THE LAW OF BORDERS

CIAJ's 47th Annual Conference

REPORT FROM CIAJ'S 47th ANNUAL CONFERENCE
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By Nathan Afilalo and Sarah Rowe, April 2024

CIAJ
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OVERVIEW

The following report is based on the panel discussions at the Canadian Institute for the Administration of Justice's 47th Annual Conference, entitled "The Law of Borders." The event was held in Ottawa from October 25–27, 2023. The conference brought together many legal and academic professionals who work in the realm of borders, both domestically and internationally. At its heart, the conference addressed the significance of borders in Canada and globally, the vulnerability of people who must cross them, and their impact on the many divergent groups within Canada and abroad. The program is available on the CIAJ website.

INTRODUCTION

Borders are, by their very nature, discriminate.[1] Whether depicted as geographical, physical, political, legal, fixed, or processes, borders act as "a filter or screen that slows and halts the entry of some, while permitting and expediting the entry of others."[2] Borders limit entry based on a set of defined people, practices, institutions, or norms, or through the physical environment. The same border can permit different means of entry based on a person's relationship to the function of the border and to those who maintain it at the time of crossing. Consequently, the relevance of a border varies according to (1) who is seeking to cross, (2) where they are trying to enter, and (3) under what conditions they are attempting to do so.

The following report relates the discussion highlights from CIAJ's conference on "The Law of Borders." The panellists demonstrated the influence of borders in Canada and their effect on the people who seek to cross them. The report aims to summarize the conference in a format accessible to the wider public. The report seeks to highlight the key takeaways and provide enough information for readers to pursue further research on the issues detailed by the speakers. The report is divided into two sections. The first section outlines the discussion of the three special guests welcomed at the conference, highlighting their insights, and establishing the overarching themes of the conference. The second section provides an overview and analysis of each of the nine panels, noting the main discussion points addressed by the panellists.

[1] Audrey Macklin, "(In) Essential Bordering: Canada, COVID, and Mobility" (2020) Frontiers in Human Dynamics 1 at 2.
[2] *Ibid at 2.*

SECTION I

The Enduring Importance of Borders

Introduction

Three distinct voices shouldered the discussions of the conference. Each provided an insightful perspective on the importance on borders and the laws that regulate them today. The Honourable Justice Mahmud Jamal of the Supreme Court of Canada opened the conference with a discussion on how border policies reflect a nation's values and the historic significance of borders in Canada. Her Excellency Yuliya Kovaliv, Ambassador of Ukraine in Canada, emphasized the vital role of international law in maintaining the rule of law in times of wars of aggression. Finally, Professor Ghizal Haress, Visiting Scholar at the Faculty of Law and Massey College and Former Ombudsperson of the Islamic Republic of Afghanistan, closed the conference with a discussion on maintaining and losing the rule of law throughout her career as a jurist in Afghanistan and experiences as a refugee.

Borders as a Measure of a Nation

Justice Jamal introduced two fundamental points: (1) that the law of borders has come to shape the lives of more people in Canada than ever before; and (2) that borders "act as a national litmus test." He explained that in 2023, Canada reached a historic height: more than 8.3 million people, 23% of the country's population, were recorded as currently having or previously had immigrant or permanent resident status.[3] This represented the highest proportion of migrants among the G7 countries.[4] Further, international immigration accounted for 96% of Canada's population growth in the third quarter of 2023, welcoming 107,972 immigrants to supplement the country's low rate of natural increase.[5] Justice Jamal remarked that should these numbers continue, by 2041, half of the Canadian population will be first-generation immigrants.

While these numbers are novel, he stressed that they maintain a long history of immigration in Canada, quoting Justice LaForest in *Andrews v. Law Society of British Columbia*: "Our nation has throughout its history drawn strength from the flow of people to our shores."[6] The novel numbers in Canada reflect global trends. The United Nations High Commissioner for Refugees ("UNHCR") reports that forced displacement is currently at a record high since the Second World War. The UNHCR recorded that at the end of 2022, 108.4 million people were forcibly displaced due to "persecution, conflict, violence, or human rights violations,"[7] food scarcity, inflation, and the climate crisis, with more than 110 million people forcibly displaced worldwide as of May 2023.[8]

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[3] Statistics Canada, "Immigrants Make up the Largest Share of the Population in Over 150 Years and Continue to Shape Who We are as Canadians" (26 October 2022), online: <www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026a-eng.htm> [Statistics Canada, "Immigrants"].

[4] *Ibid*.

[5] Statistics Canada, "Canada's Population Estimates, Third quarter 2023" (19 December 2023), online: <www150.statcan.gc.ca/n1/daily-quotidien/231219/dq231219c-eng.htm> (due to an ageing population and low fertility rates).

[6] *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) at para 197.

[7] USA for UNHCR, "Refugee Statistics" (25 July 2023), online: <www.unrefugees.org/refugee-facts/statistics/#:~:text=Global%20Trends%20At%2Da%2DGlance,35.3%20million%20refugees>.

[8] USA for UNHCR, "Five Takeaways from the 2022 UNHCR Global Trends Report" (11 July 2023), online: <www.unrefugees.org/news/five-takeaways-from-the-2022-unhcr-global-trends-report/>.

On the breadth of migrants across the world fleeing their homes due to conflict, political oppression, poverty, or climate change, Justice Jamal emphasized the relationship between a country's border policies and its values. He stressed that "borders act as a national litmus test," measuring a country's openness, empathy, and courage to welcome people who seek home or shelter:

> Borders act as a national litmus test. They are a test of our openness, our empathy, and our courage. The way we arrange and enforce our borders is a measuring stick of how far we have come as a country and how far we have to go, both as a country and part of the global community... Borders are not simply lines on a map. They embody the legal frameworks established by nations to regulate the movement of people, goods, and ideas. They serve to maintain order, reinforce sovereignty, and ensure security. At the same time, borders test our national character. They are places where our humanity and courage to do what is right is graded by those who leave their homes in search of something better.[9]

While Justice Jamal saluted Canada's past efforts in welcoming immigrants to its shores, the changes in Canadian history of immigration demonstrate his point.

During the first 50 years of Canada's confederation, immigration policies encouraged immigration from the United States, British Isles, and European nations, restricting immigration from Asian, African, and South American countries.[10] The *Chinese Immigration Act of 1885*[11] exemplifies early Canadian immigration policy, which sought to restrict immigration based on ethnic origin.[12] This Act legislated a head tax that lasted until 1923, when a new *Chinese Exclusion Act* prohibited nearly all Chinese immigration for the next 24 years.[13] This history of racist and discriminatory policy exists alongside a history of refuge, albeit selective, as from 1891 to 1914, between 150,000 and 170,000 Ukrainians were welcomed after fleeing Austro-Hungarian rule.[14] This era of explicit inclusion and exclusion saw a record number of immigrants in Canada, comprising 22.3% of the population in 1921.[15] From the 1960s onward, Canadian immigration policy became more inclusive through regulations that eliminated overt racial discrimination in immigration policy and the welcoming of people beyond Europe and the Americas.[16] However, disparities and preferences remain exemplified in Canada's divergent emergency regimes, allowing both Ukrainian and Palestinian refugees to enter the

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[9] The Honourable Justice Mahmud Jamal, "Welcome Remarks and Introduction" (Address delivered at the 47th Canadian Institute for the Administration of Justice Annual Conference on The Law of Borders, 25 October 2023) [unpublished].

[10] See Immigration and Citizenship Canada, "Canada: A History of Refuge – A Timeline" (last modified 1 February 2024), online: <www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role/timeline.html>.

[11] *Chinese Immigration Act 1895*, SC 1885, c 71.

[12] See Parks Canada, "Exclusion of Chinese Immigrants (1923–1947) National Historic Event" (2 August 2023), online: <parks.canada.ca/culture/designation/evenement-event/exclusion-chinois-chinese>. See also Immigration, Refugees and Citizenship, "Racism, Discrimination and Migrant Workers in Canada: Evidence from the Literature", by Nalinie Mooten (July 2021) at 35, online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/research/racism-discrimination-migrant-workers-canada-evidence-literature.html>.

[13] *Ibid*.

[14] Statistics Canada, *A Sociodemographic Profile of Ukrainian-Canadians*, by Max Stick & Feng Hou (28 April 2022), online: <www150.statcan.gc.ca/n1/pub/36-28-0001/2022004/article/00003-eng.htm>

[15] Statistics Canada, "Immigrants," *supra* note 3.

[16] *Ibid*. See Canadian Museum of Immigration at Pier 21, "Immigration Regulations, Order-in-Council PC 1962-86, 1962" (2 April 2018), online: <pier21.ca/research/immigration-history/immigration-regulations-order-in-council-pc-1962-86-1962>.

country but with a notable cap on the number of Palestinians receiving visas, as well as the reported[17] alarming and unprecedented level of personal information required from asylum seekers and migrants.[18]

Testing International Law

Following the remarks of Justice Jamal, Ambassador Kovaliv spoke on the relationship between border security and international law. The Ambassador marked that today, the international community stands at a crossroads. The preventative instruments of international law have not deterred wars of aggression, namely, the Russian invasion of Ukraine.[19] The invasion of Ukraine is widely considered[20] a violation of the prohibition of the "use of force" in Article 2 (4) of the *Charter of the United Nations*,[21] with the invasion involving allegations of war crimes and crimes against humanity.[22] Further, as a member of the United Nations Security Council ("UNSC") with veto power over the UNSC's binding resolutions, Russia's actions test the limit of international law, challenging the capacity of these instruments to respond to the conflict and dispense justice.[23] Considering this, the Ambassador highlighted that for the international legal order and community one path forward is whether to continue as it has in the face of the invasion:

> Or, another step, is to restore justice and restore the rule of law. And this very important because the power of law should be stronger than the power of guns, because military power cannot be something that protects people and borders of countries around the world. And that is why, not only for Ukraine but for all of us, justice is not an empty word. It is the word that can stop more aggressions … and prevent war crimes from being the norm.[24]

The Ambassador stressed that the strength of international law is not measured by the depth of its corpus of rules, but rather the enforcement of those rules in response to their violation. She remarked that international instruments must be levied to take legal action against belligerent or authoritative nations who violate international law to sustain and support the rule of law.

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[17] See Immigration, Refugees and Citizenship Canada, "Canada-Ukraine Authorization for Emergency Travel" (22 March 2023), online: <www.canada.ca/en/immigration-refugees-citizenship/news/2022/03/canada-ukraine-authorization-for-emergency-travel.html>; Immigration, Refugees and Citizenship Canada, "Crisis in Gaza: Special Measures for Extended Family" (2 February 2023), online: <www.canada.ca/en/immigration-refugees-citizenship/services/israel-west-bank-gaza-2023/gaza-tr-measures.html>.

[18] Raffy Boudjikanian, "Ottawa Seeking Unprecedented Level of Personal Details from Palestinian Migrants, Lawyers Say", *CBC News* (11 January 2024), online: <www.cbc.ca/news/politics/palestinian-gaza-migrant-canada-1.7080991>.

[19] See Michael Kelly, "The Role of International Law in the Russia-Ukraine War" (2023) 55:1 Case W Res J Intl L 61 at 70–71.

[20] See Government of Canada, "Canada and the Russian Invasion of Ukraine" (20 March 2023), online: <www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/ukraine-situation.aspx?lang=eng>.

[21] *UN Charter*, 26 June 1945, Can TS 1945 No 7, art 2(4)

[22] *Report of the Independent International Commission of Inquiry on Ukraine*, OHCHR, 78th Sess, UN Doc A/78/540 (2023); *ibid*.

[23] See Oona A Hathaway, "How Russia's invasion of Ukraine tested the international legal order", *Brookings* (3 April 2023), online: <www.brookings.edu/articles/how-russias-invasion-of-ukraine-tested-the-international-legal-order/>; Kelly, *supra* note 19 at 70–71.

[24] Her Excellency Yuliya Kovaliv, Ambassador of Ukraine in Canada, "Welcome Remarks and Introduction" (Address delivered at the 47th Canadian Institute for the Administration of Justice Annual Conference on The Law of Borders, 25 October 2023) [unpublished].

The Ambassador explained that while Russia was not deterred from its invasion, international law mechanisms have been hard at work to keep it accountable for its actions. She detailed that the International Criminal Court (the "ICC") has opened an investigation into Russia's alleged crimes in Ukraine[25] and issued an arrest warrant against both Putin and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation.[26] In 2022, Ukraine won their request for provisional measures against Russia at the International Court of Justice, which ordered Russia to suspend military operations in response to allegations of genocide under the *1948 Convention on the Prevention and Punishment of the Crime of Genocide*.[27] Further, Ukraine currently has two cases pending before the International Court of Justice, alleging genocide and human rights atrocities.[28] Ukraine has also called for a special tribunal to prosecute Russian military and political leaders, adding to an additional three other cases before international tribunals.[29]

Maintaining the Rule of Law

Ghizaal Haress, Visiting Scholar at the Faculty of Law and Massey College and Former Ombudsperson of Afghanistan, concluded the conference. She discussed her efforts to maintain the rule of law and fight corruption throughout her career as a jurist in Afghanistan and her experience as a refugee.

Professor Haress and her family fled their home in 1992 to Pakistan to escape the civil war in Afghanistan. In Peshawar, she attended a primary school for refugees and the Afghan university until the institutions were closed by the government due to pressure from the Taliban. Professor Haress worked at a legal non-profit until returning to Afghanistan during the formation of the Islamic Republic of Afghanistan in 2004, along with five million other Afghans from the diaspora over the following eight years.[30] During that time, she accomplished novel advances for the country, becoming a professor at the faculty of law at the American University of Afghanistan (AUA) and the first presidential Ombudsperson.

During her return to Afghanistan, Professor Haress became the only female commissioner for the Independent Commission for Overseeing the Implementation of the Constitution. Enacted in 2004, the Constitution was based on the European civil-law tradition, adapted to the Afghan culture, history, and relationship with Islam.[31] Professor Haress explained that the Constitution

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[25] See International Criminal Court, "Situation in Ukraine: Investigation" (2 March 2022), online: <www.icc-cpi.int/situations/ukraine>.
[26] See International Criminal Court, "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" (17 March 2023), online: <www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.
[27] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Order of 16 March 2022, [2022] ICJ Rep 182 at para 1.
[28] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* ICJ No 182 at para 1, online: <www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.
[29] See Bart Meijer, John Chambers & Stephanie van den Berg, "EU seeks tribunal to probe possible Russian war crimes in Ukraine", *Reuters* (30 November 2022), online: <www.reuters.com/world/europe/eu-seeks-set-up-russian-war-crimes-tribunal-von-der-leyen-2022-11-30/>.
[30] The UN Refugee Agency, "2012 UNHCR country operations profile - Afghanistan" (4 June 2012), online: <web.archive.org/web/20120604063834/http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486eb6> [UNHCR].
[31] "The Constitution of Afghanistan*"* (3 January 2004), Preamble, online: <www.wipo.int/wipolex/en/text/241817>.

contained a strong division of powers.[32] Despite a robust Constitution, she explained one of the important lessons she learnt as commissioner:

> Having a constitution is not necessarily enough. You need to work on so many other aspects. You need to build a constitutional culture because … if you do not have that constitutional culture, and you have come a long way with not having one, then people forget what it means to have a constitution in the first place.[33]

Professor Haress' remarks echo those of Ambassador Kovaliv: that the strength of a law is measured by its implementation and that the rule of law cannot exist independently of people willing to adhere to and protect it.

Professor Haress detailed that her career promoting the humanitarian and emancipatory ideals espoused in the Afghan constitution came at a high cost.[34] In addition to weathering violence and combating gender-based bias from colleagues, as Commissioner and Ombudsperson, Professor Haress had to fight corruption in government through her appointment as Ombudsperson. She stressed the difficulty of this task, saying, "one of the tags for Afghanistan would be corruption."[35] Government officials were under pressure from ministers and the president, producing an inconsistent application of anti-corruption policy and law. Professor Haress explained that her office was dependent on the same offices that she was meant to oversee, which detracted from a "constitutional culture" that applies the legislation and builds strong institutional and legal frameworks. Internal resistance against fighting corruption led people to lose confidence in the state and to hope that an institution that sought to fight corruption would achieve its goals. She concluded this point by explaining that her institution had two fundamental challenges: (1) fighting corruption; and (2) making a place for itself and rebuilding public trust. While COVID-19 presented a turning point for her work, charging 16 provincial governors with corruption charges and building a coalition against them, Professor Haress was forced to flee again in 2021 during the Taliban.[36] Professor Haress explained that she still teaches the 2004 constitution to Afghan students despite the Taliban.

Conclusion

Focusing on the importance of borders, the three special guests addressed two key themes present throughout the conference. The first theme was the vulnerability of the person who seeks to cross borders. Whether willingly, through force, or by necessity, today there are not only important economic and physical challenges that an asylum seeker or migrant faces, but too legal challenges which are subject to drastic and rapid change in response to emerging political realities. The second theme was the vulnerability of the very legal regimes that regulate borders. Institutional vulnerability extends as high as the international instruments of the United Nations, the International Court of Justice, and ICC, to the very domestic tools that welcome people as well as bar their entry.

