a critical race theory (CRT) focus, proposing key revisions required for the test to be effective. Parties may submit multiple arguments to support the establishment of a new standard and or test, provided they adhere to the required type of argumentation and effectively support their position.

The Appellant shall ground its argument in an individual rights and civil liberties perspective, i.e. consideration of potential Charter rights violations caused by discretionary police power.

The Respondent shall base its argument on public safety and policy considerations, i.e. the importance of discretionary police powers in ensuring public safety. The Respondent is expected to recognize the social context and any parts of the Appellant's position that it accepts while providing its own distinct position. The argument should not be a repetition of the Appellant's position.

Innovation by both sides is encouraged.

Parties are expected to reference Canadian legal authorities to explain what the law is, why it is ineffective and what it should be.

c) Issues on Appeal

The issues on appeal include both doctrinal and theoretical issues. The doctrinal issues deal with what the parties believe to be the current state of the law. The theory issue(s) ask(s) where the parties believe that the law needs to go to be more just. The scope of the issues is intentionally broad as it is expected that students innovatively address these issues based on their positions.

It is the parties' responsibility to ensure that both types of arguments are included in their written and oral submissions. Failure to comply will result in disqualification from the final rounds of the Moot. To prevent this, parties are required to organize and identify their oral and

[2] See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)* 2015 SCC 39 at para 33 [Quebec v. Bombardier].
[3] See *R v Lee* 2019 SCC 34 at paras 75-76.

written submissions as follows: "Existing Law"; "Impracticality of Current Law Argument 1:..."; and "Revision of Law Argument 1:..".

The doctrinal issues on appeal are as follows:

1. What is the current test for racial profiling as established in paras 50-52 and specified by para 54 of *Ali*? Please consider the scope, strengths and weaknesses. (Existing Law)
2. What are the trial judge's errors in interpreting this test at paras 47-49 of the judgment? (Existing Law)

    2.1. Did the dissent fully capture the extent of the trial judge's errors?

3. What do the errors you identified reveal about problems with the application of the current test? (Impracticality of Current Law)

The theoretical issues that may be raised are open and require both the Appellant and Respondent to think critically about ways in which the existing legal system can be critiqued in a manner favourable to their position. These may be identified as "Revision of Law" arguments.

For example, theoretical issues on appeal may include but are not limited to:

- Whether the current legal framework for racial profiling requires changes to more effectively address the problem? If so, what kind of changes?
- Whether the onus to prove racial profiling should be modified to recognize racial profiling is pervasive but notoriously difficult to prove. For example:
    - Once the Applicant makes out a prima facie case or raises an air of reality, should the Crown be required to disprove racial profiling?
    - Whether regulatory offence investigations involving racialized people that turn into detentions for criminal offence investigations, require the police to demonstrate the detention is not influenced to any degree by stereotypes?
- Whether the test for racial profiling should consider the impact of the officer's conduct rather than (or in addition to) the motivation or attitudinal bias?
- Whether a judicially developed factorial / indicators test is required? If so, what should inform those factors?

- Whether unconscious bias should be recognized as racist conduct?
- To what extent do modern courts recognize and address the prevalence of anti-Black racism and its role in racial mistreatment by the police?
- Do current systems of law and practices of law operate unfairly towards, and fail to benefit, Black people?

d) Deadlines

The following deadlines will be strictly enforced by the Moot Director and Moot Committee:

- **Appellant Factum due**: Thursday, January 9, 2025, at 3:00 PM EST
- **Receipt of opposing Appellant Factum by Respondent**: Thursday, January 9, 2025
- **Respondent Factum due**: Thursday, January 16, 2025, at 3:00 PM EST
- **Receipt of opposing Respondent Factum by Appellant**: Thursday, January 16, 2025
- **Moot Competition**: Thursday, January 30, 2025 to Saturday, February 1, 2025

e) Format

The following is an excerpt from the Official Moot Rules regarding the factum format that teams must follow. Please consult the rules for the full list of factum requirements:

- 20 pages maximum
- Times New Roman
- 12-point font
- 1-inch margins
- Double spaced (except indented quotes)
- Numbered paragraphs
- 8.5" x 11" pages
- Bold headings and sub-headings including the five (5) following sections
    I. Overview
    II. Statement of Facts
    III. Statement of Issues
    IV. Argument
    V. Order Sought

- Citations according to the latest edition of the McGill Guide.
- The cover should be in the same form as factums at the SCC, except:
    - use 12-point font;
    - "Supreme Court of Canada" should be changed to "Diversity High Court of Canada "; and
    - there is no need to make any references to the Supreme Court Act or Rules.

