Lines That Matter: Reading the *Charter* at the Canada-US Border

by

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Abstract

Border studies and critical geographies of the border have been influential at calling attention to the structures of power and limits to rights at border sites. In North America, significant research has been conducted investigating the US Department of Homeland Security and its role in the securitization of migration within the United States. In Canada, border studies has enjoyed a long history within academic discourse, but the border too often becomes simply a stand in for the US-Canada relationship. This thesis emerges from a desire to look at the border from the North, and to consider the processes and institutions undergirding border work in Canada. Specifically, I take as my focus Canadian courtrooms where judges and lawyers frame arguments and write decisions that place individuals in or out of a particular legal framing. I look to the *Charter of Rights and Freedoms* as an important re-centering of the role of the judiciary. I ask: How do judges and lawyers make sense of the border as a legal space? And, what role does the Charter serve in that legal space- making?

To answer these questions, I consider how judges and lawyers make brackets to organize and make sense of information that then defines a field of possible action. I look to three cases at the border that have been heard by the Supreme Court of Canada since the adoption of the *Charter* in 1982. Each of these cases represent a constitutional question based in the *Charter*. I use these three cases to offer a thorough accounting of border work considering customs work at the port of entry, and deportations that occur well within Canada. I argue that far away from public scrutiny, laws are dusted off, legal acrobatics are performed in courtrooms, and judges are making decisions that quietly change how borders function and how we understand borders as a legal space. My study of these courtrooms reveals that judges and lawyers are implicated in the work of making and effectuating borders.

Keywords: borders; Supreme Court of Canada; legal geography; securitization of migration; post-9/11 North America; bracketing

Dedication

To Tyler & Logan, may this toil in some way help you make the world you inherit better than the one I knew and lived.

To Ma, Pops, and Marissa, for teaching me how to love.

To Alecia, for being there to meet my love.

Acknowledgements

> …Look, if you've been successful, you didn't get there on your own. You didn't get there on your own. I'm always struck by people who think, well, it must be because I was just so smart. There are a lot of smart people out there. It must be because I worked harder than everybody else. Let me tell you something -- there are a whole bunch of hardworking people out there. If you were successful, somebody along the line gave you some help. – President Barack Obama at a campaign rally in Roanoke, Virginia (Office of the Press Secretary 2012)

You bet, Mr. President. And I won't even claim, on the submission of this humble thesis, to be anywhere in the orbit of success President Obama was talking about as he revved up a crowd on the campaign trail. But completing a project like this is a success, and it is not one I have managed on my own. I came to this project, and to grad school, young and hesitant. That I leave old is my own fault; that I leave confident in my voice is the work of so many who have cared for me personally and professionally over the years.

Like a Trojan horse, the University of Chicago has nested in my head, revealing itself at times throughout my life to encourage and foster further curiosity. I entered the Gothic quads of Hyde Park scared and hesitant in my voice; mentors like Susan Gzesh and Alison Boden kept pushing me and helped me learn firsthand the pleasure and promise of research.

I had never taken a Geography course before I met Jennifer Fluri at Dartmouth, and later an entire department of exquisite teachers, researchers, and mentors there who showed me how exciting this discipline could be. That I am here at all is a testament to supportive pushes—to see me through the cold New Hampshire winter and to dream as aggressively as one should to plot a course to a PhD. I spent my days learning as much as I could from Matt Mitchelson, whose moral compass and sense of justice remains a goal for me. His charity of self have inspired me and my work.

In March of 2011, I was visiting another university I had been accepted to with a Dartmouth mentor and infamous straight-shooter, Richard Wright. I received an email

from Nick Blomley and called immediately—coming to work with Nick was beyond my wildest dreams. I rushed out of the bathroom stall where I had dashed to take Nick's call to tell Richard. I asked him what I should do, and perhaps half-seeing the excitement in every bit of my being, and knowing Nick's reputation as a scholar, he affirmed that I'd be foolhardy to work with anyone else. Everyone in the department I was visiting understood when I said, I was off to work with Nick Blomley. Really, I only half-understood what this meant at the time; I knew Nick was smart, demanding, and had a great reputation, but I didn't fathom then how much I would be met in Vancouver with someone so deeply committed to sending me out in the world tested, proven, and confident. I feel all the more grateful that I have been able to pair Nick's generosity with two committee members who have informed my thinking even from afar. In Merje Kuus, I met an academic who was asking exciting and provocative questions—focused, detailed, important, questions. Every step of the way, she's asked practical and thoughtful questions of me. I internalize them all and keep them close as I find my way from ideas to product. In Reuben Rose-Redwood, I have found someone who is animated and excited about inquiry—when I'm downtrodden, I think of Reuben's unbridled enthusiasm for geography, and his curiosity takes me through the next lap. I am in awe of his ability to make even the most complex understandable and fun. It's a thing to watch and I'm glad to have a few chances to see Reuben bring the taken-for-granted to life, as only he can.

This research was supported by multiple graduate fellowships from the Department of Geography and the Dean of Graduate Studies at Simon Fraser University, and one particularly lucrative Graduate Summer Research Award, which I have since held was the most money I have ever made for following Twitter. Much of the primary source material from the Supreme Court was purchased by Nick Blomley. Thanks as well are due to the Department of Geography at Simon Fraser University as well as the European Union Centre for Excellence at Dalhousie University for funding to present elements of this research and solicit feedback.

Toward the end of this work, I wrapped up teaching and joined a massive SSHRC project, *Landscapes of Injustice*. It's an incredible feat of collaboration and partnership and I've benefited in many ways from my conversations with many on the

project. Jordan Stanger-Ross has been a fantastic guide in how to do public history well and I'm appreciative for all the support he has offered me professionally and personally along the way. Above all, I am deeply grateful to have a mentor like Pamela Sugiman who has continued to invest in me and believe in my scholarship. Coming to work at Ryerson University and for Pam was a fantastic choice that has surrounded me with supportive scholars and colleagues who have been instrumental to my productivity and creativity. I'm also lucky to advise a group of graduate research assistants—Alex Pekic, Erin Yaremko, Peter Hur, and Rebeca Salas—who have been a source of inspiration and energy throughout the solitary work of writing.

I want to thank all the students I taught and served as TA for over the years, especially that flock of Geography 381 who had me for night classes as I wrote my comprehensive exams. I have no doubt that I tested a lot of material out on them—at 8pm, no less. At Simon Fraser University, I met no shortage of fantastic students who kept me intellectually nourished and coming back for more teaching opportunities, even at the expense of this work, but who in their own way have forced me to become clearer and sharper in my communication. I'm a better writer because I'm today a better teacher and so I thank every student who had the patience to watch these ideas unravel.

I can't imagine a grad school victory not being shared with Britta Ricker, Daniela Aiello, or Victoria Hodson. Victoria had the misfortune of being my office-mate at SFU, me with my notoriously busy and verbose office hours and desk clutter. We've all left Burnaby Mountain, but when I think of hearts and hugs that defined my experience among the concrete in the clouds of Simon Fraser University, it is these friends and their hearts, their intellects, and their humour that I hold tight and remember fondly.

In the final year of this work—when new words become harder to find, breakthroughs and aha moments feel so scarce—I happily met my partner in the truest sense of the word. I've debated and discussed in some way or another, usually over dinner, while driving, or, to the misfortune of our seatmates, while flying—nearly every corner of this research with Alecia, and my thinking is better for it. That I have not been able to fully capture her clarity of thought remains my fault, but this work and my thinking about my research are improved for her attention to these details.

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List of Acronyms

Term	*Initial components of the term (Canadian unless otherwise noted)*
ATIP	Access to Information and Privacy Request
BSO	Border Services Officer (within CBSA)
CAIPS	Computer Aided Immigration Processing System
CBP	Customs and Border Protection (US)
CBSA	Canada Border Services Agency
CIC	Citizenship and Immigration Canada (see note)
CISC	Criminal Intelligence Service Canada
CPIC	Canadian Police Information Centre
CSEC	Communications Security Establishment Canada
CSIS	Canadian Security Intelligence Service
FOSS	Field Operations Support System
FVEY	Five Eyes Intelligence Agreement (also, UKUSA)
GCMS	CIC Global Case Management System
ICE	Immigration and Customs Enforcement (US)
ICES	Integrated Customs Enforcement System
IPIL	Integrated Primary Inspection Line
IRPA	Immigration Refugee Protection Act
KIHC	Kingston Immigration Holding Centre
MPSEP	Minister of Public Safety and Emergency Preparedness
NCIC	National Crime Information Center (US)
PIL	Primary Inspection Line
RCMP	Royal Canadian Mounted Police
RPP	Report on Plans and Priorities
STCA	Safe Third Country Agreement
TECS	Treasury Enforcement Communications System (US)
Note	At the time of the bulk of this research, the agency responsible for immigration work in Canada was Citizenship and Immigration Canada. Toward the final days of this thesis, the agency adopted a secondary acronym, IRCC, and new working name, Immigration, Refugees, and Citizenship Canada.

Preface

I flew to Vancouver for the first of countless times in July 2011. After a harried layover—I was not particularly well practiced in the nuances of connecting flights yet—I sat on board my flight reciting what I would say at the border. Americans, I had been told by my program, and by anxiety-fueled late-night Googling, could apply for their student visas at the border. I hadn't lived in Canada, but I already had enough sense to know that this could become a complicated affair. The goal of modern travel is to get out of customs as quickly as possible and yet, I was voluntarily submitting myself to stay longer. When I made my way to 'secondary inspection', Canada Border Services Agency staffers did their due diligence and ran me through a gauntlet of questions. Bags were searched, a dog was trotted out—though the poor thing seemed about as tired as I was at 11:45 at night. I was warned about working legally, about my admissibility, and other law-like-sounding things that no one could be expected to remember under the stress of travel. I was handed a pamphlet on your rights when searched at the border, in English and French, of course, and a bill for $150 payable before I could access the fresh British Columbia mountain air. Two hours later, I was let go, and a certificate affixed to my passport certified me as official. I have crossed countless times since that first instance, for excuses ranging from the big to the banal. However, that border, and the anxieties I experienced that night in many ways animate my consideration here of courtrooms across Canada, where bordering is contested, asserted, and reimagined.

In this way, my relationship with the border and with the spaces of bordering at the 49th parallel is not just business, but is personal as well. More recently, whilst clearing customs in Vancouver, a US Customs and Border Protection agent inquired as to what the purpose of my visit to Canada was. At one level, his question makes sense—after all, I do carry a US passport—but I blanked for a moment as I tried to re-compartmentalize my life and my various subject positions. I finally blurted out what he wanted to hear: that I was a PhD student at a Vancouver university. This utterance rendered intelligible a vast pile of data—my home, my schooling, my family, my bank accounts, my friends, my property. As I will explore further in this thesis, my work of anticipating what the border guard wanted to hear was a way of drawing upon a bracket,

a way of framing myself in relation to the state to make possible certain courses of action. Four days later, a CBSA officer would note my NEXUS receipt with a “R” for resident and welcome me home. That “R” was, I will argue, a kind of bracketing, of organizing and making sense of information that then defines a field of possible action. In both of these cases—applying for my first student visa in 2011, and clearing customs in 2016–I walked off into the noise of the terminal flustered and convinced that the way we sort ourselves and space is an under-developed narrative. In those airports and in this thesis, I want to add complexity to our border talk and draw attention to the lawyers and judges doing border work in discrete ways that well removed from the line itself.

In everyday conversations within Canada, ‘the border’ takes on a multiplicity of meanings: touching on questions of the Canada-US relationship, the spine of Confederation, and Canada’s place in the world. Like the railroad or the Trans-Canada Highway, talk of ’the border’ also works to harness a vast and complex landscape. Similarly, academics like Jody Berland (2009), continue the tradition of McLuhan and Innis (Innis and Broek 1945; Innis and Watson 2007; McLuhan 2009) in mining the cultural politics of border-making as tied to deeper narratives of Canadian identity and politics. Building on these cultural narratives of ‘the border’, my work here moves to take a legal and political focus.

As a way into thinking about the border, this thesis looks to courtrooms to identify the way judges and lawyers frame their perspectives and how that framing in turn, does spatial work. I consider the law not as some monolithic force, but instead as a vocabulary through which conflict is negotiated and space is effectuated. My research here contributes to a growing legal geographic sub-discipline that far predates my arrival to graduate school. This thesis then connects the work of legal geography to border studies scholarship and demands we think about the many ways the border is a legal space. By stepping into courtrooms, I look at the way the border is operationalized. Specifically, my analysis here of the cases of *Simmons, Monney*, and *Chakaoui* bolster an idea of ‘the border’ that we are only beginning to understand the implications of: the idea that the border is a way in which the Canadian story is expressed as much as it becomes a terminus or edge of the nation-state. As sure as there are—or were—TV shows called *The Border*, Canadians are keenly aware of the performative social and

cultural power wrapped up in a line. In Canada, the nation is always reimagining itself in bordered perspectives, moving north/south across the line, and east/west along it. At a micro-level, nearly every Canadian likely has, for better or worse, a story of (not) crossing the Canada-US border. For these reasons, studying the border seems at home in Canada and among Canadians who tend to equate studying the border to mean studying Canada. Indeed, borders are unique points where all sorts of state work meet a broad constellation of nation-building, identity development, and territoriality.

My investigation begins here, at the 49th parallel. To think about the border, I turn to Canadian law and specifically to the courtrooms and legal actors who are charged with doing the argumentative work of making spatial and legal sense of what happens at the border. I argue that questions of bordering and the role of courts in border work offer an important vocabulary and perspective to ongoing conversations of mobility, public safety, citizenship, and sovereignty. Like academics who speak so often in code, or specialized jargon, law, as I have come to learn, is not much different: an intellectual toolkit that helps make sense of the world and make meaningful knowledge. Just as my world has been rendered through this research, the law in Canada similarly renders the heterogeneous, messy world through its sightlines. That mess however, is only briefly tidied. My thesis considers the ways in which the law organizes information, people, and, space, to create legally intelligible decisions. I view the law as a particular and technical field of productive power that can help us better organize and understand what happens at the border, as well as the broader significance of these happenings. Through my exploration of three cases heard in the Supreme Court of Canada, I interrogate the law's meaning-making at the territorial edge, where 'Canada' begins and where a *Charter of Rights and Freedoms* also begins its legal geographic work.

What happens at the border matters, and when things go wrong at the border, the resulting legal bracketing works at the most intimate of scales. Things going wrong, is of course, productive, both for academic research, and also for the legal process itself, which demands that rights be breached in order for rights claims to be activated and for a legal proceeding to be initiated. The work of legal bracketing, as I will discuss further in Chapter 2, "entails complex and subtle calculations that govern what is, and what is not, to be included within a particular setting" (Blomley 2014, 136). This thesis takes the work

of those calculations and distinctions as its focus to suggest that productive power rests in the construction and performance of sturdy brackets. The bracketing that occurs in the cases I focus on, has shaped every facet of border work. For instance, when I submitted myself to secondary inspection to renew my student visa in February 2017, I saw signs posted advising me of my rights. Border services officers referred to my time as 'waiting' and when I was pulled aside for a search, 'doubt' was not a satisfactory rationale. Each of these details can be read as the performance of legal bracketing work. First quietly done in courtrooms away from the public eye, brackets touch the border and the many people, from travellers to border services officers to policy professionals, who effectuate border work daily. I cross the Canada-US border frequently, but with the eyes of someone who sees how 30 years of court cases have effectuated themselves in guard booths, posted signs, NEXUS lanes, and inspection practices. In this way, I view the border as an ongoing project of increasing complexity, one that is not dissimilar from all Canadian society as a whole.

As I have noted above, there is much anecdotal talk of 'the border'. The aim of this thesis however, is to join existing academic conversations that consider how the vast appendages of border security challenge human rights and human dignity. I take as my dominant frame *the Charter of Rights and Freedoms* and situate discrete conflicts at the border within the legal and social history of Canada that resulted in a codified set of constitutional rights in 1982. The cases that I analyze exist at the border – a border that is at once conceived in geographic, legal, and ethical terms. These cases directly speak to many of the questions that persist throughout Canadian society today—questions of police power, state sovereignty, and our rights as aliens and citizens. The individuals in these cases have found themselves at odds with law and state power. These appellants are not often the most likely to attract our sympathy or support: drug smugglers and terror suspects move through courts without much public goodwill on their side. Nonetheless, their arguments still demand our attention because their resulting legal bracketings and their arguments persist as legal precedent that in turn defines the field of action. The decision, for instance, in *Simmons* remains the first point, a kind of test, for lawmakers and jurists alike in thinking about the legality of search and expectations of privacy at the border. The challenges raised by lawyers for named appellants in *Charkaoui* offer guidance to lawyers challenging deportations, secrecy of state evidence,

and the use of immigration holding centres. Long after their individual cases are resolved, these *Charter* claims offer a useful interjection into how rights work and how they are activated. I attend to how the *Charter of Rights and Freedoms* becomes a legal frame through which their cases, and future border work, is managed. Beyond any spatial border, the cases I analyse represent major social and economic cleavages in Canada that make the pain and suffering of some more significant, more worthy of our public concern. In this way, the cases that I have selected to consider speak to conceptual and social borderings as much as territorial lines. These cases ask us to think about rights in places and moments of challenge – in liminal spaces where, with close attention to legal bracketing, new intellectual possibilities may arise.

This kind of attention to the in-between in urgently needed. When I began this work, Stephen Harper was a popularly re-elected Prime Minister. In the US, Barack Obama was contemplating a second term at the White House and Donald Trump was pestering him to release his birth certificate. Identity politics, the militarization of border work, and the expanding invocation of borders as a kind of metaphor for xenophobia, racism, and economic insecurity have marked this period. In my adopted home of Vancouver, I crafted this project while the Occupy movement fought to reclaim public space. I have continued writing as Confederate flags came down in the U.S. South and police brutality and the marginalization of African-Americans was put in stark relief. At the same time, I watched with rapt attention as Donald Trump promised a wall along America's Southern border. Across the Atlantic, Britons, fearing waves of immigrant 'others', voted to leave the European Union, undoing a post-war project of international cooperation. I couldn't have expected how fraught border politics would be when I sat down and proposed this work. I could not have known how much borders would be re-emerging in political and social discourse, and how an analysis of the legal institutions that undergird this bordering would be so sorely needed.

I remain convinced now more than ever that a dissection of how the law enacts and performs borders is a timely contribution to the public discourse. Following Mountz (2010), I agree that telling stories about how the border works must involve, sometimes, getting away from the border:

> Employees in the field of immigration enact dynamic networks on a daily basis. Much of their work takes place not along literal borders, but rather in office towers, across e-mail accounts and telephone wires, and among people sharing information from all over the world (Mountz 2010, xxix).

Border work is enacted in a broad set of spaces and often, not at the border itself. My thesis considers how border work occurs in the courtroom, and is in many ways motivated by Mountz's efforts to tell stories of how the border is effectuated away from "literal" ports of entry. I look specifically to circuits of legal power where I see the law as one set of offices, actors, and ways of bordering. The law, and its proceedings are but one way into thinking about 'the border', but it is my hope that a critical review of the law opens up greater possibility to consider other institutions and relationships that are active in producing and performing borders.

Chapter 1. Introduction

As a kid growing up in the United States, my parents would pack me into the van and drive the 20 or so hours from New York to the Gulf coast of South Florida. I'd collect highway maps at the rest stops and note our location as we progressed, snapping photos of welcome signs ushering us into Maryland, or Virginia, or South Carolina. By the time we hunkered down into our last day of driving—my mom usually insisting that this routing be broken up into three pieces—I would run through the list of Florida counties, and note the changing colour of police cruisers as we moved from Columbia County in the North down to our home in Lee County along the Southwest coast. There were no guard booths marking the route between start and finish. Instead, straddling the North Carolina-South Carolina border was a gimmicky Mexican-themed restaurant and amusement park called 'South of the Border'. South of which border wasn't always clear. Indeed, the signs for fireworks and competition barbecue didn't signal Mexico so much as they told my Northern parents they had made it South. This rest stop was South, after all, of the Mason-Dixon line, itself a metaphor for all things Southern. Of course, the Mason-Dixon line is not so much a line but an expression, a sentiment called into being by the way we spoke of it and looked out for it. However, each trip I was to be disappointed that the 'line' did not actually exist—no signposts or flags—and I would have to settle for a garish sombrero two states down the road. Everyone has border crossings—with their particular and peculiar significances—packed in their carry-on bag. For all the places I've gone since, this dated and surely racist rest stop off a Southern highway taught me many of the lessons I still carry with me about borders, boundaries, lines, and the way they are pulled off the grid and take on a rich life of their own.

As an object of inquiry, borders offer more questions than answers. Today, borders seem to be back on the menu, back en vogue in a world that seems more connected but also more divided. We need only look to the post-9/11 critiques that painted then-U.S. President George W. Bush as a convenient boogey man while positioning Canada, with its own increasing militarism at the border, as a consequence or afterthought in the uneven Canada-US relationship. I have lived through and chronicled the worst and most malicious of US Department of Homeland Security policies, mapping the expansion of internal enforcement programs that capture people

and goods far away from the borderlands. So, while I understand the perniciousness of American border work as security work, I worry that we in Canada have let our lawmakers off with a pass. The consequence of turning the other cheek here is that Canadian borderlands themselves have become deeply racialized, militarized, and dangerous alongside their American counterparts. Much of the laws governing border work in Canada have early histories that originated well before 9/11, though the organizations that now are held to defend these laws were conceived out of a post-9/11 counter-terrorism mandate. Far away from public scrutiny, laws are dusted off, legal acrobatics are performed in courtrooms, and judges are making decisions that quietly change how borders function and how we understand borders as a legal space. In these courtroom triages, borders are conceptualized and become guideposts to legislators looking to expand their sovereignty, often in the name of security, in new and creative ways. This thesis stems from my curiosity about how borders, walls, and fences found their way back into political parlance and how the antique mechanisms of nation and state-making have become important all over again. In this thesis, I contend that judges and legal actors are implicated in the work of making and effectuating borders. Critiques and analysis of border work along the 49th parallel have become a lopsided discussion that is almost entirely fixated on the American securitization of migration. I aim to correct, in part, this imbalance by focusing (almost) entirely on Canadian jurists, chiefly among them the Supreme Court of Canada, to investigate how circuits of legal power make and effectuate borders.

In the course of my MA research on immigration enforcement programs in the United States, I became interested in the way the border—that is, the place we assume customs and immigration work to be occurring—had moved (Labove 2011). Government officials and academics agree that the work we associate with the border—screening, customs collection, and securitization—is happening beyond geographical/material borders. Today the border is a complex organism with a vast assemblage of policies that are unevenly managed and experienced. This might lead some to wonder if bordering in North America is going the way of Europe, a kind of broad continental Schengen-land of passport free travel (Zaiotti 2014)? At other vantage points, it would seem the North American borderlands are expanding and pushing out. One glance in the newspaper points to bilateral agreements such as the Beyond the Border Action Plan, that seem to

disperse border work into an increasingly larger set of offices, embassies, and airports. The border has been actively replaced by a 'security perimeter' and border work has been taken up in a growing set of locations. Still, there is also a hardening of the physical border itself, perhaps most clearly with the passage of the Western Hemisphere Travel Initiative (US Department of Homeland Security 2007; Government Printing Office 2005). American politicians, fearing a leaky border with Canada, now insist on passports for travel between the two countries. The immediate effect of increased border lineups has led to policy negotiating backstage and, publicly, a media blitz to get a passport in the years and months that led up to the Vancouver 2010 Winter Olympics as many wondered if Americans, turned off by the lines, would stay home (Lee 2008). (They did not.)

All of this brings us no closer to what a border is, much less what a border means. Today, the border seems to occupy seemingly contradictory legal, social, economic, and political positions. We talk about borders in the negative and as what they are not—they are not lines, for example, is a common refrain. However, even a cursory glance at a geometry textbook leaves many other possibilities open—border points? border vectors? border zones? Defining a border in opposition to other concepts and geographies has done little to define their shape or significance. As a result, we have fallen into a see-saw trap of speaking of the tensions that exist in speaking of and studying borders—that they create relational conditions but are asserted as a matter of national sovereignty. Borders have become a stand-in for geopolitical relationships, the 49th parallel then a vast metaphor for the Canada-US relationship. Others use borders to speak to a kind of friction with which some of us move through space and still many more use the phrase as a stand-in for state power and limitations on the will of the individual.

Perhaps struggling with the dualities of bordering in North America—of openness and closure, of inside and out—academics often talk about a border that exists in theory, but less in practice. Most are not talking about Canada's role in border making and border work; the shadow of the US border enforcement bureaucracy looms large and demands critical scholarship. Moreover, the way we talk about borders in Canada remains woefully underdeveloped. Canada's border is discussed often philosophically,

as a cultural reference point akin to Tim Hortons and hockey, or as a stand-in for the Canada-US relationship. Some academics have begun to examine the Canada-US border but many can't help but frame their work as an investigation of 'America's northern border', interesting perhaps for the glaring differences between the two US borderlands. Canadians can be deferential and, as an American in Canada, it seemed everyone wanted to talk about the US. The desire to talk about something that virtually eludes clear communication has only furthered my interest about what was going on in my new home. The research that unfolds here is my modest contribution to make sense of how Canadian courts have imagined their borders by looking at the law as an instructive site for the changes to border work that have occurred.

I arrived in Canada in 2011, in the early days of a re-elected Conservative government and sure that I would continue to talk about immigration detention much as I had previously. Deportation was top of mind in the United States, and border scholars were beginning to look at the vast network of immigration prisons as a perverse geography of post-9/11 America that demanded closer scrutiny (De Genova and Peutz 2010; De Genova 2007; Coleman and Kocher 2011a; Loyd, Burridge, and Mitchelson 2009; Mountz et al. 2013; Conlon, Moran, and Gill 2013). A decade removed from 9/11, geographers had begun to examine not only policy but also the world-making implicit in calling something a 'homeland': the territorializing work that is done through naming something home, and yet, distinct from other, previously held understandings of the limits of sovereign territory (Kaiser 2002). All of this remained salient to me north of the 49th parallel, where I was living in the interstices between 'homeland' and whatever lies beyond. Still, Canada's border story was underdeveloped. Significant changes had already come to the way border work was performed and researchers had failed to keep up with Canada's role in the Canada-US border. I knew that deportation itself would not occupy the same political or legal prominence it had sadly come to in the United States. For example, in the same year Canada deported 8,000 individuals, the United States had removed 315,943 persons (D. Black 2015; Immigration and Customs Enforcement (US) 2015). Of those 315,943, 102,224 were 'interior removals'—which describe the deportation by Immigration and Customs Enforcement within the US and away from the border or a port of entry. Further investigation revealed a trove of US data—with groups like Migration Policy Institute and the Transactional Records Access Clearinghouse at

Syracuse University at the forefront. While Canada has not shied away from law-and-order discourse that drew the border closer to its broad anti-terrorism objectives, the government North of the 49th parallel has made far less known about how and where it is working. In designing this research, I surmised quickly that an investigation of Canada's immigration detention practices would be lost in a series of Access to Information and Privacy (ATIP) requests, or involve digging through Government of Canada websites, themselves going through a calculated shedding of data and a consolidating of information (Kingston 2015)[1].

With these challenges in mind, I come to the law as an object of investigation thorough which I can critically engage with all the material changes at, and about, the border. Although the law remains vulnerable to the work of interpretation as well as data loss in the Harper government's updates to Government of Canada webpages, I contend that the law remains a useful record of thought and action at the border over a period of decades. As a kind of archive, the law offers a longitudinal view of the concept of the border, thus placing the intense rhetoric following 9/11 within a historical/social context. Law is a key facet of social, political, and geographic action. This thesis is my strongest case that the law is integral to world-making insofar as it struggles with the meaning and significance of borders, so do we. The very real tensions embedded in making legal meaning are the same tensions (of categorization, bracketing, translation, etc.) that have made borders a complex proposition both in this country and beyond.