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[32] *Ibid*, arts 27, 130–31.
[33] Professor Ghizal Haress "Fireside Chat" (Address delivered at the 47th Canadian Institute for the Administration of Justice Annual Conference on The Law of Borders, 25 October 2023) [unpublished].
[34] See Sune Engel Rasmussen, "American University Attack: At Least 12 Dead and 44 Injured in Afghanistan", *The Guardian* (25 August 2016), online: <www.theguardian.com/world/2016/aug/24/american-university-afghanistan-attacked-kabul>.
[35] *Corruption in Afghanistan: Recent Patterns and Trends*, UNODC (December 2012) at 3, online: <www.unodc.org/documents/lpo-brazil//Topics_corruption/Publicacoes/Corruption_in_Afghanistan_FINAL.pdf>.
[36] UNHCR, *supra* note 30.

SECTION II

Panel 1: The Paradox of Borders

Key Points

- Multilateral instruments resolving conflict between nations are threatened by the increase in the use of force.
- Consider borders not as static structures but as active processes that engage in the operation of "bordering" to better elucidate their roles as filters that change depending on the relation of the person trying to cross that border with the nature of the border itself.
- Border policies that seek to regulate the flow of migrants can have inverse effects than their intended purpose, forcing migrants to make "perverse choices."

Speakers

- Ferry de Kerckhove, former Canadian Ambassador; Professor, Centre for International Policy Studies, Faculty of Social Sciences, University of Ottawa
- Audrey Macklin, Professor & Rebecca Cook Chair in Human Rights Law, Faculty of Law, University of Toronto
- Delphine Nakache, Full Professor, Faculty of Law – French Common Law, University of Ottawa
- Doug Saunders, Journalist, Author & Columnist, The Globe and Mail

Introduction

There are many tensions and paradoxes with regards to borders in Canada and on the international stage. Today, we see an escalation of border conflict around the globe, threatening the efficacy and legitimacy of multilateral instruments that seek to resolve conflict between countries and bring justice to those who commit wrongs. Further, borders are inherently paradoxical. While they present as static fixtures, when understood from a functionalist approach, they act like continuing and active processes that filter and select entry based on a variety of categories and relationships. As borders move across people and people across them, migrants must overcome shifting policies that can force migrants into ever greater states of vulnerability. Finally, borders, particularly Canada's border policy, ought to be considered at once from an international and domestic perspective to ensure that the two remain coherent.

Dangerous Trends Around the World

As the first panellist of the conference, former Ambassador Ferry de Kerckhove spoke on the nascent and recurring trends present in border conflicts in 2023. Among the trends outlined, we detail two in particular: (1) the deficit of strong leadership on the international scene, the weakness of international and multilateral political and (2) legal instruments, and increasing domestic tension caused by inequality and disparity of income across the globe. Together, these trends exacerbate tensions between nations and weaken the collaboration necessary for the limits of self-imposed multilateral instruments to work.

The first worrisome trend identified by Mr. de Kerckhove is the weakness of international and multilateral institutions, namely the U.N. and its subsidiary organs. At a fundamental level, he said that this is due to a lack of leadership at the international level. Exemplary is the U.S. as

a permanent member of the U.N. Security Council, an actor to uphold multilateral agreements, refusing the jurisdiction of the ICC. Mr. de Kerkove noted a consequence of this is the lack of U.N. presence and ability to influence the actors in conflicts, notably with regard to the Russian invasion of Ukraine and the Israel-Palestine conflict, among many others.[37] As noted above, in the Ukrainian Ambassador's discussion, the U.N. Charter has not deterred conflict between member nations. The structural issues of the U.N. are presented when the Security Council vetoes resolutions otherwise passed by the U.N.'s General Assembly, its most diplomatic forum.[38] A recent example of the consequence of a lack of leadership is the division between states on the Israel-Palestine conflict, with the Biden administration's stance at odds with reports from international organizations alleging atrocities committed in Palestine[39] and vetoing the resolution passed at the U.N. General Assembly calling for a humanitarian ceasefire in Gaza.[40] Mr. de Kerckhove noted that the Russian invasion of Ukraine demonstrates that the state of law worsens as the strength of arms dominates in international relations, with bordering becoming no longer a question of law but of fact.

The second worrisome trend regarding international impact comes at the domestic level. Mr. de Kerckhove pointed to the increasing disparity in inequality and wealth in many countries such as the U.S.[41] and in Canada,[42] where in the case of the latter, the wealthiest 20 percent of households control more than two-thirds (nearly 68 percent) of the total wealth, while the least wealthy, 40 percent, account for 2.7 percent.[43] Mr. de Kerckhove conjectured that wealth disparity not only causes internal conflict but creates a sense of inwardness in nations in the

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[37] See Jon Schwarz, "The UN Is Powerless to Help Gaza. That's How the US Wants It", *The Intercept* (21 October 2023), online: <theintercept.com/2023/10/21/security-council-veto-united-nations/>.

[38] See United Nations, "Security Council Fails to Adopt Resolution Condemning Moscow's Referenda in Ukraine's Occupied Territories, as Permanent Member Employs Veto" (30 September 2022), online: <press.un.org/en/2022/sc15046.doc.htm>.

[39] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, "Application Instituting Proceedings and Request for the Indication of Provisional Measures" (29 December 2023), ICJ Pleadings at para 1, online: <www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>. See also Hans Nichols, "Scoop: Internal State Dept. Memo Blasts Biden, U.S. Policy on Israel-Hamas War", *Axios* (13 November 2023), online: <www.axios.com/2023/11/13/biden-gaza-hamas-policy-state-department-memo>.

[40] See "'Double Standards': World Reacts to US Veto on Gaza Truce Resolution at UN", *Al Jazeera* (9 December 2023), online: <www.aljazeera.com/news/2023/12/9/double-standards-world-reacts-to-us-vetoing-unsc-gaza-resolution>.

[41] See Melissa Kollar, "Income Inequality Down Due to Drops in Real Incomes at the Middle and Top, But Post-Tax Income Estimates Tell a Different Story", *United States Census Bureau* (last modified 1 November 2023), online: <www.census.gov/library/stories/2023/09/income-inequality.html#:~:text=The%20ratio%20of%20the%2090th,a%206.7%25%20decrease%20from%202021.>.

[42] See Statistics Canada, "Distributions of Household Economic Accounts for Income, Consumption, Saving and Wealth of Canadian Households, Fourth Quarter 2022" (31 March 2023), online: <www150.statcan.gc.ca/n1/daily-quotidien/230331/dq230331b-eng.htm>; Statistics Canada, "Distributions of Household Economic Accounts for Income, Consumption, Saving and Wealth of Canadian Households, First Quarter 2023" (4 July 2023), online: <www150.statcan.gc.ca/n1/daily-quotidien/230704/dq230704a-eng.htm?HPA=1> [Statistics Canada, "First Quarter 2023"].

[43] See Statistics Canada, "First Quarter 2023", *supra* note 42; Ghada Alsharif, "Gap Between Canada's Rich and Poor Increasing at Record Speed, New StatCan Data Shows", *Toronto Star* (6 July 2023), online: <www.thestar.com/business/gap-between-canada-s-rich-and-poor-increasing-at-record-speed-new-statcan-data-shows/article_c1477d8f-4961-5691-9179-a5b8cabaace9.html#:~:text=The%20wealthiest%2020%25%20of%20households,40%25%20accounted%20for%202.7%25.>; David A Green, W Craig Riddell & France St-Hilaire, "Income Inequality in Canada: Driving Forces, Outcomes and Policy", *Institute for Research on Public Policy* (23 February 2017), online: <irpp.org/research-studies/income-inequality-in-canada/>.

face of problems going on abroad. Related to the crisis in confidence, the loss of faith in governance structures domestically and in traditional media because of inequality. A recent study in Canada revealed low levels of public confidence by Canadians in the Canadian media and Parliament, and higher, albeit still low, levels of confidence in the police and justice system.[44] A few other notable problems are loss of consensus domestically and internationally, history catching up with geography with conflicts emerging from colonial past, and the consequent trend of multipolarity among nations. He elaborated that this is characterized generally by the strained relationship the U.S. and the "West" have with China and Russia,[45] which is also at play in the conflict in Ukraine through China's neutrality.[46]

Mr. de Kerkove concluded on a fundamental tension. The work of creating permanent and *ad hoc* multilateral institutions like the U.N. or the International Criminal Tribunal, as well as subsidiary mechanisms, such as the ICC, that seek to settle borders and disputes among nations, is of fundamental importance. To work as designed, these instruments depend on inter-state cooperation to accept jurisdiction and work within the self-imposed limits of the multilateral instruments. This means that for international law to mediate conflict between states, those states have to themselves want to have their conflict mediated. These rely not only on international relations, but also on the domestic conditions of a nation producing political leadership that understands that international cooperation is in its best interest. Mr. de Kerkove concluded that the tension of international law is that, while it offers solutions, it depends on people to apply them.

Bordering as a Process

Professor Audrey Macklin discussed the function of borders, challenging participants to consider borders not as static nouns but as active operations and processes. She explained that the understanding of borders as processes is captured by the term "bordering," which refers to both the activity that establishes borders and that borders themselves perform. Seeing borders. Further, Professor Macklin argued that considering borders as active processes allow us to better appreciate what borders do and understand their function.

Rather than fixed lines, Professor Macklin explained that the literature on border studies tends to view "'bordering' as a process, as an attribute of different temporalities."[47] The process of "bordering" is a dynamic and continuous dialogue between those who belong to the "we" (the citizen) and those who do not (the non-citizen). However, bordering is not restricted by "separate distinct sovereign territories," but is rather, "a means towards and an expression of the articulation of the policy sphere."[48] States engage in bordering practices to "constitute, sustain or modify borders," such as an agreement of common standards for a railway line between France and Germany[49] or "the creation of the 'Schengen border-free zone'" within

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[44] See Statistics Canada, "Confidence in Canadian Institutions" (14 November 2023), online: <www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2023057-eng.htm>.
[45] See Nicole Hong, "Why China and Russia Are Closer Than Ever", *The New York Times* (20 March 2023), online: <www.nytimes.com/2023/03/20/world/asia/china-russia-ties.html>.
[46] See Mansur Mirovalev, "'Pro-Russian neutrality': How Ukraine Sees China's Emerging Role", *Al Jazeera* (18 May 2023), online: <www.aljazeera.com/news/2023/5/18/how-ukraine-views-chinas-role-in-peace-settlement>.
[47] Nira Yuval-Davis, Georgie Wemyss & Kathryn Cassidy, *Bordering* (Cambridge, UK: Polity Press, 2019) at 19.
[48] Maurizio Ambrosini, Manlio Cinalli & David Jacobson, "Research on Migration, Borders and Citizenship: The Way Ahead" in Maurizio Ambrosini, Manlio Cinalli & David Jacobson, eds, *Migration and Citizenship: Between Policy and Public Spheres* (Cham: Springer Nature Switzerland, 2020) 295 at 296.
[49] Noel Parker & Rebecca Adler-Nissen, "Picking and Choosing the 'Sovereign' Border: A Theory of Changing State Bordering Practices" (2012) 17 Geopolitics 773 at 776.

the European Union.[50] Bordering exists "in almost every aspect of society," within and outside of the State,[51] even on the local scale, where "inner city or residential neighbourhoods" maintain "strongly segregated and separate group identities."[52]

Professor Macklin explained that viewing borders as a means of bordering allows us to describe what borders do and understand their function. Broadly understood, borders are conventionally depicted as "a filter or screen that slows and halts the entry of some, while permitting and expediting the entry of others."[53] Borders sort people into citizens and non-citizens, with the non-citizens into subcategories such as high and low-risk travellers, each with different applicable regimes to regulate behaviour. Borders are. therefore, porous and filter people through admittance requirements: people can be refused, admitted, or admitted on conditions. This understanding of borders is not limited to state borders, "such as airports, harbours, stations, [or] embassies," as borders may also "filter migrants' access to labor markets, welfare states, and political communities."[54] While many of the borders that determine who is included and who is excluded "are invisible to the human eye,"[55] "contemporary ethno-territorial…border conflicts…such as [in] Israel/Palestine," perpetuate the relevance of "hard geographical boundaries."[56] Further, borders play a role in extracting data and information, and today, act as a space where the state can act in certain ways in the name of security where it could not otherwise.

Given the many roles that borders play, they can take on several forms: spatial borders, extra- and intra-territorial borders, temporal borders, digital borders, and delegated borders. Spatial borders extend across landscapes and into other territorial spaces. Through certain requirements, borders can extend themselves, such as requiring visas of selected people. Individuals may choose to cross borders for reasons of leisure or survival. The latter group may experience various barriers, especially when crossing into different cultural or religious jurisdictions. Border crossing may also involve "no human movement" at all when "the border itself is relocated," forcing individuals to become "citizens of new countries without even requesting to cross a boundary."[57] Moreover, border crossing need not occur "at the 'edge' of the…place where the border is expected to be found," but as Professor Macklin described, may occur "at the check-in counters at airports in their home countries," such as "the creation of a micro piece of ex-territory under US jurisdiction in…[a] foreign airport territory," filtering out "'undesirables'…long before they ever reach the actual destination."[58] Professor Macklin referenced the "Muslin ban" enforced by the Trump administration and the problems it causes for areas of U.S. preclearance at Canadian airports, as those provisions may violate the *Charter*. The changes made to the *Canada-U.S. Safe Third Country Agreement* ("STCA") in 2023 also demonstrate the temporal aspect of borders and how they can extend or shrink overtime.[59]

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[50] *Ibid* at 782.
[51] David Newman, "Borders and Bordering: Towards an Interdisciplinary Dialogue" (2006) 9:2 European J Social Theory at 176-177.
[52] *Ibid* at 179.
[53] Macklin, *supra* note 1 at 2.
[54] Paola Bonizzoni, "The Border(s) Within: Formal and Informal Processes of Status Production, Negotiation and Contestation in a Migratory Context" in Maurizio Ambrosini, Manlio Cinalli & David Jacobson, eds, *Migration and Citizenship: Between Policy and Public Spheres* (Cham: Springer Nature Switzerland, 2020) 217 at 218.
[55] Newman, *supra* note 51 at 171–72.
[56] *Ibid*.
[57] *Ibid* at 178.
[58] *Ibid* at 178–79.
[59] Immigration, Refugees and Citizenship Canada, *Additional Protocol to the Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries* (24 March 2023), online:

Furthermore, the thickening of borders occurs, both in terms of what areas constitute the border, as well as the conditions and legal resources for crossing the border. Research on bordering has highlighted the proliferation of "incursions of the state into places well beyond the border—rendering immigrants vulnerable to exclusion or arrest at every turn, thus precluding membership and limiting recourse."[60] *Singh v Canada (Minister of Employment and Immigration)* changed Canadian borders dramatically through the principle that "protection of the *Charter* extends to 'every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.'"[61] In *Singh*, the Court "imagined the nation-state as a clearly bounded entity and presumed a direct, coterminous correlation between state, territory, and authority," making the border "a stable and static line located along Canada's geographic perimeter."[62] However, this approach ignores the "series of domestic measures, bilateral agreements with the United States, and international agreements with other states," establishing measures that can be "positioned in multiple locations far removed from Canada's territorial boundary line."[63] Such measures enacted under the Multiple Borders Strategy block refugees "before they set foot on Canadian soil and trigger the protections outlined in *Singh*…redrawing Canada's borders in order to "push the border out."[64]

In summary, Professor Macklin's discussion invited the conference participants to consider borders as processes that enter into relationships with different people across different spaces, times, and mediums, with the same border having different requirements for different people. One border may be much more challenging for the refugee to cross than for a family going on a vacation, or a professor to a conference, and even then, it depends on where that vacation or conference takes place and who the members of the family and professors are relative to the borders enclosing their destination.

Migration Policy on the Road

Journalist Doug Saunders brought into focus the realities faced by migrants who brave the world's major migration pathways.[65] Mr. Saunders spent the last year documenting the lives of migrants along the world's major migration routes, focusing on the day-to-day decisions made in response to policy and border law changes. He highlighted the "perverse incentives" for migrants presented with changing border policies. Mr. Saunders noted that policies meant to regulate or bar entry, whether well-intended or not, can put migrants into life-threatening danger because, while rules of a border might have changed, the conditions that forced them to migrate to that border have not.

Mr. Saunders detailed the four large migration pathways or routes that exist today: (1) the Eastern Mediterranean Route; (2) the Mediterranean Sea Route; (3) the Central American

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<www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/additional-protocol.html> [www.scc-csc.ca/cso-dce/2023SCC-CSC17_1_eng.pdf] [*STCA*].

[60] Jamie Goodwin-White, "'Today We March, Tomorrow We Vote!': Contested Denizenship, Immigration Federalism, and the Dreamers" in Maurizio Ambrosini, Manlio Cinalli & David Jacobson, eds, *Migration and Citizenship: Between Policy and Public Spheres* (Cham: Springer Nature Switzerland, 2020) 61 at 64.

[61] Efrat Arbel, "Bordering the Constitution, Constituting the Border" (2016) 53:3 Osgoode Hall L J 824 at 834, citing *Singh v (Minister of Employment and Immigration)*, 1985 CanLII 65, [1985] 1 SCR 177 at para 35.

[62] *Ibid* at 834.

[63] *Ibid* at 834–35.

[64] *Ibid* at 836.

[65] See Doug Saunders & Jeremy Agius, "Tracing the Journeys of the World's 110 Million Migrants in Crisis", *The Globe and Mail* (last modified 2 November 2023), online: <www.theglobeandmail.com/opinion/article-world-migration-routes-map-interactive/>.