Please ensure that factums are only identifiable via use of the team's assigned number (check for tracked changes or any other areas where your names may appear), as points may be deducted if names are included.

Refer to the Official Moot Rules for specific details regarding submission and formatting.

2. Substance

The doctrinal foundation for the moot is *R v Ali*.[4] The theoretical foundation for the appeal is briefly summarized below.

Theoretical arguments must incorporate research of relevant social context, studies and reports, and case law on anti-Black racism. They must also apply Critical Race Theory (CRT). The CRT scholarship cited below in the footnotes is a starting point for competition in the moot, but additional research is welcome. Parties will be evaluated on their ability to practically apply CRT arguments to the courtroom, and not on the number of scholars or articles on CRT that are cited.

a) What is Racial Profiling

In Canada, courts have acknowledged both the existence and unlawfulness of racial profiling. The Supreme Court adopted the following definition of racial profiling in *Bombardier*, a definition that was most recently cited in *Le* in 2019:[5]

> Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on

[4] 2023 SKCA 127.
[5] *Quebec v Bombardier, supra* note 2 at para 33.

> actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.
>
> Racial profiling [also] includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.

In *Le*, the court further explained that the concept of racial profiling is primarily concerned with the motivation of the police.[6] Racial profiling is present where "race or racialized stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or treatment."[7] The example provided in *Peart*, is that of a police officer who observes a vehicle speeding and decides to pull the driver over, in part due to the driver's race.[8] The officer has engaged in racial profiling, even though their action would have been justified by the driver's speeding.[9] Differential treatment which results in detention is arbitrary and contrary to s. 9 of the *Charter*.[10] This conclusion was confirmed in the recently decided case, *PG Quebec c Luamba.*[11] The Quebec Court of Appeal unanimously upheld that the section of Quebec's *Highway Safety Code* that permitted police officers to randomly stop drivers without reasonable suspicion of an offence was contrary to the *Charter*.[12] Specifically, individuals' section 9 and 15 rights which relate to arbitrary detention and equality were violated by these types of police stops.[13] Thus, the law which led to members of the Black community being racially profiled by police officers while driving was deemed inoperative by the court.[14]

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[6] *Le, supra* note 3 at para 76; see also *R v Dudhi*, 2019 ONCA 665 at para 55.
[7] *Ibid* at para 76.
[8] *Peart v Peel (Regional Municipality) Police Services Board* (2006), 43 C.R. (6th) 175, 217 O.A.C. 269, 39 M.V.R. (5th) 123 (Ont. C.A.) at para 91.
[9] *Ibid* at para 91.
[10] *David M. Tanovich, "Applying the Racial Profiling Correspondence Test" (2017), 64 Crim LQ 359 at 359.*
[11] *PG Quebec c Luamba* (23 October 2024), Montréal 500-09-030301-220 (QCCA).
[12] *Ibid* at para 222.
[13] *Ibid* at para 224.
[14] *Ibid* at para 224.

In the landmark racial profiling case, *Brown*, Justice Morden concluded that the framework for assessing racial profiling must be inference drawn from circumstantial evidence.[15] Requiring proof by direct evidence, he noted, would be too high a bar, as police officers rarely admit to use of racial profiling.[16] Consequently, a substantial burden of proof is placed on claimants to prove racial profiling as it requires establishing the internal mental processes of individuals in positions of authority. [17]

This raises a critical question: is Canada's current test for racial profiling fair, or does it inherently disadvantage racialized individuals seeking justice?

b) What is CRT

Critical race theory is a field of inquiry focused on the intersection of law and racial inequality. It considers the racial undertones of the law and critically analyzes it to identify racial discrimination and advocate for equitable treatment. CRT challenges our established interpretations of law and society and highlights how race plays a salient part within the law and institutions, as these mechanisms have allowed race to play an explanatory role in social outcomes.