There are effectively two ideological schools of thought, neither of which seem to fully capture the liminalities of bordering. On one side, there is the 'borders are everywhere' camp and, across the aisle sits the 'borderless world/borders are dead'

[1] A wide-reaching project of the Government of Canada to consolidate former independent agency websites has resulted in dead links at best and a loss of information at worst. A "systematic erosion of government records" has gutted the vast majority of once easily accessible government data (Kingston 2015). My work has not been exempt from the cuts; changes to the Immigration Refugee Board, Canada Border Services Agency, and Citizenship and Immigration Canada websites have all resulted in a loss of information that would have certainly aided my research. In some cases, information I had previously found one week was gone the next. Given, at times, no better information, we are left to take this degrading of government data as itself instructive.

camp. Neither of these perspectives fully explain the space of Point Roberts, Washington. Point Roberts is an exclave of the United States, only reachable through the lands of the Tsawwassen First Nation in Delta, British Columbia (Minghi 1962). Something about Point Roberts excites and troubles me; it is an economy made by virtue of geography—package pickup stores, American groceries, and of course, gasoline, which is sold at American prices but, in a nod to the overwhelmingly Canadian consumer base, still by the litre. For Point Roberts to exist—the borders are dead camp has to be somewhat right—British Columbians queued up at package stores to pick up everyday items ordered online and to purchase the grocery items unavailable over the border. There was a banal practicality to it—I along with many others lined up for parcels expected the border to be thin and saw little interference with our global commerce. Still, Point Roberts has been called the 'most militarized gated community in the US' because for all this borderless world talk, the border was real, lineups could stretch far, and CBSA would flag cars into secondary inspection as matter of daily practice. A clearing has been cut through the lush evergreen trees on both sides to allow US and Canadian officials easy surveillance and detection of those who do not present themselves at the official port of entry. From the ferries that push off nearby, Point Roberts lights up bright at night as border's military grade lighting is turned on. For me, Point Roberts represents the tensions I see coursing through border studies as a discipline. The tensions raised in Point Roberts speak to the challenges facing the US and Canada as they move along with an ambitious plan to reimagine border work in North America through a bilateral agreement called 'Beyond the Border' (Devereaux 2013). Still, no matter how much scholars talked about the border as something we were breaking down, pushing past, or deconstructing, I can't help but notice that in Point Roberts that simply isn't the case (Hudson 1998; Côté-Boucher 2002; Sparke 2000; Sparke et al. 2004). Here, the border is a line, it is quite fixed, very entrenched, and imbued with legal meaning and consequence. To that end, I have found little academic output examining North America's borders from Canada's perspective, certainly not with any focus on the Canada Border Services Agency and its role in border work. Some have tried to bring complexity to the way we talk about the border by looking at the economic activity that occurs back and forth (Andresen 2010), but such a view seems woefully incomplete. Focusing on the movement of goods, while important, is incapable of capturing a whole broader set of interactions individuals are having at the line each day. To the inverse,

some critical geographers are beginning to call out programs like NEXUS as a kind of "fast lane" with "expedited border crossing rights for business elites" (Muller 2010; Sparke 2006, 173). I have a NEXUS card and hardly feel I am a "transnational business elite" (Sparke 2006, 173). However, the criticisms of programs like NEXUS and FAST are helpful in calling out the priority placed on trade and commerce. Still, characterizations of a program largely held by weekend shoppers deal-hunting Stateside seems to paint an incomplete picture as well.

Two points have become clear to me: first, we lack good vocabulary to explain the complexities of borders and bordering, and second, this absence/poverty can be addressed by looking more closely at the processes and decisions that make these spaces—ports of entry, preclearance zones, airports. My research here is inspired by Jennifer Hyndman's suggestion that we need to get "beyond the binaries of either/or, here/there, us/them" because the border today—at least in the US and Canada—is a both/and operation (Hyndman 2003, 10). Unfortunately, we presently lack a vocabulary with which to talk about how the border is not a simple 'here or there' binary space, and how much state power is wrapped up in performing vagueness at the border. The resulting both/and kind of operation at the border means more staff at the border *and* the roll out of NEXUS fast lanes. This border is corporealized on the body through biometrics *and* expanded, pushed out, and shifted to visa pre-screening at consular missions abroad. The policy reaction feels at times a bit manic, with a whole litany of projects and technologies being brought to the border and border work: fingerprint scanners, pre-clearance, and retina scans, and the downloading of airline passenger manifests, culminating in annual trade shows where the latest and greatest in surveillance technology is first brought to a captive market. My project begins from the frustration of needing better vocabulary to talk about the way borders work in North America in 2017. By investigating a particular condensation point of state power with an eye toward the 'exceptional', the hope is to catalogue an example of how "contemporary operations of sovereign power produce territory in a way that destabilizes divisions between onshore and offshore, domestic and foreign territory" (Mountz 2013, 5). How that blurring is both fruitful and vexing, vital and challenging, goes a long way to explaining not only what is unique about the way borders work and the way courts

conceive of border spaces, but sovereignty more broadly, where borders and ports of entry serve as geographic metaphors for the nation-state.

Despite having come into existence at the same time as the US Department of Homeland Security, the CBSA seemed to attract little of the same scrutiny as its American counterpart. In the years leading up to the creation of the organization, little outcry was heard. When the Standing Senate Committee on National Security and Defence convened in the year following the 9/11 attacks to consider *The Myth of Security at Canada's Airports,* only one speaker was invited to discuss the border and preclearance operations (Standing Senate Committee on National Security and Defence 2003). Perhaps that was because the CBSA was whipped together by an Order in Council, only later to be subjected to the typical legislative process on the House floor. Or maybe it was all part of big changes—the organization began as Paul Martin was sworn in as Prime Minister in December of 2003. Whatever the reason, the people who would be responsible for Canada's border entered our daily life without much fanfare or criticism. A cursory scan of the major newspapers of Canada reveals nothing, hardly a peep, that a new, amalgamated border agency would soon be coming. Confronted with a curiosity about the Canada Border Services Agency, Canada's newest border staffers since 2003, I set out to understand the work of the border in its many forms. What are 'border services' anyway? I have attempted here to answer that question (albeit perhaps circuitously) by focusing on the constellation of laws that support the CBSA's work. In the absence of easy access to Agency staff, at least on the record—the CBSA remains, in the words of one civil servant "anxious by design"—case law provides a kind of side door into the work of the CBSA. As I dipped into the morass of paper and filings that accompany legal proceedings, it became increasingly clear that a careful examination of the law and its role in making and reimagining what goes on at Canada's borders was sorely needed. All the while, my premise here has remained embarrassingly modest—to explain how the law, and more specifically, how legal actors, make space at the border. It is the 'how' that perhaps sets this project apart; rather than speaking of borders in vague terms, this research begins from the premise that we would be well served to consider how borders are legally conceptualized. I argue that in understanding how jurists and lawyers make sense of the we can better think through how policy-makers and border services officers go about their daily work. I am mindful that something called

‘the law’ is not the only force effectuating the border, but it is one that has broad reach and wide implications and one that I have chosen to dedicate particular attention to here. A courtroom demands certain bits of information be heard—citizenship status, legal presence—and it gives space to particular ways of categorization that then inform bordering work beyond the courtroom. Courtrooms bracket information for efficiency and they bracket to make theoretically developed arguments that reach into the history of legal precedent and forward into practice. These brackets instruct policy technicians and border services officers on what kinds of information are legally intelligible and discernable. Those doing border work are guided by case law and precedent to concern themselves with whether you are an alien, on a visa, or coming home. They do not care about my proclivity to romantic comedies or unsweetened iced tea, however much I hold those dear.

I am buoyed in this work by the recognition that a comprehensive understanding of how legal decision-making has changed the space of the border and border work is long overdue. I am convinced as well that my methodological challenges point to the need for this research. Material that continues to define bordering practices remains out of reach, hard to access, and as such, far out of the public discourse. For a nation defined by its border, Canadians know so little of how their border works. Border talk often fixates on lawmakers in Ottawa, and yet each day, away from the pages of *The Globe and Mail*, thousands of border services officers get up, go to work, and are bracketed in their possible courses of action by a number of laws and by precedents set through case law.

Surveying the Field: Law, Geography, and Border Studies

This work aims to bring together several disciplinary fields of inquiry, with a particular focus on something called ‘border studies’: the meeting point in a Venn diagram between geography and politics with ‘legal geography’, particularly the ways legal geographic research has been able to describe vividly the complex sets of relations that govern the way people and space are organized and imagined. In this way, the aim of this work is to bring multiple schools of thought into conversation with each other and to look to the border as a useful condensation point for larger questions about space,

law, security, and rights. It serves then, that the literature supporting this effort be equally diverse and wide-ranging. To map, as it were, the contribution this project aims to make requires looking at several academic disciplines and concepts. In the synthesizing of geography to the work of the courtroom, and in the critique and analysis of rights discourse and security practices, it is my hope that this effort stands on its own, and offers a new intervention for how these discrete methods and disciplines can connect. Geography, above all, is uniquely positioned to be a convenor, bringing atomized concepts into closer dialogue. A faculty member in my program would famously ask at the end of a lecture, "How is this geography?", the question being both at once simple and complex. Geography is everywhere, implicated in all the ways the 'world' is 'written'. Geography is concerned with the way places are claimed and spoken about and geographers have long investigated the role humans play on their environments. Geography offers a helpful vocabulary and toolkit. Kuus (2015) draws on a definition from the *Dictionary of Human Geography* (2000) of 'the geographical imagination' that is helpful in framing the discipline: "sensitivity toward the complexity of places and a sympathetic understanding of spatial relations, both connections and cleavages" (2015, 548). This sensitivity is at the heart of geographic research. This work's desire to place many fields of thinking in conversation is in furtherance of geography as a kind of awareness to human-spatial complexities. In so doing, this research takes the border as its subject but is invested in a fulsome analysis of the way space is made through the processes of the legal system. While I choose to interrogate bordering and border sites, the questions raised here—of mobility, of space, of rights, of citizenship—extend far away from the line and enjoin ongoing geographical conversations well removed from the border itself.

Borders and Bordering: Placing Border Studies at the 49th Parallel

There is, at first glance, an apparent paradox in the way we understand borders. As Wendy Brown (2010) notes, "What we have come to call a globalized world harbours fundamental tensions between opening and barricading, fusion and partition, erasure and reinscription" (7). States today cooperate across borders to economic, social, and environmental ends (among others), yet the past decade has been marked by an impressive expansion of border security technologies. This seemingly Janus face of

borders—at once about globalization and openness and yet still very much mired in the territorial state—is instructive to political geographers and scholars more broadly as a way to think about and engage with states in 2017. As Heather Nicol and Ian Townsend-Gault (2005) suggest, borders "are indicators of broader geopolitical, economic, and cultural processes" (13). We can learn from the application of borders today much about the way the contemporary state has both moved beyond and yet is still deeply tied to the Westphalian notions of nation-states. This allows us to see the many borders and bordering processes at work across states and spaces. Such a reading allows scholars to see the role of discursive, legal, social, cultural, and material borders in tandem—recognizing that today, none of these borders or bordering processes operate singularly.

Border studies operates largely in the liminal borderland between geography and a range of programs across the social sciences: surveillance studies, sociolegal studies, and political science, among others (Newman 2006b). Today, the field of border studies is home to scholars questioning mobility (discursive, economic, social, or human) and documenting the shifting role of the territorial state. It is important to note, however, the way that border scholars today are reacting to, and critical of, earlier attempts to define borders and the domain of border studies. Such a (re)positioning of geopolitical borders belies a longer and more troubled history about the way borders were conceptualized in geography. Modern border scholars have leaned on post-structuralism and constructivism "to distance themselves from the politics and perspectives of Ratzel, Curzon, Haushofer, and Mackinder" for whom borders were symbols "of structural determinism, imperialism, organicism, [and] state centrism" (O'Dowd 2010, 1039). Rather than seeing borders as static, many geographers have since viewed "boundaries as complicated social processes and discourses rather than fixed lines" (Paasi 1998, 73). While such an "expansive understanding of borders and boundaries in recent scholarship has enriched border studies, it has also obscured what a border is" (C. Johnson et al. 2011, 61). Much like borders themselves, the study of borders, bordering, borderlands exists in a tension between seeing borders "as stable, fixed lines" and seeing them as "processes" (Paasi 1998, 72).

Neither are incorrect, but separately each perspective offers an incomplete understanding of the international border. When Paasi suggested "new perspectives for

boundary studies" and posited that "boundaries are contextual phenomena", he was doing so alongside many other political geographers and early border scholars in the first issue of the new *Geopolitics*, which just a year prior had been known as *Geopolitics and International Boundaries* (Paasi 1998, 72; Newman 1998). In subsuming the second half of the journal's title, Newman noted that a more complex fashioning of borders would follow in the years and pages ahead. However, early days of border studies—beginning with that 1998 special issue—were anchored in a pre-Y2K fascination with the internet as the great equalizer and globalization as signaling the end of the territorial state. In his introduction, Newman notes two themes for the issue: firstly, "the deterritorialisation of the state as characterised by the increased permeability of boundaries in the face of economic and information globalization" and secondly, the impact of these changes, to the extent in which they really occur, on the role and functions of the post-Westphalian state, particularly as it relates to the changing nature of State sovereignty" (Newman 1998, 8). Nearly two decades removed, we can safely question the extent of that 'deterritorialisation' and to what extent we have moved beyond Westphalian notions of statehood. Eight years after that special issue, Newman had tempered his enthusiasm suggesting that "it is not possible to imagine a world which is borderless or deterritorialized" (Newman 2006a). Globalization has not, as we all have learned, mowed down borders universally, but many of the paradigms around the way borders would work in a globalizing world remain salient questions that continue to animate the field of border studies today. Especially prescient was Gerard Toal's contribution on global terrorism where "transnational terrorism and proliferating weapons of mass destruction" were rendered as both "global dangers" and threats to the United States of America (Ó Tuathail 1998, 18–19). In identifying the " 'in-betweenness' of the current geopolitical condition", Toal eschewed simplicity for a more sophisticated understanding of the way "dramas characterizing world politics are acknowledged as being global, transnational, and post-territorial, yet…these same dramas are rendered meaningful as threats to 'national security'" (19). In detailing the way bureaucracies were established in Washington to address a range of global contingencies, Toal notes the way modern states (here the United States) could move at one instance toward a borderless world while at the same time "the territorial authority and military might of the United States are still needed to keep world order and contain 'rogue states' (21). Only a few years later, many of Toal's observations would be scaled up for primetime in the

Department of Homeland Security, which by its very naming attempted to find new a new space, *a homeland*, whose borders could be secured against all global threats (Kaplan 2003, 85). In light of the global war on terror, state power has both expanded and been mobilized.

And yet, every time I queue up at the Peace Arch Crossing, I find children with selfie sticks striking poses while straddling monuments and border markings. These photos are only interesting, only worth taking, if the idea of being on the border is somehow meaningful. I believe it still is; seduced by big platforms like global finance and the vast knowledge mobilization offered through technology, it is easy to forget that borders still exist and frame our behaviours and relationships. My goal here then is to bring back some of the complexity that has been theorized away, and to redescribe how borders are constantly being reinvoked and performed. That being said, as we should not assume lines to be static, neither should we imagine that borders have been uniformly and equally erased either. In contemporary Canada, 'the border' is a site of domestic worry and spending, increasingly a test site for techniques of governmentality and state-making while at the same time a stand-in for the friction undergirding an at-times strained relationship with the United States.

This thesis speaks to a larger school of thought that has reconceptualised borders, moving "away from static depictions of borders as things" and instead drawing on a more "process-based understanding of bordering" (Kaiser 2012, 522). This usefully allows us to consider a range of tools and practices as shaping mobility and to focus on those mechanisms and approaches rather than attempting to identify static lines as decidedly telling. Such a recasting of borders, from things to processes, allows for viewing borders as performative and calls attention to the way in which signs, guards, laws, passports, NEXUS cards, and fences cooperate to "stabilize, naturalize, and essentialize borders so that they come to appear as existing things rather than socio-spatial practices" (Kaiser 2012). In recognizing that borders are performed, we then move our attention away from the physical sitings of the boundary line—realizing too that a broad assemblage of what we might call 'border work' happens far away from the territorial edge—and instead focusing on the relational effects through which lines become perceived as meaningful.

Bringing Law to the Border: Legal Geography

At one instance, law and borders work closely together: as borders produce legally meaningful spaces laws can be made and arbitrated. When I cross borders into the province of British Columbia, I might reasonably expect a vast legal assemblage of courts, regulatory bodies, practitioners, and of course, law, to follow. Indeed, that very expectation is representative of the performative-how of borders, whereby institutions, policies, and practices all function together to effectuate a meaningful border crossing.

The marriage of border studies and legal geography is one of convenience, a practical move that can help clarify critical geographic scholarship at the border and draw further attention to the techniques through which space, like a border, is made. Legal geography seems a natural (at the very least useful) toolkit to bring to the border. Legal geographers have attempted to problematize how the legal and the spatial are decidedly constitutive—they are not divided or operating on the other at a distance. As Blomley, Ford, and Delaney (2001) note: “the legal and the spatial are, in significant ways, aspects of each other and as such, they are fundamental and irreducible aspects of a more holistically conceived social-material reality” (D Delaney, Blomley, and Ford 2001). This divide, between something called ‘law’ and something called ‘geography’ is itself performative—and legal geographers want to problematize that divide, and in their own way, residing very much in the borderlands where the two meet. As Eve Darian-Smith argues, “law, as an expression and vehicle of power, is intimately and necessarily interrerlated with space” (Darian-Smith 2013, 172). Seeing the way law and space produce each other pushes past disciplinary boundaries and asks important questions about the way space is produced. As Blandy and Silbey (2010) suggest, “law and space actively shape and constitute society, while being themselves continuously socially produced” (2010, 278). For a researcher considering the way boundaries and borderlines take on significance, the law is a useful addition to the conversation. After all, “one very important way in which law produces space is through its designation of boundaries, marking distinctions between spaces (e.g., the public and private world)” (Blomley and Labove 2015, 476). Rather than treating law and space as autonomous categories, the application of legal geography scholarship demands we recognize the

way both are necessarily interrelated, and as such, how those relationships are implicated in an ongoing process of making space (Blomley and Labove 2015).

Much as Agnew (1994) sought to trouble the taken-for-grantedness of 'territory' and political space, legal geography encourages us to interrogate the mundane as a means of gaining insight into the tensions that occur everyday at the legal-spatial divide (Bakan and Blomley 1992; Blomley 2003; Blomley 2004; Blomley 2005a; Blomley 2005b; Blomley 2009; Blomley 2010; Blomley 2011; Blomley 2012). Echoing that sentiment, Blomley (1994) encourages us to take seriously "the legal places of 'everyday life' as politically significant" (Blomley 1994, 48). By investigating the way individuals make space and engage with legal actors, we are reminded that these spaces and occurrences are not simply examined, "they are lived" (Delaney 2010, 59). The living of these spaces—not the least, the Canada-U.S. border, is important because these spaces are lived, felt, and experienced unevenly. Legal geography becomes a useful guide to understanding, then, the uneven and conflicting ways the border is made and experienced. While legal geography has been useful to critique the production of many spaces and practices of space-making including zoning and bylaw enforcement (Valverde 2009), sidewalks and public spaces (Blomley 2005a; Mitchell 1995), immigration (Coutin 2005; Coleman 2005), and nationalism (Darian-Smith 1994; Darian-Smith 1995), far less has been said about how law has similar effects at the border. Critical scholars should see this not simply as an opportunity, but consequential of the way border enforcement work has evolved. Bringing legal geography to the border, then, is about calling attention to the way spaces of border control are made and focusing on the unevenness and opacity of the legal decisions that support the production of the modern border.

Law is but one particular and highly technical way of looking at the making of the border. While much is made about border policy, far less is said about the judiciary that engage directly in border work, and the decisions by judges and the courts that have made the border both more fixed at the line and operationally more diffuse. Academics should be attuned to the way law works in creating spaces for all the theoretically valuable reasons legal geographers already know—to problematize the taken for grantedness of political space, namely—but also because the law needs to be critiqued.

Given my focus on appellate cases, this thesis directs attention to the messy and conflicting discourses that illustrate the difficulties in making space, and the real challenges jurists battle in conceptualizing the work of the border.

There is a challenge, I am aware, of essentializing something called 'the law' to be border-maker in chief, but this work attempts the exact opposite. When I speak of the law, I am not speaking of an amorphous concept or an omnipresent force, rather I am interested in the thinking of judges, the way they question and struggle with what goes on at a border. I begin here from the contention that law is performative, that it effectuates relations and is engaged in work of meaning-making. I do not attempt to assign it primacy or in any way argue that law somehow bests other languages, though I will say that the law provides a way into asking questions that merits closer consideration. I am fixated on the process far more than the result—the way legal proceedings discursively connect borders to sites both in and out of the territory. I also concern myself with the rhetorical work that lawyers do; in trying to bend, twist, and fold a border to suit a range of argumentative needs. I too, am aware of the temptation to talk about law as some kind of magical force[2], a grand explainer. Rather, by focusing on the process and arguments, my goal in this research is to not to essentialize but to inventory. At the other end of the spectrum, I run the risk of suggesting too much can be inferred or understood to be true from a legal narrative, but my ambitions are humble here. It is my hunch that process has been too often ignored—the how has been bypassed for bigger platforms.

Intellectuals, Judges, and the People of Geopolitics

This research focuses on a less considered actor in bordering and statecraft: judges and legal actors. Following Coleman (2016), I contend "that critical geopolitics scholars have not entirely succeeded in their treatment of geopolitical intellectuals" (2016, 493). This work, then, attempts to remedy this, by making judges as intellectuals the center of my inquiry. This is at once valuable to fill the gaps in knowledge and better

[2] Butler (1999) notes that "Bourdieu will invoke the phenomenon of social magic to characterize the productive force of performative speech acts" (1999, 114). This speaks to the way that the law, "works its social magic and compels collective recognition of its authority" (1999, 122).

complement geopolitics research that look at other aspects of statecraft. Engaging with "the materiality of legal practices"—what judges ask, how decisions are made—brings into consideration "the spaces through which legal authority is produced, for example through court rooms, government departments and international bureaucracies" (Jeffrey 2011, 343). By talking about bracketing, this thesis is invested in the 'how' of making space and the people who are tasked with activating rights, framing legal positions, and structuring arguments at the border. I heed Mountz's suggestion that "scholarship on immigration requires deeper contemplation of the state, and specifically the bureaucracy in order to demystify and deconstruct notions of homogeneity among decisionmakers" (Mountz 2010, 57). The many apparatuses and sites of decision making away from literal borders demand further inquiry. Mountz's work with/in the civil service architecture of Citizenship and Immigration provides a valuable look beyond the headlines and into the banal processes that undergird border work. There are, I argue here, still other sites of decision making that are worthy of our critical attention. For the purposes of this thesis however, I am invested in calling attention to the mechanics of the law because much as Mountz wishes to call attention to difference of opinion and perspective within the civil service, analyzing the way legal arguments are put together helps see the law as complex and comprised of diverse and competing arguments. By looking at the individual arguments put forward, by the way legal brackets are deployed or pushed aside, this work aims to add much need complexity and detail to the way academics talk about and engage with the law.

Bringing Territory into Secondary Inspection

An operating question throughout my research has been: What kind of legal space might we understand a border to be, particularly as taken up in the various channels of Canadian law? Good answers are hard to come by, but seldom fulsome and complete on first pass. Borders—as spaces, things, and governmental practices—are implicated in a long history between Canada and the US. So perhaps I should be clear about what I mean when I say 'legal space', since notionally, space itself is often legally arranged, codified in law, owned, managed, taxed, rented, or some other legal arrangement that serves to remind us that the legal and the spatial are inherently

comingled. Firstly, as a legal space, I want to reinscribe the border back into conversations about law and sovereignty, rather than the pervasive moves that view borders as extra-legal or exceptional spaces. The Peace Arch is not Guantanamo Bay. Conversations that place the border beyond the state inaccurately represent the way border work is done in North America. Secondly, rather than question its legal position, I want to add to the chorus of academics who critique the spatiality of borders and bordering. More often than not, I see a border as a collection of activities and techniques, not a physical frontier by itself. I am interested in how these activities and techniques – the methods and approaches to doing the work of bordering, have their own geography and make spaces. These space-makings are compelling and complex, and very much embedded in law. The legal spaces of bordering are diverse and can include, for instance: a deportation raid in East Vancouver, a secondary inspection at an airport in Calgary, a mail screening in Toronto, and an interception of a boat off the coast of Esquimalt, BC. As Alison Mountz puts it, "Borders exist as walls only in the geographical imagination", where the wall is instead a metaphor for the "dispersed, chaotic geographies" through which border work is taken up (2010, xxix).

Dispersed geographies are hard to legally define, but that hasn't stopped judges from trying. And despite all appearances, border work is anything but stark, in and out binaries. Like cell phones flickering between Canadian TELUS and American AT&T on a ferry boat in the Salish Sea, borders emerge erratically and inconsistently. We know this intuitively, along the 49th parallel, where the material border itself is uneven and idiosyncratic. In BC, the Peace Arch is a sprawling monument to cooperation: a state park adjoining a provincial park and framed by border checkpoints sporting the latest technologies of surveillance and policing. In Lake of the Woods fraying Minnesota from itself and into Ontario, the border is a modest phone box that operates on the honour system (Tuchman 2006). All this to say the image of the 'border as line' should well be out of our minds by now, faithfully disproven. And yet, there's something so resonant about that line, perhaps a sign off to the side welcoming us to sovereign land, maybe a fence for good measure. These images persist above all because they effectuate a kind of border we wish to be so, a border that is striped, marked, fenced, and demarcated. A border that is tidy, the 'border as line' discourse performs a kind of legal certainty where the border is an intelligible legal space that courts can engage with and make use of.

Even when viewed as a networked geography of policy, frontline officers, and civil servants, the searches of people and their belongings have long been part of the work associated with requesting permission to enter a sovereign territory. Who is doing the searching and what they are looking for can change, or as Santos (1987) demonstrates, multiple legal positions and jurisdictions can be overlapping and intersecting to produce spaces of 'interlegality'. The border—historically as well as in the present—has been a site of multiple, contingent, if not competing, jurisdictions. In the cases reviewed here, search and seizure rights of travellers are read through various legal scales[3], positions, and proximities.

Borders suffer as the geographic impossible subject because while many academics intend to examine the "place of the border" they often end up speaking of something happening beyond it: of state power that supersedes any Westphalian notion of territory (Johnson, Paasi, and Amoore 2011). When Balibar offers that we "are in a time of vacillation of the very notion of the border", he is not, as some may suggest, saying that borders are everywhere or anywhere (Balibar 1998, 217). The hunch that borders today demand a deeper contextualization, that the work of borders occurs beyond "an institutionalized site that can be materialized on the ground and inscribed on the map" leads far too many academics to cry that borders are dead. However, "a simple focus on the 'presence' or 'absence' of such borders is a rather unhelpful starting point for thinking about border politics" that both oversimplifies border experiences and keeps the legal and spatial unnaturally embargoed (Vaughan-Williams 2009, 15). Legal geographers do not have such a luxury; and so an examination of the legal spaces of bordering must take Balibar's calls for a richer contextualization of borders and border work seriously. We must be able to hold that borders "are no longer localizable in an

[3] In Canada, border work and border search case law is not assumed to be federal in the same way we see in the United States, where I (2011) could argue that the expansion of immigration and border enforcement work in new spaces represented a messy geography of federal zones of policing in and around local scales. The cases I utilize here are useful because they serve as the federal benchmarks—cases upon which provincial decisions are to be tested—but they do not represent the totality of the way or spaces where border work is being questioned and managed. While generally beyond the scope of this thesis, the rights and sovereignty of First Nations also adds to this 'interlegality'. In her PhD thesis, Sarah Hunt (2014) provides a lucid analysis of the way distinct sovereign claims not only to space but to government speak to the kind of 'interlegality' Santos discusses.

unequivocal fashion" and yet still find the spaces their work and actions signify (Balibar 1998, 220). Legal geography brings to the border an understanding that diffuse bordering does not mean "a world without borders" (Balibar 1998, 220). Rather, "borders are being both multiplied and reduced in their localization and their function, they are being thinned out and doubled", and bring to a space technologies of surveillance and control from a multiplicity of scales (Balibar 1998, 220). At the same time, new formulations of bordering, much like our liberal democratic conceptions of rights, are more intimate and individualized than ever. One person's experience at the border can vary greatly from another's and so legal geography is ideally suited to identify how our unique subject positions effect the way we are bordered and how the work of the border reaches into our life, home, work, or school.