Route; and (4) the Southeast Asian Route.[66] Eastern Europe can now be added to these with the Russian invasion of Ukraine.[67] The two Mediterranean routes connect with other routes in East and West Africa, many of migrants flee conflict, and taken altogether, "[n]early 90 percent of those who attempt to reach Europe by sea come from ten countries, in descending order by percentage: Syria, Afghanistan, Eritrea, Nigeria, Pakistan, Iraq, Somalia, Sudan, Gambia, and Bangladesh."[68] Mr. Saunders reported that through the Central American route, people from South America are fleeing poverty, violence, cartel drug trade, and destabilized states[69] and are funnelled through the perilous "Darien Gap" in southern Panama,[70] as the only land bridge to Central and North America.[71] Migrants along the Southeast Asian route, fleeing political turmoil, and repression, as well as environmental changes, particularly in Vietnam, face the threat of high rates of human trafficking and forced labour due to the "restrictive migration policies, and a lack of legal frameworks for refugees."[72]

To explore the work faced by migrants on these routes, Mr. Saunders focused on the experience of Carry Vasquez, who sought asylum with the goal of enrolling her young son into school. Vasquez fled Venezuela with her son because of her partner's gang association, and eventually, found herself in New York working under the table as a server while her refugee status was being processed. She is one of seven million Venezuelans to flee the country since 2015.[73] Her route to New York took her to Colombia, Ecuador, through the Darien Gap and across Central America to Texas at one of the US-Mexico borders, all while evading the gang associated with her son's father, being captured by cartels, or facing deportations from police based on other cartel activity.

Mr. Saunders explained one of the "perverse incentive" through Carry's experience with the American Government's CBP One mobile application. Brought in by the Biden administration to reduce irregular border crossing, the app allows "non-citizens without appropriate documents" to apply for asylum appointments at land ports of entry ("POE") along the U.S. border.[74] However, the app would only allow for appointments to be made if, through geolocation, the applicant's phone was found north of Mexico City. Further, those appointments would only take place three to six months after the application was made. Upon application for a hearing at the Brownsville crossing, to take place in three months, Carry rented an apartment and sought work in Matamoros, the town opposite Brownsville, in Mexico. However, due to the extreme danger and exploitation of migrants in Matamoros by the Gulf Cartel,[75] prohibiting Carry from working or earning a safe living, she decided it was safer to spend her last five dollars to cross the Rio Grande and put herself in the arms of the U.S. Border Patrol. Carry was then offered a plane ticket from the Governor of Texas and flew to

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[66] See Eve Conant, "The World's Congested Human Migration Routes in 5 Maps", *National Geographic* (19 September 2015), online: <www.nationalgeographic.com/culture/article/150919-data-points-refugees-migrants-maps-human-migrations-syria-world>.
[67] Saunders & Agius, *supra* note 65.
[68] Conant, *supra*
[69] *Ibid.*
[70] See Juan Pappier, "How the Treacherous Darien Gap Became a Migration Crossroads of the Americas", *Human Rights Watch* (10 October 2023), online: <www.hrw.org/news/2023/10/10/how-treacherous-darien-gap-became-migration-crossroads-americas>.
[71] Saunders & Agius, *supra* note 65.
[72] Conant *supra* note 66.
[73] See UNHCR, "Emergency Appeal: Venezuela situation" (August 2023), online: <www.unhcr.org/emergencies/venezuela-situation>.
[74] See US Customs and Border Protection, "Fact Sheet: Using CBP One to Schedule Appointment", (12 January 2023), online (pdf): <www.cbp.gov/sites/default/files/assets/documents/2023-Jan/CBP%20One%20Fact%20Sheet_English_3.pdf>.
[75] See Eyder Peralta, "Why the Mexican Border City of Matamoros is Under Heavy Scrutiny", *NPR* (17 March 2023), online: <www.npr.org/2023/03/17/1164146700/why-the-mexican-border-city-of-matamoros-is-under-heavy-scrutiny>.

New York. Mr. Saunders stressed that despite going through the proper legal routes, it was ultimately safer for Carry to go through other channels to seek asylum in the U.S.

According to Mr. Saunders, these perverse choices extend across the globe. The closure of Québec's unofficial border crossing of Roxham-Road at the Québec-U.S. border, to close a loophole in the STCA and push migrants towards official POEs, has led to dangerous crossings at night and in dangerous conditions to avoid being caught by border agents.[76] As Carry's case demonstrates, these policies can force people who want to go through official channels to go through illegal processes, risking their life and safety.

Tensions Between Canada's International Reputation and Its Domestic Policies

The panel concluded with an examination of the "myth" of Canada as an exemplar of immigration policies. Professor Nakache contended that there is great need to study the relationship between Canada's open stance on immigration and refugee issues internationally and its more complex and restrictive domestic policies regarding migrants and refugees.

The professor laid out the case for Canada's praise internationally: (1) Canada is one of the largest donors to the UNHCR; (2) its immigration and asylum legislation takes a rights-based approach; and (3) it is a party to many international treaties on migrants and refugees. Further, Canada developed and adopted the *Global Compact on Refugees*[77] and the *Global Compact for Migration*,[78] the first UN global agreement that sets a common approach to international migration.

Despite Canada being a significant proponent of immigration, Professor Nakache exposed several policies on asylum and migrant law that both contradict this stance and suggest it to be increasingly exclusionary. She argued that these policies contribute to the fracture and fragmentation of migrant and refugee rights, with the web of laws and regulations that make up the immigration and refugee paradigm labyrinthine and difficult for claimants to navigate.

With regards to refugee claims, two of the grounds of ineligibility in the *Immigration and Refugee Protection Act* ("*IRPA*")[79] are ineligible to have their claim referred to the Refugee Protection Division.[80] Professor Nakache noted that the ineligibility is not due to the person successfully making a refugee claim elsewhere, but simply because they made a claim. [81] The ineligibility scheme is made more complex through ineligibility grounds based on a claimant's country of origin.[82]

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[76] Verity Stevenson, "Akwesasne Deaths Show Dangers of New Border Rules, Advocates Say", *CBC News* (4 April 2023), online: <www.cbc.ca/news/canada/montreal/advocates-danger-of-closing-border-akwesasne-1.6800685>.
[77] United Nations "Global Compact on Refugees" (2018), online (pdf): <www.unhcr.org/sites/default/files/legacy-pdf/5c658aed4.pdf>.
[78] UN, Refugees and Migrants, "Global Compact for Migration" (2024), online: <refugeesmigrants.un.org/migration-compact>. See Immigration, Refugees and Citizenship Canada, "Canada Supports the Global Compact for Migration" (19 May 2023), online: <www.canada.ca/en/immigration-refugees-citizenship/news/2022/05/canada-supports-the-global-compact-for-migration.html>.
[79] See Immigration, Refugees and Citizenship, "In-Canada Refugee Claims: Grounds for Ineligibility" (31 March 2022), online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/canada/processing-canada-refugee-claims-grounds-ineligibility.html>.
[80] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 101(1)(c.1) [*IRPA*].
[81] See *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 42 (subject to the exceptions, see s 159.5 (a) to (h) of the *IRPR* and s 6 of the *STCA*).
[82] *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 159.3, 159.4(1) [*IRPR*]; *STCA*, *supra* note 59, s 4(1).

Professor Nakache concluded that coherence between Canada's international stance on borders and its domestic policies is important because of Canada's sterling reputation internationally.[83] If Canada is to be seen as a leader on migrant issues, then its practices, that are at times at odds with its stance internationally, pose risks to proliferating exclusionary border policies when regarded as a model to export and reproduce in other countries under the guise of being open.[84]

Panel 2: Migrants and Workers

Key Points

- The legal rights of temporary foreign workers under the closed permit system are insufficient compared to those with permanent residency.
- The closed permit system generates power imbalances that expose temporary foreign workers to unfair and abusive practices by employers.
- Accessibility barriers within the legal and regulatory framework of the Temporary Foreign Worker program create practical issues for temporary foreign workers.

Speakers

- Amanda Aziz, Staff Lawyer, Migrant Workers Centre
- Eugénie Depatie-Pelletier, Doctor in Law, Adjunct Professor, Department of Geography, Université Laval; Executive director, Association for the Rights of Household and Farm Workers
- Constance MacIntosh, Professor, Faculty of Law, Dalhousie University

Introduction

This panel on *Migrants and Workers* illustrated how the Canadian immigration system inadvertently heightens the vulnerability of migrant workers through policies that tie their legal status to specific employers and limit job mobility. Professor Constance MacIntosh described the legal and regulatory framework for migrant work in Canada. Lawyer Amanda Aziz underlined how this framework exploits migrant labour and creates access to justice barriers for migrant workers. Professor Depatie-Pelletier summarized the restrictions to accessing permanent status and their effect on temporary foreign workers. Their panellists concentrated their discussion on the closed work permit system for low-wage, temporary foreign workers ("TFWs") and how the system contributes to the structural vulnerability of these workers.

The Closed Work Permit System

The Temporary Foreign Worker Program (TFWP) was established "to fulfil short-term needs" in the Canadian workforce.[85] While migrant workers in the economic class are provided

[83] See United Nations High Commissioner for Refugees, "As global displacement grows to nearly 80 million people, Canada shows itself to be a world leader in refugee resettlement: UNHCR report shows" (June 2020), online: <www.unhcr.ca/news/global-displacement-grows-80-million-people-canada-world-leader-refugee-resettlement/>.
[84] Sanyam Sethi, "Perception ss. Reality? Canadians Believe They're Leading the Way on Refugee Support but They're Actually at the Back of the Pack", *Ipsos* (6 July 2022), online: <www.ipsos.com/en-ca/news-polls/Canadians-Believe-Leading-Refugee-Support-Actually-Back-Pack>.
[85] Jamie Chai Yun Liew & Donald Galloway, *Immigration Law*, 2nd ed (Toronto: Irwin Law Inc, 2015) at 111.

permanent residence and recognition as "highly skilled workers,"[86] TFWs are characterized as "low-skilled"[87] and must obtain an employer-specific work permit to remain in the country.[88] Professor MacIntosh explained that the vulnerabilities migrant workers face result from this system design focused on addressing labour shortages.[89] Under this system, a worker's status is tied to an employer-specific, or closed, work permit,[90] and they are "unable to circulate in the labour market."[91] Ms. Aziz explained that the closed work permit ties a worker's legal status to a particular employer, creating a power dynamic where workers may be reluctant to report abuse for fear of termination and deportation. In a September 2023 statement, the UN Special Rapporteur on Contemporary Forms of Slavery, Tomoya Obokata, compared this migrant worker regime to "modern-day slavery."[92]

The panellists distinguished this closed work permit regime from open work permits, which provide permanent residency and more comprehensive rights, including access to social services and the freedom to leave an abusive workplace.[93] Professor MacIntosh highlighted that specific employment rights that employers are required to provide, such as health care coverage and workers' compensation, are inaccessible for many TFWs, particularly those in the Seasonal Agricultural Worker Program ("SAWP").[94] While Ontario, Québec, and Manitoba have passed legislation that requires all SAWP workers to be enrolled in provincial Medicare on arrival, she explained that other provinces require all TFW to wait three months to a year for this coverage, which is particularly problematic for SAWP workers who may work for a maximum of eight months.[95] Professor MacIntosh further explained that where a province does not provide Medicare coverage to TFWs, the employer must provide health care through a private insurance plan; however, many private clinics require patients to pay in advance and seek reimbursement, which many TFWs cannot afford. Moreover, she indicated that workers' compensation claims require the claimant to be medically examined, which is impossible without health care coverage.

Professor MacIntosh highlighted "the *Open work permit for vulnerable workers policy*" which the federal government implemented in 2019 to provide a temporary open work permit to migrant workers "who can demonstrate that they are experiencing abuse or are at risk of abuse by their employer."[96] Ms. Aziz explained the policy's four goals: (1) to provide workers with a distinct means to leave their employer; (2) to mitigate the risks of migrant workers in Canada

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[86] *Ibid* at 161–62.
[87] Sarah Marsden, "Who Bears the Burden of Enforcement: The Regulation of Workers and Employers in Canada's Migrant Work Programs" (2019) 22:1 CLELJ 1 at 3.
[88] Liew & Galloway, *supra* note 85 at 90–91; *IRPR*, *supra* note 82, s 7(1).
[89] Amanda Aziz, *A Promise of Protection? An Assessment of IRCC Decision-Making Under the Vulnerable Worker Open Work Permit Program* (Vancouver: Migrant Workers Centre, 2022) at 7.
[90] *IRPR*, *supra* note 80, s 7(1).
[91] Marsden, *supra* note 87 at 3.
[92] United Nations, Office of the High Commissioner, "Canada: Anchor the Fight Against Contemporary Forms of Slavery in Human Rights, A UN Expert Urges" (6 September 2023), online: <www.ohchr.org/en/press-releases/2023/09/canada-anchor-fight-against-contemporary-forms-slavery-human-rights-un#:~:text=Tomoya%20Obokata%20was%20appointed%20UN,human%20trafficking%20and%20modern%20slavery.>.
[93] See World Health Organization, *Word Report on the Health of Refugees and Migrants* (Geneva, Switzerland: World Health Organization, 2022) at 54.
[94] See Employment and Social Development Canada, "Hire a Temporary Worker through the Seasonal Agricultural Worker Program: Overview" (21 March 2023), online: <www.canada.ca/en/employment-social-development/>.
[95] *Ibid*.
[96] Eugénie Depatie-Pelletier, Hannah Deegan & Katherine Berze, "Band-Aid on a Bullet Wound—Canada's Open Work Permit for Vulnerable Workers Policy" (2022) 11:3 Laws at 1 [emphasis in original].

working irregularly; (3) to facilitate worker participation in inspections of their former employer or recruiter; and (4) to encourage workers to assist authorities by reducing the perceived risk and fear of removal from Canada in coming forward. However, research by the Migrant Workers Centre found that "[w] ithout structural changes to the way work permits are issued in Canada, the [policy] provides only a temporary and inadequate solution to the framework of the [Temporary Foreign Worker Program] that creates the circumstances for situations of abuse in the first place."[97] Professor Depatie-Pelletier concluded that not providing TFWs with access to permanent status upon arrival in Canada has created an underclass: a system in which a certain group of individuals, despite their contribution to the workforce in society, are denied the full range of rights and opportunities available to others.

Abusive Employer Practices and Exploitation

The closed permit system further emboldens unscrupulous employers to exploit migrant labour.[98] Research by the Migrant Workers Centre reported that 30% of workers interviewed faced some degree of physical abuse (direct violence by their employers, exposure to chemical pesticides, being forced to work after an injury), 70% had experienced psychological abuse (verbal, threats of termination and deportation, racism), and three workers reported sexual abuse by their employer.[99] Ms. Aziz explained how the COVID-19 pandemic exposed the violations occurring across the country, as in-person inspections were temporarily stopped and workers who were sick felt compelled to continue working for fear of losing their employment, and as a result, their legal status in Canada. She highlighted that migrant agricultural farm workers experienced an increased risk of dying of COVID-19 and that temporary caregivers were barred from leaving their employers' homes due to the risk of contracting the virus.

Ms. Aziz added that this power dynamic further allows for financial abuse by employers, such as unjust wage practices where workers receive less than agreed upon or face illegal deductions.[100] She referenced research regarding the *Open work permit for vulnerable workers policy* conducted by the Migrant Workers Centre, which reported that 96.7% of workers interviewed had experienced financial abuse.[101] Ms. Aziz highlighted illegal recruitment fees as a form of this abuse frequently rejected by immigration officers, who often characterize these fees as a "voluntary" choice by the applicant "despite the clear evidence of vulnerability and the power imbalance between the worker and the immigration consultant."[102] She indicated that out of the over 30% of research participants reported being charged a recruitment fee, officers only recognized these fees as financial abuse in one case. Ms. Aziz also noted that financial abuse can amount to "bonded labour," where a worker, having borrowed money or mortgaged their homes overseas, is compelled to work in an abusive workplace "for increasingly lengthy hours to pay back the debt they incurred."[103]

Many TFWs are "denied a safe working environment" and "the benefits that Canadian workers would expect."[104] Workers often cite "[a] lack of knowledge of legal rights and available resources, or mechanisms for redress," as well as language barriers, as driving the abusive

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[97] Aziz, *supra* note 89 at 29.
[98] *Ibid* at 16–20. See OHCHR, "Canada: Anchor the Fight Against Contemporary Forms of Slavery in Human Rights, a UN Expert Urges" (6 September 2023), online: <www.ohchr.org/en/press-releases/2023/09/canada-anchor-fight-against-contemporary-forms-slavery-human-rights-un>.
[99] Aziz, *supra* note 89 at 14.
[100] *Ibid* at 38.
[101] *Ibid* at 14.
[102] *Ibid* at 17.
[103] *Ibid* at 19.
[104] Liew & Galloway, *supra* note 85 at 89.

treatment “and their tolerance of it.”[105] However, workers are limited in their recourse against employers for fear of termination.[106] With the looming possibility of permit expiration, workers may endure poor conditions rather than risk unemployment and potential deportation, perpetuating the cycle of exploitation.

Practical Barriers Faced by Migrant Workers

The panellists stressed that comprehensive measures are necessary to address the vulnerabilities of TFWs. Professor Depatie-Pelletier emphasized that accessibility barriers systematically interfere with the protection of workers’ rights and access to justice. In *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, the Supreme Court held that “[i] f people cannot bring legitimate issues to court ... laws will not be given effect.”[107] Not only does TFWs’ status prevent them from bringing legitimate issues to court, but Ms. Aziz indicated that the lack of legal representation for migrant workers also deters them from making complaints about issues related to their employment. She highlighted that the enforcement regime is reactive, not proactive, and relies on workers to submit complaints or report abuse during inspections; however, where an employer is found non-compliant, “all migrant workers working for that employer may see their work permit revoked, leaving them without the authorization to be legally employed in Canada.”[108] While TFWs possess the same employment rights as citizens and permanent residents on paper, Ms. Aziz emphasized that accessibility barriers prevent them from seeking legal remedy and redress.