CRT offers a lens to rethink and reform our understanding of law; you have likely engaged with it throughout your legal education. The ideological movement has allowed for reform in our understanding of legal doctrine through the ability of critique. As Derrick Bell, the "intellectual forefather of CRT", explains: "Critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it."[18]

Justice Michael Tulloch's report of the Independent Street Checks Review exemplifies CRT's practical application, highlighting the persistence of implicit bias and calling for an integrated approach across government sectors. He stated that "there is no quick fix to the problem of

[15] *R v Brown,* 2003 CanLII 52142 (ON CA) at para 44.
[16] *Ibid* at para 44.
[17] *Le, supra* note 3 at para 78; see also *Dudhi, supra* note 14 at para 55.
[18] Derrick A Bell, "Who's Afraid of Critical Race Theory" (1995) 1995:4 U Ill L Rev 893 at 893.

systemic discrimination […] justice, education, and mental health are not separate issues, and they should not operate in silos."[19]

Canada's legal framework offers space for CRT's principles. Section 15(2) of the *Canadian Charter of Rights and Freedoms* allows conscriptive and ameliorative policies addressing social and historical inequalities. However, this approach contrasts sharply with recent U.S. Supreme Court rulings declaring race-conscious affirmative action policies unconstitutional.[20] This divergence reflects a broader debate on whether modern policies should still account for race to rectify historical disadvantages. In such discussions, it is important to note racism can be covert and passive while still facilitating inequity.

With hindsight, racism in Canada before the 21st century may appear more explicit than it does today. Consider the neglect and destruction of Africville and the grisly creation of Japanese internment camps, facilitated by socio-political opinion being turned into law. However, the history of racial discrimination in Canada demonstrates the persistence of inequity in various forms. Racism, although sometimes less overt in contemporary contexts, continues to evolve, necessitating a fluid CRT approach to unpacking and addressing it. Decoding these evolving forms of racism is, according to many CRT scholars, central to contemporary anti-racism in legal scholarship and practice. In *R v Le*, the Supreme Court of Canada emphasized the importance of considering racial context in section 9 detention analysis, acknowledging the historical tensions between police and racialized groups.[21] This CRT-informed perspective encourages judicial sensitivity to systemic inequities when deciding cases.

CRT urges us to critically engage with the role of race in legal structures. Simply put, if you are critically thinking about race and law, then you are doing critical race theory.[22] The intent of the Isaac Moot is to encourage participants to dig deeper into how legal frameworks can both challenge and perpetuate racial hierarchies whilst fostering imagination and creativity—hallmarks of CRT. With that in mind, participants should not feel pressured to follow

[19] Justice M. H. Tulloch, *Report of the Independent Street Checks Review* (2018), at 214 para, 28.
[20] *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. ___ (2023).
[21] R v Le, 2019 SCC 34 at para 76.
[22] Khiara M Bridges, Critical Race Theory: A Primer (New York: Foundation Press, 2019) at 7

any particular "methodology" or reach any particular "conclusion" in their arguments to remain faithful to CRT—indeed, CRT prescribes neither.[23]

Race is often understood as an identity marker (e.g., Black, white, etc.), yet it functions more as a process (verb) than a person (noun).[24] As Kendall Thomas, another founding CRT thinker, writes: "we are 'raced' through a constellation of practices that construct and control racial subjectivities."[25] Race is a social construct that surrounds our understandings and institutions; in legal practice, if we do not keep such in mind in arguments and analysis, we allow racism and its harms to permeate. This normalization of bias and prejudice hinders the evolution of our development as a collective.

Participants are urged to look closely at how everyday actions can perpetuate racial profiling, recognizing that racism often lies in subtle patterns woven into societal structures. Critical race theory in action requires confronting these hidden biases, shining a light on the racial undertones embedded within our laws and practices. By analyzing and challenging these aspects, we do not just expose injustice; we create opportunities for true transformation, advancing a society where equity is not just a principle but a lived reality.

[23] Bridges, *supra* at 11.
[24] 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.
[25] Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick" (1993) 79:7 Va L Rev 1805 at 1806–07.