Richer descriptions of bordering often fail to identify the material spaces of border work. In many ways, the present constellation of bordering practices provide challenges to thinking about borders as legal spaces. As border studies has moved away from 'boundaries' and toward a more sophisticated cataloguing of border work, the law has been a tool to this end and has also been eclipsed by new technologies and approaches that break down old brackets of legal knowledge production. This research focuses on specific human-spatial interactions in material space: courtrooms, airports, and land crossings. I connect the occurences at these sites to larger theoretical discussions that call in questions of rights, state power, and security. This ability to tie the border to its material practices is a value that the law offers border studies. Working from appellate law means dealing with the banal mechanics of bordering as it has impacted and effected people at a particular place and time. Bordering has a geography. There are places of detection and interception, and we have in Canada the signs and markers demonstrating this territoriality. For all of this though, I accept and even embrace the idea that borders are more of a verb today than a noun—a series of practices more than a thing or line and that those practices can and are often untethered from traditional boundaries.

Plan of Work

This is research fixated on and digging into, actual cases that have made it to the Supreme Court of Canada. With a working knowledge of the critical toolkit established in Chapter 2. Chapter 2 sets out the methodological framework for my analysis as well as addressing some of the limitations I faced in tracking down data. I explain here as well the organizational structure of courts in Canada, explaining how they have evolved over the course of the cases I consider as well as offering some context for how a case makes its way to the Supreme Court of Canada. Finally, in Chapter 2, I take up the concept of bracketing and explain how I intend to utilize the *Charter* as a bracket in an analysis of the cases that follow. In Chapter 3, I aim to offer a political and historical context for bordering in Canada, considerations that fall outside the bracket of case law but have no doubt shaped the way cases are taken up and considered. Chapter 3 offers a reminder of the many forces at work at and on the border and the many sites for researchers to consider in bringing legal geography into conversation with border studies. I begin Chapter 4 by considering a range of search and seizure cases that have been taken up by the Supreme Court. Beginning here is useful, not least of all because this is sequential; cases like *Simmons* and *Monney* represent early post-*Charter* interventions by the Court into the work of bordering. Their discussions and rulings have had an effect on how law and policy is made at the border today. I begin by considering the case of Laura Mary Simmons, who was strip-searched upon arriving at Toronto's Pearson Airport on a flight from Jamaica. While Customs Inspectors may have had a good guess—Ms. Simmons was packing $22,000 worth of marijuana on her person—her detention and search raised big questions about how the newly minted *Charter* was permeating work at the border. After discussing the facts of the case, I focus on the way legal arguments are framed in *Simmons*. The Supreme Court answers questions of a Constitutional nature, and to that end, parties must agree to and submit Constitutional questions, which form the boundaries around arguments and discourse within the Court. I will take up those questions (there are two) and focus on the way judges and lawyers alike push and pull the events in *Simmons* into and out of particular bracketings.

I look to the legal work that has followed *Simmons,* and take up the case of Isaac Monney. On March 13, 1993, Mr. Monney presented himself to customs officers upon

his arrival at Toronto's Pearson Airport. Nearly a decade later, and in the same space as Laura Simmons, border staffers approached Mr. Monney keenly aware of the critical questions *Simmons* invigorated: How are individuals made aware of their Charter rights? And, what constitutes detention in the heightened security environment of a border? From there, *Monney* deviates. Unlike *Simmons*, *Monney* asks the Court to consider the intensity and quality of detention, where the appellant is restrained to a drug loo facility and monitored to excrete narcotics. Mr. Monney's stay in a secondary inspection area was long—well over 4 hours from beginning to end—the time needed for Mr. Monney to securely excrete 83 pellets of heroin, leaving the last one to come out after being transferred to RCMP custody. In *Simmons* as well as in *Monney*, judges must make sense of how much discretionary power those who staff the border have, and they must at least attempt to justify and limit those powers either geographically or temporally. Building from U.S. case law, I argue that justices in Canada construct a space of increased vigilance and surveillance and they imagine frontline border staffers to have a wider toolkit to detect and detain those entering Canada as well as their belongings. *Simmons* and *Monney* serve as a test on the concept of 'reasonable suspicion' and the lower standard it offers officers. Written into the 1970 iteration of the *Customs Act*, 'reasonable suspicion' confers broader power to border staffers to stop and detain those who they are suspicious of without the intervention of the courts to produce a warrant. Reasonable suspicion grants officers greater latitude at the border, but it raises, as I will discuss big questions about the spaces of bordering.

At the heart of these search and seizure cases is this burden of 'reasonable suspicion'—and it is a burden of proof that is found, for the Court, in cases that occur far away from the border. The work of Anna Pratt is instructive here to explain in particular the way such a test of reasonableness and of suspicion is a strange mashup, an attempt to normalize border control through "rational quasi-scientific assessment of objectively verifiable risk indicators by trained and experienced border officers" (Pratt 2010, 462). 'Reasonable suspicion' is a construction that attempts to imagine border enforcement in ways that appear scientific and technical, and imagines those doing the suspecting—border officers—as uniformly trained and sophisticated with an advanced technical knowledge that privileges their decisions as informed and rigorously tested.

The language of reasonable suspicion and risk governs border work in search and seizure cases, and it is not far from the surface when we look at the securitized border and deportation as well. In Chapter 5, I turn my attention to the government's security certificate program, and call out an entirely different geography of border work that has benefited from risk assessment discourse at the physical land crossing. Indeed, suspicion—and the presentation of said suspicion as reasonable, tested, calculated, and managed—is central to the administration of the security certificate program that seeks to deport on grounds of national security, visitors or permanent residents from within Canada. The *Charkaoui* case which serves as the backbone of this discussion has taken on a life of its own—a massive, hulking series of appeals and zig-zags through the courts, *Charkaoui* raises questions about not only how suspicion is calculated and made, but, much like the search cases, about the administration of justice and due process in border spaces. To many, *Charkaoui* is a case about due process, not borders; the constitutional questions here are about what gets heard and how defenses are mounted when the individuals named pose a terrorist threat to Canada. My reading, then, of *Charkaoui* as a story of evolving borders, is not an obvious one. However, as I have suggested, is greatly assisted by the discussion of search mechanisms at the border in Chapter 4. Both sides of something turn on a basic assumption of 'national security' run to distinct ends, where the enforcement of property and bodies is undergirded by the production of impartial police work and intelligence.

This thesis centres on considering the constellation of borderings and evaluating the way such work is reconciled within the space of Canada's courtrooms. I am keen to note here, once again, that search and deportation are but two ways of seeing the border, but they do not represent the totality of its functions. Rather, viewing the border through these particular vantage points allows us to identify ways legal actors such as judges and lawyers have had an influence on the changing role of borders. In my concluding chapter I suggest how the research I have conducted in this thesis might provoke future research, or points where border studies and legal geography can continue to align their approaches. This is sorely needed, and not solely for tweedy academics, but for real critical appreciation of the way claims to human rights, social justice, and democracy can be mobilized in the very securitized and increasingly

complex geography of the border. This after all is but one thesis, and the author has humble if not realistic expectations of its widespread reception.

Chapter 2. Methodology

Mapping the Court: Decisions as Geography

This thesis proposes that we can take from court decisions, particularly Supreme Court decisions, insights into how the border is rationalized and made. This kind of work involves making courtrooms my site of inquiry and taking up questions of the border that emerge there. I investigate here how judges fixate on words, groupings, and orderings, to make distinctions in what we can term 'bracketing' as part of their work of producing legal meaning. In this case, legal meaning offers us a unique look at the taken-for-granted role judges play in making space. There are a few cases that have migrated all the way to the Supreme Court, and thus, have become constitutional referenda on bordering that hold up long after the issue of the day is resolved. There is no shortage of ways to investigate the border and the many techniques of policing and security deployed at the territorial edge. I have chosen to pursue a critical analysis of bordering through law and the spaces of legal argumentation (as opposed to spaces of law making), not because this is by any means the only way to make sense of bordering, but because, as I have noted, it is woefully lacking in contemporary scholarship.

To that end, this project hinges on a review of cases that dealt with 'big problems' in bordering and border work. How did courts take up cases on border searches as well as particular programs of the control of people and, security certificates[4]? In actuality, the court has infrequently directly answered this and resulting questions. While the Court

[4] I am using a critical analysis of security certificates—however a seldom used piece of policy (only 27 have been issued in over 40 years)—as a means of speaking to larger moves within the bordering toward the securitization of migration. To the extent that security certificates conflate the control of people and national security, much of the securitization of migration can be seen through the small certificate program. Any conjectures drawn are not due to the program's scale—27 is admittedly modest—but to the extent the discourses deployed in defending the security certificate program speak to larger moves and trends in bordering, the security certificate regime becomes a useful lens.

has had several opportunities to take up these questions and solutions indirectly, through invocations of Crown sovereignty, the border itself has infrequently been in a starring role. Although I will contend that this research is less about borders and more about the production of legal space, I do contend that bordering offers a valuable insight into the making of political space far beyond the edges of the territory. At the same time, 'borders' as we understand them today are wrapped up and implicated in a range of post-9/11 security anxieties that make their behaviour and position worthy of further critique. I did not, then, want to extend questions of sovereignty back out to the border, but instead wanted to see the tensions that bordering raises as productive and descriptive of the way space is made and performed.

A few cases hold up and compose the analytical substance of this research. These cases dated from 1988, 1999, and 2007 have remained significant commentaries on constitutional law, on the limits of the state, and on the spaces of rights in Canada. By starting from the decisions made in courtrooms—how judges wrestle with spaces of rights and sovereignty—I consider the judge to be a kind of geographer, making and remaking space in relation to the issues a particular legal question raises.

Focusing on legal decision-making is an underappreciated way to tell stories about how concepts like 'citizenship', 'identity', 'rights', 'security', and 'sovereignty' are hashed out on a daily basis. Any worries I may have had that courtroom proceedings couldn't offer the fulsome drama of a ride-along with a CBSA officer have been quickly negated. Working with these documents is however, also a conceit of access—reading courtroom transcripts is a practical way to analyze the laws of border security without the obvious ethical challenges of working with human subjects. Border scholarship, as I have noted, has not been particularly rigorous with the law as a focus of its scholarship and critique. Many have focused on ethnographies on the 'frontline'—notably Mathew Coleman across the US (Coleman and Kocher 2011; Coleman 2013; Coleman 2012a; Coleman 2005; Coleman 2012b) and Karine Côte-Boucher in Canada (Côté-Boucher 2002; Côté-Boucher 2015). My end result here—taking law seriously—brings valuable context to those ethnographies and peopled geographies of the border. To rigorously tell a story of the law at the border, demands pulling up court decisions and looking at the methods of decision-making and argumentation that occur away from that border.

Supreme Court judgments are quite thin, matter-of-fact summaries of the logic that brought the Court to their analysis and response[5]. One could not tell a complete narrative of the way the law has been a central character in bordering by looking at these documents. A Supreme Court of Canada judgment[6] can, however tip us to a concept, a case, a law, or a legal principle that can acts as a useful gateway into larger decision-making processes that culminate with the diminutive decision in the LexUM *Supreme Court Reports*. Engaging, then, with the work of the Court means starting with judgments as a kind of guide into the thinking of judges. Judgments provide guidance into everything that comprises a full case file: beginning with the application for leave to appeal, often including testimony from lower courts, and transcriptions of oral arguments[7]. Of particular value to this research—and where I am principally concerned with *how* judges rationalize border work within the context of the *Charter,* is a tidy document at the beginning of an archival file: the Notice of Constitutional Question. A Notice of Constitution Question is what I shall describe as a bracketing exercise in condensed form. This document broadly shows how the Appellant anticipates the Court will organize its analysis and review. As the term suggests, constitutional questions are framed as questions, big issues of constitutional law that the Court anticipates answering. Constitutional Questions are organizing and bracketing, setting out the terms through which legal (re)consideration of the laws undergirding a particular act of

[5] Among the many ways my American bias showed up, I had initially expected Supreme Court decisions to be hulking, meaty narratives as they had long been in the US (SCOTUS), where judges like Antonin Scalia were regarded as writers as much as constitutional theorists. In Canada, Supreme Court judges do not draft decisions with the same linguistic flourish as has been long a fixture of SCOTUS opinions. American jurists, and particularly the Supreme Court under Chief Justice John Roberts, have been criticized for increasing opacity and page lengths. In 2010, the *New York Times*, following research previously conducted, reported that SCOTUS opinions had ballooned to record lengths. See for instance, see Liptak (2010); R. C. Black and Spriggs II (2008).

[6] When referring to Canadian cases, I use the terms 'judgment' and 'decision' interchangeably as do the major databases cataloging the work of the Court. In the U.S., the final product of the SCOTUS is always referred to as an 'opinion'.

[7] Somewhat surprisingly, the inclusion of transcriptions of oral arguments in Supreme Court case archives cannot be taken for granted. In *Simmons,* for example, judges rely on the transcripts of evidence and proceedings in County and Provincial Courts and no transcript exists of material presented before the justices at the Supreme Court. This is less common in the Mclachlin-era Supreme Court, which has accepted (perhaps not always freely) the heightened interest and scrutiny that has defined the Court's work in the post-*Charter* years. For a detailed consideration of the media "dialogue" between the Court and Parliament, see Sauvageau, Taras, and Schneiderman (2006).

bordering can occur. We might expect to see a question that asks, for example, is this section of law consistent with the *Charter?* The invocation of the Canadian Charter in Constitution Questions is telling, for while most of the cases discussed here begin in Ontario, their decisions draw in the entire country.

Distinguishing Public Access from Open Access

When I embarked on a project to evaluate Canadian jurisprudence, I naively assumed that material would be publicly available, and as such, open in access. I also supplanted an American's perspective of federal bureaucracy and state-making, where both the Supreme Court and Congress are filled with more introspection, academic investigation, and as such, massive record keeping establishments that chronicle the way business is done. Such is not the case in Canada, where the Supreme Court is still very much in its youth, coming into its own in the post-*Charter* era and only now beginning to come to terms with the level of interest in how its work accompanies the Court and justices in the U.S.

As Taras (2000) notes, the *Charter* moved the Supreme Court away from "the outskirts of political reporting in Ottawa". The *Charter* originally received little attention as journalists focused their attention almost exclusively on Question Period and the daily news scrums on Parliament Hill" (2000, 2). While the court has moved closer to "centre stage", there remains "increasingly unease with the nature of judicial reporting" in Canada and Canadian jurists have not grown accustomed to or comfortable with such attention directed to their work (Taras 2000). I have seen this discomfort manifest itself firsthand throughout the vast tentacles of the Canadian judiciary. While it is true that the Supreme Court has made exceptional advances toward easy open and public access in the last decade, today with webcasting and online archiving, older cases remain shelved in boxes. In some cases, older cases have been digitized, providing for an easy transfer of materials at a relatively modest cost and limited expense of time. However, still hundreds of cases referenced—the material that underpins today's legal decisions—remain available only on microfilm, or require arduous and expensive photocopying and digitization. Lower courts are even worse; the Court of Appeal for Ontario (from which I drew some of my data) does not let material leave their records office in Toronto. Hopes

that Federal Court administration would be better, if not geographically untethered given its national jurisdiction are unfounded. Records originating in the Western Division (British Columbia, Alberta, Saskatchewan, and Manitoba) do not migrate and clerks who maintain Federal Court registries are unable to address questions about cases outside of their jurisdiction. While I imagined a database at every court, from Victoria to St. John's, this could not be any further from the reality, where some material exists online, some in webcasts, plenty more in banker's boxes and on microfilm.

Add to this the massive challenge facing the dissemination of legal knowledge—language—and you begin to appreciate that the law as it is made and practiced in Canada, exists in a tight geography around Toronto, Ottawa, and Montreal. *The Official Languages Act* (R.S.C. 1985, c. 31) provides for translation of legal decisions and judgments only. There is no requirement for transcripts, motions, or factums, to be produced in both English and French. As a result, a full research of a case—for precedent, for example—will offer often a mix of French and English reading. My own second-language skills aside for a moment, all of these challenges point to a troublesome methodological challenge when it comes to analyzing legal knowledge in Canada.

As so many of the documents I initially desired were chained to desks in Ontario and plenty others left in their original French, I quickly came to see how Canadian law is made and trafficked through only a narrow swath of the country. My challenges in getting information while living in British Columbia reveals the divide and an ad-hoc assemblage of websites and Access to Information and Privacy (ATIP) requests have not rectified a massive rift between the policy centre of the country and the West. In every way, the cards are stacked against lawyers, jurists, and scholars in the West. In British Columbia in particular, we wrestle past a culture that is overwhelmingly English speaking, time zone differences, and the reality that the information we want to access is a $900 plane ride away. Herein lies the distinction between public access and open access; the material is available to the public, but to a highly specialized kind of public that can dedicate the time and resources to track it all down.

By the time I began this project, much of the material I might have drawn upon had already been destroyed or otherwise lost. A phone call to the Attorney General of Ontario, in the hopes of tracking down a factum of appeal was telling: the Ministry had replaced their computers sometime in the late 1990s and had no record of cases or interventions before that juncture. A receptionist offered however, in a bit of last ditch effort, to 'ask around and see if anyone remembers working' on the case I had inquired about. Of course, no one *did* remember working on a case nearly 30 years old, but this idiosyncratic search function of 'asking around' reveals big gaps in the way the law can be taken up by scholars and citizens alike. The cases I work with have informed the way border work is done in 2016, and yet understanding how those decisions were made remains challenging.

The irony here is I set out to look at the laws that physically make the limits of sovereignty—the border—assuming that no structure could be more universally legislated and mandated. I went into my research imagining that the creation of a Canadian border would demand a clear, consistent, legal system whose decisions and decision-making abilities are on open display. What I discovered is that so much of the fractious and ad-hoc way of bordering in Canada begins with a divided legal system that cobbles so much knowledge (and thus, power) along Highway 401. This is in part because of the many intersecting and overlapping agencies working the border, where what we think of as the border is really the colocation of many government offices and ministerial portfolios in a common space. 'The border' stands in for the work of the Canada Border Services Agency (CBSA), Citizenship and Immigration Canada (CIC), the Immigration and Refugee Board of Canada (IRB), Passport Canada, the Canadian Food Inspection Agency (CFIA), the Receiver General for Canada, along with various sub-units of the Royal Canadian Mounted Police (RCMP) tasked with policing the movement of drugs, antiquities, weapons, and people across and around the Canadian borderlands. What is commonly referred to as 'the border' is instead a performative effect; a way of speaking about a range of practices and policies that together are understood as bordering. This research as a result interrogates a broad set of policies and policy-making institutions that collectively inform our conceptions of some thing called a border. This research however, also struggles with the reality that the border is the confluence of many jobs and actors, leaving one to feel as if there is and continues

to be a seemingly boundless set of materials that could be called in as data. Worse still, given the vast set of agencies and actors shaping our ideas of the border, research at the 49th parallel cannot help but have blind spots. These blind spots are not failures, but necessary and imperative to the research. That is, what we call the border in Canada (and the United States for that matter) is never fully knowable. Nevertheless, by calling into question how lawyers and judges attempt to make meaning out of the legal space of the border, I am calling greater attention to the existence of, at least one, knowledge gap. This at the very least problematizes what we call a border. Furthermore, recognizing that lawyers and legal actors are not alone in working to define and perform the border, reminds that what emerges from courtrooms does not exist in a vacuum.

Academics in Canada approaching the border may be turned off by the institutional and archival limitations of our legal system, but there is reason—and ways—to press on. A regional narrative of bordering could be worked out, by accessing provincial court materials, and, to a lesser extent, records from American courts. I generally eschewed cases that didn't move beyond the province because these cases often pivoted back to Supreme Court decisions and I wanted to tell a story of how big the thinking about the legal space of borders can become. Cases in British Columbia like *R. v. Buss* [2014 BCPC 16 (CanLII)], a case involving a border search of a computer revealing child pornography reminds us that the work of bordering will undoubtedly come up against new sets of conflicts, technologies, and rights claims. That being said, the 1988 *Simmons* decision which I focus on in this thesis still applies, even though it was decided in a time before laptops—never mind smartphones and tablets—were ubiquitous. To that end, scholars would be well advised to pick further through some of the new challenges that smartphones and increased computer use bring to bordering. In both search and seizure and the intelligence work of admissibility, state access to personal computers and computer-like-devices has a significant impact on bordering, and, for geographers, to the ongoing questions about where exactly a border begins or ends.

Doing Legal Research in Canada

I realized somewhere through the difficulties of tracking down information that was purportedly available to the public that I could either surrender my goal of reporting on the way judges are implicated in bordering in Canada, or I could draw into stark relief the massive gaping holes in our collective awareness of how the juridical sausage gets made. Along the way, I have had to accept that when we talk about the law in Canada, we are talking about a diffuse concept, far less a noun than I could have imagined. The law can never be fully grasped or held—there is always more beyond your reach. We must accept, then, that the way we talk about law performs a powerful narrative of its truthiness[8], and that 'law talk' itself forecloses who can access allegedly public material. As Blomley (2014) notes, "that which we name law …., should be treated as a performance, rather than as a reality that precedes our actions" (134). Recognizing the performative quality of law and seeing the way reality is produced through legal decision-making also allow us to see the limits of law: the brackets that produce legal meaning as well the traditions, institutions, and practices of legal knowledge transfer. In this way, we find law effectuated in a range of places and ways as 'the border' pulls in every scale and arena of law to perform banal bordering—everyday security practices that draw on a series of actions that reconstitute the border at specific sites and on particular bodies. There are of course many ways to make sense of this bordering work, but I have chosen to examine the law's role. Specifically, I fixate my analysis on the role of the *Charter* in these decisions because the *Charter* has had a particular and profound effect on Canadian jurisprudence as a whole. Along its short lifespan, the *Charter* has offered a powerful new vocabulary for conceptualizing the spaces of law where courts, particularly the Supreme Court, can affect change.

[8] While the term originated with Stephen Colbert's "faux pundit" as a way to describe "what wasn't truth, but a mere approximation of it", linguist Ben Zimmer (2010) notes the term has entered popular parlance: "It has even entered the latest edition of the New Oxford American Dictionary, published earlier this year, with Colbert explicitly credited in the etymology". I use the term here to convey a way truth is effectuated, a distinction from the facts, and like Colbert, something that approximates, but performs truth.

Getting on the Docket: How Courts Work in Canada

That which we call the law or legal institutions demand a bit further clarification and discussion, if only to appreciate the many courtrooms and stages arbitrating border practices in Canada. I take as my focus the courtrooms throughout Canada where rights claims are argued and bordering is taken up by judges and lawyers. This has meant for me getting acquainted with the technicalities of the Canadian legal system and the Canadian courtroom. In Canada—and in this thesis—there are two concurrent court systems running alongside each other: the Federal Courts and the Provincial Courts. The Federal Courts[9] (Administrative Tribunals[10], the Federal Court, and the Federal Court of Appeal) have a wide jurisdiction that belies a national focus—cases involving Crown corporations, "intellectual property issues covering copyrights, trademarks, and patents", and challenges to the Competition Act are heard in the Federal Court (H. A. Johnson 1995, 764). Most relevant to this research is the Federal Court which takes up cases relating to immigration, citizenship, and refugee issues. Then Chief Justice of the Federal Court Frank Iacobucci offers a useful summary and reflection of the Federal Court's work: "The Federal Court, as a public law court in the Charter era, is thoroughly implicated in the fashioning of a judicial response to the important questions of the Charter and its impact on our lives" (1989, 326). In carving out jurisdiction and scope for the Federal Court, Parliament was cautious to protect the broad and eclectic mandate of the Provincial Courts. Chiefly, for this work, Provincial Courts are where most criminal cases enter the Canadian legal system. We cannot quite say that the Provincial and Federal systems are parallel tracks—"Canada has clung to Provincial court administration" which helps explain why so many of the border security cases pop up at the provincial level (H. A. Johnson 1995, 764). However, at the end of these Provincial and Federal tracks lies the Supreme Court, the final court of appeal for Canada tasked

[9] The Federal Courts are also understood to include the Tax Courts and the Military Courts, but the cases I consider in this research do not enter those courtrooms, but this does not rule out the possibility that questions of bordering could be taken up in these settings.

[10] While there are many administrative tribunals, the largest, and most significant to this work is the Immigration and Refugee Board of Canada (IRB). The IRB decides, in a somewhat less formal setting, on a range of immigration appeals. Still, any party to an appeal—the individual appearing before the IRB, the Minister of Public Safety, of the Minister of Citizenship and Immigration may appeal to have the case heard in Federal Court, a rerouting of the case out of an administrative tribunal and into Court system terminating with the Supreme Court of Canada.

with “dealing with legal questions of national significance” (Iacobucci 2002, 30). Given this parameter, The Supreme Court must say ‘no’ to many cases, which in turn leaves standing decisions from lower appeals courts. In 2015, 467 applications for leave—appeals for consideration by the Supreme Court—were made. Of these, 43—or a modest 9% were granted leave and heard by the Supreme Court (Supreme Court of Canada 2017). In this way, the cases I consider that go to Supreme Court represent opportunities to question and clarify a constitutional issue of national significance.

As a starting point, it is useful to understand where people enter the legal system. When one begins to look at several key cases, the heterogeneity and diversity of entry points becomes apparent. Search and seizure cases, for example, often begin in a court of provincial standing, such as the Queen’s Bench for Alberta, or the Ontario Court of Justice before being appealed first to a provincial appeals court. Courts in Canada have seen a drastic overhaul beginning in the 1970s and continuing through much of the time period considered in the case law here. For instance, in 1971 the Exchequer Court was replaced by the Federal Court. Addressing an audience of Toronto lawyers in 1989, then Federal Court Chief Justice Frank Iacobucci (who would later go on to serve as a puisine justice of the Supreme Court) described the new Federal Court’s mandate: “as a public law court in the *Charter* era, [the Federal Court] is thoroughly implicated in the fashioning of a judicial response to the important questions of the *Charter* and its impact on our lives” (Iacobucci 1989, 326). In 2003, the *Federal Courts Act* divided the Trial Division and Appeal Division, creating a Federal Court of Appeal as an intermediate stop before arriving at the Supreme Court (R.S.C 1985 c. F-7). While these changes have helped defined the scope and role of a federal court in Canada, the recently unsuccessful appointment of Marc Nadon from the Federal Court of Appeal to the Supreme Court was a significant referendum on the role of the Federal Courts. The *Supreme Court Act* (R.S.C 1985 c. S-26) requires justices who come to the bench from Quebec (in particular) to come from that province’s Superior Court or the Court of Appeal. Beyond Quebec, the Act makes no mention of service on the federal bench as a prerequisite for appointment. While the details of this appointment presented critics a rare opportunity to block a Prime Minister’s nominee to the Court—Nadon was named but never served—this situation also calls attention to how the Federal Court occupies a liminal position and is still finding its sea legs and claiming its turf. Provincial

courts have also gone through their own genesis, particularly in Ontario where legislators aimed to address confusion and inconsistences around District and County courts with the *Courts of Justice Act*. While some of the cases I review did begin in county courtrooms, Ontario today operates similar to other provinces, with a Superior and Supreme Court.