Moreover, Ms. Aziz highlighted how language barriers hinder effective communication of workers’ rights and entitlements.[109] Professor MacIntosh highlighted that employers are required to give all employees a 16-page document outlining their rights; however, this document is only provided in English or French, thus, inaccessible to workers with “limited proficiency” in those languages.[110] The panellists indicated that effective reform should guarantee greater flexibility for job mobility, clearer communication channels, enhanced legal protections against employer reprisals, and a viable path to permanent residency.

Panel 3: Borders, Barriers, and Legal Pluralism

Key Points

- The Canadian judiciary is increasingly faced with legal questions concerning the myth of Canadian sovereignty and compelled to search for a persuasive account of the re-emergence of Indigenous legal orders within the Canadian constitutional landscape.
- The emancipatory narrative of citizenship within a settler-colonial state can change to one of domination.
- The scope, speed, and unilaterally with which border policies change have a profound impact on migrants who can, from one day to the next, face radically different realities.

Speakers

- Efrat Arbel, Associate Professor, Peter A. Allard School of Law, University of British Columbia

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[105] Bethany Hastie, “The Inaccessibility of Justice for Migrant Workers: A Capabilities-Based Perspective” (2017) 34 Windsor YB Access Just 20 at 28–29.
[106] *Ibid*.
[107] 2014 SCC 59 at para 40.
[108] Depatie-Pelletier, Deegan & Berze, *supra* note 96 at 15–16.
[109] *Ibid* at 9.
[110] *Ibid*.

- Ryan Stuart Beaton, lawyer, Juristes Power Law
- Asha Kaushal, Associate Professor, Peter A. Allard School of Law, University of British Columbia

Introduction

The panel on *Borders, Barriers and Legal Pluralism* examined the relationship between borders and legal orders. The panellists discussed borders not simply as instruments of filtration and entry, but also as instruments that create and impose jurisdiction. First, Mr. Ryan Beaton explained the strategies that Canadian judges use to navigate and interpret legal claims regarding Indigenous sovereignty based on two judicial stances: (1) the positivist stance; and (2) the pluralist stance. He explained that pluralism is open to accepting sources of law outside the prescribed jurisdiction of the state, whereas positivism struggles to do so because of a need to tie legitimate sources of state law to the Canadian claim of sovereignty. Second, Professor Asha Kaushal examined the role of borders in the context of citizenship, which is traditionally understood to offer the person seeking emancipation minimal legal rights. This narrative does not hold regarding citizenship in settler-colonial states, particularly Canada, as the state's legal order is defined alongside other pre-existing legal orders and societies. For people belonging to the pre-existing state, citizenship in a settler state can lead to political domination, not emancipation. Finally, Professor Efrat Arbel detailed how COVID-19 border policies prohibiting the entry of asylum seekers enabled the Canadian state to neglect its duty to migrants seeking refugee status.

Reconciling Claims of Sovereignty: Two Judicial Stances

Judges are increasingly asked to decide cases regarding a foundational tension in the Canadian legal order: the pre-existing sovereignty of Indigenous People and the Crown's assertion of sovereignty. While Canadian courts previously disregarded the authority and legal orders of Indigenous communities,[111] Mr. Beaton explained that the Supreme Court of Canada is now presented with questions on both (1) the applicability of the *Charter* to Indigenous law[112] and (2) the exercise of Indigenous self-government based in inherent jurisdiction.[113] In this contemporary landscape, Mr. Beaton argued that courts are searching for a compelling account of the emergence (or re-emergence) of Indigenous legal orders within the Canadian constitutional landscape.[114]

Mr. Beaton's framework defines the interpretive orientations and practices governing the analytical process that judges use to reconcile the tension of (1) pre-existing Indigenous sovereignty and the authority of Indigenous legal orders and (2) Canadian state law and sovereignty. The framework identifies two judicial stances: (1) institutional positivism; and (2) historical pluralism. Mr. Beaton stressed that these stances are not formal or opposing positions adopted by judges but are pragmatic approaches that judges use to navigate the issues and material presented to them. Illustrating these approaches helps to map the fault lines that emerge in judicial debates regarding claims of sovereignty and to explain the driving forces behind different judicial stances. He elaborated that the framework also

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[111] See *Rex v Syliboy,* 1928 CanLII 352 (NS SC), [1929] 1 DLR 307 at 313 [*Syliboy*].
[112] See *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5.
[113] See *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5.
[114] See Ryan Stuart Beaton, "Introduction: How Does a Legal Order Confront its Founding Myths" (July 2023) [forthcoming].

demonstrates how Canadian judges are grappling with the foundational myth of Canadian colonial sovereignty.

Mr. Beaton explained that “institutional positivism” perceives lawful authority as coming singularly from the state. Based on positivism, courts operate within an institutional framework where the state determines their normative power and jurisdiction through explicit mandates. The power of courts is reliant on the legitimacy of the state and the Crown’s assertion of sovereignty. The state's legitimacy itself arises from the mere assertion of sovereignty—an act circularly presumed sufficient to establish legitimacy—as indicated in *R v Sparrow*:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.[115]

Consequently, institutional positivism recognizes that extant and operative state law is the ultimate and sole source of law available to courts. Mr. Beaton explained that institutional positivism does not explicitly discount the validity of Indigenous legal orders as a source of law. However, while contemporary judges will not use the conceit of unilateral state supremacy to invalidate its authority, Indigenous law is not on par with state law precisely because the state has not prescribed it as a source of authority. The institutional positivist does not discount other sources of law beyond the state because they do not belong to the state, but because they have not been sanctioned for use by the state, and therefore, lack the normative power available for courts to use.

On the other hand, historical pluralists are much more willing to consider historical relationship agreements and Indigenous legal orders as direct sources of law. These sources are on par with state law and incorporated into the judicial analytical process used to decide a case. For the pluralist stance, the Canadian legal order is bound not only by the norms explicitly set out by the state, but also by agreements between parties, generating an analysis that is much more inter-party and contextual.

Mr. Beaton referenced *Caron v Alberta* to illustrate the two positions.[116] In *Caron*, the Supreme Court of Canada considered whether a provision in Alberta’s *Languages Act,*[117] providing that laws may only be enacted in English, was unconstitutional. The decision turned on whether an assurance made by Parliament in 1867 regarding “respect for ‘the legal rights of any corporation, company or individual’ in the western territories” obliged a duty of legislative bilingualism in Alberta by virtue of the assurance’s incorporation into the *Constitutions Act, 1867*.

While the case is factually complex, Mr. Beaton highlighted the distinct methodologies that the majority and minority used to reach their conclusions.[118] The majority “examine [d] the text, context and purpose of our Constitution”[119] to determine whether a language right is an

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[115] *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at 1103.
[116] 2015 SCC 56 (CanLII) [*Caron*].
[117] *Languages Act*, RSA 2000, c L-6.
[118] *Caron*, *supra* note 118 at para 3.
[119] *Ibid* at para 6.

entrenched “constitutional guarantee of legislative bilingualism,”[120] ignoring the “historical evidence of the desires and demands of those negotiating the entry of the territories.”[121] In contrast, the dissent referenced the history of Rupert’s Land and the Northwest Territories and the “negotiations between representatives of the provisional government of the territories ... [and] the historic agreement between the Canadian government and the inhabitants of Rupert's Land and the North-Western Territory” in finding “a promise to protect legislative bilingualism.”[122] Mr. Beaton clarified the difference between the two stances, explaining that the positivist position of the majority sought to read history in light of the Constitution, whereas the pluralist position sought to inform the Constitution through an analysis of the historical context. In other words, the majority-positivist perspective is concerned with grants by state institutions, whereas the minority pluralist position is concerned with agreements between the parties.

Regarding claims of Indigenous sovereignty, Mr. Beaton concluded that the pluralist is more disposed to “invite” such claims into Canadian law, whereas because Indigenous claims of sovereignty contradict the claim of Canadian sovereignty, the positivist struggles to welcome in and accept such claims because they remain outside the valid sources of state law.

Citizenship in a Settler Colonial State

Professor Kaushal approached the issue of borders from the perspective of citizenship. She problematized the notion of citizenship as an emancipatory act, arguing that in the contemporary era, and in settler-colonial states, citizenship acquires different notions altogether.

She explained that while traditionally understood as a formal legal status, citizenship contains many other typologies: a meta-status for a collection of rights and privileges, a psychological sense of belonging and identity, and a symbol or product of international relationships granting rights of mobility and entry. Traditionally, citizenship suggests emancipation: granting a sweep of rights to an individual. Under the standard narrative of acquiring citizenship, a person moves from being an outsider with limited rights to a member of a group with a fulsome sweep of rights. Outside of this typology, Professor Kaushal indicated the irreducibly political nature of citizenship: describing the relationship between a person and the state. She suggests that when citizenship is framed as a political relationship, in a settler colonial context, it begins to escape the emancipatory and right-conferring narrative, adopting a different notion altogether: one of oppression.

Professor Kaushal argued that in a settler-colonial state, the narrative trajectory of subject to citizen does not confer full emancipation but rather a new form of colonial domination. In classical colonial states, the relationship between the colonizer, the land, and the people, who inhabit, own, or protect it, is one of extraction of labour and resources. In a classical colonial state, the land sought after is an object of extraction. The indigenous people who own, inhabit, protect the land face domination as a necessity of extraction. In theory, colonial domination ends when the land in question is no longer useful for the extraction of the sought-after resource. However, in settler-colonial states, the land itself is at issue, as it is the space where the colonists settle and live. While in classical colonial states, the resource is the product of colonialization, in settler-colonial states, the colony as settlement is a

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[120] *Ibid* at paras 102–103.
[121] *Ibid* at para 38.
[122] *Ibid* at paras 115–16.

product of colonialism. The settler-colonial state creates a new society and legal order that claims sovereignty over pre-existing societies. It is both a product of colonial practice and new colonial relationships. Citizenship in such a state while grants emancipation for the settlers presents itself as an act of dominion upon the indigenous societies over which the settler's state exists.

Thus, when we consider Canadian citizenship conferred onto the Indigenous people upon whose land sovereignty was claimed, the emancipatory aspect of citizenship "runs-out." As an illustration, Professor Kaushal highlighted the 1869–1985 "enfranchisement" policies.[123] Enfranchisement was a process whereby an Indigenous person was no longer considered an "Indian" under the *Indian Act.* The enfranchised person was removed from their band lists and lost their Indian status if enfranchised after 1951, including all benefits of being on a band list or being a status-Indian, which would have extended to their descendants.[124] When enfranchised, the person was conferred all the rights of other Canadian citizens, considered "civilized," and given the ability "to vote in elections, work, own property off-reserve, and purchase alcohol, all of which were not necessarily available to Status Indians before 1960."[125] Citizenship through enfranchisement became a tool of political dominance through its mechanisms of cultural erasure.

Professor Kaushal turned to *R v Desautel* to illustrate that, in the settler colonial context, not only can the traditional trajectory of citizenship be reversed, but the very idea of citizenship and the powers it confers can also be supplanted.[126] In *Desautel*, an Indigenous person who is a citizen and resident of the United States crossed into British Colombia to hunt elk. He was charged under British Columbia's *Wildlife Act* for shooting an elk without a licence and without being a resident of the province. The majority found that under section 35 (1) of the *Constitution Act, 1982*, the modern-day successors of Indigenous nations and communities who occupied the territory in question at the time of European contact included "Aboriginal groups that are now outside Canada."[127] While the court did not explicitly address whether these same facts entitled those protected under section 35 (1) to cross the border, Professor Kaushal suggested that D (the defendant in the case) was able to exercise a right typically paired with citizenship, that of mobility, without the need to be a citizen.[128] Professor Kaushal asked the conference participants to consider D to be exercising a different kind of citizenship altogether, untethered from the Canadian state but nevertheless contains a right typically reserved for citizens. The decision throws into question the relevance of citizenship, or conversely, highlights a different type of citizenship, unique to Indigenous people subject to settler-colonial states, in which rights are grounded in Indigenous legal orders enforceable in Canadian courts.

Disappearing Legal Responsibility

Professor Efrat Arbel closed the panel with an examination of the impact of border policies adopted during the COVID-19 pandemic on the rights of refugee claimants at the Canadian border. She argued that if we frame border policies through the lens of being "magic tricks,"

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[123] See Crown-Indigenous Relations and Northern Affairs, "Remaining Inequities Related to Registration and Membership" (3 June 2022), online: <www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889>.
[124] *Ibid.*
[125] *Ibid.*
[126] 2021 SCC 17 (CanLII).
[127] *Ibid* at paras 1, 22.
[128] See *Constitution Act 1982*, s 6, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

acts of sleight of hand and conjuration, we illuminate an aspect of border law that is often obscured: the instantaneous and unilateral ways borders can be redrawn and the subsequent impact on refugees seeking to cross them. Professor Arbel explained that to the refugee claimants seeking to cross the border, radical changes in policy can appear to be done so by magic in the conjuration of a radically new reality that the refugee did not previously have to face. She illustrated this point by examining how the March 20th, 2020, Order in Council, which forbade asylum seekers entry into Canada, had the effect of suspending the enforceability of the obligations in law that the Canadian state owed to refugee claimants.

Professor Arbel began by framing border policies as "slights of hand." She explained that her analysis was drawn from the keynote lecture of Professor Tendayi Achiume on "Race, Borders and Jurisdiction."[129] In that lecture, Professor Achiume explained that it is admittedly strange to liken border policies to acts of conjuration. She said, however, that borders, and the jurisdictions they draw, do have the" effect of making the unthinkable into neutral, irrefutable material acts—as if by magic."[130] They can fundamentally change the reality of crossing a border from one day to the next. Therefore, a changing policy can appear to someone who is trying to cross a border like a magic trick as a conditional right that previously permitted their crossing or was available to them has suddenly disappeared and is unavailable to them. It is the speed, scope, and effect of a changing border policy that lends itself to ideas of those policies being likened to "magic tricks." Thus, the language of magic highlights the unilaterality and speed in which a border can be redrawn and the consequent shock of their effect to asylum seekers.

Professor Arbel used the March 2020 Orders in Council to illustrate the point. Despite assurances made that the border would remain open to asylum seekers by the Minister of Public Safety on March 17th, the March 20th Order in Council, PC 2020-0161, mandated the closing of the Canadian border to nonessential travel and providing a specific prohibition on crossing the border "for the purpose of making a claim for refugee protection."[131] Professor Arbel highlighted the dramatic changes to the rights available to refugee claimants at the border before and after the Order. Prior to the Order, refugee claimants benefited from the limited section 7 rights of the *Charter* to "life, liberty and security of the person," recognized by The Supreme Court of Canada in *Singh v Canada*.[132] In *Singh*, the Court determined that the right of asylum seekers who are deprived of the right to not "be removed from Canada to a country where his life would be threatened" under section 55 of the *Immigration Act, 1976* constituted a violation of section 7.[133] Further, operative at the border were the obligations of the United Nations *Refugee Convention*, which prohibit Canada expelling refugees to countries where they might face persecution,[134] including applicable moratorium policies made by the Canadian government for removal to certain countries. Thus, refugees who fled

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[129] Professor E Tendayi Achiume, "Race Borders and Jurisdiction" (Keynote address delivered at the Young Scholars in Public International Law and the German Society of International Law Conference, UCLA, 3 September 2021) [unpublished].
[130] E Tendayi Achiume, "Race, Borders and Jurisdiction" (2022) Geo LJ 110 UCLA 465 at 477.
[131] *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, PC 2020-0161 (20 March 2020), s 4(1), online: <orders-in-council.canada.ca/attachment.php?attach=38958&lang=en>.
[132] 1985 CanLII 65 (SCC) at para 47.
[133] *Ibid* (see discussion at paras 47–56).
[134] See *Convention and Protocol Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 33 [*Refugee Convention*]; *IRPA*, *supra* note 80, s 115.

persecution in their countries who previously benefited from the right to *non-refoulement*, now found themselves facing removal orders to return them to those very countries.

Professor Arbel stressed, however, that the rights available to asylum seekers before the closure did not disappear forever. Rather, they remained embedded in law but were unenforceable to asylum seekers at a specific time: while the Order applied. As such, previously enforceable rights were conjured in and out of existence for a certain group of people seeking refuge at a specific point in time. In her analysis on the unenforceability of the claimant's rights at that moment in time, Professor Arbel suggested that with the March 2020 Order, Canada operated in such a way to disavow its legal obligations under domestic and international law, sidestepping its responsibility by suspending applications through the Order in Council. Professor Arbel explained that on this point, she builds on Scott Veitch's analysis of the "irresponsibility" of legal regimes. She explained that for Veitch, legal regimes do not simply organize responsibility into an enforceable framework, they also organize irresponsibility through which governments, courts, and other actors, who operate to distance themselves or disavow responsibility for harm caused by legal action sanctioned or authorized.[135] Professor Arbel explained that the March 2020 Order in Council is an example of a system employing its mechanism of "irresponsibility."