Immigration-based matters are more complicated; some individuals see their refugee claims adjudicated in an IRB admissibility hearing, while security certificate cases involve a wide network of courts to arbitrate the various substantive and procedural due process issues these cases undoubtedly produce. In one courtroom, lawyers may be advocating for the rights of the detained to have shoes, or fresh air, while in an entirely distinct venue, counsel may be finding their way through questions of national security and threats to Canada. Security certificate cases, insofar they involve non-citizens almost certainly bring in the IRB. As these cases usually call in Ministers of Public Safety (MPSEP) and Citizenship specifically, security certificate and deportation cases often pass through the Federal Court, before going to the Federal Court of Appeal and onward to the Supreme Court. Of course, not every case makes its way all the way to the Supreme Court which is tasked with answering constitutional questions. It is not sufficient to say that border work is of federal nature and therefore must be heard by a court with federal standing. Rather, for a case to be heard in the Supreme Court, it must present some complication to pre-existing law and previously offered decisions that demands further clarification from this bench. My research is very tightly focused then, in that I consider only cases that have moved their way through the courts system up to the Supreme Court. These Supreme Court of Canada (SCC) cases are ideal objects of inquiry for two reasons: they provide researchers with a lengthy legal record and history to examine, and they represent interjections into the way borders are conceptualized at the highest level of the legal system. After all, cases are only heard by/in the SCC if they are considered to complicate/stymie/intervene in per-existing laws or SCC decisions. As a result, the two cases I consider here—both search and deportation cases—have had resonating effects on the way legal spaces of bordering are taken up across the country. Above all, Supreme Court decisions become guideposts that help lower court jurists compare, contrast, distinguish, and make legally cogent decisions.

Research Process and Design

I began my research by searching common academic legal databases such as Westlaw to find any available cases involving the Canada Border Services Agency as a party. This proved not to be fruitful for at least three reasons. Firstly, the CBSA is a young organization with a mandate understood and affirmed through a broader tapestry of legal decisions and Acts of Parliament. In fact, while the cases I look at here have had an undisputed effect on the CBSA, the organization itself is mentioned only once in passing. This lone mention speaks to the relative youth of the CBSA itself—only 14 years old as I write this—while bordering and space making have been longer, ongoing processes in Canada. Secondly, the CBSA answers to many masters; technically managed under the Minister for Public Safety and Emergency Preparedness (MPSEP), the work of 'border services' overlaps with a wider constellation of agencies and ministers. As a result, the CBSA would often not be the official respondent on cases involving policy or ministerial decisions. So, thirdly, when the CBSA did appear as a respondent, it was often in matters of the Agency's own human resources or in the Canadian International Trade Tribunal. The CBSA's human resources have been well-documented—both in the media and in *Canada (Attorney General) v. Johnstone* (2014 FCA 110; 2015 2 FCR 595) where a Border Services Officer (BSO) sued the Agency for discrimination in the scheduling of her shift work at Toronto's Pearson Airport after returning to work from maternity leave. Although Johnstone's case reveals major institutional growing pains and a disorganized workplace culture, it does not offer much insight about the laws governing officers at the border. As a methodology for seeking cases of bordering in the courtroom, honing in on cases that mention CBSA was unsuccessful.

Undeterred, I considered the elemental functions of bordering that I wanted to investigate: the search and seizure capacities of the border, and the assemblage of decisions that speak to some of the post-9/11 anxieties around bordering well within the territory through a practice known as security certificates. With these two interests in mind, I began from the top-down by searching the archives of the Supreme Court, all but assuring that what cases I did find would have a long and well documented appellate history. I did not select these cases with the hope that they could represent the total sum

of bordering effects, but as two distinct glimpses into border work and how judges rationalize and make border spaces. While distinct, these cases do reveal important similarities (for example, the concept of detention). Both cases also speak directly to the judicial process of bordering, but in different ways. That is, while the search and seizure cases of Simmons and Monney relate directly to legal action at the border itself, Charkaoui's security certificate case relates more generally to processes of spatial exclusion, and the ideological and penal work of bordering more generally. I also recognize these vantage points were some of the clearest to tackle from my position in British Columbia. My goal has been to evaluate how judges think, talk, and make space—how the law works. I have pursued this end in the best ways that were possible given what was available and what has been harder to come by. As I have said, with so much legal knowledge and materials kept in Ontario, perhaps my greatest service can be to call attention to the need for more research closer to the scene, and ultimately, an emancipating of legal knowledge to the rest of the country.

The Records Centre at the Supreme Court of Canada has proven to be a useful resource in my work. When material is digitally available, I have been fortunate to get quick access to factums, transcripts, and appeals books. Still, most documents are not yet digitized and were cost prohibitive to view until I could be physically present at the Supreme Court to view the documents firsthand. Other courts had far more limited record-keeping practices and were generally not digitized. As such, I have not been successful in obtaining material directly from lower courts. Decisions are all readily available, and in some cases, non-profits have made their factums public record as well, so I have constructed a narrative, however incomplete, through reading these decisions and factums as framing the way Supreme Court justices make sense of the law and their range of available options within it. Learning about these cases beyond the court records has been unexpectedly difficult. That difficulty—for instance, to learn anything about Laura Simmons outside legal proceedings, or to understand how (or why) Isaac Monney came to lodge narcotics inside his person—speaks at once to Canada's relatively modest interest and awareness in its Supreme Court as much it does to the ways the trials of drug smugglers were not framed as a rights issue every Canadian should care about. The Supreme Court of Canada asks for, and gets, by extension, less attention from the people it serves than its U.S. counterpart. Record-keeping has been spotty, and

cameras have only recently made their way in. While national newspapers employ a Justice reporter, their work seldom makes it 'above the fold', if at all: The *Simmons* case, which has continued to influence the way border work is done, received no coverage at the time. In part as well, this is likely because it so easy to view cases like *Simmons* and *Monney* as trials for 'bad guys'—and not to see how the rights of drug smugglers in turn says something about the rights of everyone at the border.

In 2015, the Supreme Court instituted a new program for frequent users of Court files and in June 2015, I was approved for registered access to obtain court records by the General Counsel and Registrar of the Supreme Court. In the course of writing this thesis, I visited the Supreme Court 20 times during 2014, 2015, and 2016. I have found these visits to the Court to be the most productive and easiest way to access the information contained within this research. While my requests for records from BC would have to go through an application process, with larger requests needing permission from the Registrar, requests to view records in Ottawa are as casual as an email. Cases are contained on microfilm reels, surely a dated technology, replete with scuffs, scratches, and smudges. The microfilm reels represent a string of docket numbers, with bigger cases often being subdivided into several volumes. There is no shortcut for the tedious work of loading a film reel and leafing through all the grainy pages available to find the documents in question. A Supreme Court case often, but not always, begins with the paperwork of the appeal, the request to hear the case in the Court. Most of the cases I examined spend the bulk of their time in testimony and oral arguments before presenting majority and dissenting opinions. There is always, however, a lingering feeling that what you are reading is still less than complete. The Court has and continues to tweak its record-keeping and access policies, but materials from the early-post-*Charter* days feel, even after an afternoon in the library, scattered. This is not wholly an indictment on the Supreme Court but a reflection on an evolving and expanding justice system throughout Canada. Given the relative youth of the West, court records in British Columbia align most tidily with the modern courts we today know. In contrast, Ontario has been more a case of trial and error, with court administration having seen perhaps the greatest changes in the last 30 years.

What makes using Supreme Court arguments so useful is the way they hinge on counsel's ability to make arguments fit within the brackets of the *Charter.* As I have compiled the back histories on cases I review here, having the benefit of the Supreme Court transcripts helps to clearly demonstrate the way judges and lawyers were articulating the Constitutional limits of border work. As a legal frame, the *Charter* has expanded the mandate of the Court. At the same time, it makes the spaces of the border more heterogeneous as ports of entry are held in comparison to a broader set of spaces and sites where the *Charter* exerts influence. This is at once a challenge as much as it is a possibility; examining borders as a legal space means identifying all the untidy ways that bordering scatters/leaks into other liminal places away from the border line. I came to utilize the *Charter* then, as a way of tracing how border work in SCC cases powerfully draws liminal spaces well into zones of Canadian jurisdiction, and how that drawing in simultaneously creates many unstable comparisons that anchor borders in and out of where we assume our courts can go.

Additionally, I have consulted relevant Acts of Parliament, notably the *Customs Act* and the *Immigration and Refugee Protection Act* as these pieces of legislation are taken up by jurists in the cases I examine. It is worthwhile to point out some of the difficulties overcome here as well. In most instances, cases examined here refer to historical law, or versions of law no longer in effect. Given the dismal state of Government of Canada websites, tracking down revised statutes was challenging. It is important, however, that when speaking of changes to the *Customs Act* or the *Immigration Refugee Protection Act* that I could actually draw on the versions of law that would have been in force when these cases were underway. In order to realistically understand the manner of argumentation and the way distinctions and brackets were drawn, I would need to know what judges and lawyers were working from. In many cases, finding the accurate law as it existed on the books historically means consulting the *Revised Statutes of Canada.* Since Confederation, there have been six printings of the *Revised Statutes*; most of the revisions and legislation I draw upon come from the 1970 and 1985 iterations. In particular, the 1970 version is not the easiest to find and it was a great struggle to track down the *Customs Act* as it would have existed in 1982 when Laura Simmons came through the international arrivals area of Pearson Airport. In all cases, I have tracked down and reference the versions of the laws as they were

heard before the courts at the time. The fact that such basic legal research proved challenging—admittedly, my humble university without a law school could only get me so far—present a frustrating view of legal research and legal knowledge production in this country, where information is boxed, fixed, and stored in specific places. The more generally willing I became to centre myself in Ottawa and Toronto, the more likely I was to find resources to help tell a legal story. What could be gleaned from BC—especially in understanding how legislation is amended and evolves as a response to legal decisions—was skeletal at best. Similarly, on the point of being willing to move to where the information exists, I summoned from Library and Archives Canada all applicable internal government files related to border enforcement and deportation. While LAC maintains a Pacific Region repository steps from Simon Fraser University, most materials of a federal government nature exist solely in Ottawa and do not circulate. Although the Canada Border Services Agency did not yet exist for many of the cases I consider, a careful review of the *Canada Border Services Act* (S.C. 2005, c.38) gives helpful cues into the nature and extent of what constitutes bordering, or at the least, border services. Still, the major test facing judges throughout the cases I look at is to consider how and if these laws violate *Charter* rights. In so doing, judges engage in an ambitious re-scaling of the law—from the big platform and wide, the invocation of the *Charter* brings the law—and the border—to the individual.

I did much of my research and data collection in the waning days of the Harper government, when government agencies were hostile toward researchers and ATIP requests regularly took too long. There are now signs of opening and transparency with the election of Justin Trudeau and the Liberals. Soon after this change in power, I filed for proactive disclosure of materials already released under previous ATIP requests. Within two weeks, I was sent a DVD with a full complement of Citizenship and Immigration Canada (CIC) training manuals that I have been able to make use of here. Still, the relative frictionless process suggests more access for researchers and more material might be available. Today, a new Open Government website allows individuals to make 'informal' requests for previously disclosed material. The CBSA is still notoriously awful at disclosing information—mostly disclosing in part or contending that such information does not exist—but the relative ease through which these decisions can today be scrutinized is a marked change, one that occurred toward the end of my

work. This research isn't really an investigation into the CBSA, but bordering practices as understood by the courts. However, researchers today are better positioned to contextualize the CBSA's role in bordering.

Border work is happening on a range of scales often disconnected from the edge of the nation-state. Before delving into a case study analysis of each SCC decision/case, I think it is useful to explain my chosen analytical tools and to help the reader grow accustomed to the vocabulary of 'bordering', 'bracketing', and performativity that my analysis and critique hinges on. I have chosen to explain legal decision-making as 'bracket-making' or 'framing' because I have found such a toolkit helpful to explaining *how* law works. Rather than essentialize law as a monolithic thing, the use of bracketing and framing is helpful to begin to look at the way knowledge is made legally legible and the way decisions are produced within Canada's courts. By focusing as well on the words of judges and lawyers, I also aim to see the law less as a big mythic force and instead as "a socially embedded process of knowledge production that enrols individuals and institutions beyond the confines of law courts and judicial pronouncements" (Jeffrey 2011, 346).

The chosen lenses of search and seizure and deportation

Open up any Canadian newspaper and you are bound to find talk of a "routine border search", but simply placing words together does not make them meaningful (Boyle 1993, for example). Can any border search be said to be routine, if after all, the search is based on the well-grounded suspicions of the traveller or their luggage? Still, the general pervasiveness with which media outlets, judges, and everyday travelers talk about routine searches at the border somehow suggests some kind of predicable fashion to the work. In reality, the term has a kind of power to gather a broad cross section of surveillance practices under the umbrella of 'routine'. Similarly, a pervasive discourse of "trade offs" has worked to connect border security to the global war on terror and the associated need to defend Canadian sovereignty (Aiken 2009, 172). Like search and seizure at the port of entry, security certificates can be issued (and have been issued) under the lower threshold of a reasonable suspicion. Conceptualized under a similar discourse of 'national interests', deportation and customs work can both tap into

brackets that frame border work within a “standard lower than probable cause” and thus, “justified by the national interests of sovereign states in preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue” (Dickson, CJ in *R v Simmons* [1988] 1988 CarswellOnt 91, para 48).

Looking, as I have chosen to, at searches and deportations, affords us a view of the two, albeit at times muddled, components of border work today: the control of goods (customs) and the control and people (immigration). These two facets of border enforcement have long existed in a complicated slurry of bureaucracy, with multiple ministries and agencies taking on the various tasks of monitoring the flow of goods and people into Canada. The border in Canada had been going through changes before 9/11, a subtle shift from the border as a site of revenue collection to the border as a complex space engaged in a broadening set of responsibilities. The changes are illustrated in the mere names of the groups staffing the border. Until 2003, passengers dealt with the short lived Canada Customs and Revenue Agency, and in the years since, border work has been divested from taxation into the Canada Border Services Agency. Moved into a new ‘super-ministry’ designed to mimic the US Department of Homeland Security, CBSA hints at a broader mandate and a new fixation on the border as a site of securitization.

Still, the post-9/11 fixation on controlling the flow of people and goods has not been vested neatly into the CBSA. Much like in the United States, the frontline officer, employed by CBSA, works triage for a broad set of mandates and policies, most obviously, Citizenship and Immigration Canada (CIC). Today, border services officers (BSOs) are tasked with a broad security mandate as an agency of Public Safety Canada, manifested through the inspection of goods and people at points of entry. Customs work calls in a host of agencies and laws concerning taxation and immigration work draws upon on visa and immigration policy. All told, border work has a broad and shifting mandate that answers to many masters. The consideration of these two facets of border enforcement—people and things—demonstrate two important ingredients of border work. In some ways, the two are never really that far apart: someone who is delayed as their bags are searched finds that it is not just their goods but also their person that are held in waiting. My goal in this work is critique border work by examining

how some of this work has at times run up against constitutional rights. I realize that there is more to border work than customs and immigration enforcement, and more too as well than what finds its way to a courtroom. Still, we will find more that unites the practices of surveilling goods and bodies than we might initially think, and see how expanded executive powers in the years since 9/11 have allowed policy-makers and intelligence experts to situate national security anxieties at the space of the border. All of this makes the border—in its many forms—a constantly evolving test site for the 'securitization of migration'. This work attempts to contribute to that discussion and to situate early law-making and space-making at the port of entry as performative of nation, security, and sovereignty.

Bracketing, Framing, and the Mechanics of Making Space with/in Law

In making sense of the way in which the courts engage in bordering, I use the concept of 'bracketing'. Drawing on Michel Callon's idea of framing, I look to Blomley's development of bracketing as a useful way to approach law and the discourses of the courtroom. For Callon, framing undergirds decision-making and what he sees as "calculation": "a clear and precise boundary must be drawn between the relations which the agents will take into account and which will serve in their calculations and those which will be thrown out of the calculation as such" (Callon 1998, 16-17). Callon comes to framing from work by Irving Goffman in theatre and performance studies. The disciplinary difference opens up great possibilities—and perhaps helps us see how this concept can be of use in spaces beyond its initial intended audience. Goffman's work with framing speaks to the organization of the theatre, and what both Goffman and Callon identify in framing is a relational effect that governs or dictates courses of action.

Drawing on Callon, Blomley conceives of bracketing as "the attempt to stabilize and fix a boundary within which interactions take place more or less independently of their surrounding context" (Blomley 2015, 169). Certainly the law and courts are not alone as technologies of space-making, but the goal of this research is to examine how law as a concept goes about world-making. By investigating the how—that is, as opposed to simply suggesting that law is implicated in the making of territory—I seek to

trouble any perceived distinction between "'law in action and 'law in the books'" (Cover 1984). My endeavour here is of course indebted to more than two decades of scholarship on legal geography that has sought to conceptualize law and geography as mutually constitutive. As Delaney (2004) notes, "`the legal' and `the geographical' are no more encountered separately than are `the political' and `the economic', `the social' and `the sexual', or any of the other analytical chunks into which scholars are prone to break up reality" (2004, 849–50). The divide between law and geography may be forced and artificial, as Delaney and others in the legal geography canon have noted, but it is also destructive to a more fulsome understanding of the way both concepts—law and space—function. By taking "the spatiality of legal practices seriously…we should cease to look upon the law as a closed, formal and acontextual system" and instead begin to see the way it is deeply referential, relational, and performative (Hogg 2002). Together the legal and the spatial form the bounds of a nomos—a "normative universe" that, as Cover (1984) suggests, is constantly open to reinterpretation and negotiation: "we constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void" (1984, 4). This world making reinforces norms around space—for instance, public/private, home/work. These norms then come to create powerful knowledges and framings through which we and our actions are made distinguishable and recognizable in a courtroom.

One of the challenges in making legal meaning arises from the way we translate it into law, which assumes an equivalence between actions on the street and how they may be discussed in a courtroom. The "unsolvable tension" is the "theoretically endless variability and open-endedness on one hand, and the limited variability and closure of possible legal states on the other" (Szabo 2004, 67). Those possible legal states are our brackets, or the means through which all the possibilities in the real world are constructed as legally knowable relational effects in the courtroom. The concept of bracketing as I aim to use it here draws on legal scholarship that has attempted to reconcile how the law functions on the world that it makes, how meaning is made, and how stories are told (Sheppele 1989).

It is helpful first, then, to explain what 'brackets' do. This demands identifying how brackets are a tool to dissect legal decision making, but do not explain the decision

in their own right. Rather, brackets are devices of, to use Dworkin's term, "interpretation" that set up relational effects between individuals, spaces, and state power that can then be made legally legible as subdivided relationships to be triaged and argued under some performed sense of a control group. As researchers, brackets become effective devices to identify the norms and worlds performed in the court, but they do not explain those worlds. To understand how legal discourse and decisions function, the bracket has to be understood as serving a particular function of 'signification' and equivalence (Cover 1984). The bracket is the "black box" of legal decision making—where a mess of positions, policies, relations, and effects go in, and something resembling a cogent decision based on precedent comes out (Valverde 2005). Indeed, taking a flashlight into the black box means troubling the "the taken-for-granted machinery of law" and understanding not only how the gears turn for the sake of it, but because those gears spit out the legal positions and relations we occupy and inhabit (Valverde 2005, 427). While it may be well understood that the law produces consequences, effects, and relations, it may be less considered *how* a nomos, a world of law, can come to be made.

My goal here is to demonstrate how what I am calling brackets facilitate world making and legal knowledge production. Beyond borders, my interest here is what the law does, and how the law works. At its heart, law is a way of seeing and making sense of our worlds—of people, spaces, and events. Understanding the way legal actors think, talk, and make sense of events means recognizing that law is performative. Performativity interrogates the way representations, projections, and utterances are not a static thing but a series of "'doings' that become naturalized" in space and time (Nash 2000, 655). Law is one of these 'doings'—in fact, really, a whole litany of doings in resonance. To claim that law is performative is to note that law is really an idea produced around a series of relations, not simply between people, but with space, language, economy, symbols, and standards. Law effectuates and makes vital these relations, drawing many connections and relationships together to form a particular approach to answering legal questions. Courtrooms then, are specific spaces in aid of this work—with designated seats for judge, jury, and lawyers, and with ritualized procedures, symbols, and icons that make the courtroom a distinct space from other sites. Like Goffman's 'stages', courtrooms work much in the same way, with a particular layout, language, and use of space to signal that the work that goes on inside the court

is distinct and separate from the outside. Trials are commenced formally by rising before judges and taking oaths to tell the truth. The written decision itself can also be thought of as a bracketing exercise, textually signifying how the decision is to be situated (with reference to this prior decision, or that academic reference on constitutional law).

There are many approaches and techniques used by legal professionals to make sense of the world and hear the messy conflicts of a court case in the language of the law. I examine but one approach here not to give the concept I investigate any sort of primacy, but to draw further attention to how these performed relations that undergird the law can be made, cobbled together, and operationalized. Examining, as I do here, the work of making and using brackets is about understanding how legal positions are made and contested. If the challenge, as Nick Blomley notes, "is to find a conceptual language that allows us to think beyond binary categories such as 'space' and 'law'", I offer bracketing to that end (2004, 29-30). Brackets, as I am using them here, help us make sense of how the legal and spatial are so deeply entangled and also provide a conceptual framework for how legal arguments are made and hang together. As the curtain fades on a Broadway show, so do taps of the gavel signal the start of a legal proceeding. Much as territorial boundaries embody the performance of geographic knowledge production, these brackets of what will be said, heard, and decided upon enact the performance of legal knowledge production, where the marking out of law and the rendering of legal opinion represents a productive 'symbolic power'. The law proclaims, names, and, in its utterances and pronouncements, creates (Labove 2016).

For Blomley, brackets are implicated in a need to 'disentangle' "what is, and what is not, to be included within a particular setting" (2014, 136). Law finds meaning in an ability to identify a set of relations as "legally consequential" and "detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame" (Blomley 2014, 136). The function of this project is to interrogate some of the unique brackets that might be in play at a given moment. To that end, it is helpful to identify what we might call 'everyday brackets' as a means of understanding how I am making use of the term to explain legal decision making. A contract. A title or deed to land. Even my receipt for lunch. All of these are making use of brackets at their most elemental level. The contract spells out those who are party to the terms of the

agreement—all others are excluded. When I went for lunch today and paid with a credit card, I signed to signal that I promised to uphold my commitments to pay and so I entered into a contract with the hamburger vendor where he would provide me with food in exchange for my promise to pay and to ask the credit card company to pay on my behalf. The power comes in the way the receipt or contract distills and brackets off all the other information and material swirling about: the hamburger vendor, for instance, likely does not care that I am an Aires, or what sports teams I root for. Nor does he even care about other contracts I may already be in. Ours is a short contract, to eat up and pay up. Contracts do their work by disentangling many bits of information and pushing those aside; what is left, what remains in the brackets, is the matter at hand.

When we speak of 'brackets', we are calling attention to the way legal adjudication is a relational process of meaning-making. Much as boundaries and borders are relational and in their drawing create spaces of meaning—'Canada', 'the United States'—brackets help make sense of the world, legally. The legal world imagines the spatial "as a series of containers or bounded zones, the specification of which reflects inherent or natural modes of ordering" (Blomley 2010, 204). Brackets work on our inclination towards order. As we compartmentalize, we can make meaningful distinctions that then help organize people and space. Much as Blomley's 'cuts' (2010) create meaningful distinctions and relationships to property, where "'cuts' organize and constitute the world in particular ways", brackets create and define the relational effects of law (2010, 207). A bit of memory back to high school algebra is useful here. Brackets come in many forms in math, surely, but two features are helpful to us. First, we were told to bracket related integers together—never mind how they are related—but that we note their relation through their bracketing. By placing terms together, we force the mathematician to find their commonality. Negative, positive, even, or odd, what we placed in those brackets determined a particular relationship. Secondly, when those brackets were parentheses, the material inside the bracket was given primacy. Work inside the parentheses first, went the order of operations. In the courtroom, everything that can be made legible will be bracketed into its own set of parentheses, and while this would surely stifle the solving of algebraic expressions, it is a useful reminder of the way in which concurrent, overlapping, and even contrasting brackets are trucked out in the

effort to make the vast set of possibilities and realities fit into the legal relationships undergirding any one bracket.

The concept of the 'bracket' is also useful because it can captures a long history of legal work. When Oliver Wendell Holmes proposes a "path of law" built out by a range of actions and contingent reactions, he is speaking of brackets (Holmes 1897). The work, as he notes, "to reduce a case to a rule" is about the production of the binaries that will frame legal decision making (1897, 474). Brackets are discursive devices built around binaries—this, not that, here, not there—and the legal profession maintains a fixation on binaries as it considers the relationship between the case at hand and precedent. Justices in Canadian courts, for instance, will 'consider' some cases in relationship to the matters at hand and 'distinguish' others. Black box meets sorting hat as brackets work to cluster cases together among similar Constitutional questions. Legal knowledge is produced then, through efforts to translate—to take what is before the court and explain it within the canon, vocabulary, and semantics of law. In defining bracketing, Blomley identifies the binary-making function of bracketing as "the attempt to stabilize and fix a boundary within which interactions take place more or less independently of their surrounding context" (Blomley 2014, 135). While I'm cautious not to complicate our usages of the term 'boundary', I will indulge in the exercise for a moment here to at least help describe the technique of bracketing. By identifying boundaries, Blomley is suggesting a binary is set-up—here, the matters before the court from all the surrounding appendages that can be left outside, beyond the scope of the court's decision making. Bracketing is then a way that we may "divide up our experience into separate compartments or categories", creating, for instance, a discrete piece that is for the court, with its "own kind of validity, its own language" (J. B. White 1990, 3).

Take, for instance, this discussion in *Hunter v. Southam* (1984 CarswellAlta 121) a case involving a search of the Southam Corporation and their *Edmonton Journal* newsroom, a case I will discuss in further detail later for its value in establishing precedent around search and seizure procedure after the *Charter:*

> The Plaintiff has argued that the meaning of s. 8 is not clear because there are two words in the French version, namely "fouille" and "perquisition" where there is one word "search" in the English version. The Plaintiff translates "fouille" as "rummage" and argues that the

French version therefore prohibits unreasonable rummaging from "fouille" and searching from "perquisition". (Southam v Investigation and Research of the Combines Investigation Branch 1982 CanLII 1136, para. 13 in decision)

Beyond clever word play, the disagreement reveals the way legal definitions and distinction can be open to interpretation and argumentation. In this case, a new bracket—French translation—works to complicate and undercut the primacy of a bracket that defines search by its English definition. Why look to the French? Because doing so offers a competing, alternative bracket, a different way of organizing and seeing the world. What this fixation on the French reveals though is the way legal actors rely on brackets to contain and isolate relations around a particular argument. *Southam* hardly rests on a bit of bilingual wordplay; not to be outdone, the government agents who raided the *Journal's* newsroom believed to be searching within the bounds of a section 8 search and seizure claim. Journalists in the searched newsroom could, and did, see another constitutional bracketing; that the state searching of their offices amounted to a breach of freedom of the press. All these claims are bracketed in their own way by legal procedure—by judges asking questions, and by lawyers who are consistently rearranging the decks to hopefully persuasive ends. Judicial contests are in a very real sense contests fought in and through brackets – what evidence is to be excluded? What body of law is implicated in this case?

In his 2004 book, *What Do Pictures Want?,* WJT Mitchell examines the way the visual stands in for a host of emotions, feelings, and behaviours. Mitchell argues that behind standing in for something, pictures want—that is to say, they have a politics worth interrogating as more than static representations of things. In describing the animism of images, Mitchell notes that shrewd ad executives know that "some images, to use the trade jargon, 'have legs'—that is, they seem to have a surprising capacity to generate new directions and surprising twists in an ad campaign as if they have an intelligence and purposiveness of their own" (Mitchell 2004, 31). Thinking about Mitchell and his pictures seems a good way of thinking about brackets, because new directions and surprising twists are exactly what new brackets make. This allusion to literature and media studies is not totally contrived: much like Mitchell's pictures, brackets are embedded in practices of representation and interpretation, of drawing connections and

reasserting contrasts. This is a reminder of representational power wrapped up in the making of a bracket but also a call to consider what brackets want—that they imagine particular outcomes of world-making and are tools toward that end. Lawyers and judges will toss around several brackets, a whole smattering of categorizations and segmentations that do not simply make circumstances intelligible; they alter positions and make those positions recognizable within the courtroom. To push Mitchell's metaphor one step further, some brackets 'have legs' that take us elsewhere even as actors remain within the courtroom. While it is important to see brackets as devices that build connection and equivalence, I also want to stress that these connections are tools to derive particular outcomes. While the objective is translation of reality into our world of laws, individual brackets work toward unique outcomes, asserting they represent the 'realest' meaning.

Many brackets are in contention at a given moment in a court case; lawyers and judges alike reach for particular brackets that realign people and space in particular and political ways. Some brackets are broad in scope; in *Canada v. Canada Council for Refugees,* for instance, lawyers for the Crown attempted to bracket the refugee John Doe outside Canada and outside the Charter, while counsel on "behalf of John Doe, an asylum seeker from Columbia (in the US), seek redress from the Federal Court by calling into question the way the Safe Third Country Agreement is in conflict with pre-existing law and international obligations" (Labove 2016, 197). The STCA is a bracket, that creates relational effects—between countries that are so-called 'safe' (here, the US and Canada) and those that are not, between those individuals who are physically present in Canada and those who are not, and as a result, between those who may activate their *Charter* rights and those who may not. The *Charter* itself is a bracket and within it, those who make use of its legal protections are bracketed as well. Most of the rights enumerated in the *Charter* are guaranteed to all legally present in Canada, some actually can pick up and move with Canadian citizens, such as to vote and to return home. Lawyers as well look to legal precedent to find openings, to call out ways that courts have conceptualized the messy heterogeneity of a legal case within a particular section, and how, in some cases, a piece of constitutional law, like a section of the *Charter* can be imagined to have a different scope than otherwise argued. To that end, in Chapter 5, I look at how intervenors in *Charkaoui v. Canada* sought to locate the racial

profiling of those detained under security certificates as a violation of section 15 of the *Charter.* Writing in support of Adil Charkaoui and his co-appellants, the Canadian Council on American-Islamic Relations (CAIR-CAN) suggests a kind of primacy for some *Charter* rights, offering a bracket test around the concept of 'equality under the law' as a first course of action for the Court:

> This Court has long held that all *Charter* rights strengthen and support each other, and that section 15 is the "broadest of all guarantees". Equality therefore plays an important role in framing and informing other *Charter* rights. (Charkaoui v. Canada [2007], para. 49 factum of the intervenor, CAIR-CAN)

Note the use of the word 'framing' here. For the interveners writing in from CAIR-CAN, section 15 is itself a bracket, a way of looking at the facts of the case. Their factum on appeal encourages reorganizing the facts of the case (security certificates, discussed further in Chapter 3) to view section 15 and equal protection under the law as the key test. That fact that it 'frames' all argumentation demonstrates how brackets can be deployed to re-order and argue competing perspectives. When CAIR-CAN looks to develop its 'frame', its bracket, it uses the words of the Court to its argumentative end. This is compelling, but hardly unique. Clever lawyers and interveners find that the Court has produced a trove of opinions and reactions. Finding ways to pull out these prior utterances from the Court is the basis for building brackets—particularly the compelling, convincing kind designed to spin and twist an argument by reminding judges how they've reacted and decided in the past.

It follows then that brackets are political. As lawyers look to assemble relations and material in particular rhetorical ways, they are seeking to advance particular argumentative or political ends. Thinking again about *Canada v. Canada Council for Refugees,* we realize that a lot hinges on an ability to push the refugee Mr. Doe outside the bracket of standing. Not everyone has standing to bring a case before Canadian courts; and the Crown has sought to demonstrate that by Mr. Doe's mere presence in the United States, he is beyond the scope of the *Charter.* But, by his own admission, Mr. Doe is in the United States because the Safe Third Country Agreement all but guarantees his *refoulement* (return) to the United States. Canada considers the US 'safe' for refugee resettlement purposes, as safe as its own territory. STCA creates a

bigger border around the two countries together, and when Mr. Doe arrived in the US, he simultaneously entered safe North American space, according to counsel for the Crown. But “in the performance of law, border expansion goes both ways; the border can be seen as pushed out to already place Mr. Doe in ‘safe’ territory, but it can also be read as a space of rights and so Mr. Doe’s access to Canadian law from outside the country would constitute its own, however oppositional, border expansion” (Labove 2016, 198).

In the course of legal proceedings, brackets frame legal possibilities much as a physical courtroom creates an appellant, respondent, and judge. When cartographers draw a line on a map they create geographic knowledge through the production of spaces on either side of the line. Similarly, when legal practitioners frame their activities and positions within the context of a bracket, they are creating legal knowledge. Crumbs of data become bracketed material to be taken up inside the courtroom. And while legal discourse aims to flatten the topography, remove difference, and use brackets as a kind of common language, all parties remain committed to the addition—and subtraction of increasingly more bracketed out material.

Good lawyers realize the value in bringing in helpful “surrounding context” especially as it serves their client (Blomley 2014, 135). Humans engage in this practice all the time. Imagine being pulled over for speeding. You might find yourself bargaining with the officer, including information that you needed to rush to the hospital. As the officer looks to slap you with a hefty ticket, your inner negotiator might swing into action to find other bits of information to complicate his decision making. In that exchange however, most other context is bracketed out; the police officer has written you a ticket without concern for where you were heading or your public celebrity as a prolific geographer. While your exchange with the officer is (hopefully) brief, legal proceedings are a protracted process. Nevertheless, in both cases the goal remains the same; to bring in bracketed bits of information that help clarify or contrast the behavior of each named party. To that end, lawyers must draw on past cases—as will judges in rendering opinions—to show how the treatment of information in this case conforms to or contrasts with prior rulings.

If it would seem that anything can be brought in and made into intelligible material for the court. This is the struggle and promise of legal argumentation—to make some context meaningful and heard, while leaving other bits of information outside the courtroom's doors. If we take White's (1990) suggestion to imagine the work of justice as akin to translation, brackets become the crucial tool in drawing those necessary comparisons, of making things distinct or similar. Of course, and this is White's point, such an approach might not be unique to law and to imagine 'brackets' as a particular way of making knowledge unlike others only serves to make artificial distinctions between law and other kinds of knowledge. His use of the term 'translation' is effective at explaining what the law does—really, what brackets do as well—but it also moves law out of the exotic and into the banal mainstream. All knowledge is made by aggregating what we know into discrete piles and by comparing new, unknown concepts to what we already have in our memory. The memory of a court is not then much different than that of a pupil who learns to add, then subtract, multiply, then divide. More context and knowledge is added by creating distinctions that allows us to compartmentalize the known from the not yet known—from that which will be squeezed into the court's jurisdiction and discourse.

My goal here then is modest; to perhaps remind ourselves that legal knowledge is fashioned in ways we already know and understand and the way courts end up making legal spaces, making territory, is but an elaborate exercise in knowledge production. The story I offer here is one about the technique of making space, of distinguishing this from that, and the discursive steps taken beyond the map to imbue territory with statutory meaning and consequence. While I still approach the courts with a youthful exuberance to learn more, I am forced to see the work of the courts not through legal training, but from the knowledge that I have previously acquired. In conceptualizing the law in Canada, then, I have made my own brackets and framings that rely not on law school but on a broad set of experiences and of course, coursework, reading, and research across the social sciences. I have been forced to clarify, distinguish, frame, and compare the work of the courts to what I might reasonably already know. I am ill-equipped, then, to fetishize 'the law', instead forcing legal process through the sieve of my social science researcher background has meant seeing the law not as distinct but as truly imbricated by all other facets of everyday life.

This work proceeds by deploying bracketing as a way to understand how legal decisions are constituted. I contend that legal positions are performed and those performances are facilitated by the use of discursive cuts that determine what will be heard and what will be left outside the courtroom's doors. I also suggest that as we move our gaze to how legal distinction and difference is rendered, we begin to see the law as a language. The law is, importantly, not merely or only a language, but for this project, calling attention to law's productive power to talk through and translate is crucial. Brackets are at the heart of legal translation. Brackets become discursive tools through which moments can be divided, social relations untangled, and law can be performed. This happens, usually, quite quietly and without much attention. Still, brackets are everywhere. They map out options and make order. Take, for instance, a Canada Border Services Agency E311 Declaration Card:

Canada Border Services Agency / Agence des services frontaliers du Canada — **Declaration Card**

– For Agency Use Only –
PAX R U.S. V OV Cr O

Part A | All travellers (living at the same address) – Please print in capital letters.

1 Last name, first name and initials
Date of birth: Citizenship:

2 Last name, first name and initials
Date of birth: Citizenship:

3 Last name, first name and initials
Date of birth: Citizenship:

4 Last name, first name and initials
Date of birth: Citizenship:

HOME ADDRESS – Number, street, apartment No. City/Town
Prov./State Country Postal/Zip code

Arriving by: Air Rail Marine Highway
Airline/flight No., train No. or vessel name

Purpose of trip: Study Personal Business

Arriving from: U.S. only Other country direct Other country via U.S.

Figure 1 Brackets abound as the Canada Border Services Agency organizes travelers on a Declaration Card.

The declaration card demands travelers self-organize into a variety of legal and social categories. Purpose of your trip? Where are you coming from? These kinds of

divisions and organizing principles are central to a sovereign's interest in controlling its population. Drawing upon Foucault's work on the "art of government", brackets in the courtroom, much as binaries on the CBSA declaration form, aggregate and "permit the exercise of this quite specific, albeit very complex form of power" (Jessop 2007, 37). These checkboxes and categories are at once a means of facilitating the work of government. We travellers are forced to select a checkbox—business or pleasure?—and in so doing, become enlisted in apparatuses of state knowledge production. Like Foucault who identified "power as productive", able to produce a larger "system of power relations", we should find brackets, frames, and cuts, as at once embedded in discourses of sovereign power while itself productive of state power (Ettlinger 2011, 548). As a technique of socio-legal knowledge production, brackets call out and make certain relations and behaviours know-able. As a means of state legal authority, brackets direct our attention to, and privilege, certain kinds of knowledge. Discernment, as a kind of visibility, is its own productive power. My goal in this work is to untangle the power of making legal 'sightlines' from the decisions that later become precedent, and in turn, shape human-spatial interaction. When lawyers deploy brackets—of relationships, of behaviours—they in turn are encoding those brackets with power and contributing to the knowledge gathering that underscores the power of the state.

We should be conscious of brackets as a kind of state power and the way, as Sparke (1998) reflects, a legal proceeding calls in "a whole series of politicized representations of experience, but it also directly coordinate[s] and control[s] such experience within the confines of the court" (1998, 464). To the extent that experiences are politicized, they are made relational, fixed into brackets that can frame interactions as legal questions. I call attention in this work to bracketing as a kind of world-making. Much as the border draws distinctions, the bracket expels certain qualities of information as outside. By focusing on brackets as they are deployed within the courtroom setting, this work problematizes the world-making role of the judiciary and what kinds of narratives and experiences are given an audience within the space of the law.

Rights and bracketing

Legal bracketing happens in many ways, and operates at multiple scales. I focus, in particular, on the way in which rights-claims are bracketed in the border cases I focus on. The 1982 passage of the *Canadian Charter of Rights and Freedoms* has, and continues to have, a significant effect on the work of the Court. The *Charter* has invited the Court's perspective in a broader and more intimate set of questions than ever before. In their 2006 look at the relationship between the media and the Supreme Court, Sauvageau, Taras, and Schneiderman offer that the *Charter* "placed the Supreme Court at the nexus of societal power and change. Judges had to give life to the *Charter*, and in doing so it can be argued that they redefined and reordered much of the Canadian social contract" (Sauvageau, Taras, and Schneiderman 2006, 8). 'Giving life' to the *Charter* has meant a broadened mandate, one that touches big questions of individual rights in ways that have brought more scrutiny and interest in the work of the Court. *Charter* questions are often quite granular, intimate, and personal and the Court is positioned as arbiter of these questions that speak to the many ways individuals interact with state power. It cannot be overstated; the *Charter* has given the Court a new opportunity to comment on a wider terrain of legal questions with a "growing emphasis on individual rights" (Epp 1996, 765). The *Charter* is largely viewed as a liberal triumph, which "arms individuals with a negative set of formal rights to repel attempts at government interference" (Hutchinson and Petter 1988, 283). It is clear, now more than 30 years out that the *Charter of Rights and Freedoms* has become a dominant discursive framing device among academics and those engaging with the Supreme Court—with *Charter* claims becoming the bulk of cases heard by the Court. This means today (and short after 1982), that the Court is more interested in civil rights and individuals; these representing the overwhelming majority of cases heard[11]. The conception of a 'post-Charter era'

[11] This does not suggest that the types of parties by itself is a signal of the increased space given to individual liberties, but it does demonstrate that rights claims are more commonly being heard in individual terms. Several empirical analyses have been conducted of the Court in the early post-*Charter* era. Firstly, James B. Kelly's 1999 PhD Dissertation has looked at the growth of *Charter* cases as a part of the Court's docket and in particular how these decisions have become increasingly unanimous signalling changes in Court composition as well as disposition toward civil liberties (Kelly 1999). Secondly, Charles Epp's 1996 analysis reviews succinctly the growth of the *Charter* and the way "the *Charter* has influenced the Court's agenda" (Epp 1996).

conveniently divides out the years since 1982 and, would, on the surface, suggest something of a sea change in the work of the Supreme Court. Consensus among Constitutional scholars is that today, the Court operates with a broader mandate—more brackets—and finds itself arbitrating issues that more intimately effect the individual (Sharpe and Roach 2005; Mclachlin 2007; Dauvergne 2013).

As a bracket to read the work of the Court through, the Charter is a powerful one that holds only more angles, brackets, and frames to be deployed. As a geographer, however, the Charter opens up new spaces—a whole new complex geography of rights. And as those rights are backed up by state power, the Charter offers a way to investigate territory making, under the valence of rights talk. Indeed, the Charter has shoved the Supreme Court into more places—cars, workspaces, homes, bedrooms—than it was before. Additionally, this relationship between the Charter and the Supreme Court has shaped the protection of individual rights, and extended the spatial reach of Canadian rights jurisprudence. If "claiming a right can mobilize a state", the Charter armed Canadians with a broad set of rights to claim and has, in turn, mobilized state power (Blomley 2009). For geographers, rights talk moves in two scales concurrently—one at the site of the individual political subject who claims a right and secondly at the instruments of state power charged with protecting said rights. I see the Charter and rights discourse more broadly as very much "embedded within law" and demanding the power of the legal system to ensure their protection (Blomley 2009). In the case of the Charter, this relationship is undeniable; rights are protected for Canadian citizens and those present in Canada. Catherine Dauvergne (2013) notes that this has made the Charter a failure for immigrants, but it further calls attention to the way the Charter is itself bracketed by law. Inversely, we can look at the relative ubiquity of rights talk and appreciate that the Charter and rights culture have offered Canadians more opportunities to "promote an interest or advance a cause" (Jones 1994, 3).

I take from Blomley, then, the suggestion that we see rights as constitutive of our "political subjectivity" (Blomley 2009). However, as many have noted, the mechanics of rights mean that not all subjects are made equal or appear before the law in the same manner. Problematically, rights in liberal democracies are both omnipresent and nonexistent; rights are talked about commonly but marked by their "starkness and

simplicity, [their] prodigality in bestowing the rights label, [their] legalistic character, [their] exaggerated absoluteness, [their] hyperindividualism, [their] insularity, and [their] silence with respect to personal, civic, and collective responsibilities" (Glendon 1993). For all the talk, rights need to be activated (Donnelly 1985). We call upon our rights only when they have been compromised, which means first knowing what our rights are and knowing how and where to seek redress. Problematically, if rights culture calls upon the state to ensure collective protections, such resources are bound to be unequally and unevenly deployed as some are better resourced, with greater awareness of their rights and the ability to ensure their protection in court. This is not unique to the border or airport, but indeed, these are spaces not meant for lingering; and the rights consciousness of newcomers should be expected to be especially low. Indeed, as sure as returning Canadians admit to a lump in the throat when approaching the border, it is clear that even citizens remain unsure what kind of legal space they idle in before their passports are stamped, or their NEXUS cards read.

As a geography exercise, the deployment of rights is but one way we can map the reaches of territory, but perhaps more than static Cartesian representations, a critical cataloging of the spatial reach of rights shows the way territory expands, contracts, and twists. In particular, we may view the geography of rights as topological, connecting individuals to state power across an expansive terrain. As the *Charter of Rights and Freedoms* protects and enumerates rights of Canadian citizens and those present in Canada, it draws institutions of state power as being implicated in the protection of rights into and wherever Canadians may go. Rights discourse is particularly effective at calling attention to broad assemblage of powers, policies, and technologies brought to the border across a range of scales. In particular, post-9/11 security politics have marshaled state resources to the surveillance, detection, and screening of the individual. We should be careful to contrast the historical underpinnings of border control with more contemporary approaches "in which rights-restrictive policies have been used to limit the ability of individuals, interest groups, and the courts to engage in rights-based politics—to challenge state control measures through the promotion of the rights" of those entering Canada (Anderson 2013, 1). Border control today is marked by rights restrictive policy, but the shape of those restrictions are borne out from some of the earliest legal and rights-based challenges to bordering. The permutations and contours detailed here

are not then historical relics, but precursors to the more regressive present period of restricting rights at the border.

Chapter 3. Doing Border Work in Canada

Courts, like the Supreme Court, do not make legal space at or around the border out of thin air. Rather, border work broadly defined is governed by a broad assemblage of laws. It is important, therefore, that we consider this context. These laws both define the agencies and actors that are involved in bordering—the *Canada Border Services Act,* for instance, enumerates the role of the CBSA in most border functions—and provide spatiality to bordering, telling us where and how bordering can occur. The *Preclearance Act,* for example, provides for a distinct space at major Canadian airports to provide for the screening of American-bound travellers. When we speak of laws at the border, it is easy to imagine a tidy set of laws governing the work of BSOs as they handle their work at a port of entry. It is also easy to imagine that these laws are national and uniformly taken up, so that the border in Quebec is the same as the border in British Columbia and that the traveller coming in on a cruise ship in Halifax has a similar experience and set of expectations as the business traveller arriving at the airport in Calgary. It is however, still tempting to grab on to something called 'the law' and imagine it moving straight across the country in an even fashion. It's also easy to simplify bordering—even if I have assured you it is beyond simplification—to a few practices. We might imagine, then, that customs and immigration as distinct border behaviours were governed by a modest set of laws, but we would miss all the messiness of bracket making—particularly in Canada—where in fact the CBSA has authority in whole or in part of 75 federal laws:

> Access to Information Act, Aeronautics Act, Anti-Personnel Mines Convention Implementation Act (through EIPA), Blue Water Bridge Authority Act, Bretton Woods and Related Agreements Act, Canada Agricultural Products Act, Canada Customs and Revenue Agency Act, Canada Grain Act, Canada Post Corporation Act, Canada Shipping Act, Canada-Chile Free Trade Agreement Implementation Act, Canada-Costa Rica Free Trade Agreement Implementation Act, Canada-Israel Free Trade Agreement Implementation Act, Canada-United States Free Trade Agreement Implementation Act, Canadian Dairy Commission Act, Canadian Environmental Protection Act (1999), Canadian Food

Inspection Agency Act, Canadian International Trade Tribunal Act, Canadian Wheat Board Act, Carriage by Air Act, Chemical Weapons Convention Implementation Act (though EIPA), Civil International Space Station Agreement Implementation Act, Coastal Fisheries Protection Act, Coasting Trade Act, Consumer Packaging and Labelling Act, Controlled Drug and Substances Act, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Copyright Act, Criminal Code, Cultural Property Export and Import Act, Customs Act, Customs and Excise Offshore Application Act, Customs Tariff, Defence Production Act, Department of Health Act, Department of Industry Act, Energy Administration Act, Energy Efficiency Act, Excise Act, Excise Act of 2001, Excise Tax Act, Explosives Act, Export Act, Export and Import of Rough Diamonds Act, Export and Import Permits Act, Federal-Provincial Fiscal Arrangements Act, Feeds Act, Fertilizers Act, Financial Administration Act, Firearms Act, Fish Inspection Act, Fisheries Act, Foods and Drugs Act, Foreign Missions and International Organizations Act, Freshwater Fish Marketing Act, Hazardous Products Act, Health of Animals Act, Immigration and Refugee Protection Act, Importation of Intoxicating Liquors Act, Integrated Circuit Topography Act, International Boundary Commission Act, Manganese-based Fuel Additives Act, Meat Inspection Act, Motor Vehicle Fuel Consumption Standards Act (not in force), Motor Vehicle Safety Act, National Energy Board Act, Navigable Waters Protection Act, North American Free Trade Agreement Implementation Act, Nuclear Energy Act, Nuclear Safety and Control Act, Pest Control Products Act, Pilotage Act, Plant Breeders' Rights Act, Plant Protection Act, Precious Metals Marking Act, Preclearance Act, Privacy Act, Privileges and Immunities (North Atlantic Organization) Act, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, Quarantine Act, Quebec Harbour, Port Warden Act, Radiation Emitting Devices Act, Radiocommunication Act, Seeds Act, Special Economic Measures Act, Special Import Measures Act, Statistics Act, Telecommunications Act, Textile Labelling Act, Trade-Marks Act, Transportation of Dangerous Goods Act, 1992, United Nations Act, United States Wreckers Act, Visiting Forces Act, Wild Animals and Plant Protection and Regulation of International and Interprovincial Trade Act.

This list shows the broad and eclectic mandate of the CBSA and, the many spaces of bordering that arise from the CBSA's mandate over a diverse set of policies covering everything from pork chops to wild animals. While one can hazard a guess at what the *Textile Labelling Act* might cover—there's no telling what plant breeders' rights might entail. Thought of as your evening meal, the CBSA could claim responsibility over your salmon entrée, the wine you sipped, the bone china flatware you served it on, and the ships, trucks, and trains that brought it to you through various free trade agreements, and the price you paid for it all.

What all this means is that laws of border work are impressively broad and call in nearly every facet and space of Canadian life. Much of these laws touch the border and CBSA admittedly in very vague or tangential ways. But they serve as a useful illustration of how law-filled, the border actually is. The above list reveals two truths: first, that the border is in some way implicated in nearly every aspect of Canadian society and economy, and secondly that the border is then an expression of deep resonance of state power and the multiple scales and platforms through which it can be called into being. As I have found, the border, particularly in the post-9/11 security climate, can be bent and twisted into a broad set of geographies and performed on a population. By this measure, the border stands in for security and immigrant anxieties, conflated as one and the same by politicians who “catalyzed the transition from border security to national security” and the exceptional suspicion of particular populations along the way (Kruger, Mulder, and Korenic 2004, 82).

Such legal work does not occur in a vacuum and the various activities of bordering have been susceptible to a litany of worries and anxieties as terrorism has become an ever-present concern among both lawmakers and citizens. In a kind of “resonance machine”, broad security worries have helped produce law, policy, and practices that have drastically reconfigured the border and the bureaucracies that oversee it (Connolly 2005). Blame perhaps the persistent, however wrong, claim that 9/11 hijackers slipped into the US from a porous Canadian border, but Canadians and Americans have both used the ensuing years to align counter-terrorism measures to border work (Struck 2005b). Getting tough on the border, including decking it out with walls, jails, and guns are all part of the “securitization of migration” that aims to bring security and policing to the border and the handling of those entering the country (Bourbeau 2011; Ibrahim 2005; Duran 2010; Mountz 2015; Salter 2007, 2008a). As I write this in 2016, the CBSA was moving ahead to arm most of its 6,433 frontline officers in what has been a 10 year, $1 billion initiative unveiled in the Harper government’s first budget (Canada Border Services Agency 2015). The arming of officers illustrates clearly how bordering has become more closely aligned with security objectives and how the work at the border borrows from policing insofar as technologies of surveillance and detention are now a core component of the modern borderlands.

Border work used to be an extension of revenue protection and border ports of entry were staffed by officers from Canada Revenue and Customs, and as the name suggests, the work focused largely on collecting tax revenue. The National Film Board of Canada short, *Two Countries, One Street* offers viewers a dramatic, if not historical, representation of this border work conducted by Canada Customs agents (Palady 1955). The drama in this 1955 film shot on the border between Vermont and Quebec is not terrorism but rum-runners engaging officers in a high-speed chase to avoid interdiction. *Two Countries, One Street* represents how Customs and Revenue officers' preoccupation with contraband helped find illicit alcohol slipping through the border. The concern in 1950s Vermont appeared to be about lost duties and customs income. Customs and Revenue did not, to use Ottawa-speak, 'have a seat at the [national security] table' and their work could not be thought of as part of counterterrorism strategy because, 1) their functionally was very little of a wide-reaching strategy, and 2) they also sat outside the Ministerial portfolio that was most likely tasked with any security objectives, terrorism or otherwise. In the days following 9/11, Canada worked quickly to remedy this, creating firstly the Department of Public Safety and Emergency Preparedness as a kind of mirror to the Department of Homeland Security that Americans were building around the same time. In December 2003, Public Safety was formed, picking up a broad basket of agencies and responsibilities from "the former Solicitor General Canada, the Canada Customs and Revenue Agency, the Canadian Food Inspection Agency, as well as the departments of National Defence, Justice, and Citizenship and Immigration Canada" (Public Safety Canada 2004). Newly formed out of all this new legislation and government reorganization was the Canada Border Services Agency. CBSA was the immediate byproduct of "75 domestic laws that govern trade and travel as well as international agreements and conventions" as well as a direct response to critics that 9/11 revealed vulnerabilities in fortress North America (Public Safety Canada 2004). CBSA was born from the echo chambers of Washington and Ottawa that have rushed to risk management discourses and moved border work from "focus[ing] on customs collections to an obsessive preoccupation with security", broadly, if not ever actually defined (Muller 2009, 71). 9/11 seemed to produce throughout the US and by extension, Canada, a single-minded fixation on "governing through risk", and of speaking in tropes of persistent, however unidentifiable, risk and insecurity. I am a child of this moment, of long periods of time when we went to school, airports, and hospitals under

the US DHS' vague orange level of threat. Of course, orange was just one notch below red which denoted 'severe', so I lived in orange and my mother and father lived in 'just below red'. Heightened security was normalized, and emergency conditions were domesticated into a kind of banal anxiety, what Engin Isin (Isin 2004) has identified as "governing through neurosis" (Isin 2004). Border security was thrust into the centre of all this collective unease and the surviving gatekeepers—CBSA and CBP—have recreated the border not as a site of trade, culture, economic, or environmental exchange—but as a site of danger. In announcing the Homeland Security Advisory System, the actual name for the colour-coded system that the US used throughout the Bush-era, Secretary Tom Ridge spoke of a generalized, dislocated, and omnipresent risk:

> …we should not expect a V-T day, a victory over terrorism day anytime soon. But that does not mean Americans are powerless against the threat. On the contrary, ladies and gentlemen, we are more powerful than the terrorists. We can fight them not just with conventional arms, but with information and expertise and common sense; with freedom and openness and truth; with partnerships born from our cooperation. If we do, then like the men and women who fought Nazism and Fascism 60 years ago, our outcome will be equally certain: victory for America, and safety for Americans (Office of the Press Secretary 2002).

As a set of performative effects, the border represents all the promise and paranoia of the emergency state and serves both as a locus to discipline and police the population via admission and exclusion as well as a site of measure and the "manipulating of the quantities and qualities of the population through citizenship, immigration, and refugee claim adjudication" (Salter 2008b, 366). These techniques of inclusion and exclusion, and of "distinction between inside and outside" work because 'inside' and 'outside' are bound up with meaning (2008b, 366). As Agnew (2007) reminds us, "the model of statehood has had as its central geographical moment the imposition of sharp borders between one state unit (imagined as a *nation*-state, however implausible that usually may be) and its neighbors" (2007, 398). Borders matter because they are implicated in the nation building inherent in the protecting and claiming of territory. As "units of a partitioned space", territories must be defended and organized with the aid of sovereign power (Kuus and Agnew 2007). Borders are then an expression of the defense of territory as much as they are means of doing the work of controlling the space and those who may enter, stay, study, or work within it. Borders—

and thus the techniques of measurement and control that border work entails—are necessary to territory insofar as territory is political space and its partitioning is both reified through bordering so much as the mechanisms that permit bordering also in turn create the conditions through which partitions, lines, fences, walls, and visa schemes may be deployed. The border is not a precondition of sovereignty so much as the work done through bordering is a demonstration of sovereign power. At the Peace Arch Crossing at the border between British Columbia and Washington State, Canada welcomes travelers by automobile through security checkpoints; license plates can be photographed, dogs summoned to sniff around, paperwork checked, and fines assessed—all of which are sovereign moves that define the territory, defend it, and assert a particular governmentality that controls the population at seemingly the most intimate of scales. Those who talk about borders as an end do so at the risk of missing the way borders are themselves drawn into the performance of sovereignty, the way the multi-headed hydra of border work is itself an effectuation of state power. Borders are not the result or the finality, but rather an anxious test site for many concurrent deployments of state power.