Panel 4: Extradition

Key Points

- Canada's extradition regime is governed by international treaties and federal legislation.
- Despite the safeguards under the *Act*, the case law reveals extradition requests made in bad faith and resulting in unjust outcomes for the person sought.
- As the current system does not result in fair outcomes in all cases, experts have made recommendations on how the process may be reformed.

Speakers

- Robert J. Currie, K.C., Professor of Law, Distinguished Research Professor, Schulich School of Law, Law & Technology Institute, Dalhousie University
- Demetra Fr. Sorvatzioti, Associate Professor, Department of Law, School of Law, University of Nicosia, Cyprus
- Donald Bayne, Partner, Bayne Sellar Ertel Macrae, Ottawa
- Janet Henchey, Director General and Senior General Counsel, International Assistance Group, National Litigation Sector, Justice Headquarters, Justice Canada

Introduction

The panel on *Extradition* examined how an individual can be moved across the Canadian border without their consent under the federal *Extradition Act*.[136] Professor Robert Currie introduced the topic by outlining three cases where extradition requests were made in bad faith. Janet Henchey explained the intended legal process under the *Extradition Act*, international treaties, and the *Canadian Charter of Rights and Freedoms*. Donald Bayne

[135] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (New York: Routledge-Cavendish, 2007).
[136] *Extradition Act*, SC 1999, c 18.

complemented Ms. Henchey's discussion by explaining the issues under the *Extradition Act* and the regime as a whole. Finally, Professor Demetra Fr. Sorvatzioti brought the discussion overseas, providing a picture of the legal system in continental Europe. The panellists demonstrated the complexities inherent in Canada's extradition regime and considered the effects of various proposed reforms.

Extradition in Canada

Canada's extradition regime is based on international treaty obligations with countries that Canada recognizes as having fundamentally fair justice systems that respect human rights. These treaties align with the underlying principle of extradition: respect for the differences in other legal systems. They allow an established partner state to request an extradition from Canada for a person to (1) stand trial, (2) impose a sentence, or (3) enforce the serving of a sentence. Likewise, Canada can request an extradition from partner states. In *Schmidt*, the Supreme Court held that "[t] he judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country," finding "nothing unjust in surrendering ... a person accused of having committed a crime there for trial ... simply because that system is substantially different from ours."[137] However, while this system facilitates cooperation between foreign countries, this trust is not unconditional. Ms. Henchey explained that the three principles exist within the structured extradition process to ensure fairness and due process:

(1) **Dual criminality**: Canada will not send a person to a foreign country for a crime that does not exist in Canada;
(2) **Specialty**: the person sought may only be prosecuted for the crime for which they were extradited; and
(3) **Reciprocity**: extradition is a reciprocal relationship of cooperation between states.

Moreover, each of the three stages of extradition involves a high-level oversight and numerous procedural safeguards. These stages are laid out in the *Extradition Act*: (1) Authority to Proceed; (2) Extradition Hearing; and (3) Ministerial Surrender or Refusal to Surrender for Extradition.

Under the first stage, the Department of Justice ("DOJ") receives an extradition request and chooses whether to move forward with the extradition process. Ms. Henchey explained that, if there is a treaty, the DOJ will examine (1) the circumstances of the offence, including whether they have been prosecuted for this offence before; and (2) the circumstances of the requesting state, such as whether they act in accordance with fundamental justice. Ms. Henchey highlighted that, in the last three years, between 25 and 40 percent of all cases for which they have received extradition requests were rejected at this stage. In the second stage, the person sought has a hearing before a superior court judge who considers two elements: whether the person before the court is the person sought; and whether the evidence that has been presented by the requesting state would be sufficient to have a person committed for trial in Canada if the conduct had occurred there."[138] This stage was originally envisioned to examine the sufficiency of evidence, but Ms. Henchey explained that today the hearing has transformed into a fairness process.

After determining that the person could have been charged with a criminal offence if the conduct had occurred in Canada, the judge commits the person for extradition, and the process advances to the third stage. The case then returns to the DOJ for the Minister of Justice to make a final decision on whether to order surrender. At this stage, the person sought

[137] *Schmidt v The Queen*, 1987 CanLII 48, [1987] 1 SCR 500 at para 48.
[138] Robert J Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (2020) 44:6 Man LJ 1 at 11.

can make submissions to the Minister regarding the fairness of the extradition, such as highlighting the length of the sentence, human rights considerations, health concerns, or due process considerations. Sections 44 to 47 of the *Extradition Act* establish where a minister is required to refuse an extradition request: (1) where "the surrender would be unjust or oppressive"; or (2) where the request is discriminatory or prejudicial and has been made to prosecute or punish the person for "their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status[139] If the Minister chooses to order their surrender, the person sought may still apply for the decision to be judicially reviewed and appealed to the Supreme Court of Canada. The person sought may also request that the Minister reconsider the case at any point before surrender.

Bad Faith Extradition

Canada's *Extradition Act* operates based on the presumption of good faith between the requesting and the requested states. Professor Currie argued that if a requesting state is violating international law by making an extradition request without jurisdiction, Canada should not accept the request. He explained that the *Extradition Act* appears to bar the committal judge from considering whether the requesting state has jurisdiction; however, the case law tells a different story. Professor Currie presented *Virgo*[140] as an example of when Canada should have refused the extradition request. In this case, a Cypriot oil tanker with a Russian crew (the T/V Virgo) collided with a US fishing vessel, killing several American crew members before coming into port in Newfoundland and Labrador. In the event of a collision on the high seas, the law of the sea stipulates that either the state in which the offending vessel is registered or the state of nationality of the charged individuals on the offending ship has jurisdiction to prosecute.[141] However, in *Virgo*, the United States made an extradition request of Canada under the Canada-US Extradition Treaty,[142] even though Cyprus and Russia had jurisdiction. While the American and Russian governments eventually came to an agreement that the Russian government would prosecute them, Professor Currie argued that the Canada-US treaty did not require or permit Canada's involvement. He further referenced *United States v Meng*[143] as another case where the US requests extradition outside of its jurisdiction. Canada argued that because the extradition of the Chinese citizen was requested under the Canada-US treaty, Canada did not have to consider whether the US had the legal jurisdiction to prosecute. This case was also resolved through a deal between the two foreign states.

Professor Currie detailed that misunderstanding of the extradition process can lead to trial-like arguments during preliminary hearings. The presumption of reliability for evidence is particularly problematic because Canada's legal standards require that evidence be proven reliable rather than presumed so. In 2018, Mr. Bayne wrote a letter to the Prime Minister outlining seven discrete issues stemming from Dr. Diab's extradition:[144]

(1) the three years and two months of imprisonment in France unfairly deprived Dr. Diab of his liberty–a fundamental principle in democratic justice systems;
(2) the unsworn allegation of the foreign official was presumed to be reliable evidence;

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[139] *Extradition Act*, *supra* note 136, s 44(1).
[140] See *ALT Navigation Ltd v United States of America*, 2001 CanLII 33796 (NL SC); *R v ALT Navigation Ltd*, 2002 CanLII 53982 (NL SC); *ALT Navigation Ltd v United States of America*, 2002 CanLII 54111 (NL SC).
[141] See *United Nations Convention on the Law of the Sea*, 10 December 1982, 1835 UNTS 3 (registered on 16 November 1994), art 97.
[142] See *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*, Canada and the United States, 11 January 1988, 1853 UNTS 407.
[143] 2020 BCSC 785 (including ten other instances of this case before the BCSC) [*Meng*].
[144] See *Canada (Attorney General) v Diab*, 2010 ONSC 401 [*Diab* SC]*; France (Republic) v Diab*, 2014 ONCA 374.

(3) jurisprudence places the burden on the person sought to prove that the record of the case is manifestly unreliable;
(4) the foreign state is not obligated to make disclosure;
(5) the *Act* overstates the needs of comity, consequently undervaluing liberty;
(6) the person is supposed to be extradited for trial (not foreign investigation), but France never had a trial-ready case; and
(7) the Canadian Justice Ministers disregarded the judge's finding that the unsworn allegations were illogical and manifestly unreliable.

Mr. Bayne explained that extradition should not be perceived as an expedient or summary process because liberty is at state. He argued that the presumption of reliability for unsworn evidence reverses the presumption of innocence and the burden of proof in criminal matters. Under *Stinchcombe*, full disclosure is required where liberty is at stake;[145] however, Mr. Bayne explained that foreign states can "cherry-pick" which evidence to submit for extradition requests, even omitting unmistakable evidence of innocence, and base their allegations on unsworn statements, which Canadian defence counsel cannot question. Moreover, Mr. Bayne argued that the appeal courts across the country have made the manifest unreliability standard unattainable. While the Canadian extradition judge in *Diab* did not find the evidence "manifestly unreliable," he did find it questionable, illogical, and suspect.[146] Mr. Bayne argued that Canadian extradition is based on a fiction of mutual respect. Canada extradited Dr. Diab on an unreliable allegation, whereas France refuses to extradite a priest who is wanted in Canada for multiple sexual abuses against Indigenous children. Mr. Bayne quoted Anne Warner LaForest, stating that the Canadian extradition system overstates the needs of comity and consequently, undervalues liberty interests.[147] Even though "[t] he whole purpose of the extradition is to send the person sought to the requesting country for trial,"[148] France never had a trial-ready case against Dr. Diab. Canada extradited him for a protracted foreign investigation that concluded he was not even in France when the crime was committed.

Professor Sorvatzioti called for careful consideration before extraditing Canadian citizens to continental Europe. In reviewing the continental trial process, which has not been reformed since 1809, she highlighted that the concept of a fair trial in her system differs from the Canadian justice system. Unlike Canada, all evidence is admissible under the continental system regardless of whether it may have a biased effect. In fact, her system does not have an equivalent to Canadian evidence law. They do not have standards on admissibility, reliability questions, objections, similar fact evidence, or restrictions on character or hearsay evidence. They have a single trial—no sentencing hearing—where all the evidence goes in, and the judge is responsible for finding the truth according to his intimate conviction. However, the judge does not detail how he evaluated the evidence, rather, they decide based on their investigation of the case. Professor Sorvatzioti stressed that this system does produce fair trials according to their standard of fairness; therefore, an extradited Canadian will not receive a fair trial that is in line with the *Charter*. Even though extradition is a foreign affairs matter, she believes these disparities between the two systems should receive greater consideration to ensure alignment with Canadian principles of fundamental justice.

Recommendations for Reform

Even though the *Extradition Act* was designed to ensure that the person sought will receive a fair trial in the foreign state, scholars and legal experts have criticized how the actual process plays out. The House of Commons Standing Committee on Justice and Human Rights report,

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[145] See *R v Stinchcombe*, [1991] 3 SCR 326 at 336, 1991 CanLII 45.
[146] *Diab* SC*, supra* note 144 at paras 118–21.
[147] See Anne Warner La Forest, "The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28:1 Queen's LJ 95 at 174.
[148] *United States of America v Ferras*, 2006 SCC 33 at para 55.

Reforming Canada's Extradition System, identified the issues present in Canadian extradition laws, policies, and practices and made 20 recommendations for reform, including:

- Strengthening procedural safeguards
- Improving communication between countries
- Ensuring reliable evidence
- Addressing legal system disparities
- Addressing language barriers
- Ensuring jurisdictional legitimacy, and
- Improving communication[149]

The report also found that a comprehensive review and reform of the *Extradition Act* is necessary to safeguard individual liberties and uphold Canadian fundamental justice. These recommendations are also in line with the challenges that Ms. Henchey identified need to be overcome: (1) delays creating negative outcomes for the foreign state and the person sought; (2) differences between common and civil regimes producing different kinds of evidence; (3) reciprocity conflicts caused by jurisdictional authority; and (4) the need for accurate document translation. Moreover, such reform could help prevent the injustice in Dr. Diab's case from reoccurring. Mr. Bayne stated that Canada's reigning parody of justice is the *Extradition Act* of 1999 and the jurisprudence it has produced. The panel emphasized that effective reform would not only ensure Canada does not become a safe haven for international crime but also protect the liberty interests of those unjustly accused.

Panel 5: Criminal Law Issues and Immigration

Key Points

- The Canadian immigration and criminal law regimes apply differently depending on an individual's status.
- The concepts of "safety of the public" and "public safety" can create exclusions for those subject to both immigration and criminal proceedings.
- Immigration is a social contract, where Canada's primary goal is to reap the benefits of having immigrants.

Speakers

- The Honourable Justice Peter H. Edelmann, Supreme Court of British Columbia
- Anthony Navaneelan, Barrister and Solicitor, Refugee Law Office, Legal Aid Ontario
- Banafsheh Sokhansanj, Senior General Counsel, National Litigation Sector, Justice Canada

Introduction

The panel on *Criminal Law Issues and Immigration* considered the overlap between Canadian criminal law, immigration, and refugee proceedings. The panel's discussion centred around two cases: *Agbakoba v British Columbia*[150] and *Mason v Minister of Citizenship and*

[149] See House of Commons, *Reforming Canada's Extradition System: Report of the Standing Committee on Justice and Human Rights* (June 2023) (Chair: Randeep Sarai). See also Robert Currie, *Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform* (October 2021) at 6, online (pdf): <cpij-pcji.ca/wp-content/uploads/2021/10/The-Halifax-Proposals-2021.pdf>.
[150] 2022 BCCA 394 [*Agbakoba*].

Immigration.[151] The Honourable Justice Peter Edelmann used the two cases to discuss how conflicting legal regimes may impact a person's status. Banafsheh Sokhansanj highlighted the purposes and goals of both the criminal and immigration regimes and how the courts use the applicable legislation to interpret implicated cases. Anthony Navaneelan considered the human impact of the overlapping criminal and immigration schemes in relation to the dignity of the accused. The panellists explored both immigration and criminal law regimes and how their interaction can create exclusions, or in other words, borders.

Shifting Status

The panellists explained how an individual's status may create a border that prevents them from accessing the same rights as someone with a privileged status. In both *Agbakoba* and *Mason*, the consequences for criminal activity are determined by how the individual's status is assigned under the *IRPA*. Mr. Navaneelan explained how the sentencing goals of rehabilitation[152] and reintegration[153] are effectively excluded for non-citizens, as permanent residents are converted into foreigners when a criminal deportation order is imposed. By s. 3(1) of *IRPA*, the Act is intended "to protect public health and safety and to maintain the security of Canadian society"; however, regarding the accused found not criminally responsible in *Agbakoba*, Mr. Navaneelan argued that, without access to rehabilitation and reintegration, non-citizens are excluded from this "public." Justice Edelmann confirmed this border between citizens and non-citizens, noting that citizens can pose a significant risk to the public, and we do little about it in our law. However, Ms. Sokhansanj framed the division in the *IRPA* as a multi-layered approach, where no one provision determines inadmissibility rather, the Act determines when individuals are excluded. The panel demonstrated that, as an individual's status shifts, the border created by the applicable legislation may cause them to lose or gain certain privileges.

Exclusions Based on Safety

The panellists examined how the two cases interpreted the considerations underpinning "public safety." Regarding *Agbakoba*, the panel discussed whether the interpretation of "safety of the public" under s. 672.54 (*b*) of the *Criminal Code* includes or excludes "the inhabitants of the proposed receiving jurisdiction."[154] While the court in *Agbakoba* included the "public abroad" in their interpretation of s. 672.54 (*b*), this provision does not require the IRB to determine that such deportation would be appropriate without confirmed supervision or treatment in the receiving jurisdiction. In considering whether to impose a non-removal term, Mr. Navaneelan added that no provision of *IRPA* requires the decision-maker to consider the danger to the public abroad, rather ss. 113 (*d) (i*) and 115 (2) (*a*) only require consideration of the "danger to the public in Canada." Such exclusion of the public in the receiving jurisdiction creates a border that prioritizes the public in Canada.

In *Mason*, "public safety" is bordered by competing legal regimes. Ms. Sokhansanj explained that criminal law and immigration processes examine "public safety" through different lenses. She described the regimes as overlapping lanes, where immigration is more jurisdictional, with the exclusive responsibility over decisions regarding membership, and criminal justice is more individualistic, with a primary focus on punishment and public safety. She explained that "public safety" is also part of the larger project of immigration when considering who qualifies as a member of the community and which characteristics are disqualifying.[155] However, Mr. Navaneelan indicated that this division could result in unfair outcomes where admissibility

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[151] 2019 FC 1251; 2023 SCC 21.

[152] See *Criminal Code*, RSC 1985, c C-46, s 718(*d*).

[153] See *Corrections and Conditional Release Act*, SC 1992, c 20, s 3(*b*).

[154] *Agbakoba*, *supra* note 150 at para 64.

[155] *IRPA*, *supra* note 80, s 3(1)(*h*).

hearings precede criminal trials and discovery without a right to silence is later used at trial. Moreover, in determining inadmissibility, the court does not require guilt beyond a reasonable doubt, rather the immigration systems allow for an individual may be excluded simply based on reasonable grounds to believe they may be a risk to "public safety." As a result, non-citizens may be subject to additional consequences for committing acts of violence, as their risk to "public safety" is considered under both *IRPA* and the *Criminal Code*.