While the number of cameras at the Peace Arch Crossing might lead travelers to assume the border is a site of militaristic state power, the governmentality of border work rests in the ability to "find certain technologies capable of making them implementable" (Walters 2002, 279). The camera may not have any film in it. Or, the camera may broadcast its images to no viewer. In order to functionally screen, monitor, and control access, you need a "means to identify who is a citizen and who is foreigner". The border demands people—feet on the ground, eyes in the air—to do the work that effectuates the modern border (Walters 2002). This is not usually a problem along the US-Canada border, where the ongoing conflation of migration work to security work has legitimized a staggering array of militaristic techniques—of surveillance and data management. More than a flag, guards, guns, and bright lights signal the arrival to either nation at the land crossings. It is here where the nation meets state in an overwhelming collection of technologies of constructing docile (and heavily surveilled) subjects. In their making and maintenance, borders point to resources and technologies of territorialization, the "calculative mechanisms in the commanding of territory" undergirding border work (Elden 2007). Wrapped up in borders is a wide set of discursive practices that create

puzzle-piece-like nation-states that have sovereign power over a territory. The border becomes a site (but also a series of approaches) that manifests but is predicated on sovereign power. It's primed for a legal geographer, because rather than see the border as law-free, we can and should witness border work as deeply embedded in law as part and parcel to sovereign claims. At the border, we find then, all "the humble and mundane mechanisms by which authorities seek to instantiate government: techniques of notation, computation and calculation; procedures of examination and assessment; the invention of devices such as surveys and presentational forms such as tables; the standardization of systems for training and the inculcation of habits; the inauguration of professional specialisms and vocabularies" (Rose and Miller 2010, 281). These techniques and approaches are the lifeblood of bordering; signs tell us what line to get in, passport schemes make citizenship visible, and databases create a vast network of material through which border work operates. The border becomes an active site through which all these technologies can be deployed but their deployment reflects a larger apparatus of state power that brings to the edge of the territory all the data and means of seeing people and space as to effectuate sovereign control. The work of bordering, has, as I will discuss, no shortage of enumerated law to draw on. That being said, discourses of bordering, so often understood through a persistent if non-specific security anxiety, remind us how much borders are not a suspension of law, not even in emergency times. This thesis disavows 'emergency politics' rhetoric and instead wishes to look at the banality of law as productive. Border work—whether experienced at an airport, a train station or through prescreening mechanisms such as at embassies or refugee camps—call upon the law. Border work is implicated in territory making, in the means through which states historically "turn[ed] influence into power and power into control" (Coplan 2012, 508). When we speak of borders, we are speaking of a whole litany of state projects and the mechanisms through which screening, detection, surveillance, immigration, and deportation are called into being. The case studies in the following chapters draw our attention to the spatio-legal grounds through which such projects are made viable.

Canada and its border anxieties can be read as a governmental project, as deeply implicated in the discourses of freedom and risk, and in the techniques of calculation and control that have marked this era in much of the world. The CBSA is an

organization born out of discourses of liberty and of risk and a response to border anxieties that were wafting over the 49th parallel from an addled US. Hillary Clinton, Senator John McCain, and former DHS Secretary Janet Napolitano are among the many notable voices inside the Washington echo-chamber who insisted that 9/11 terrorists entered the US via Canada (Struck 2005a). The Canadian response immediately following 9/11 was therefore predictable, and the haphazard ways in which CBSA emerged are by no means surprising. Parliament sat on September 18, 2001 and the general order of business was naturally side swept for both the ritualistic expressions of sympathy and the mounting sense that Canada was ill-equipped to police its own 9/11. MP Myron Thompson rose to read a letter from a Canada Customs and Revenue agent, highlighting the ways the group was not sufficiently provisioned as a law enforcement apparatus, but immediately after 9/11, territory had to be defended and modest displays of statecraft would not suffice:

> Neither our shoulder patch nor our badge say officer or inspector, they simply say, Canada Customs. Our bullet-proof vests have a reflective strip on the back that also reads the same.
>
> I looked at my U.S. counterparts this week during this time of extra security and their vests read in bold print "Police U.S. Immigration". My silly lettering is a mere three quarters of an inch, a stunning example of image (Canada 2001, 5471).

Public displays of sovereignty—and a not so little uniform envy—begin the rapid and quick work through which border work has migrated out of Revenue and into a new ministerial portfolio. This letter, and indeed its rereading in Parliament, illustrates the way border work is not an end product but a performance, anxiously made and re-rendered through signs, checkpoints, and fancy uniforms. Moving forward, Canada would need to effectuate authority over its borderlands—and if the Americans were going to be sporting flashy Kevlar, it was clear Canada would not be far behind.

As an organization, the CBSA has had an awkward relationship with its various publics. When Public Safety was founded, CBSA was one of its most drastic reorganizations and lauded as the cornerstone of a domestic security strategy that made 'intelligence sharing' into a buzzword. I offer up here a suggestion of what Canada Border Services Agency does by reviewing mandate letters from Prime Ministers to their

appointed Ministers for Public Safety and reviewing the annual Reports on Plans and Priorities which cabinet ministers submit to the Treasury Board Secretariat. These become key building blocks to understanding what encompasses the work of any government agency. In my case, investigating actually what is meant by 'border services' functionally is less about the CBSA as an organization and more about making sense of how border work is legally and politically defined, allocated, and taken up. Any critique of the laws of bordering has to understand what is being meant in border work in Canada and where those meanings are derived from. The mandates tell a story of threat mitigation and securitization, but it wasn't until *Martin-Ivie v. Attorney General of Canada* [2013] that we began to see how that mandate was put into practice.

Martin-Ivie is an occupational health and safety case, not an immigration or customs case specifically—but the workplace—the primary inspection line (PIL) at Coutts Port of Entry in Alberta ends up offering insights into some of the governing structures of CBSA as they take up the bordering mandate. Noting that in 2005, "armed and dangerous lookouts are not being flagged locally and nationally", Ms. Martin-Ivie and seven of her colleagues working the PIL at Coutts noted that the "lack of accurate information about armed and dangerous individuals, lack of armed presence at the border, and lack of training put them in danger such that they were entitled to refuse work under the [Canada Labour] Code" (Martin-Ivie v Canada (Attorney General) 2013, 2–3). We can leave it to the courts to debate the dangerousness of Ms. Martin-Ivie's work. The Federal Court decision in her case, however, reveals some of the databases and systems deployed in border work, particularly at 'secondary':

> The BSOs in secondary have access to a number of databases:
>
> a. ICES, a CBSA database that, amongst other things, contains information about Canadians who have come into contact with CBSA or individuals who might seek to enter the country and might pose a risk;
>
> b. Field Operations Support System [FOSS], Citizenship and Immigration Canada [CIC] and CBSA's shared database, which contains millions of records about all CBSA and CIC contacts with non-Canadian citizens;
>
> c. Canadian Police Information Center [CPIC], the database used by Canadian law enforcement agencies; and

d. National Crime Information Center [NCIC], a somewhat comparable database used by American law enforcement agencies.

Both CPIC and NCIC contain information regarding existing and expired "wants and warrants", or details of individuals who are or were wanted for some reason by a law enforcement agency or for whom a warrant of arrest was or is outstanding. These two databases also contain significant additional information relevant to law enforcement, including details of individuals the law enforcement agencies consider to be armed and dangerous. (Martin-Ivie v Canada (Attorney General) [2013], 12–13)

This alphabet soup is instructive. These databases become the technological means for sorting, othering, and bordering the thousands of travelers who cross between Canada and the US daily. As Martin-Ivie's testimony showed, however, this fulsome set of databases—however messy—were only available to BSOs working secondary, where less than 5% of travelers end up. Most at Coutts and across Canadian airports, land crossings, and marine ports, pass through a primary inspection in under 90 seconds[12]. Problematically, information stored in various and distinct systems creates significant delays to get to the information needed and some of the databases are notably slow to load. Management at CBSA openly wondered in *Martin-Ivie* if these systems actually could support millions of searches from every BSO on the PIL. Neither party disagrees that information about a particular person's dangerousness could be hidden in plain sight, in one but no other databases, possibly fed into the PIL, but possibly buried instead in information CBSA shares with another agency or organization. The heterogeneity of the contents of the databases and the overlapping, conflicting, and distinct sets of information contained within each speaks vividly to bordering as a constantly evolving set of principles and parameters. The unevenness of information, of sightlines real and perceived, informs the material spaces of bordering themselves. Given the difficulty in accessing material, it perhaps shouldn't be terribly surprising that "much of the data in FOSS, CPIC and NCIC is stale-dated and therefore inaccurate", no doubt aided by the sheer difficulty BSOs like Ms. Martin-Ivie face to accessing the information to begin with (Martin-Ivie v Canada (Attorney General) 2013, 19).

[12] See paragraph 27 in 2013 FC 772, *Martin-Ivie v. Canada* where Justice Gleason notes that evidence "established that the average time taken to process a traveller at the PIL is between 30 and 90 seconds".

The atomizing of information, along with the creation of categories of danger and risk in *Martin-Ivie* are telling for the way they speak to the CBSA's position within a risk-management approach to security in the global war on terror. A risk management approach, as Mariana Valverde and Michael Mopas describe, "breaks the individual up into a set of measurable risk factors" under the promise of scientific data gathering that is objective and "smart" (think here of smart border agreements, for example) (Valverde and Mopas 2004, 240). What Valverde and Mopas see as 'targeted governance' has expanded wildly, rooted in the "belief in the ability of information and technology to produce a risk-free society" (Amoore and De Goede 2005, 150). The CBSA finds itself deeply implicated in this narrative, born out of a moment when computers and technology could present the means through which the state could be made diffuse and taken up "through a complex policy constellation including regulatory state bodies, international institutions, industry self-regulating bodies and private risk assessment firms" (2005, 150). What *Martin-Ivie* points to, even as it calls attention to structural inefficiencies along the way, is the way technology is being marshalled to the work of assessing risk, both through the collection and databasing of material into categories of populations. Risk management's reliance on categorization and classification trades in a veneer of science but speaks in a legally decipherable register, where objective computerized classifications can become legal positions taken up by courtroom actors. It is useful to situate the securitization of migration within a critique of the discourses of risk management that have coalesced along the borderlands and encoded in the myriad of laws that take border work far beyond the territorial edge. As Benjamin Muller (2009) notes, it is seldom through discourses of security, but rather insecurity, where threats are assumed to be mitigated through increased vigilance and better data gathering. Risk societies, Canada included, are the latest iterations of the governmental project, where technologies that govern the individual are today proffered as both means to liberty and security. As Isin reflects, "governing oneself by calculating risks involves using various technologies but also it means that governmental authorities do not simply manipulate the subject but govern it as a free subject by encouraging, inculcating, and suggesting certain ways of conduct that increase the health, wealth, and happiness" (Isin 2004, 220). We are nudged into compliance. I could choose to not declare the oranges I packed from Florida in my bag, but I make that declaration in an airport peppered with signs, audio announcements, sniffer-dogs, BSOs milling about, and a cashier's window

ready to collect my hefty fine. "Government is an activity that shapes the field of action" and the border is no exception, where the shaping is very much on full display (Dean 2009, 21). Still, it is useful to draw a distinction through governing through fear and governing through freedom, and suggest that both are not mutually exclusive, but rather mutually constitutive. As Hyndman (2007) observes, "states produce crisis and fear to obtain consent for securitization measures" (2007, 362). Today, it is often through freedom that 'risk' is taken up—while subjects are free to move or choose, it is through risk that government can order and organize their choices. The risks, albeit omnipresent, are their own discursive technique, a mechanism through which choices can be framed and limited, populations controlled, and agency managed.

Beyond the Bracket: Terrorist Anxieties and the Post-9/11 State

It is important to note at least briefly the narratives through which today's border laws are made. While the focus of this project is to consider the role of judges, thereby assessing the constitutional basis of a law, it is useful to accept that laws are not created in a vacuum and to acknowledge that judges do not create laws but respond to the imperfect laws Parliament produces. Researchers considering the expanding nature of bordering would be well served to recognize the multiplicity of actors implicated in border-making and enforcement. Such an approach effectively brackets judicial action: judges take up law in the courtroom in response to law on the street. As Mountz and Hiemstra (2014) note, much of the making of borders and border work in the post-9/11 era is framed in discourses of anxiety and risk:

> Drawing on the *Oxford English Dictionary*, we understand chaos to be the appearance of confusion and disorder and crisis as a condition of sudden change that causes alarm. Although each emerges at particular moments, both hold in common the projection of danger, instability, panic, and dramatic upheaval, and both surface frequently at the nexus of human mobility with state power. In a neoliberal era where bureaucrats must work within frames of risk assessment and the bottom line, this language is first and foremost a discourse of states…(2014, 383).

The calling in of states and state work, particularly under the valence of chaos, crisis, and generalized security panic is helpful context through which the work of states at the border can be better appreciated and read. One of the objectives of this research is to underscore that Canada has not been on the sidelines for these discursive and political moves. Indeed, much of the critical academic research has focused on the US and to a lesser extent, the UK and the EU, but Canada's discourses of threat mitigation, chaos, and emergency demand a closer reading and appreciation. Border policy in this country has been implicated in similar tropes of national emergency that we see in other parts of the world. While judges must take a long view, situating laws within brackets of constitutionality, lawmakers and government officials often work with shorter horizons and their work, the work of drafting a law, is very often implicated in a richer discourse of nationalism and anxiety.

Beyond the myriad laws that are drawn into the CBSA's mandate, much can be gleaned about the organization and border work through several forums:

1. *Mandate letters.* Prime Ministers, in naming their cabinet, submit letters to the cabinet ministers to be. Framed as a bulky job offer, mandate letters are broad, thematic pieces that allow for the articulation of a vision, rather than a specific course of action, though Prime Minister Justin Trudeau's 2015 letter to MPSEP Ralph Goodale does offer specific policy and organizational goals, such as repeal of "the problematic elements of C-51" and the creation of "an Office of Community Outreach and Counter-Radicalization" (Office of the Prime Minister 2015).
2. *Federal budgets.* Similar to the mandate letter, federal budgets have become a vision statement from the PMO to Parliament. Perhaps even more so than in a mandate letter, budgets describe evolving political priorities and provide dollars to broad philosophical commitments, such as, in 2004, when the Martin government initially imagined the CBSA and desired "a more cohesive approach to meeting border security and trade objectives" (Department of Finance Canada 2004, 196).
3. *Parliamentary oversight.* The Senate in particular has maintained a regular interest in Public Safety and the CBSA through the Senate Committee on National Security and Defence. Senators have made a practice of bringing CBSA top brass to Parliament Hill for appraisals of their work. These testimonies are very data-centered, with Senators interested pursuing accountability through measurable interventions into Government work.

4. *Ministerial corporate reporting.* The MPSEP has been reporting back to the Government and the people of Canada since 2004 through Reports of Plans and Priorities (RPP). By no means the only strategic visioning document within MPSEP or CBSA, an RPP is a notably ambitious document; one-part annual report—where did your money go, one-part mission statement about how the Minister aims to turn the budget into plans for the year ahead. RPPs are generally easily accessible, though, as noted the Government of Canada's overhaul of its web presence had made some of this material scarce. Other internal documents, emails, and presentations can be accessed through ATIP requests.

Arguably, it is in these fora that discourses of terrorist anxiety are most clearly worked out in (nearly full) public view. For as long as there has been a CBSA, there has been a rhetorical coupling of border security to broader global war on terror language, if not the policy outcomes explicitly. Securitization of immigration is, in this way, a complex arrangement of policy and sentiment, to the extent big picture planning such as RPPs and budgets harden links between work at the border and work done under the guise of antiterrorism. This wider set of resources is instructive to future scholars looking to interrogate Canada's bordering practices post-9/11. Rather than bracket borders around questions of constitutionality as judges will, lawmakers speak with a greater degree of latitude and to particular discourses—of fear, of anti-immigrant xenophobia, of anxieties of Canada's role in the global war on terror, and increasingly, frustrations borne from a sluggish economy where nationalist protectionism begins in trade and customs law and branches outward to intelligence and policing laws that seek to limit access to the nation-state. These policy materials invoke different questions—namely, questions of intention and desired effect—whereas remaining focused inside courtrooms means tracing how judges are moving the border in and out of constitutional space. In this way, intention has little, if any, place within the courtroom—all that matters is whether or not laws follow or contravene rights established within the *Charter.* Still, intent and effect do matter and offer useful clues into some of the ways bordering has grown to stand in for a richer assemblage of state effects. While generally beyond the scope of this work, it is still important to note that judges alone do not *make* law, instead that judges *respond* and bracket law within the bounds of the Constitution, and in particular, the *Charter.*

Chapter 4. Anything to Declare?: Search & Seizure

Many of us have border stories—of lineups, of waiting—and these banal retellings about surveillance and inspection at the port of entry speak to the search and seizure component of border work. When I embarked on this project, everyone I encountered had experiences to share that spoke to what they viewed as the dark comedy of border work. Well-heeled intellectual types wanted me to share in the humour of their cars being searched, a woman next to me on a plane was incredulous at the lengths to which she was searched, exclaiming, “I mean, look at me!”, or the more common refrain, “I mean, this is Canada, come on!” Canadians have accepted that intense security and screening is necessary at ports of entry, but they aren’t as convinced those enhanced techniques ought to be applied to them. What this means is that the border search is a kind of cultural artifact within Canadian daily life and something that everyone has an opinion about. The cases I review here ask questions of the search and seizure power of border staffers, often as travelers arriving with narcotics find their contraband intercepted on arrival. By no means are drugs the only ‘no-no’ at the border; lower courts have dealt with all sorts of illegal goods and entries, child pornography, counterfeit products, and agriculture that poses threats to Canadian food security. Any examination here of ‘drug cases’ is strictly because these cases rise to the farthest reaches of Canadian courts. By examining search cases, I am broadly considering the customs side of what can be thought of as a customs and immigration apparatus. (In the section to follow, I will more directly address the movement of people.)

Search and seizure cases, reveal, I argue, very specific brackets of legal decision-making. For one, the brackets justices deploy to make sense and reason out a clear precedent in early search cases are derived from an ad-hoc collection of methods and approaches. In particular, I consider here the way American case law foregrounds assessments of the Charter at the border and suggest that looking to American case law demonstrates how crucial constitutionally codified rights have become in the way we

understand the border, and by extension, political space by and large. Jurists in Canada identify, with some reservation and caution, a closer alignment between American and Canadian legal traditions after the adoption of the *Charter.* I argue here that the looking to US precedent underscores a connection between the two legal systems that reveals usefully the way space is made and effectuated through constitutionally protected and sanctioned rights claims.

Like the US, where the border is a thing and process, we find that brackets around questions and decisions aim to foreclose borders and bordering both spatially and temporally. From the early days of border search cases, it is clear that the judges must reconcile the border as a physical space and the border as a range of practices culminating in the possible detention or holding of travelers who arouse suspicion. In this section, I aim to triangulate brackets of legal decision-making around borders. In particular, I want to consider the brackets that have been most resonant from early case law to the present. I focus on the brackets of 'reasonable suspicion' and 'detention'—specifically how these terms are defined and how the politics of definition allows for borders and subjects to be drawn in and out of rights claims. Additionally, I investigate the methods judges employ to legally define the border, either by looking at international (here, American) precedent, or by decisions from within Canada. The humble expectation is that a reading of the contours of said bracketing tells us something about how the law conceptualizes borders as spaces, at least of search and seizure.

Most of the surveillance and search capacities of the border have long been bundled under the *Customs Act*. As borders were staffed by Customs & Revenue officials well into the new millennium, this is not especially strange, but a useful reminder of how modern fixations on the threat of individuals and perceptions of dangerous migration have at times outpaced law which remained fixated on goods and belongings. Where we enter this history, laws like the *Customs Act* find themselves ensnarled in the newer rights discourse that values individual liberties and sets limits to state power. The first constitutional challenge to the Customs Act in the post-*Charter* era arrives at the doors of the Supreme Court in February 1985. Little is known about Laura Simmons, chiefly what possessed her to carry just under 2 kilograms of cannabis resin on her through customs upon arriving at Toronto's Pearson Airport. Whatever the reason,

Simmons has become synonymous with search and detention practices at the border. As a series of rulings, *Simmons* sets the precedent for legal thinking about borders as spaces and borders as a process, bordering. It stands to reason then that we should begin by looking at how the courts took up what borders are, what borders do, and what borders signify by looking at the questions asked and answered within *Simmons.* On November 14, 1982, Laura Simmons arrived back in Canada on a flight from Jamaica. A primary inspection officer described Ms. Simmons as "nervous, jittery, and agitated" and referred her to secondary inspection for further questioning (R v Simmons 1988, 72). Ms. Simmons' declaration card was marked '86' and she was sent to wait for another officer for further questioning. That '86' served, on that date and time, to signify 'doubt' among Canada Customs officers working in the arrivals area. Her containment in the customs area of the airport would be as a result of 'doubt', parlance within the customs bureaucracy, but justices would be left to determine if 'doubt' met the basic test of the *Customs Act*, which demanded officers act only with "reasonable and probable grounds to believe". These hunches and doubts expressed by staffers at the border might have been the way the job was done on the ground, but it raised questions about how wide a net could be drawn. Questioning in secondary quickly brought officers to request a strip search, where it was discovered that Ms. Simmons had lied on her declaration form and was found to be carrying a series of plastic bags taped to her chest with hashish oil, or marijuana. Escorted into a private room for a strip search, officers pointed to a placard on the wall that articulated Ms. Simmons' right to counsel but admittedly did not elaborate or check to see she understood her rights.

Ms. Simmons brings her case as a host of *Charter* violations that can be read both spatially and temporally. Counsel for Ms. Simmons claimed that being held subject to waiting, examinations, and a strip search constituted a detention as described under Section 10 of the *Charter* and that as such, she was entitled to retain counsel immediately and to be informed of her right to retain counsel. Secondly, Ms. Simmons alleged that the search of her belongings and body were 'unreasonable' as described in Section 8. What are the grounds to justify the 'doubt' scribbled on her declaration card? Put in spatial terms, do we have different expectations of privacy in border spaces? The brackets devised to logic out an answer to these questions first try to approximate a best practice from the US, to determine the space of the border as legally unique, and to

determine the temporal expectations of bordering, the point at which banal waiting becomes legally perceptible as 'detention'. Defining detention does not foreclose the possibility of leaving open who works the border. 'Border services' in the modern era responds to a broad mandate that dips into work historically bounded in several ministerial positions—taxation and excise, immigration, agriculture and food safety, among others. Justices, even in the post-*Charter* days of *Simmons* could not have anticipated how far open the lid on the box of 'border work' would be pushed in the decades to follow. Still, their deliberations reveal the tensions of border enforcement that guide the work well into the present day.

When the Supreme Court considers border searches for a second time, it does so because the case raises new questions and offers new bracketings in the years since *Simmons.* In *Monney*, a traveller arrived at Toronto's Pearson International Airport "having swallowed 84 pellets of heroin of about five grams each" (Ayed 1999). This is a key and crucial difference that explains where these two border search cases deviate: Laura Simmons wore her contraband on her person, Isaac Monney had ingested the drugs he was smuggling into Canada, so a pat-down like the kind Laura Simmons experienced would by itself not be sufficient. Isaac Monney was asked to submit to a 'bedpan vigil' where his excretions could be monitored. Two similar, but distinct questions arise at this point. Firstly, Mr. Monney arrived in Toronto at 4:30pm, but was not met by members of Interdiction and Intelligence,

> "a unit of Canada Customs experienced in dealing with narcotics smuggling. Although customs officers from the Interdiction and Intelligence unit are normally expected to respond to a call for assistance as soon as possible, in this instance the officers did not arrive until approximately two hours later. In the interim, the respondent was detained in the secondary customs area" (Iacobucci, J in R v Monney [1999], 658).

The first problem—and bracket—is the question of a speedy search and whether or not the dawdling around by Canada Customs itself constituted a violation of his *Charter* rights. Interdiction and Intelligence began working the case at 6:24pm and nearly three hours later, extracted a urine sample. Over the course of the next four hours—until 1:50am—Mr. Monney would be detained in a bedpan vigil setup where he excreted 83 of the 84 heroin pellets and finally "transferred into the custody of the

RCMP" where the final 84th pellet was passed (Iacobuicci, J. in R v Monney [1999], para. 8 of decision). The bracket of detention then turns on two particularities of the way Isaac Monney was handled—first, was he moved through the border search process too slowly, from 4pm to nearly 2am the next day—and secondly is being handcuffed to a bedpan a form of detention? Of course, the uniquely embarrassing quality of being forced to excrete and have said excretions analyzed calls in new brackets and *Charter* challenges. *Monney* invokes section 7 of the *Charter* by asking if the bedpan vigil Monney underwent should have been conducted with medical supervision. Does a protracted search, one where the suspect cannot access running water, deny the individual to "life, liberty, and security of the person" as imagined in s.7 of the *Charter?* If it does, *Monney* asks us to consider s. 24 of the *Charter*, which challenges the admissibility of any evidence obtained in ways that "infringed or denied any rights or freedoms guaranteed". As in *Simmons*, the judges here will openly wrestle with the application of s. 24 and wonder if greater latitude is to be granted at the border: to border guards who arrive late, to the exceptional importance of safeguarding ports of entry, to secondary officers who don't read travelers their rights. Section 24 demands a particular timeline—"infringement…must precede chronologically the obtaining of the evidence" and courts seem to accept that the obtaining of evidence occurs at borders and ports of entry in ways that are at times slow, idiosyncratic, or at the very least bureaucratic (Morrissette 1984, 527). While it is not their criminal convictions or the Criminal Code I wish to focus on, the use (or refusal) of the exclusionary rule itself offers some insight into how judges are making sense of the border as a space.

The Legal History of Border Searches in Canada

It has been a slow progression toward the security and control climate that undergirds borders and border searches in Canada today. In its earliest days post-Confederation, Canada was largely rural and agricultural and the state viewed immigration as a means to turn its vast terrain into workable, productive land. Canada's first attempt at border work, the 1869 *Immigration Act*, offers little guidance to the kind of inspections that go on today, and an approach aimed at reducing friction for those picking up and settling in the new country. The *Immigration Act* is fairly broad and hardly

offers much in the way of control; at this point, there is hardly anything akin to a border search. The movement of goods is generally unimpeded; and most people could expect to move freely into and across the borderlands.

We have to go to the *Customs Act* in 1970 to find the roots of the modern border search. Even in the early days of the *Charter*, the border had not yet taken on the anxiety of counter-terrorism, and border work was managed by Customs and Excise under the Department of National Revenue. When Laura Simmons crossed, the preoccupation would have been on the "protection of Canadian industry…and safeguarding of national revenue" (O'Donnell 1984, 467). The *Customs Act* (R.S.C 1970 c. C-40) "gives officers very broad powers of search", which can be loosely bracketed into two distinct categories: the search of vehicles and goods and the search of persons. The two are distinct and distinguished; the search of a boat, car, plane, and items is governed by Section 143:

> Every [officer employed for the prevention of smuggling and the enforcement of this Act] . . may, upon information, or upon reasonable grounds of suspicion, detain, open and examine any package suspected to contain prohibited property or smuggled goods, or goods respecting which there has been any violation of any of the requirements of this Act, and may go on board and enter into any vessel or vehicle of any description whatever, and may stop and detain the same, whether arriving from places beyond or within the limits of Canada, and may rummage and search all parts thereof for such goods.

This doesn't rule out the search of people and bodies, but the reach of Customs and Excise officer to search a person would be explicitly stated in Section 143 under the title, Search of the Person:

> Any officer. . . may search any person on board any vessel or boat within any port in Canada, or on or in any vessel, boat or vehicle entering Canada by land or inland navigation, *or any person* . . . who has come into Canada from a foreign country in any manner or way, if the officer . . . has reasonable cause to suppose that the person searched has goods subject to entry at the customs, or prohibited goods, secreted about his person. [emphasis added]

I will take up the peculiar wording of 'reasonable grounds to suppose' in short course. Suffice it to say that the phrase is a bizarre legal construction that does all sorts of legal and spatial work. For now, we should take notice of the broad latitude afforded to

Customs & Excise officers, and also the way in which those broad powers are bracketed in questions about protecting the Canadian economy through the detection of prohibited goods. For its part Currey (1993) notes that, "management appears to emphasize the collection of revenue" over any perceived law enforcement role (Currey 1993). The border and the border search was not simply a site of revenue enforcement but of revenue creation, through the collection of duties and fees. Management has now changed its tune. The border search today is bundled with so much added anxiety precisely because of the enlarged scope of CBSA interest; note for instance, how questions of immigration admissibility, terrorism, and criminality are beyond at least the discourse of the *Customs Act.* Immigration and resettlement, for its part, had been brought into a newly created portfolio, the Department of Manpower and Immigration in 1966 (Atchison 1988, 12). Bracketing aside the horribly gendered terminology of 'manpower', the Department's focus is obvious from its title; emerging from the economic doldrums of war, and having seen an influx of refugees from Europe as an early signatory to the 1951 Convention on the Status of Refugees, Ottawa was skittish on migration, but labour "provided a rationale" for increased migration that was seen as publically palatable (Atchison 1988). More than any other event, 9/11 shuffled the deck and changed radically what 'borders' stood and spoke for, and after 9/11, "talking about open borders is considered politically impolite" especially as politicians rushed "to demonstrate their commitment to securing borders" where a secure border does all sorts of political, legal, economic, militaristic, and geographic work (Andreas 2003, 2). The border search may have been born in a time before borders were condensation points of terrorist anxiety and xenophobia, but the border search has been brought into a political moment where the original latitude of 'reasonable grounds' remains and 'suspicion' has been broadened and amped up, moving the border into new realms of everyday life.

Today, we expect to be searched and surveilled through a range of practices. As a first measure to more directly fuse immigration and citizenship to border work, the

Western Hemisphere Travel Initiative (WHTI)[13] brings the border—and the border search—into the big, diffuse, hazy, questions of securitization post-9/11, connecting platforms like intelligence to border work in clearly identifiable ways. At the heart of all this securitization is a humble border search that hasn't specifically changed itself, so much as the world around it has been shuffled and shaken up.

The searches I review here are very much illustrative of a pre-9/11 border culture. Both of the cases analysed here are drug cases and no one suggests any big platform of 'national security imperatives' beyond the desire to keep drugs and contraband out of Canada. That discursive restraint is important and it allows these two cases to serve as guide posts for an eclectic and expanding reach of border guards and customs officials. Today, politicians advocate for broad powers through the construction of imminent danger and threat. More discretion is needed, the argument goes, because the nation-state is under an expansive set of evolving threats. *Simmons* and *Monney* challenge this claim as two cases from well before the conflation of border work to terrorism prevention and set the groundwork for the broadened basis of searches to follow. That so much has changed at and around the border, *except* perhaps the laws governing search and seizure, is a point of fact I find instructive and telling. Such a reality reinforces the value of *legal* scholarship at the border not as a novelty, but as a kind of cataloguing of how the border actually functions. Rather than frame the border as a site of security panic, any analysis that begins from *Simmons* and *Monney* demands

[13] While brought into effect in 2007 through 2008, the WHTI was initially proposed in 2004 as part of the *Intelligence Reform and Terrorism Prevention Act of 2004.* Specifically, Section 7209b states: "The Secretary of Homeland Security, in consultation with the Secretary of State, shall develop and implement a plan as expeditiously as possible to require a passport or other document, or combination of documents, deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship, for all travel into the United States by U.S. citizens and by categories of individuals for whom documentation requirements have previously been waived under section 212(d)(4)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(4)(B)). This plan shall be implemented not later than January 1, 2008, and shall seek to expedite the travel of frequent travelers, including those who reside in border communities, and in doing so, shall make readily available a registered traveler program (as described in section 7208(k)). (2) The plan developed under paragraph (1) shall require all U.S. citizens, and categories of individuals for whom documentation requirements have previously been waived under section 212(d)(4)(B) of such Act, to carry and produce the documentation described in paragraph (1) when traveling from foreign countries into the United States" (Government Printing Office 2005).

seeing the border as a space of rights. Both cases are *Charter* challenges and ask judges to consider seriously what constitutes detention under section 8.

Two Cases at the Border: *Simmons* and *Monney*

This chapter proceeds by considering two foundational cases that have dealt with issues of search, seizure, and detention at the border: the case of Laura Simmons and her strip search at Toronto's Pearson International Airport and the case of Isaac Monney and his detention in a drug loo facility (also called a bedpan vigil) at the same airport nearly a decade later. A thorough consideration of *Simmons* and *Monney* demands an looking at the way judges and lawyers at the time framed their arguments, and the legal precedent that guided their decision making.

While little is known beyond what appeared in court files—newspaper reporting of both cases is relatively thin by comparison to today's more crowded media environment—an overview of these two border search cases is useful before engaging with the ways lawyers seek to distinguish these cases from others. It is also helpful to distinguish *Simmons* and *Monney* from each other—by more than just the passage of time—noting the reasons why a thorough discussion of border searches needs to engage with both of these cases, not simply one or the other.

I begin my analysis chronologically, with the case of *Simmons*, which emerged in the early days of the *Charter.* Laura Simmons arrived in the Customs area at Pearson Airport, looking, in the words of Customs Inspector Kathy Badham, "bulgy in the front" (R v Simmons 1983 CarswellOnt1471 Ont. Co. Ct., 117 in trial transcript). Having suspicion that Ms. Simmons may be carrying drugs, Inspector Badham contacted a Superintendent for permission to conduct a search. Badham was joined by Inspector Karen Lewis in "what we call a search room" where a more thorough investigation was to occur (R v Simmons 1983 CarswellOnt1471 Ont. Co. Ct., 120 in trial transcript). Rather than say as we hear so often on cop shows, about your right to remain silent or to an attorney, Badham pointed to a sign on the wall that noted sections of the *Customs Act*. This pointing will be a source of much angst in the trial proceedings—and while no constitutional question demands clarifying the difference between announcing your

rights and gesturing to them, judges wrestle with whether pointing is a sufficient means of getting a point across. In many ways, *Simmons* turns on what happens before the search—the grounds through which someone is referred to a search—and probes at border staffers courses of action and organization.

I follow and complement an analysis of *Simmons* with a similar consideration of *Monney*, which follows *Simmons* by nearly a decade. The case of Isaac Monney bears some similarities—two travellers with Canadian passports flying into Toronto, two cases of drugs found on (or in) their person. That is where the similiarities end, and *Monney* raises questions about the invasive quality of a search that were not on the docket in *Simmons.* Isaac Monney, like Laura Simmons, finds himself in secondary inspection through the specious term of 'doubt'—suspicions are raised because Mr. Monney, a cab driver in Toronto has purchased a flight to Switzerland (and upon further inspection, Ghana) on short notice and with a cheque. But Isaac Monney is hiding narcotics in and not on his person—he has lodged 84 pellets of heroin inside himself—and border officers detain Mr. Monney for several hours on a specially designed toilet and observation unit known as a drug loo to secrete out safely the contraband. Much of the cases that ensue then, involve taking up questions of privacy and detention as they relate to drug loo facility and to squaring the drug loo with the Customs Act's guidelines governing search (R.S.C 1970 c. C-40, sec. 98.1): "…if the officer suspects on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or might be contravened…" Lawyers for the Crown argue that 'secreted on or about' can well be taken to mean within. In one particular refrain, lawyers for the Crown turn to dictionaries and biology to convince the Court that *Customs Act* should hold sway, on, about, or, in:

> …if you look at the dictionary definitions, even the one that Justice Rosenberg located, from the Random House Unabridged Dictionary, all of the dictionary definitions of the term 'about' include 'in. And, in my submission, that really should —should be as far as you need to go and I —I also submit that just as a matter of common parlance, when one —one uses this expression one uses it to mean in. If—if I had said to this Court that I came here early this morning to try and get comfortable before my argument and I came and I spread my books about the Court, I meant I was putting them outside. It would have — it would have been —common parlance suggests that it means 'in'. And, even in terms of the body, we talk about blood coursing about our body and I don't that's a phrase used often but I—I would simply

say that I would simply say thought that, according to the dictionary and according to the ordinary uses of about, in, on, that these terms do include inside (Leising, James for the Crown R v Monney [1999] 1 SCR 652, 15 in transcription of cassettes).

Before we get too invasive, it is useful to set *Simmons* and *Monney* aside and consider the legal history and the context. *Simmons* occurs in the early days of the *Charter* and has ramifications well beyond the border; so too do other cases and legal questions from beyond the border inform how judges and lawyers wrestle with what *Simmons* and *Monney* present.

Hunter v. Southam and the Legal Basis for Search and Seizures

The legal history of border searches goes, perhaps not surprisingly, beyond the border. *Hunter v. Southam* [1984] (hereafter *Southam)* offers an opportunity for the Court to offer guidance on what constitutes a reasonable expectation[14] of privacy under Section 8 of the *Charter. Southam* tests the rights of the state to search in the post-*Charter* era by asking what constitutes reasonable expectations of privacy and to what state ends those expectations may be curtailed. As we shall see, Southam's bracketing of the 'reasonable expectation of privacy' was significant to the border cases I analyze below. The Southam Corporation in Edmonton published newspapers, including the city's largest print daily, *The Edmonton Journal*. Grounds to search and seize property at the Southam offices were provided through the Combines Investigation Act which oversaw non-competitive private monopolies. This rationale—competition and regulation—is not central to *Southam* nor to any thorough analysis of what the case has meant for the way privacy and search is taken up in Canadian courts, but given the way

[14] This is not to say that the concept of what constitutes a 'reasonable expectation of privacy' is by any means settled law. A more recent series of cases, beyond the scope of this research, culminating with *R. v. Patrick* [2008], have aimed to recalibrate privacy rights and expectations away from property rights and toward something more fulsome and dynamic, moving beyond questions of trespassing. Reflecting on the more eclectic means of surveilling and monitoring available, the Court noted in *Tessling* [2004] a desire to take a broader interpretation of when privacy might be expected: "as the state's technical capacity for peeking and snooping increased, the...protected sphere of privacy" should be "refined and developed" (R v Tessling [2004], para. 16).

in which the exceptional character of borders and border security imperatives are proffered in cases that follow, it is at least useful to remember that *Southam* provides much of the basis to critique a search without the real or imagined bracket of national security anxieties.

The Combines Investigation Act allowed a broad search and seizure by state agents, not in the service of criminal investigation, but as part of a routine investigation of trade practices and the regulation of monopolies. In April of 1982, the offices of the *Edmonton Journal* were served with notice that investigators were now authorized to "examine anything therein and copy or take away for copying any book, paper, record, or document that in your opinion may afford such evidence":

Consumer and Corporate Affairs Canada

In the matter of the Combines Investigation Act and section 33 and section 34(1)(c) thereof and

in the matter of an Inquiry Relating to the Production, Distribution and Supply of Newspapers and Pelated Products in Edmonton

TO: M.J. Milton
M.L. Murphy
J.A. McAlpine
A.P. Marrocco
being my representatives under section 10 of the Combines Investigation Act

You are hereby authorized to enter upon the premises hereinafter mentioned, on which I believe there may be evidence relevant to this inquiry, and examine anything thereon and copy or take away for copying any book, paper, record or other document that in your opinion may afford such evidence.

The premises referred to herein are those occupied by or on behalf of

Southam Inc.
10006-101 Street
Edmonton, Alberta
and elsewhere in Canada

This authorization is not valid after May 31, 1982

Dated in Hull, in the Province of Quebec
this 13th day of April 1982

I certify that the above exercise of powers is authorized pursuant to Section 10 of the Combines Investigation Act.

Dated in Ottawa, in the Province of Ontario
this 16th day of April, 1982

Member

Figure 2 Combines Certificate served on Southam, Inc. in April 1982.

The certificate provided for, as then Justice Dickson noted, was “tantamount to a licence to roam at large on the premises of Southam Inc.” with a broad mandate and “breathtaking sweep” which raised questions about the reasonableness of the search (Hunter v Southam [1984], 150). The breadth of the search, seemingly limitless in its scope, formed the basis for the challenge, but the constitutional question here—as in the border search cases—is a question of reasonableness, or the mechanisms through which reasonableness can be made, read in, and constructed around a state search.

Southam is, for several reasons, a troublesome standard and a difficult bracket to force upon cases at the border. Making reasonableness at the headquarters of a newspaper deploys a different set of discourses and subject positions then would be expected or found at a border or port of entry. *Southam* is not a criminal investigation and curtailing the wide reaching authority of the state to search and seize can be logically bracketed by expectations of privacy that trade in traditional legal norms that long tied privacy to property ownership and trespass. Reasonableness in *Southam* is argued out by challenging the spatial scope of the search—Dickson noted that the certificate was labelled with Southam Incorporated’s Edmonton address and then specified, “and elsewhere in Canada” (Hunter v Southam [1984], 150). Lacking any premise of a surgical precision, the Combines search proposed a seemingly open-ended area—Southam’s Edmonton offices, but potentially others, elsewhere—and seeks an indefinite and broad fishing expedition of corporate documents for reasons altogether unspecified. One could hazard a guess at what the Consumer and Corporate Affairs Canada may have been investigating, but a loosely titled “inquiry relating to the production, distribution, and supply of newspapers and related products in Edmonton” struck Dickson and the rest of bench as so general and vague as to neither provide those doing the searching with any reasonable parameters and those being searched with any assurances of privacy. That the Court saw in *Southam* an early opportunity to “constrain governmental action inconsistent with those rights and freedoms” enumerated in Charter is generally considered a liberal win, a victory for individual rights against state power. However, that *Southam* endures as a time-honoured test of reasonable searches and privacy ends up holding more occurrences of state search and seizure to a standard set outside of the criminal process.

Justices from Alberta (Southam v Hunter, 1983 ABCA 32) and at the Supreme Court wrestled with their role to "employ the necessary safeguards" into the Combines Act to prevent unreasonable search and seizures. In their reasons for judgment, Justices for the Alberta Court of Appeal reflected that while safeguards against unreasonable search may be called for, they would need to draw a bracket around the kind of work the judiciary could do:

> In interpreting statutes the courts are often required to make implications where the statute is silent. It must be kept in mind when doing this that the function of the court is to interpret legislation, not to create it. An interpretation is not implied unless it necessarily follows, can be reasonably inferred, or is suggested by the expressed wording of the statute (Southam v Hunter 1983 ABCA 32, para. 58)

The Alberta courts were uneasy about filling the gaps with what they viewed as legislation, setting up a bracket around the limits of what courtrooms could do with the issues raised by the search at Southam's offices. They utilize the word 'safeguards', realizing that yes, the *Charter* can be that very safeguard in between individuals and state power, but as a provincial court of appeal, they were not inclined to make bold inferences to either promote or create those safeguards. Clearly concerned that the "Court carry out its judicial function" and to not be involved "in a legislative capacity", the Alberta bench "dealt with obvious omissions in the [Combines] Act" as a means to promote the need for further safeguards, a prompting to Parliament (Prowse, J. in Southam v Hunter 1983, para. 62 of decision).

> It is Parliament which has traditionally expressed the guidelines for the authorization of search and seizure… (Prowse, J. in Southam v Hunter 1983, para. 59 of decision).

While I view *Southam's* role outside criminal search as a challenge to any construction of a bracket that draws in border searches, Justice Claire L'Herreux-Dubé offers a useful contrast in her dissenting opinion in *Simmons*. L'Herreux-Dubé notes that border searches, just like a combines search, are not "part of the criminal process but rather part of the process of entering into the country", in this way, drawing *Southam* into news spaces of search, such as the border (R v Simmons [1988], 465). *Southam* offered three key "criteria to which searches must conform", in that case allowing judges to square the reasonableness of the search capacities of the *Combines Investigation Act* with the *Charter.* In the cases here, judges would ask a similar question, testing the

reasonableness of the search provisions within the *Customs Act.* In offering his opinion in *Simmons,* the Chief Justice enumerated the new *Southam* standards:

> …First, where possible, the search must have been approved by prior authorisation…Second, the person authorizing need not be a judge but must act in a judicial manner…Finally, there must be reasonable and probable grounds, established upon oath to believe that an offence has been committed and that evidence of this is to be found at a particular place… (R v Simmons 1988, 439).

These *Southam* standards should strike us as a bit troublesome at borders and ports of entry, where individuals arrive at the border without advance notice. In this way, a caravan of tourists driving up to the Peace Arch challenges these standards—it would be hard to obtain prior approval to search a car that wasn't logically expected to arrive beforehand[15]. Given this, it is the final test, of reasonable and probable grounds, that is the most resonant from *Southam*—a concept not unique to this case, but grows a rich legal life within police procedure and search and seizure through this decision.

Expanding the Bracket: American Legal Decisions in the Supreme Court

When the Supreme Court of Canada suddenly found itself with an expanded mandate with the *Charter,* it looked for guidance broadly as to how to make decisions in an environment now with clear constitutional rights. American courts that had long been considering questions of constitutional rights were drawn closer than before. The bracket of relevant jurisprudence is opened up to make space for American decisions, themselves engaged in their own distinct form of bracketing. It is important to interrogate its use, especially here at these flash points of sovereignty and jurisdiction, and what it can mean to draw in a neighbour's legal principles—but at the same time it is important

[15] It is this detail that has seen the most drastic change in the years this research progressed. A series of initiatives between the United States and Canada have sought to better understand who is leaving (and coming) each country, and in so doing, to have a better sense of when individuals could reasonably have expected to appear at ports of entry. Beginning in 2013, CBSA and DHS began a pilot project to share entry and exit data in an effort to reconcile records. The work at four ports of entry in BC and ON resulted in a 94.5% reconciliation rate between Canada and US entries and exits, allowing each group to better identify and predict movement across the 49th parallel (Government of Canada 2013b).

to remember that its use was not evenly or uniformly accepted. Here, as everywhere brackets are deployed, there are battles of brackets. These 'battles' are at the heart of the way the law works, by trying out different interpretations and ways of organizing information. This undergirds the way legal logic is made and the possible inclusion or exclusion of American material is no different in that regard. While Justice La Forest (1994) spoke of his willingness to look to American law as anchored in a larger cultural and economic connection between the two nations, Chief Justice Dickson argued for something more restrained, offering his perspective in *Simmons:*

> While we must, of course, be wary of adopting American interpretations where they do not accord with the interpretive framework of our Constitution, the American courts have the benefit of two hundred years of experience in constitutional interpretation. This wealth of experience may offer guidance to the judiciary in this country. (Dickson, C.J. in R v Simmons [1988] 2 SCR 495, para. 26).

While the Supreme Court of Canada was not beholden to American laws or judicial behaviour, in other words, American precedent offered helpful guidance, especially in the post-*Charter* era. The *Charter* brought to Canada "a phenomenon that Americans have lived with for some time: judicial review of both legislation and official action for compliance with constitutional rights" (Harvie and Foster 1990, 730).

Speaking to a meeting of lawyers from Maine holding their state's bar association conference in New Brunswick, Supreme Court of Canada Puisne[16] Justice Gérard La Forest noted how American precedent became so influential to Canadian courts: "…It was really one event, the enactment in April 1982 of the Canadian Charter of Rights and Freedoms, our version of a constitutional Bill of Rights, that marked the decisive point in this transition to an expanded use of American materials" (La Forest 1994, 213). The *Charter* drew Canada closer to the US. Surely the two nations had a shared topography and a similar history—La Forest himself had a degree from Yale Law School—but the *Charter* brought forward new juridical comparisons and similarities between the two neighbours that were not previously as overt. Justices were cautious to offer that with a

[16] Justices other than the Chief Justice of the Supreme Court are referred to as 'puisne', from the French for 'junior'. See, for example, Iacobucci 2002: "The composition of the Supreme Court of Canada remains much the same today as it was in 1949. Its members consist of the Chief Justice of Canada, and eight puisne Justices appointed by the Governor in Council…"

newly codified bill of rights, “American jurisprudence, like the British, must be viewed as a tool, not as a master…” (R v Rahey [1987], 639). Still, this was a moment of intense improvisation in the courts, as justices in Canada scrambled to embrace the new broad mandate the *Charter* created. The brackets were unsettled, in other words. As Justice La Forest noted in 1988: “It is like compressing the United States’ experience of about 50 years into a moment of time. There was no building up gradually…” (La Forest 1988, 320). For the kinds of constitutional questions border search cases like *Simmons* raise, the Court was in relatively uncharted waters. As Justice La Forest conceded, Canada was operating from a deficit of legal history on constitutionally codified rights.

Even if the *Charter* was less individualistic in approach, valuing concepts like multiculturalism and bilingualism, the similarities with the US Bill of Rights are clear and fruitful. For these reasons, it is worthwhile to back up to a few years before the *Charter,* before *Simmons,* and look at a case from the US that would prove influential and instructive. Justices in Canada looking at *Simmons* were guided primarily by the decision in *United States v. Ramsey* [1977]. *Ramsey* raised many of the questions of ‘reasonableness’ Canadian justices would be tackling in *Simmons*, the kinds of searches and degree of privacy we should expect when crossing an international boundary. *Ramsey* is important to this discussion both for the way it represents an organizational bracketing of legal knowledge—putting the events of *Simmons* against the events in *Ramsey*—but because *Ramsey* established key legal bracketing about border work, including from US Chief Justice William Rehnquist, distinctions about differences within bordering that held great sway with Dickson and his peers in the Supreme Court of Canada. Judges in Canada have largely adopted this piece of *Ramsey*, and so to the extent this American case gives us clues to the theoretical underpinnings of legal brackets, any discussion of border searches in Canada must reasonably consider how American courts debated similar cases. For researchers, I would argue the American courtroom is fertile ground for getting a better sense of Canadian courts—the Supreme Court of the United States already had recorded and transcribed its proceedings in 1977, so while we have little sense of the questions Canadian jurists were asking in the 1970s and 1980s, we can trace legal decision back to debate in the United States. For someone as myself who has claimed an interest in showing how the law is contested and articulated, then, American transcriptions like *Ramsey* give a rare glimpse inside

courtrooms and allow for Canadian decisions and opinions (and their related brackets) to exist less as established fact but instead as the kind of ongoing legal conversation they really are.

Ramsey calls in another activity of border work, the surveillance and search of international mail[17]. This can be viewed, not as point of distinction or even difference, but valuably as a reminder of the fact that bordering activities generally and border searches in particular, both in Canada and the US, sometimes involve people and, at other points, involve strictly the movement of goods themselves. In *Ramsey*, a customs inspector opens, without a warrant, eight otherwise non-descript envelopes at a customs mail center in New York City. The parcels were shipped from Thailand, believed to be a source for narcotics and were irregularly weighted. Described as "normal sized envelopes used in domestic and international mail", the customs inspector had no probable cause, though a hunch, given that the envelopes originated in Thailand (U.S. v. Ramsey 1977, Kenneth Geller at 00:02:28[18] in the oral arguments). The envelopes did in fact contain heroin, and were opened in the mailroom in New York, resealed, and sent along to Charles Ramsey and his co-petitioner[19], James Kelly, in the Washington, D.C area under supervision. When the parcels arrived in their possession, authorities had grounds to arrest the men and break up their international drug smuggling operation. Much as is the case in border searches of people (and goods) at a port of entry, Customs officials in the US did not have a warrant to open the suspicious envelopes, and so here, even before *Simmons,* we see the articulation of 'reasonableness' and of the expertise of customs staffers who are trained in the highly technical work of bordering. Ramsey questions that reasonableness, but it also inevitably limits that

[17] As mail was opened as part of the investigation, counsel for Ramsey attempted to bracket the opening of mail as a violation of the First Amendment, protecting free speech, but the Burger court was generally unsympathetic to this angle, noting that "the existing system of border searches has not been shown to invade protected First Amendment rights, and hence there is no reason to think that the potential presence of correspondence makes the otherwise constitutionally reasonable search 'unreasonable.'"

[18] Timestamps come from the Oyez project, a collaboration between Cornell University and the Chicago-Kent School of Law at the Illinois Institute of Technology. Oyez maintains fully searchable oral arguments of the U.S. Supreme Court dating back to the installation of audio recording technology in the Court in 1955.

[19] Here, I use the terms as applied by the US Supreme Court; parties are petitoners and respondents.

questioning around the imagining of the border—or sites of border work—as particular and in some ways, exceptional. In other words, the border brackets, and is bracketed from other spaces as distinct in its mandate and range of responses. Chief Justice Warren Burger believed the government had expanded and exceptional grounds to search at the border:

> Chief Justice Warren Burger: Well, the United States Government can stop and inspect anything crossing its borders, can it not?
>
> Mr. Kenneth Geller (Counsel the United States): That is correct.
>
> Chief Justice Warren Burger: That is an inherent power of sovereignty. (U.S. v. Ramsey [1977], 00:07:53 in the oral arguments)

Justice Burger aside, this fact of sovereignty is, in fact, anything but inherent or obvious and, as has already been noted, is the point of rich debate within political geography (Newman 1998; Sidaway 2003; Fluri 2011; Dodds 2013). Even if the United States or Canada has a sovereign interest in protecting its borders, do we take the Chief Justice at his word that a search at a border needn't be held to the same standards of due process because of its simple proximity to a national boundary? As with so much in border studies, yes and no—all at once. As Justice Thurgood Marshall noted in his questioning, wouldn't spot checks—where passengers and bags are randomly selected for search—represent a rights breach? All the justices seemed to acknowledge, though, that once you get beyond the border, you "need something more", thereby allowing for 'less' in ports of entry. Without being explicitly legislated, the border—here from the point of view of American jurists—was a distinct legal space. If a peace officer needs "more"—more than a hunch, more of a reasonable cause—to search an individual, a car, or a bag, than by the inverse all the justices concede borders are spaces where the burden of 'reasonable cause to suspect' is lowered.

What *Ramsey* offered judges in Canada was a train of thought—a working through—and the development of legal distinctiveness of the border and of the quality of search. Although *Ramsey* didn't involve stopping travellers in their tracks, the application of border search norms to the mailroom allowed justices in Washington to formulate useful bracketings for kinds of searches at the border. *Ramsey* offers up a border search exemption, a reduced expectation of privacy at the border. This constitutes a bracket,

where the border is legally distinct from other sites of search and surveillance and can be bracketed off from other kinds of searches and other spaces where searches may occur. Underpinning the exception is the idea that the border represents a distinct security imperative and a unique instantiation of sovereign power. This move to bracket off the border is instructive as jurists question what sort of legal space a border actually is. As (then) Justice Rehnquist notes:

> The border search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country. It is clear that there is nothing in the rationale behind the border search exception which suggests that the mode of entry will be critical. It was conceded at oral argument that customs officials could search, without probable cause and without a warrant (U.S. v. Ramsey 1977, 620).

Border searches are different by virtue of the presumed status of the border as an instance of sovereign power and the Supreme Court in the US seems willing to grant certain exceptions or latitudes to how those searches are conducted. This legal norm of reduced expectations of privacy at the border predates *Ramsey.* Rehnquist, writing in the majority opinion, drew attention to *United States v. Thirty-seven Photographs* where the Court held that search and seizure are customary and standard practice as part of the work of the border:

> But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officials characteristically inspect luggage, and their power to do so is not questioned in this case; it is an old practice, and is intimately associated with excluding illegal articles from the country (U.S. v. Thirty-Seven Photographs 1971, 376)

The Burger court has more than made its comfort with warrantless searches at the border by the very mere fact of it being the border. *Ramsey* puts in words, then, the idea of a border search exemption, that borders are legally distinct from other spaces, and the kind of policing that is done at the border can be bracketed off from other sites of investigation. Other brackets and arguments will fit the border into other pre-existing norms of search and seizure, but *Ramsey* proposes something different; that the border is unlike other spaces and by its sheer fact of being the sovereign edge is to be treated differently by courts, and by extension, those who do the work of bordering. Of course,

Ramsey is but one interpretation, one way of framing the argument. Part of what is interesting in the Canadian proceedings that take up *Ramsey* is an ability to juggle the seemingly air-tight argument of the border as exceptional against other arguments that hold the border and border work accountable to constitutional rights.