Benefits of Immigration

Finally, the panel considered whether findings of inadmissibility are justified based on the stated goals of Canada's immigration system. Ms. Sokhansanj defined non-citizens as conditional members of the state who have an obligation to conform to the expected social contract of the new community or society. The Court in *Tran v Canada (PSEP)* confirmed that "*IRPA* aims to permit Canada to obtain the benefits of immigration."[156] Section 3 (1) of *IRPA* provides support for Ms. Sokhansanj's perspective through a list of immigration objectives, including "social, cultural and economic benefits,"[157] "development of minority official languages,"[158] and "the [general] attainment of immigration goals established by" the federal government and the provinces.[159] Further, the Court in *Agraira v Canada (PSEP)* linked[160] Ms. Sokhansanj argued that *IRPA* itself is a border for the purpose of defining membership, where admissibility is decided in consideration of the nation-building project. Moreover, as discussed by Mr. Navaneelan, *IRPA* inserts itself into the criminal justice system, removing rehabilitation and reintegration for non-citizens, in effect, positioning permanent residents outside of the Canadian community. Moreover, he highlighted that criminality for non-citizens is often a product of their lives in Canada, caused by neglect suffered in their country of origin and exposure to crime in Canada. This overlap between the immigration and criminal regimes effectively bars non-citizens from full participation in Canadian society. Furthermore, Justice Edelmann added how this perspective may extend to refugees, explaining that under Article 33 of the *Refugee Convention*, a refugee may be expelled or returned to their country of origin where they are found on reasonable grounds to be "a danger to the security of" Canada or "constitute[161] [e] a danger to the community" in their country of origin.[162]

Panel 6: Technology and its Use in International Law

Key Points

- Courts must learn to grapple with immateriality as the virtual world continues to expand.
- The rise of digital technology has made borders more flexible, often resulting in jurisdictional conflicts
- Global digitization is compelling legal systems around the world to evolve.

Speakers

- Naivi Chikoc Barreda, Assistant Professor, Faculty of Law – Civil Law Section University of Ottawa

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[156] 2017 SCC 50 at para 40.
[157] *IRPA*, *supra* note 80, ss 3(1)(*a*), 3(1)(*b*), 3(1)(*c*).
[158] *Ibid*, s 3(1)(*b.1*).
[159] *Ibid*, s 3(1)(*f*).
[160] 2013 SCC 36 at para 78.
[161] *Ibid*.
[162] *Refugee Convention*, *supra* note 134, art 33.

- Céline Castets-Renard, University Research Chair on Accountable Artificial Intelligence in a Global Context; Faculty member, Centre for Law, Technology and Society; Full Professor, Faculty of Law, Civil Law Section, University of Ottawa
- Gerald Chan, Partner, Stockwoods LLP, Toronto

Introduction

The panel on *Technology and Its Use in International Law* examined how borders can both complicate and expand the law regulating the use of technology. Gerald Chan considered how technology is transforming the Canadian legal system, focusing respectively on cross-border criminal law and cross-border telework. Professor Naivi Chikoc Barreda discussed the challenges of conducting work in a virtual environment, focusing on issues in private international law. Professor Céline Castets-Renard addressed the legal challenges of the digital world, especially considering the rise of artificial intelligence ("AI").[163] The panellists emphasized how technology is both revolutionizing and shrinking our world, causing our legal systems to overflow into one another.

Protecting the Virtual and Immaterial

The panellists stressed that with the rise of digital technology, traditional legal systems are learning how to adapt their laws to the international virtual environment. Professor Castets-Renard highlighted the challenges that the internet poses for regulators: should new laws be developed, or can older laws be adapted? She explained that traditionally, law has been developed to regulate material objects that have precise locations. In contrast, digital data is immaterial, replicable, and non-trivial. One immediate issue this poses is data storage on the "cloud: when using this data, people are using an online service, but the data is not stored in any defined jurisdiction. Professor Castets-Renard further emphasized the impacts of cross-border technology, as depending on the databases and training data used, digital technology, especially AI, can have vulnerabilities that result in biases, which increases the risk of discrimination. Such bias is particularly prevalent in facial recognition technology ("FRT"), which she explained is not currently regulated in Canada. Professor Castets-Renard further explained that generative AI (open AI software, such as ChatGPT and Dall-E) can have implications for intellectual property, personal data, and confidentiality. Moreover, Professor Castets-Renard highlighted an increase in cyberattacks not only by private parties but also by foreign states. She explained that foreign intrusion is becoming even more concerning, as with generative AI comes the risk of disinformation manipulating opinions, especially during electoral periods.

However, data storage and artificial intelligence are not the only new digital tools lacking clear regulation. Professor Chikoc Barreda emphasized that digitization encourages the internationalization of employment relationships through the virtual relocation of work and outlined three different degrees of mobility where cross-border telework affects both the worker and the work performance: (1) home-based teleworker working for an extra-provincial employer; (2) relocation of the teleworker's residence during their employment; and (3) digital nomadism, where the teleworker moves across borders regularly. The latter two involve physical cross-border mobility whereas the first scenario is a phenomenon that economist,

[163] She highlighted the following: (a) technology is new and evolving and takes time to fully comprehend; (b) the nature of cross-border technology creates conflicts in the territoriality of national laws; (c) traditional concepts of international law are based on materiality, whereas technology is largely immaterial; (d) protection of digital property; and (e) the rise of "cyber-criminality."

Richard Baldwin, described as telemigration because the international flow of services does not require relocation of the worker.[164]

Mr. Chan focused on *Charter* implications for individuals where digital evidence attributed to Canadians is gathered extraterritorially. He explained that *R v Hape* established the limited extraterritorial applicability of the *Charter.*[165] Regarding technology, the Supreme Court affirmed this holding in *R v McGregor*.[166] In that case, Canadian authorities sought the help of US authorities to conduct a search of the accused's electronic device, which the accused argued "violated his rights under s. 8 of the *Charter*.[167] The Court rejected the argument that the search referred only to his US residence, and therefore, "did not contemplate the search and seizure of his electronic devices."[168] As technology continues to evolve, the law is increasingly becoming entwined with the virtual world, requiring a reassessment of the material and physical nature of our current justice system.

Conflicting Jurisdictions

The digital world has also created ambiguity in questions of legal jurisdiction. Professor Castets-Renard commented on the different approaches to personal data: where the United States has chosen a property approach with free separation of personal data, the European Union and Canada have taken a more personal approach with specific protections on personal information.[169] Such conflicting laws between jurisdictions complicate international regulation of the virtual world.

Mr. Chan elaborated on this conflict, considering a person (or corporation) within the territorial jurisdiction of the issuing court.[170] While mutual legal assistance treaties ("MLATs") often facilitate such a process—they enable states to work through the central governing authorities in each of their states to assist in the gathering of evidence from different jurisdictions—where they do not exist, courts are often asked to resolve jurisdictional conflicts. Regarding technology, the question has become whether the person must be physically present, or whether virtual presence is sufficient to establish the court's jurisdiction. Mr. Chan discussed several cases where the court found that virtual presence may be equivalent to a physical presence in a jurisdiction. In *Brecknell*, the court found the virtual presence of Craigslist to be sufficient to [171] a real and substantial connection between the person and the jurisdiction.[172] *R v Love*, the court recognized "the realities of the internet age, where corporations can be present in numerous jurisdictions at the same time and information for these corporations can be stored anywhere in the world."[173] Moreover, in *eBay Canada Ltd v MNR*, the court found it "formalistic in the extreme for the appellants to say that, until" a document is downloaded, the

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[164] See Richard Baldwin, *The Globotics Upheaval: Globalization, Robotics, and the Future of Work* (Oxford: Oxford University Press, 2019).
[165] 2007 SCC 26 at paras 97–101.
[166] 2023 SCC 4 at para 25.
[167] *Ibid* at para 25.
[168] *Ibid* at paras 33–34.
[169] See David Harrington, "U.S. Privacy Laws: The Complete Guide" (10 March 2023), online (blog): <www.varonis.com/blog/us-privacy-laws>; Wendy Wagner, "Guide to Doing Business in Canada: Privacy Law" (20 October 2023), online: <gowlingwlg.com/en/insights-resources/guides/2023/doing-business-in-canada-privacy-law/>; Arielle Sie-Mah & Jasmine Samra, "European Commission Affirms Protection of Personal Data by Canada's Federal Privacy Framework as 'Essentially Equivalent' to the EU" (6 February 2024), online: <gowlingwlg.com/en/insights-resources/articles/2024/european-commission-protection-of-personal-data/>.
[170] *Criminal Code*, *supra* note 152, s 487.014(1).
[171] 2018 BCCA 5 (CanLII).
[172] 2018 BCCA 5.
[173] 2022 ABCA 269 at para 36 (CanLII).

information “lawfully retrieve [d] in Canada from the servers, and read on their computer screens in Canada, is not located in Canada.”[174]

Mr. Chan further indicated a potential conflict of laws where multinational corporations are subject to different legal obligations in different countries. Regarding production orders, Mr. Chan highlighted that there may be conflict where the law in another jurisdiction prohibits the release of users’ private personal information without a warrant or an order authorized or issued by a court in the company’s jurisdiction. This is not a hypothetical situation in *R v Strong*, as Google LLC, an American company, refused to provide information under a Canadian court order because doing so would conflict with “the *Stored Communications Act*, a United States federal statute that prohibits disclosure of communication content except pursuant to a qualifying warrant issued by a United States federal or state court.”[175] Similarly, in *R v Mehan*, the court found that American authorities intercepting email communications between Canadian residents constituted a US search because the communication occurred in Canada and was simply routed through a US server and gathered as evidence in the US.[176]

Moreover, cross-border telework can also create uncertainty regarding legal obligations. In a highly globalized economy, remote workers can cross multiple borders and perform their duties from anywhere in the world; however, Professor Chikoc Barreda highlighted that they must still confront conflict of law rules governing employment contracts. The *Civil Code of Québec* provides a potential solution to this problem by establishing that the choice of law “cannot result in depriving the worker of the protection afforded to him by the mandatory rules of the law of the State where the worker habitually carries out his work.”[177] Furthermore, the Québec *Act respecting labour standards* contains a provision confirming its application for employees who work within or outside of Québec.[178] Similar legislation also exists in provincial and territorial employment legislation and *Court Jurisdiction and Proceedings Transfer Acts*. Where such legislation does not exist, Professor Chikoc Barreda also explained that, according to the general rules of contractual interpretation, the place of performance must comply with the legitimate expectations of the parties at the moment when they signed the contract. However, Professor Chikoc Barreda indicated that a substantial connection must be established where work is performed from several locations. In *Gord’s Anchor Service Ltd v Turbo Oilfield Service Ltd*,[179] the court found that transportation services driving to Alberta were based in Saskatchewan because workdays began and ended in that province and the employer’s headquarters was located there.

In the remote work context, Professor Chikoc Barreda explained that when a company hires an employee to provide telework services from home, the parties’ expectations will normally be that the work will take place at the employee's place of residence. In *Difeo v Blind Ferret Entertainment*, even though the worker was operating his computer in New Brunswick, the court held that Québec had jurisdiction because that is where the parties negotiated and signed the employment contract, based on the “real and substantial connection” test.[180] The court also applied this test in *Danks v IOLI Management Consulting*,[181] which involved a contract between a US company in Virginia and a teleworker in Ontario. After an assessment of the relevant factors, the court concluded Virginia to be the appropriate jurisdiction.[182]

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[174] 2008 FCA 348 at para 50 (CanLII).
[175] 2020 ONSC 7528 at para 103 (CanLII).
[176] 2017 BCCA 21 at para 52 (CanLII).
[177] Art 3118 CCQ.
[178] CQLR c N-1.1, s 2.
[179] 2009 SKQB 188 (CanLII).
[180] 2013 NBQB 337 at para 34, citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para 87 (CanLII).
[181] 2003 CanLII 21459 (ON SC).
[182] *Ibid* at para 30.

Similarly, the court in *Force One Marketing et al v Rritual Superfoods* found the residence of corporate employees in Ontario to be insufficient to establish that the employer was carrying on business in Ontario when the company was incorporated in British Columbia.[183]

However, the court does not always establish the employer's location as the appropriate jurisdiction, which can also impact an employee's entitlement to benefits under employment standards legislation. In *Shu Zang v IBM Canada Ltd*, the Board found that an employee working from home in BC under an agreement with his employer in Ontario was not entitled to severance pay under the Ontario employment standards legislation because he had not worked a substantial amount of time in Ontario.[184] Professor Chikoc Barreda's presentation outlined how digitalization is challenging the traditional conflict of laws framework governing both the competence and the law applicable to employment contracts. Such conflicts will only continue to increase as the world becomes more virtual and borders become less relevant.

The Technological Revolution

The panellists identified where the virtual world is forcing the law to grapple with the increasing flexibility of borders. Professor Castets-Renard's presentation discussed how digitalization is being addressed on the international stage. She highlighted several avenues to regulating AI. In the military domain, countries are beginning to regulate AI under international humanitarian law. In February 2023, the government of the Netherlands hosted the first global Summit on Responsible AI in the Military Domain Summit ("REAIM"), where "over 60 nations agreed to a joint call to action.[185] While Canada was an observer country to this summit, the country is currently working on its own national approach through Bill C-27, *Digital Charter Implementation Act, 2022*:[186] "The Bill is designed to update Canada's federal private sector privacy law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), to create a new tribunal, and to propose new rules for AI systems."[187] Part 3 of C-27 enacts the *Artificial Intelligence and Data Act*; however, the *Act* does not apply to government institutions and therefore is limited to international and interprovincial trade and commerce.[188] Professor Castets-Renard indicated that this limited scope does not help to resolve jurisdictional issues between federal and provincial governments. Moreover, she explained that the *Artificial Intelligence and Data Act* would simply require that a person "responsible for a high-impact system … establish measures to identify, assess and mitigate the risks of harm or biased output that could result from the use of the system."[189] In contrast, the European Commission Proposal on AI Act covers risks to health, safety, and fundamental rights and further categorizes the kind of use into unacceptable risk, high-risk, and low or minimal risk.[190]conv

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[183] 2022 ONSC 2877 at para 49.
[184] 2019 CanLII 79641 (ON LRB) at para 32–34.
[185] John Xavier, "REAIM summit: Over 60 Nations Agree to a Joint Call to Action on Responsible Use of AI in Military", *The Hindu* (23 February 2023), online: <www.thehindu.com/sci-tech/technology/reaim-summit-over-60-nations-agree-to-a-joint-call-to-action-on-responsible-use-of-ai-in-military/article66518230.ece>.
[186] See Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1st Sess, 44th Parl, 2022 (first reading 16 June 2022).
[187] Kristen Thompson, "Canada's New Federal Privacy Bill C-27 – Summary of Significant Impacts and New Proposals", *Dentons* (20 June 2022): online: <www.dentons.com/en/insights/articles/2022/june/20/canadas-new-federal-privacy-bill-c27-summary-of-significant-impacts-and-new-proposals>.
[188] Bill C-27, *supra* note 186, cl 3(1).
[189] *Ibid*, cl 8 (under Part 3).
[190] EU, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM (2021) 206 final, 2021/0106 (COD) at Title II, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>.

Professor Castets-Renard explained that the lack of a clear legal framework for artificial intelligence creates a risk of territorial fragmentation. She believes that international cooperation is the only way to effectively mitigate the potential harms.

Similarly, Professor Chikoc Barreda stressed that the three scenarios of telework mobility—home-based, relocation of residence, and digital nomadism—are breaking the coherence of our regulatory framework, creating a lack of coordination between private international law and minimum employment standards. This paradigm may not only be detrimental to teleworkers, but may also undermine predictability and legal certainty for both parties in cross-border cases. Professor Chikoc Barreda emphasized that regulators have to develop solutions to conflicting employment standards legislation. She noted that as provincial law governs contracts, the expectations of both the employers and employees are that the employment standards legislation of that jurisdiction applies to the relationship and not the contract. In remote work environments, she believes that jurisdiction should be based on both the parties' legitimate expectations and the employee's rights. She highlighted that the employee is the vulnerable party of the relationship, and the goal of minimum employment standards should be to provide a minimum flow of rights to protect the vulnerable party.

Furthermore, in the face of the technological revolution, Mr. Chan stated that the "real and substantial connection" test in *Brecknell* should be the goal for establishing jurisdiction for production orders. He believes that this test is flexible enough to accommodate a situation where the company that owns and controls the data and is not physically present in Canada serves people in Canada. The virtual presence in the jurisdiction is sufficient to issue an order compelling them to produce the data. However, he noted potential enforcement issues, as the company may only agree to comply with laws that govern the jurisdiction where the data is held. This panel provided a high-level overview of the impact of technology on our current legal environment and how governments and courts are grappling with potential conflicts and ambiguities. However, as emphasized by Professor Castets-Renard, we cannot put barriers or borders around everything technological and digital, rather we need to find ways to mitigate the risks.

Panel 7: Refugee Protection

Key Points

- An overview of the process for claiming refugee status in Canada.
- Refugee protection and asylum systems in Canada and globally are under great strain, creating challenges for board members and claimants alike.
- While the Canadian system is being updated to enhance accessibility and reduce the re-traumatization of claimants, modern concerns, such as climate change, will produce new kinds of refugees and require further evolution.

Speakers

- Preeti Adhopia, Assistant Deputy Chairperson, Refugee Protection Division, Immigration and Refugee Board of Canada
- Aviva Basman, Manager & Lawyer, Refugee Law Office, Legal Aid Ontario; President, Canadian Association of Refugee Lawyers
- The Honourable Justice Lobat Sadrehashemi, Federal Court
- Azadeh Tamjeedi, Senior Legal Officer and Head of Protection Unit, United Nations High Commissioner for Refugees

Introduction

The panel on *Refugee Protection*, considered how the current laws and practices domestically and globally apply to persons seeking safety outside of their country of origin. Azadeh Tamjeedi began the discussion with an overview of the current situation for refugees and asylum seekers globally. Next, Preeti Adhophia provided an overview of the refugee claims process. The Honourable Justice Lobat Sadrehashemi of the Federal Court narrowed in on the refugee determination process, including the tensions and complexities facing decision-makers. Aviva Basman complemented Justice Sadrehashemi's presentation by explaining the barriers that the claimant may face in their attempt to convince the decision-maker that they need protection and meet the legal definitions. Finally, Ms. Adhopia responded to Justice Sadrehashemi and Ms. Basman's presentation by explaining how the IRB's Guidelines address the challenges faced by board members and claimants.

Refugee Protection in Canada and Globally

Tamjeedi explained the status differences between asylum seekers and refugees, commenting that while asylum seekers are waiting to receive a refugee determination, refugees are defined in the *United Nations Convention and Protocol Relating to the Status of Refugees*[191] and in Canada's federal law: a person who is outside their country of origin or unable to return due to "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion."[192]

Asylum seekers may gain refugee protection in Canada through two basic steps: (1) an individual makes a claim for refugee status at a port of entry to a Canada Border Services Agency officer or inland to Immigration, Refugees and Citizenship Canada;[193] and if accepted, (2) the officer refers the claim to the Refugee Protection Division of the IRB, who will determine whether the claimant is eligible for protection.[194] Ms. Adhopia explained the circumstances in which a claim may be ineligible under the first step: (1) the individual has been recognized as a refugee in another country; (2) a previous claim had been made and rejected in Canada; (3) the *Canada-U.S. Safe Third Country Agreement* applies; or (4) where security or criminal concerns exist.[195] If the claim is rejected, the claimant may appeal to the Refugee Appeal Division[196] or apply for judicial review to the Federal Court.[197]

Justice Sadrehashemi explained the inquisitorial determination process for an eligible claim. In 1993, the Supreme Court held that the claimant must establish (1) that they subjectively fear persecution, which is well-founded in an objective sense, and (2) that the persecution falls within one of three categories:

(1) groups defined by an innate, unchangeable characteristic,
(2) groups whose members voluntarily associate for reasons fundamental to their human dignity, and
(3) groups associated by a former voluntary status, unalterable due to its historical permanence.[198]

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[191] *Refugee Convention*, *supra* note 134.
[192] *IRPA*, *supra* note 80, s 96.
[193] *Ibid*, s 99.
[194] *Ibid*, s 100.
[195] *Ibid*, s 101.
[196] *Ibid*, ss 110–11.
[197] *Ibid*, ss 72–75.
[198] See C*anada (Attorney General) v Ward*, 1993 CanLII 105 (SCC).

Justice Sadrehashemi indicated that the claimant need only establish that the risk of persecution is "more than a possibility," which is a lower threshold than a balance of probabilities. The Court also held that Board members must consider all available grounds of persecution based on all the facts of the case, even grounds not raised by the claimant.[199] If the IRB ultimately determines the claimant to be a refugee, they become a protected person and can apply for permanent residence.[200] As demonstrated by Ms. Adhopia's presentation, this system aims to provide a fair and compassionate mechanism for those genuinely in need of refuge.

Strain and Challenges

The panellists explained how both changes in global migration patterns and an influx of refugees from conflict zones have placed immense pressure on the Canadian refugee protection system in Canada.[201] Ms. Adhopia indicated that, as of September, 87,500 claims had been referred to the IRB in 2023, totalling 135,000 in the last five years. She stressed that this is the largest inventory in the IRB's history: these numbers are close to three times the number received in 2017. Ms. Adhopia further explained that 73% of claims heard were accepted this year.[202] While this significant increase is overwhelming the Canadian system's capacity, Ms. Tamjeedi highlighted that 75% of refugees and asylum seekers globally are displaced in low-to-middle-income countries, stressing that Canada receives only about 2% of asylum claims. She listed the top five countries bearing the brunt of the displacement crisis, Iran, Turkey, Germany, Colombia, and Pakistan, adding that 52% of claims are from Syria, Afghanistan, and Ukraine.

This strain is compounded by the notable accessibility barriers that refugee claimants face within the Canadian refugee protection system. One primary challenge lies in the complex and legalistic nature of the process. Ms. Basman explained how many asylum seekers struggle to understand the intricate procedures and requirements and how this knowledge gap can hamper a claimant's ability to navigate the system effectively. Her presentation illustrated how Board members evaluate a claimant's credibility by comparing each interview submitted document against their oral testimony. She referenced Professor Hilary Evans Cameron in highlighting the impact of trauma on memory and recall. In her book, Professor Cameron highlights that "the Court's understanding of how people testify relies heavily on a popular commonsense theory of memory...that the human mind functions like a video recorder";[203] however, human "memories [are] unstable at the best of times,"[204] Further, the "social context" of a refugee hearing, with the power imbalances and a claimant who may "be stressed, fatigued, and traumatized," any evidence they give can be expected "to produce especially high levels of inconsistency."[205] Moreover, the Federal Court has held "that torture victims may have difficulty with memory, consistency and coherence"[206] and that Board members "should

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[199] *Ibid*.
[200] *IRPA*, *supra* note 80, s 95.
[201] See House of Commons, *Asylum-Seekers at Canada's Border: Report of the Standing Committee on Citizenship and Immigration* (May 2023) (Chair: Salma Zahid) at 12, 15.
[202] See Chantel Spade & Tearney McDermott, "'Safe' countries and 'Fraudulent' Refugees: Tools for Narrowing Access to Canada's Refugee System" (August 2020), online (pdf): <www.torontomu.ca/content/dam/centre-for-immigration-and-settlement/tmcis/publications/spotlightonmigration/2020_4_Spade_Chantel_McDermott_Tearney_Safe_countries_and_fraudulent_refugees_Tools_for_narrowing_access_to_Canada%E2%80%99s_refugee_system.pdf>.
[203] Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge, UK: Cambridge University Press, 2019) at 122.
[204] *Ibid* at 167–68.
[205] *Ibid* at 168.
[206] *Wardi v Canada (Citizenship and Immigration)*, 2012 FC 1509 at para 15 (CanLII).

not have inflated expectations as to what an applicant should recall precisely."[207] However, as demonstrated in Ms. Basman's presentation, memory reconstruction remains a barrier for refugee claimants, especially those without experienced counsel.

The panellists further illustrated the challenges that Board members face in the fact-finding refugee determination process. Justice Sadrehashemi stressed that the record before Board members is often an incomplete patchwork of evidence; they have limited time with the claimant to examine the veracity of cultural circumstances that are often unfamiliar to them. Further, she noted how implicit bias is a challenge for every decision-maker. She referenced an article by Professor Fatma Marouf, who explains how the complex nature of refugee proceedings increases the likelihood of implicit biases influencing decisions, especially in credibility assessments.[208] Justice Sadrehashemi explained that this challenge is heightened by further obstacles in conveying the evidence: lack of legal representation and familiarity with the Canadian legal system, access to personal evidence, and trauma. Moreover, refugee claimants may not be proficient in English or French, which can impede effective communication and understanding.[209] This linguistic divide may lead to mistaken information, where Board members misunderstand why a claimant is seeking refuge, and claimants misinterpret the questions that members ask. Complex legal and procedural challenges in the refugee determination process, coupled with the increased strain on refugee protection globally, create hurdles for individuals making a claim and Board members seeking to evaluate the claim's credibility.

A Modern Refugee Protection System

The panellists identified where modernization and innovation could address the exponential growth in displacement figures and mounting challenges in the refugee determination process. Ms. Tamjeedi explained that asylum claims and refugee displacement are symptoms of the ever-increasing conflicts around the world, which has further resulted in more countries closing their borders. In addition to this increase in conflicts, she indicated that climate displacement is also on the horizon. Ms. Basman referenced the Canadian Association of Refugee Lawyers ("CARL") report on climate migration.[210] The report defines a "climate migrant" as a person:

(1) who is outside of their country of nationality or former habitual residence;
(2) whose country of nationality or former habitual residence has been or will during their lifetime be affected by a short- or long-term environmental disaster or by environmental degradation; and
(3) who, if returned, faces on account of that disaster or degradation a risk to their life, liberty, or security of their person.[211]

Ms. Basman explained that the definition must be broad to address the issue of climate migration and further recommends expanding legislative provisions and policies to account for the risk caused to individuals fleeing environmental disasters and degradation.

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[207] *Zhang v Canada (Citizenship and Immigration)*, 2014 FC 713 at para 32 (CanLII).
[208] See Fatma E Marouf, "Implicit Bias and Immigration Courts" (2011) 45:2 New Eng L Rev 417 at 437–38.
[209] See generally Souhail Boutmira, "Older Syrian Refugees' Experiences of Language Barriers in Postmigration and (Re)settlement Context in Canada" (2021) 1:3 Intl Health Trends & Perspectives 404.
[210] Aviva Basman, Warda Shazadi Meighen & Rachel Bryce, *The Canadian Association of Refugee Lawyers' 2023 Report on Climate Migrants* (October 2023), online (pdf): <carl-acaadr.ca/wp-content/uploads/2023/11/CARL-Climate-Report-October-2023-1-002.pdf>.
[211] *Ibid* at 11.

Ms. Adhopia stressed that creating the perfect refugee protection system is difficult. She explained that while they may add different tools to improve it, the Canadian refugee protection system is generally on the right path: the IRB (1) requires members to undergo extensive training on cultural sensitivity, unconscious bias, and working with vulnerable populations; (2) hosts monthly professional development sessions with experts in the field; and (3) has operated a gender-related task force since 2020 with specialized training on cross-cultural and trauma-informed questioning. This type of training helps create a more supportive and empathetic environment for refugee claimants, minimizing the risk of re-traumatization.[212] Furthermore, streamlining administrative processes and investing in additional resources to reduce processing times would contribute to a more efficient system, providing timely resolution and reducing uncertainty for claimants.[213]

Updating the Canadian refugee protection system should involve simplifying processes, enhancing language support, providing affordable legal aid, and implementing trauma-informed practices. Ms. Adhopia illustrated one such change through the Chairperson's Guidelines. The Chairperson of the IRB has a statutory authority to "issue guidelines in writing to members of the Board."[214] While these guidelines are not binding, members "are expected to follow" them, "unless compelling or exceptional reasons exist to depart from them," and "must explain in their reasoning" if they choose to deviate from them.[215] Ms. Adhopia stressed that these Guidelines recognize the adverse impact that myths, stereotypes, and incorrect assumptions relating to vulnerabilities, disabilities, and personal characteristics can have on the adjudication process. She specifically highlighted Guideline 8,[216] which provides guidance on "situations where a person's disability, vulnerability, and/or personal characteristics" may require the Board member to grant procedural accommodations or reevaluate their method of adjudication.[217] Ms. Adhopia noted that disability or vulnerability is not always visible or apparent; therefore, Guideline 8 requires members to create a safe environment by applying the principles of trauma-informed adjudication to remove barriers to access to justice:

- facilitating priority or alternate scheduling;
- allowing a support person in the hearing;
- creating a more informal setting for the hearing;
- varying the order of questioning;
- offering breaks or permitting an individual to move around;
- excluding certain non-parties from the hearing;
- providing a panel and/or interpreter of a particular gender;
- using live transcription and/or a virtual chat for deaf persons or persons with hearing loss; and
- explaining IRB process in plain language.[218]

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[212] See generally Vancouver Association for Survivors of Torture, "Recommendations for a Trauma-Informed Immigration System" (30 October 2018), online (pdf): <www.ourcommons.ca/Content/Committee/421/CIMM/Brief/BR10170798/br-external/VancouverAssociationForSurvivorsOfTorture-e.pdf>.

[213] See Immigration, Refugees and Citizenship Canada, "An Immigration System for Canada's Future" (last modified 15 November 2023) online: <www.canada.ca/en/immigration-refugees-citizenship/campaigns/canada-future-immigration-system/plan.html>.

[214] *IRPA*, *supra* note 80, s 159(1)(*h*).

[215] Immigration and Refugee Board of Canada, *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides* (7 July 2022), s 6, online: <www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/policy-chairperson-guidelines-jurisprudential-guides.aspx>.

[216] See Immigration and Refugee Board of Canada, *Chairperson's Guideline 8: Accessibility to IRB Proceedings – Procedural Accommodations and Substantive Considerations* (31 October 2023), online: <www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>.

[217] *Ibid,* s 1.1.

[218] *Ibid*, s 10.2.

These measures collectively promote accessibility and aim to create a more compassionate and efficient system that respects the dignity and well-being of those seeking refuge.

Panel 8: Indigenous Sovereignty and Borders

Key Points

- Borders can be identified in the relationships created by Indigenous Nations.
- While colonial borders restrict self-governance, they do not define how Indigenous peoples perceive their sovereignty.
- Indigenous peoples are in an endless negotiation for recognition of their sovereignty.

Speakers

- Adam Letourneau, K.C., Founder and Managing Partner, Letourneau LLP
- Bonnie Cole, Legal Counsel, Mohawk Council of Akwesasne
- Wayne D. Garnons-Williams, Senior Lawyer and Principal Director, Garwill Law; Principal Director, Indigenous Sovereign Trade Consultancy; Chair, IITIO
- Michael Kanentakeron Mitchell, Former Grand Chief, Mohawk Council of Akwesasne

Introduction

The panel on *Indigenous Sovereignty and Borders* considered the conflict between Indigenous sovereignty and domestic and international borders. Panellists Bonnie Cole and Chief Michael (*Kanentakeron*) Mitchell focused on Akwesasne and how Canadian law limits Mohawk sovereignty. Wayne Garnons-Williams approached Indigenous sovereignty from the perspective of Indigenous trade, explaining how innovative trade arrangements can help to further Indigenous self-government despite the supremacy of international borders. The following section will provide an overview of the major themes discussed by the panellists: (1) the use of borders within and between Indigenous Nations; (2) how colonial borders create barriers for Indigenous peoples exerting their sovereignty; and (3) the unending negotiation for Indigenous sovereignty rights. This panel's discussion emphasized how the Indigenous perspective of borders transcends the limitations imposed on them by colonial governments.

Indigenous Interrelational Bordering

The panellists explained how Indigenous Nations use borders to develop and maintain relationships within their own Nation, with other Indigenous Nations, and with settler-colonial nation states. Ms. Cole used the Mohawks of Akwesasne as a case study to describe the presence of borders within Indigenous Nations. Akwesasne is divided by the Canada-US border, Québec and Ontario provincial borders, and New York County borders. The Saint Regis Mohawk Tribe self-governs in the American region through jurisdiction provided by the *Jay Treaty*.[219] In the Canadian region, the *Indian Act*[220] was imposed on the Mohawks of Akwesase, replacing the traditional Indigenous government that had existed for millennia with a governance system of Band Councils. This *Act* further creates a border within Canada, separating Indigenous persons who are registered and those who are not.

[219] See *Treaty of Amity, Commerce, and Navigation (Jay Treaty)*, US and UK, 19 November 1794, 8 Stat 116.
[220] RSC 1985, c I-5, s 107 [*Indian Act*].

However, as Ms. Cole explained, the Mohawks never surrendered their sovereignty to any foreign or domestic entity, and before colonization, had their own history of borders. The Mohawks of Akwesasne are members of the *Haudenosaunee* Confederacy (the "*Haudenosaunee*"), also known as the Iroquois Confederacy. The history of the *Haudenosaunee* consists of stories, laws, and traditions that structure their societies. Their Creation Story (*Tsi kiontonhwentsison*) describes birth as represented by the Sky Woman who fell to Earth. In this story, she falls through a hole in an uprooted tree towards the "Great Turtle," in effect crossing the border between the "Skyworld" and what becomes Turtle Island.[221] Before colonization, the *Haudenosaunee* comprised five Nations living in well organized, sophisticated, and independent societies. Collaborative borders were set out in their Great Law of Peace, where each of the five Nations had a role in the Confederacy, each clan had a role within their Nation, and each person had a role within their clan. Moreover, the *Haudenosaunee* followed the teachings and laws in the Thanksgiving Address (*Ohenten Kariwatekwen*) by respecting and preserving the land: take only what is needed and live in harmony with nature.

The Mohawks have further used borders to develop agreements with settlers arriving from Europe. Ms. Coleexplains how the *Haudenosaunee* created the Two Row Wampum, a Nation-to-Nation agreement to share resources but remain separate. The Two Row Wampum is a treaty that provides direction to the world, allowing for two Nations to govern themselves without interference from one another. These treaties date back to agreements made with the Dutch before British contact. They also continue to be used in the present day. Mr. Garnons-Williams explains how Wampum Belts have also been used to signify trade and peace agreements; rather than using a piece of paper to acknowledge the relationship, Wampum Belts tell the story of the agreement. Mr. Garnons-Williams was the chief Canadian negotiator for the *Indigenous Peoples Economic Trade and Cooperation Agreement* ("*IPECTA*") through Global Affairs Canada's Indigenous Working Group on Trade Policy. The Indigenous Working Group presented to the Minister of Trade a unique Two Row Wampum Belt that tells the story of the agreement: the white symbols represent Indigenous Nations and nation states, which are separated by a blue background, signifying water. This Belt tells the story of Nations collaborating in partnership but remaining independent bodies. This panel highlighted how borders are conceived by Indigenous peoples and used to strengthen relations between Nations.

Limitations Imposed by Colonial Borders

Conversely, domestic and international colonial borders have served to limit the exercise of Indigenous sovereignty. While the Akwesasne Membership Code permits other members of the Confederacy, in Canada or the United States, to be members of Akwesasne, those born in the United States face restrictions under Canadian law. For example, a member of Akwesasne from the United States married to a member in Canada cannot work in Canada even though the Membership Code would allow it. In contrast, the *Jay Treaty* allows Indigenous individuals born in Canada "to freely enter the United States for the purpose of employment, study, retirement, investing, and/or immigration" by simply providing proof of their Indigeneity at the port of entry.[222] As another example demonstrating the limitations of Canadian immigration law, Ms. Cole also told the story of a Chinook woman married to a Mohawk man in Ontario who had to leave the country every two weeks because immigration law requires landed immigrant status and a sponsor to prove that she would not unduly burden the medical system.

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[221] Canadian Museum of History, "An Aboriginal Presence", online: <www.historymuseum.ca/cmc/exhibitions/aborig/fp/fpz2f22e.html>.

[222] US Embassy & Consulates in Canada, "First Nations and Native Americans" (25 February 2016), online: <ca.usembassy.gov/visas/first-nations-and-native-americans/>.

Furthermore, as a citizen of the Métis Nation of Alberta, Adam Letourneau who moderated the panel described how the division of Métis Harvesting Areas in Alberta[223] limits his ability to exercise his inherent rights to fish, hunt, and gather. Alberta's *Métis Harvesting in Alberta Policy (2018)* permits harvesting based on "a historical connection to one of the four Métis Harvesting Areas in Alberta, as well as a contemporary connection to the same community."[224] However, Mr. Letourneau does not live in the area where he established his historical connection and is therefore restricted to travelling North to share these traditions with his children. As Ms. Cole emphasizes, for Indigenous peoples in Canada, "[t]he border is everywhere; seen and unseen," costing them "time and money, weigh [ing] on [their] mental health," and impacting them "in so many ways that [they] can scarcely untangle them all."[225]

Regarding colonial limitations, Chief Mitchell used *Mitchell v MNR* as a case study to explain how Canadian courts restrict Indigenous peoples from exercising their rights. As the claimant in *Mitchell*, Chief Mitchell sought an "international mobility right as a citizen of the Mohawk nation."[226] He highlighted the appeal to the Supreme Court of Canada to demonstrate how the colonial interpretation of borders prevents Indigenous Nations from self-governing. The Court found that when "[t]he Constitution was patriated … all aspects of [Crown] sovereignty became firmly located within [Canadian] borders."[227] The Court described Chief Mitchell's claim as the "right to convey goods *across an international boundary* for the purposes of trade," rather than simply "the right to trade,"[228] and therefore, was able to invoke the authority of "international and common law" to limit Mohawk sovereignty.[229] Chief Mitchell's presentation illustrated how the Court's decision favoured the colonial imposition of borders over his pre-contact Indigenous tradition.[230]

Further, Mr. Garnons-Williams elaborated on the actions of Canadian authorities regarding Indigenous rights, explaining the divide between what is being presented as fact for a Canadian Border Services Agency ("CBSA") agent and what is fact for Indigenous peoples. He stresses that this cultural gap creates a misunderstanding, especially as the CBSA agent will do exactly what is in their policy manual and nothing more. He called for those who work on the border to be educated on the relationships between Indigenous peoples and the history of Indigenous peoples in North America, including how the implementation of the border and *Indian Act* has prevented Indigenous peoples from moving their goods by making inter-tribal trade illegal. Moreover, he noted that the limitations on trade create barriers for Indigenous persons seeking to prove "reasonable continuity between the pre-contact practice and the contemporary claim."[231] The panellists revealed how Canadian border law imposes restrictions on Indigenous peoples, limiting their worldviews and traditions.

The Need to Negotiate Indigenous Sovereignty

The panellists further demonstrated how Indigenous Nations negotiate their sovereignty with colonial governments, between Nations, and through trade and commerce. Mr. Letourneau explained how the Métis Nation of Alberta has begun to assert its rights over the past decade

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[223] See Alberta, *Métis Harvesting in Alberta Policy (2018)*, PST 00032578-1, effective 1 September 2019, (last modified 25 February 2019), online (pdf): <albertametis.com/app/uploads/2019/07/Me%CC%81tis-Harvesting-in-Alberta-Policy-2019-1.pdf>.
[224] *Ibid* at 1.
[225] Amelia Philpott, "The Ship is Not the Only Vessel on the River: Revisiting First Nations' Mobility Rights Under Article III of the 1794 *Jay Treaty*" (2019) 24 Appeal 157 at 159.
[226] *Mitchell v Minister of National Revenue* (1998), 1998 CanLII 9104 (FCA), [1999] 1 FC 375 at para 18.
[227] *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 129 (CanLII) [*Mitchell SCC*].
[228] *Ibid* at paras 57–58 [emphasis in original].
[229] *Ibid* at para 170.
[230] *Ibid*.
[231] *Ibid* at para 26.

and has recently begun negotiating with the federal government. These negotiations have allowed the Nation to form a new government and re-establish its borders within the jurisdiction.[232] On the other hand, Chief Mitchell's presentation demonstrated the Canadian government's resistance to negotiating certain Indigenous rights. In *Mitchell*, the Court held that "the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty."[233] As he explained, the Court came to this decision despite the evidence that trade had been spread across North America.[234] While *Mitchell* provides a historical illustration of barriers faced by Indigenous peoples seeking to assert their inherent rights, the Métis Nation of Alberta shows promise in future assertions of Indigenous sovereignty.

Mr. Garnons-Williams expanded on Indigenous sovereignty and introduced international negotiation strategies. He described the *IPECTA* as a revolutionary example of an agreement designed and governed by Indigenous peoples, independent of colonial influence. This agreement allows Indigenous states to work together "to develop their economic and social systems, including through trade and investment with non-Indigenous peoples and through new technologies.[235] Mr. Garnons-Williams stressed that not only does this agreement empower Indigenous peoples to create an Indigenous-led solution, but such collaborative agreements also protect Indigenous cultures and ecosystems, creating a barrier to colonial interference. His discussion demonstrated evolving exercises of Indigenous sovereignty on the global stage.

As underlined by Ms. Cole, Indigenous sovereignty in the form of delegated authority by Canada is *not* sovereignty but a colonial construct that reinforces the subjugation of Indigenous Nations. In response, she called on the government to implement the Truth and Reconciliation Commission's Call to Action 45 to develop "a Royal Proclamation of Reconciliation" to "reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown," which would include:

1. Rejecting concepts that "justify European sovereignty over Indigenous lands";
2. Fully implementing the United Nations Declaration on the Rights of Indigenous Peoples;
3. Ensuring "Treaty relationships [are] based on principles of mutual recognition, mutual respect, and shared responsibility"; and
4. Recognizing and integrating "Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements."[236]

Through their lived experiences and unique histories, the panellists illustrated that the overlap between Indigenous sovereignty and legal borders only serves to prevent Indigenous Nations from exercising the rights they have held since time immemorial. The panellists stressed that as Indigenous Peoples' relationship with the Crown continues to evolve, Indigenous groups

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[232] See Métis Nation of Alberta, "Canada and Métis Nation of Alberta Sign Updated Métis Self-Government Agreement" (24 February 2023), online: <albertametis.com/news/mna-and-canada-sign-self-government-recognition-and-implementation-agreement/>.
[233] *Mitchell SCC*, *supra* note 227 at para 163.
[234] See *Mitchell v Minister of National Revenue*, 1997 CanLII 5266, 1997 Carswell 3604 at para 160 (FCTD).
[235] Government of Canada, "Indigenous Peoples Economic and Trade Cooperation Arrangement" (15 February 2022), art 2, online: <www.international.gc.ca/trade-commerce/indigenous_peoples-peuples_autochtones/ipetca-text-acecpa-texte.aspx?lang=eng>.
[236] Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015) at 4–5.

will undoubtedly continue to look for new ways to protect their traditions and maintain their inherent rights.

Panel 9: Family Law

Key Points

- Family law proceedings can often involve procedural challenges that turn on the practicalities of the claim as much as its merits
- Decision makers in the immigration and family context work in a space where cultures mix and have to answer legal question while navigating cultural differences
- Due to the differing value at play in the internal world, the best interest of the child standard raises unique issues in application

Speakers

- Mélanie Raymond, Administrative Judge, Tribunal administratif du travail
- Oren Weinberg, Partner, Boulby Weinberg LLP
- Awatif Lakhdar, Partner, Lavery

Introduction

The final panel on *Family Law* spoke to the challenges that borders pose for family law and the relationship between family members. The panel took the form of a three-way discussion between the panellists who each spoke on a question asked to them. The conversation produced three themes that exemplify the unique aspects family law across borders and some of the difficulties that follow. The first was the issue of "forum shopping" and how it as an administrative phenomenon captures a lot of family cases. Second was the issues of intersecting cultural norms in legal assessments. The panellists stressed the importance of the facts and particularities of a case that can often involve an assessor navigating cultural differences in the assessment of a legal norm. Finally, the panellists explained the complications of family law when the best interest of the child standard meets international considerations.

Forum Shopping

Me Awatif Lakhdar spoke to one of the most pressing issues in private international law: forum shopping. Forum shopping is a permutation of a jurisdictional competence issues found at the heart of many of conflict of law cases. However, Me. Lakhdar explained that forum shopping refers to manoeuvres and exercises practices by the parties in a family law case that seek the jurisdiction of a court over the matter with family law rules that benefit their side of the case. The choice of forum is not necessarily based on geographical location but rather on the applicability of the legal regime that will favour their position. It is therefore a strategic manipulation of jurisdictional tests. As such, Canadian jurisprudence goes so far as to declare "forum shopping" as fraudulent behaviour.

Mr. Weinberg explained that these cases often involve divorce, children, and the custody thereof in which the parents or couple met abroad, or the spouses do not share a country of origin. He detailed that in many cases one of the parties has a premeditated plan that is put in motion when the children at issue visit or return to the country of origin in question. The decision becomes strategic when the spouse who either does not return with the children or does not let them return elects a regime where child protection laws are not as stringent as those in Canada and the parents

are afforded more rights. This in turn raises questions of abduction of the child or an illicit move of the child.

Me. Lakhdar explained that the issues also extend to divorce proceedings in which regimes are chosen to overcome the division of family patrimony in Québec or property in common law jurisdictions in which the elect forum has no concept of family assets, or compensatory measures such as spousal support. Thus, a spouse against whom proceedings are initiated may be bound by a decision in which divorce is granted, as well as custody of the children with no mention of the financial issues that would otherwise be involved. She stressed that women are often victim of abusive proceedings in these cases, aggravated by factors such a spousal abuse.

Even with this stipulation, Me. Lakhdar cautioned that the issue can get much more complicated as the substantive issue is not withstanding, proceedings can multiply. For example, if a decision is granted against the spouse resident in Canada, that spouse must apply to the court to dismiss the case and vice versa. Me. Lakhdar referenced the 2019 Supreme Court Case *R.S. v. P.R.* is instructive as a recent example of courts dealing with the issue.[237] At issue in *R.S. v. P.R.* was whether a court could stay its ruling on an action brought in Québec if the dispute is already subject to proceedings in a foreign jurisdiction.[238] The case turned on the application of article 3137 of the *Québec Civil Code* (QCC) which legislates an exception to the general principle of Québec courts having jurisdiction of over a matter brought before them in instances where the matter is already subject to proceedings in a foreign court.[239] Me. Lakhdar detailed that the Court had to fundamentally decide whether the decision of the spouse's chosen forum, in this case Belgium, would be rejected by Québec courts and thus establishing their jurisdiction if the foreign decision "would be so inconsistent with certain of the underlying values of the Québec legal system as to be incapable of being incorporated into it."[240] Me. Lakhdar stressed that the first application for the decision was made in 2004, only resolving in 2019, and the reason for the case was a matter of one of the parties attempting to pay gifts to the other.[241]

Intercultural Issues

Me. Lakhdar explained that these cases often contain a cultural component in which it is not only laws that conflict but societal norms. Judge Raymond took up this theme stressing to the audience that concerning borders and family, the issue is not contained to a single field. One of the issues in *R.S. v. P.R was* a matter of if a foreign decision would offend public order. That consideration is not novel at there is often a gender dynamic at play in cases where the jurisdictions in question view a particular issue such as the rights afforded to women or children differently. Judge Raymond illustrated the tension with two examples: best interest of the child and the determination of the validity of a marriage.

Mr. Weinberg detailed the same issue of conflicting cultures in another forum: child support. He explained that he had a client originally from Dubai who was estranged from his children and wife who lived in Canada. The client was willing to pay the child support only if the children in question were male. An issue arose when the father saw his sons on FaceTime and they were wearing makeup, had coloured hair, and painted nails. Mr. Weinberg explained the client did not want to pay child support to sons whose

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[237] See *RS v PR*, 2019 SCC 49 (CanLII).
[238] *Ibid* at para 37.
[239] *Ibid* at paras 37–38.
[240] *Ibid* at para 52.
[241] *Ibid* at para 58.

cultural norms of masculinity contradicted his own. Mr. Weinberg explained that while this is not a valid basis to not pay support in the Canadian jurisdiction in question, the client refused to pay because he knew a court in Dubai sharing his value would not enforce an order made in Canada.

Judge Raymond explained that the impact of different cultural norms is felt in many aspects of immigration law involving couples. She brought up the example of spousal sponsorship wherein a spouse from a foreign country has their sponsorship denied. In that case, the matter can be appealed to the IRB immigration appeals division where the issue will turn on how authentic or genuine the decision maker believes the marriage to be. Judge Raymon detailed that while the decision maker is probing for the characteristics of an authentic couple, she questions how that decision maker is meant to know what such characteristics look like when filtered through a culture they are not familiar with? She stressed that the officer may be looking for signs of North American romantic ideals in which the spouses are two halves of a whole. Questions probe into first dates, moments when the couples said "I love you" to each other, or the intimacies of the marriage ceremony. In many instance people cannot answer these questions either due to differing norms or situations in which the spouses' family members arranged the marriage. In short, some couples may fail this subjective test because they and the officer have differing visions of the norm that the Canadian immigration system valorizes.

Complicating the Best Interest of the Child in International Instruments.

Judge Raymond raised the issues of when the best interest of the child standard comes into play with immigration law. She explained that difficult questions can arise when, for example, an argument is made by a parent that it is in the best interest of the child to have them leave the country or conversely in Canada. How is a judge meant to determine what is in the child's best interest? Judge Raymond detailed a story in which a Colombian child was orphaned in Canada due to the death of her parents. She was later entrusted to her uncle who lived in the country who became her parental figure. However, the uncle came to Canada under a false name and refugee story. When the immigration authorities discovered the false uncle's narratives there was a case to undertake measures to return him to Colombia. While there were not humanitarian or compassionate grounds upon which to base keeping the uncle in Canada, the federal court returned the matter to the IRB because the decision maker did not put enough emphasis on the best's interest of the child. Judge Raymond stressed that in this instance two domains of law came into conflict where the outcome is very grounded in the facts and demonstrates competing values in the Canadian legal system itself.

Me. Lakhdar detailed how the phenomenon of intersecting legal values finds itself in cases involving the role of the *Hague Convention on the Civil Aspects on International Child Abduction* (the "*Hague Convention*"*).* Signed October 25, 1980, the *Hague Convention* is the main international treaty for parents of children abducted to contracting states.[242] She detailed that the *Hague Convention* operates through a system of cooperation between countries, designated as "central authorities," by setting out a procedure for parents to request their child be returned to the country where they usually live.[243] Mr. Weinberg explained that while he *Hague Convention*'s framework focuses on the best interests of the child,[244] many child abduction cases

[242] See *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 [*Hague Convention*].
[243] *Ibid*.
[244] *Ibid*, Preamble.

involving the convention do not do an in-depth best interest analysis of the child analysis. The objective of the convention is “the prompt return of wrongfully removed children and the effective respect for custody and access rights,” while "ensur [ing] that rights of custody and of access under the law of one state party are effectively respected in the other states parties.”[245] Overall, the *Hague Convention*’s use of the word focus is aimed at creating “a system that will try to perpetuate continuity in environment for a child rather than maintain the legal concept of custody in all its various manifestations.”[246] Me Lakdhar explained that courts will adopt a restrictive application of the convention and offer a more expansive review of the best interest of the child in cases not involving its application.

Mr. Weinberg commented on the importance of hearing the voice of the child in immigration matter, but that too can be complicated. He explained that Canada is a signatory to the UN Convention on the Right of the Child, which too is enshrined in provincial law. While the convention operates under the primary considering of the best interest of the child,[247] it also provides the right for the child to be heard.[248] The right provides for the child to be heard in judicial and administrative proceedings affecting them. Mr. Weinberg provided an example of the intervention of the Office of the Children’s Lawyer in a matter that successfully argued for proceedings to be delayed so that the views of the child could be heard. While a legitimate concern, there are cases where the voice of the child can confuse matters. Mr. Weinberg related a case in which a child was abducted and living with someone whom they believed to be their mother and had not seen the father in five years. In this instance the child is predisposed to remain with the abductor despite the valid legal claim of the father. He stressed what each panellist repeatedly did during the discussion: that family cases turn on the facts and particularities of the case.

[245] *Ibid*, art 1.
[246] Keith B Farquhar, “The Hague Convention on International Child Abduction Comes to Canada” (1983) 4:1 Can J Fam L 5 at 15.
[247] *Hague Convention*, *supra* note 242, art 3.
[248] *Ibid*, art 12.