Simmons: Making the Border Legally Distinct

The first time courts in Canada get a chance to consider searches at the border is *R. v. Simmons*. *Simmons* asks several questions about the way bordering is done, openly opining through *Ramsey,* for example, as to whether or not the border is some distinct kind of space, outside of regularly held legal norms and rights.

In writing an intervenor's factum[20] in *Simmons* for the Attorney General of Ontario, S. Casey Hill (now Justice Casey Hill in Brampton) aimed to further support the Crown's positions, firstly that borders are legally unique spaces, and that secondly, not all detentions rise to the legal understanding of detention as spelled out in Section 10 of the *Charter.* Hill's work for the Attorney General invokes a series of brackets and ways of representing the border as at once banal:

> On a daily basis, government authorities stop, restrain liberty and search persons entering airports, courthouses or courtrooms and legislative buildings in an effort to counter the entry of weapons or items lawfully possessed but capable of use as weapons…" (R. v. Simmons [1988], 2 SCR 495, Factum of the Intervenor at page 6).

and on the other hand, exceptional:

> It is respectfully submitted that entry at a border or point of entry presents exceptional circumstances in terms of customs or immigration concerns." (R. v. Simmons [1988], 2 SCR 495, Factum of the Intervenor at page 7).

[20] One copy of the intervenor's factum, of the 21 originally circulated as part of the Supreme Court proceedings, remains. The Attorney General of Ontario switched computer systems shortly after *Simmons* and all their records from the period have since been erased. While I reference a distinct factum here, it exists only as part of the larger complete microfilm of *Simmons* at the Supreme Court.

It is at once an unenviable position (or positions) at yet, very much the nature of border work, that the practices of bordering be seen as at once humdrum and common and yet also special, particular, and exceptional in ways that allow the border to stand on its own as a legal space. This makes the border hard to bracket—even if the US Supreme Court envisioned the border as legally distinct. This banal/exceptional contradiction, where the border is at once expected and at once distinct. *Simmons*, in particular, is a first major attempt by Canadian courts to define that legal space and to make sense of the way borders are at once expected and exceptional.

At trial and on appeal in the Court of Appeal for Ontario, judges differed on the meaning of 'detention' as a statutory right and within the context of a body search at a border. Figuring out what constitutes 'detention' became the central analytical demand; sorting borders and body searches into and out of 'detention' is what *Simmons* turns on. This the first bracket at issue, critiquing the time and space of her search, comparing it to legal norms surrounding how words like 'detained' are used, in comparison, for instance, to 'arrested' or 'held'. I argue that it is not simply a question of wordplay, but that these words constitute brackets, that bundled up in their usage belies an entire expectation of relationships and results.

Secondly, the evolution of the case examines and brackets the idea of 'extraordinary', as a quality or degree of invasiveness in search. In copies of the Intervenor's factum obtained from the Supreme Court, it is clear that clerks, or perhaps a Justice him or herself was not convinced of Hill's argument. Musing on the margins, an anonymous hand points to an important bracket—the extraordinary quality of a search. Simmons was strip searched, and the note taker in this Court file openly wonders if a strip search is legally distinct from other forms of search and police procedure:

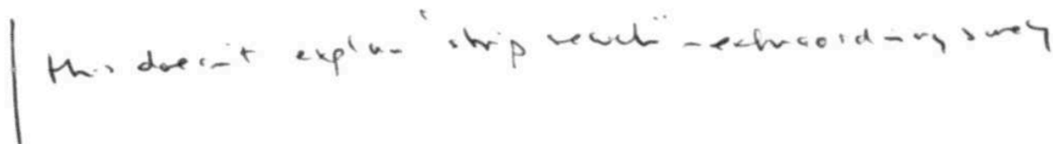

Figure 3 Scribbles in the margins; a Court staffer leaves opinions and questions on the archival copy. (R. v. Simmons [1988], 2 S.C.R. 495, Factum of the Intervenor).

The note-taker scrawled, “this doesn’t explain ‘strip search’ – extraordinary surely”, asking the question that undergirds the arguments around this bracket. A strip search, after all, isn’t a standard experience at the border, so the time that Ms. Simmons spent in custody and the way she was moved through primary and secondary inspection must be extraordinary. Strip searches are not common, the note-taker here mused, so the treatment of Laura Simmons must be legally understood as ‘extraordinary’. *Simmons* importantly sets out the Supreme Court’s thinking on the border and border searches, establishing what we can think of as the Simmons test, where Chief Justice Brian Dickson extends *Southam*’s three criteria for reasonable searches to develop what we might understand as three levels or degrees of border searches:

> It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning, which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada, and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is "detained" in a constitutional sense, and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin-search, of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the "body cavity search", in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means (Dickson, C.J. in R. v. Simmons [1988], 2 S.C.R. 495, para. 27).

This dissection of border searches will become one the most important legacies of this case. It establishes both a principle of ‘routine’ border work while bracketing said work from more highly invasive kinds of search. This paragraph is the Court’s first and a significant contribution to creating a legally distinct space at the border, opening spaces of bordering up for a greater level of surveillance and questioning than might otherwise be permitted. What I want to do in the work that follows, then, is explain how such a paragraph could come to be. While this paragraph creates new distinctions—levels of search—it also presents an argument for what is to be expected at the border and attaches means for rights adjudication along the way. It is a paragraph borne from consultation with American precedent (such as *Ramsey),* from consideration to search

and police power more broadly in Canada (as in *Southam*), and from listening to trial evidence in Ms. Simmons' case that catalogued the work at the border and how that work is experienced by an individual traveller.

It is helpful, then, to unpack the legal work behind Dickson's declaration and to look at some of the competing arguments offered and the legal-spatial work they do. Ms. Simmons' initial criminal trial was a staggeringly short one day, but it does offer the testimony that I draw upon and that judges in the appellate courts would have made use of as well. It's clear that cross-examinations in particular give some shape and structure to arguments for Laura Simmons; the defence did not call any of its own witnesses and the Crown only offered two Canada Customs agents, from primary and secondary on the night of Ms. Simmons' detention. So much of this case turns, then, on framing and bracketing the constitutional questions raised—whether or not Ms. Simmons was detained and searched in keeping with her *Charter* rights and whether or not she was made aware of the government's obligation to conduct their search within particular, prescribed rights. As then articling student working on the case Susan Woolner noted in her affidavit[21] to the Supreme Court, *Simmons* asks several concurrent questions of the Court: firstly, did her detention in secondary inspection violate "her rights pursuant to section 10(b) of the *Charter of Rights and Freedoms".* Was Ms. Simmons informed of her rights upon detention—does informing someone of their rights, for instance, demand that they understand those rights? Additionally, *Simmons* asks the Court to consider the constitutionality of the search clauses of the *Customs Act* (s. 143 and 144) against the guarantee against unreasonable search and seizure as set out in s. 8 of the *Charter.* Finally, the case tests the Exclusionary Rule—s. 24 of the *Charter*—and asks if Ms. Simmons' rights have been violated, does the Court have an obligation to exclude evidence obtained from an unconstitutional search?

[21] Woolner submitted an affidavit in defense of an unusually long factum, noting that the "number and complexity of legal issues" presented necessitated a factum over the customary 40 pages. (*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Affadavit in Support of Appellant's Factum

The Art & Science of Bordering: Effectuating Reasonableness at the Border

Much as in *Simmons*, the Court in *Monney* wrestled with the "lessened expectation of privacy" we find at airports and border crossings as well as the "state interest…to protect the public at large from the harms of an unregulated border" to hold the work at ports of entry to a "lesser standard of reasonable suspicion" rather than the more stringent probable cause (R v Monney [1999], 1–2 in oral arguments). Much like Ms. Simmons, Isaac Monney approached the arrivals hall at Pearson Airport nervously and with a recently purchased ticket for which he paid in cash. If that triggered, as customs officers said in *Simmons,* 'doubt', where does doubt meet expectations of increased surveillance at the border, the kind of expectations of reduced privacy laid out in the *Ramsey* decision in the United States?

Arising, then, from *Simmons,* and undergirding *Monney,* is the concept of reasonable suspicion, an admittedly lower threshold to initiate searches and inspections. There are a few important legal moves at work here, not the least of which is the creation (or conflation) of security interests in screening at borders as higher or greater than Main Street. There is a taken-for-granted quality to the 'state interest' that missing criminality at the edges of the nation-state poses a somehow larger threat to safety that justifies a reduced standard of privacy. Given the interest here in legal rhetoric and the moves lawyers make, I think it is worth noting how lawyers frame arguments that permit and foreclose certain kinds of (legal) outcomes.

Border searches are governed, to a large extent, by the *Customs Act*, which sets out an idea of 'reasonable suspicion':

> if the officer suspects on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or might be contravened, anything that would afford evidence with respect to a contravention of this Act or any goods the importation or exportation of which is prohibited, controlled or regulated under this or any other Act of Parliament. (R.S.C 1970 c. C-40, sec. 98.1)

This has broad implications for the way the border works and the way it is made real for people and goods. But what, exactly, is 'reasonable'—and how does the

performativity of something deemed reasonable change border work? In taking up this question, judges create a convoluted geography that connects the border to broader state security efforts while at the same time operating in a zone of prevention, thus disconnecting the border from spaces of policing that respond to laws after they have been violated. Implicit as well in the sense of 'reasonable grounds' is the image of the lone border officer, in their booth, without the full resources of the state behind them, confronting important decisions about admissibility of people and goods live and in the moment. The need to rely on sharp intellect and keen critical thinking helps create the spatial and temporal topologies of the border, where 'immediately' an imminent danger is folded upon histories of coloniality and racism, and spaces of rights are brought into contact with spaces of detention and waiting. In trying and assessing reasonableness, search and seizure cases demand a border officer to make 'reasonableness' real—to effectuate reasonableness through a series of discursive turns that elevate hunches to something more impartial and scientific while at the same time foregrounding the need to rely solely on intuition as an emergency politics that demand quick and decisive action at the frontline.

In modern, post-9/11 vernacular, reasonable suspicion has evolved into "if you see something, say something", with the catchy phrase appearing commonly in public—train stations, schools, and airports, for instance—to signal increased vigilance, if not a touch of dislocated, generalized suspicion.

Figure 4: A collection of reasonable suspicion posters from San Diego (top), New York City (bottom left), and the campus of Louisiana State University (bottom right).

This campaign attempts to create its own kind of brackets—around usual, therefore normal, safe behavior—and enlists the entire public in its work. The public is called into both see—be on the lookout—and say—pass along these suspicions to authorities. As the Metropolitan Transit Authority of New York City advises, "don't keep it to yourself". This atomization of police work—the community will recognize anything out of the ordinary—allows suspicion to be produced in the naming of that which is unlike me/here/us. Newark Airport goes one step further by suggesting that what appears normal may not be, warning travellers that "sometimes a bag is not just a bag" (Port Authority of New York & New Jersey 2016). This production of suspicion will become valuable when investigating deportation schemes post-9/11. In deportation cases, it is not some-thing, but some-one who has been rendered reasonably suspect. For now, we should recognize that the work at hand attempts to make hunches reasonable "through a blend of different kinds of risk knowledges, from quasi-scientific, quasi-actuarial expertise, to more moralistic, racialized forms of knowledge, and even knowledge constituted by near magical notions of intuition and sixth senses" (Pratt 2010, 467). As

Pratt notes in her title, lawyers and civil servants are not changing behavior so much as finding a way to make that behavior permissible within the bounds of Canadian law. She suggests that lawyers, judges, and border officers work to "make suspicion reasonable", or, to make mere hunches into legally legible, permissible grounds for border enforcement. Here, performativity offers a useful set of language to talk about the way gut feelings become actionable intelligence and how hunches become the grounds to pursue a search or investigation. To make suspicion reasonable is to frame it through certain techniques, descriptions, tools, markers, and data points that attempt to make one individual's instinct into something that is translatable. If the suspicion can be clarified and grounded in particular registers of science, knowledge, and expertise, courts and border staffers alike can make iffy feelings into grounds for search that go beyond the idiosyncrasies of a particular officer. The suspicion can be said to be reasonable and is made so through the ways in which the suspicious feelings can be articulated. *Something* can now distinguish itself from *anything*.

Even before 9/11, being on the lookout for some thing—out of place, out of a perceived (if not state produced) normal, was taking shape as a legal position of 'reasonable suspicion'. Suspicions are not reasonable unless you call them as such and so there is a productive power here in pairing these words together in a way that bridges cold science to the fuzzy and emotional. Bandied around enough, the term stands in for the tautology of willing hunches into technical, objective, policing. To that end, it is worth remembering that the brackets that are crafted represent a language, a way of speaking about people and events. This language makes permissible certain relationships. Reasonable suspicion, after all, did not fall from the sky, nor was it plucked from the soil. It was triaged out of law and policy and the placing of those words in legal documents can make words appear meaningful, but that meaning itself is a rather ornate performance. Few legal scholars hazard a guess at what 'reasonable suspicion' means, but instead guess around what it does not mean or ways they could stretch what 'reasonable suspicion' has meant in the past. I think it does mean something, surely, but that so much of its meaning has been bundled up in being present in the right spaces—court documents, public law—suggests that so much of bracket making and legal discernment is really an exercise in language. More than language, it is the way the language is drawn upon and made into tools, the way terms are rendered valuable

techniques and brackets of distinction, that suggests lawyers along with judges engage in vast exercise of performing words (and thus brackets) into power.

The law is not lacking for ornamentation and the trappings to make the performative (seemingly) legitimate. There are, of course, rules, steps, and courses of action. We know some may talk, while others are called upon. There are oaths to take and books to swear upon. As Rose-Redwood (2008) notes, performative acts are made legitimate both through "the adherence to established procedures but [are] also dependent upon the performances and counter-performances that constitute the audience's response" (Rose-Redwood 2008, 876). Among those responding may be government lawyers, who, upon entering a courtroom are no longer 'Diane' or 'James' but 'The Crown'. As Valverde and Weaver (2015) note, this turn of phrase "creates a supernatural and political 'body mystical'" and allows commoners to evoke "the special powers of monarchs" (Valverde and Weaver 2015, 94). Not simply is the lawyer representing the monarchy, but doing so through the image of "the jeweled object worn thousands of miles away by Queen Elizabeth on solemn occasions" (Valverde and Weaver 2015, 94). When the Crown speaks, it commands an audience. Under all the trappings of the very regally inspired Canadian legal system, 'reasonable suspicion' feels, as it were, reasonable.

Building a Reasonable Search: *Terry v. Ohio*

I have already stated that Canadian courts were drawn to American precedent, and that the border search in *Ramsey* is instructive when we look at how judges were making sense of the border. *Ramsey* helpfully provides brackets that gives Chief Justice Dickson and his colleagues on the bench some wiggle room to envision the border as distinct. The language of Supreme Court of the United States Chief Justice William Rehnquist draws useful brackets around border work:

> That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration (U.S. v. Ramsey [1977], 616).

Searches at the border are, to put it simply, special. When *Ramsey* presented SCOTUS with a Fourth Amendment[22] challenge, Rehnquist reiterated a border search exemption:

> Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. (U.S. v. Ramsey [1977], 619).

Still, the question of 'reasonableness' is up for debate in Canadian courts; the border search exemption offered up in *Ramsey* is not settled law in Canada and the reasonableness of the search of Laura Simmons raises constitutional questions about the validity of the search and the evidence obtained more broadly. To that end, we might backtrack on the concept of reasonableness as it is used here. I take from a 1968 US decision, *Terry v. Ohio,* key forms of bracketing on reasonableness and the way suspicion is articulated. *Terry* is a useful starting point for thinking about the way rights can bracket interactions with law enforcement, particularly in a search capacity. *Terry* regulates "the constitutionality of police conduct in citizen stops" creating the constitutional basis for the stop and frisk (Gelman et al. 2007, 817)[23]. We can and should distinguish streets from borders and ports of entry, but as a means of identifying legal arguments around the search of individuals, *Terry* remains a crucial point within the development of judicial thinking and it undergirds search cases on both sides of the border. For our use here, *Terry* is useful for the way it gives guidance around the way

[22] Where the US Fourth Amendment is roughly equivalent to s.8 of the *Charter of Rights and Freedoms* in Canada.

[23] The stop and frisk has a complex history in the United States, and it is implicated in larger questions about the way race and space (i.e. 'bad neighbourhoods') become powerful discursive brackets to make permissible a range of policing practices. Gelman et. al. identify the way *Terry* legally justifies what has largely become a racialized practice within American cities, with African-Americans targeted disproportionately: "the NYPD's records indicate that they were stopping blacks and Hispanics more often than whites, both in comparison to the populations of these groups and to the best estimates of the rate of crimes committed by each group. After controlling for precincts, the pattern still holds. More specifically, for violent crimes and weapons offenses, blacks and Hispanics are stopped about twice as often as whites…" (Gelman et al. 2007, 823). The racialization of border work is beyond the immediate scope of this research, but the legal rationale for border searches is often based in discourses that themselves are inherently racist.

‘reasonableness’ is made—how the term is taken up, creating a bracket of ‘reasonable’ searches for judges and lawyers to draw upon. In *Terry,* the Court asked for an “articulable suspicion” and then pulled in a standard of reasonableness to guide police officers in taking an impression from “mere hunch” to “having reasonable cause to believe” (Terry v. Ohio [1968], 8). We might find the Court’s stress of articulation particularly ironic when read against Justice Potter Stewart’s words from 4 years prior. Writing in concurrence to the majority opinion in *Jacobellis v. Ohio,* Potter noted that when it came to hard-core pornography, “I know it when I see it”, although such hunches might lack easily identifiable parameters or classifications (Stewart, J in Jacobellis v. Ohio [1964] 378 U.S. 184 at pg. 197). Words may fail us but we can make distinctions still. In *Terry,* Stewart joins 7 other justices in going beyond that test; knowing or believing requires articulation. If we believe a situation to be criminal or dangerous, we have to be able to articulate the way in which one arrives at such a suspicion.

In *Terry,* the US Supreme Court overwhelmingly (8-1) supported an expansion of police powers. Noticing a trio of men shuffling outside a department store in downtown Cleveland, a police officer assumes the men might be planning a robbery. Introducing himself to the men as a police officer, he questions the men and frisks each, revealing concealed weapons. While *Terry* lowered the bar for the perceived minimal invasion of privacy of a stop and frisk—a so-called *Terry frisk*—it created along the way the legal language through which instincts, intuitions, hunches, and feelings would be made reasonable. At that time, the Court justified only the stopping and frisking “upon the notion that a ‘stop’ and a ‘frisk’ amount to a mere ‘minor inconvenience and petty indignity,’ which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion” (Harlan, J in *Terry v. Ohio* [1968] 392 U.S. 1, 11). The use of the word ‘mere’ is instructive, and Justice Harlan with his colleagues on the bench would make use of that word several times in their decision to recast their opinions with descriptive, legal certainty: ‘mere hunches’ are set against ‘mere inconveniences’. Lawyers in oral proceedings as well trot out ‘mere’ and similar terms to colour police activity as lacking a technical precision and to characterize the frisk as more than a simple pat down. *Terry* draws brackets quite clearly, with the US Fourth Amendment (akin to Canada’s *Charter* section 4) serving on one side to limit warrantless, or “unreasonable” searches and seizures while a new test to ensure

feelings and impulses can be articulated creates a new bracket on the admissibility of such police work. The Court calls brackets to mind as they speak of the need for a "narrowly drawn authority" to stop and frisk. There would be limits—brackets—to what could be searched and it would be predicated on "specific inferences" that one develops as a quasi-technical skill on the beat. In particular, the Court speaks of hunches as an "un-particularized suspicion", but particulars build brackets. There would be limits placed on the kind of search that could be done, here only a pat down for weapons. *Terry* sets up a bracket around acceptable searches only "to disarm a suspect reasonably believed to be armed and dangerous" (Harris 1994, 663). As well, there were to be limits placed on the kind of suspicion that would be sufficient. Particulars of location, gender, time of day could be placed in the black box so long as those particulars could show a degree of discernment, veiled by the guise of the technicalities of policing, bracketed and distinguished from 'mere hunches'.

White and Fradella (2016) offer a useful history of the *Terry* decision. Like justices in the cases I examine in the Supreme Court of Canada, "their views morphed as consideration of the case unfolded" (2016, 58). In particular, White and Fradella point to the drafting of "evolving versions of the decision in *Terry"* and the difficulties Chief Justice Earl Warren faced trying to "fit the facts of the case into a traditional probable cause framework" (White and Fradella 2016, 59). This can well be understood as the productive tension that undergirds bracketing, where by 'frameworks' are made, challenged, pushed open, or swapped out all together. The Court's answer in *Terry* was to offer very prescriptive guidance for law enforcement. Noting that "probable cause is the constitutional standard for a reasonable arrest, [Justice] Harlan said the Court should use different phraseology to define a reasonable stop. His proposed standard was 'reasonable suspicion'" (Barrett 1998, 814).

What is striking in the Court's opinion in *Terry* is how much words have been made into powerful devices to characterize (and in some cases, challenge) behavior on the ground. Justices hardly define a reasonable suspicion, but pair the words in stark contrast to a theoretical, if not real, possibility of careless and overzealous police work. Describing a pat-down as "annoying" or a "brief intrusion" attempts to bracket off this work from more violating experiences, but it also serves to reimagine what is actually a

humiliating and public violation of privacy as (somehow) acceptable within the pre-existing brackets of the Fourth Amendment. *Terry* also functions on the fiction that law operates in a vacuum, that Terry stops would not be taken up in ways unimagined and unintended by the Court in 1968. *Terry* reminds us too that those brackets can be made and applied, they are not static, and the last 47 years since *Terry* have seen local police and in turn, jurists, push the brackets in an incremental slippage away from its original stringency. As David Harris (1994) notes, cases since *Terry* "fleshed out Terry's rules. These cases gradually required less and less evidence for a stop and frisk" to functionally being "stopped for nothing—or nearly-nothing—becoming an all-too common experience for some Americans" (Harris 1994, 660, 659). The brackets have been busted.

Reasonable Suspicion in *Simmons* and *Monney*

How, then, does 'reasonable suspicion' enter into the judicial construction of the Canadian border? It does so in an exploratory sense. There is no reason to assume the justices in Ottawa had *Terry* specifically in mind when they fashioned their own bracket of 'reasonable suspicion' as the term found its way into the *Customs Act* by 1970. Section of 143 of the *Customs Act* allows officers "upon reasonable grounds of suspicion, [to] detain, open and examine any package suspected to contain prohibited" materials (R.S.C 1970 c. C-40, sec. 143). Fashioned though it may have been as a contemporary to the *Terry frisk*, reasonable suspicion at the Canadian border had never been tested until *Simmons*. Despite the fact *Simmons* holds as a time-tested consideration of rights at the border, very little is known beyond the facts reported in the courtrooms. What is known is that on November 14, 1982 Ms. Simmons flew to Toronto Pearson from Jamaica and proceeded, as international arrivals must, through Canada Customs, at which point she lied to inspectors at the primary and secondary inspection line when questioned about the contents of her baggage and person. Ms. Simmons' arrival was marked as suspicious on her landing declaration card with a '86', as the Crown discusses in the initial trial with a Canada Customs inspector:

> The Crown: It's a code to you, is that correct?
> Kathlene Badham, Canada Customs (Secondary Inspection): Yes.

The Crown: And the eight means…?

Kathlene Badham: The eight is a referral number for the day.

The Crown: And what does the six mean on that day?

Kathlene Badham: Doubt.

The Crown: And so on another day it may well be 92, is that right?

Kathlene Badham: Ah…

The Court: 96 I would think.

The Crown: Well, you are giving different…

Kathlene Badham: 96 yes.

(*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Trial Tr. pgs. 62-63)

So we know there is a traveller and a declaration card marked with "all kind of printing on it", that among many things "indicates the topic of doubt" (*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Trial Tr. pg. 62). This is still mostly the way things proceed today, with scribbles all over a declaration card as a kind of internal language that flags some movement as dangerous. Before taking up Ms. Simmons' detention and search at the airport, the Court is curious to make sense of this concept of doubt, in particular, to test what Canada Customs agents are calling 'doubt', against established legal principles of 'reasonable suspicion'.

Mr. Fox (Counsel for Laura Simmons): And you had an 86 card, right?

Kathlene Badham: Yes.

Mr. Fox: Which indicates doubt?

Kathlene Badham: Yes.

Mr. Fox: Some kind of doubt?

Kathlene Badham: Yes.

Mr. Fox: And that's it isn't it? That's all we know for sure?

Kathlene Badham: Yes.

(*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Trial Tr. pgs. 51-52)

Counsel for Laura Simmons would like to point out how seemingly flimsy a determination of doubt actually is, and how 'doubt' seems to circumvent the evidentiary rigors of procedural due process. There are hints, early in the testimony of customs officers, that

at least a good bit of that doubt was tied to where Ms. Simmons was coming from; there were "442 drug seizures at the Toronto International Airport, 80% of which were cannabis seizures on Jamaica flights" (*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Trial Tr. pg. 66). At the initial hearing in County Court, Justice Kent was interested in what else was being seized from Jamaica around the same time as Ms. Simmons' search. His question suggests that 'doubt' could be not only a spatial concept, but also a temporal one—*Jamaica* is a source of significant drug seizures into Canada—but also—*recently*, we have been seeing an uptick in seizures or confiscations. How, then, does Ms. Simmons' case—her treatment and her search—compare to what else inspectors at the airport were seeing around the same time?

> The Court: Other seizures at approximately the 14th of November '83?
>
> The Crown: Yes. On November the 12th there was seizure of approximately five kilos of marijuana from Jamaica. The preliminary hearing will be conducted on July 28th of 1983 and the charge at this time is under Section 4, s.s.(2) of the Narcotic Control Act[24]. On November the 14th on a flight from Jamaica an individual was searched and they found 210 grams of marijuana. He was charged under Section 3(1).
>
> The Court: This is also from Jamaica?
>
> The Crown: From Jamaica.
>
> The Court: A 3(1) charge.
>
> The Crown: Simple possession[25]. He was fined $300.00 or 30 days. The third situation there was an individual found with 17½ kilos of marijuana.

[24] Ms. Simmons, too, was charged under the *Narcotic Control Act*, which was repealed in 1996 and replaced with the *Controlled Drugs and Substances Act* in 1996. At the time referenced, lawyers and judges would have been working from charges in the *Narcotic Control Act*, which among things, would have prescribed mandatory minimums on sentencing for those found to be importing drugs like marijuana. Just a few years later in *R. v. Smith* [1987], the Dickson Supreme Court would rule that the previously held 7 year mandatory minimum sentencing on importation constituted cruel and unusual punishment under s. 12 of the *Charter.*

[25] This distinction is not an accident, and one that opposing counsel for Ms. Simmons will draw upon. Drugs were being seized at the airport but not held to the charge of importation, which at that time carried hefty mandatory minimums. Some of these cases did not involve "attempts to go through Customs at the airport" as Ms. Simmons did (*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Trial Tr. pg. 69)

(*R v Simmons* [1983] 1983 CarswellOnt 1471, 10 WCB 34, Trial Tr. pgs. 66-67)

The judge's questions here poke at the edges of Ms. Simmons' case, searching for clarification and unique, distinguishing features. This exchange is early within Ms. Simmons' hearings, so the brackets are just at this point being felt out. In these moments, well before a decision is rendered, we can see the way judges sort things out and make legally cogent distinctions between one case and another. Brackets, not yet calcified, are being tested and thought out loud. Judge Kent here in the County Court hearings is engaged in a kind of on the fly, "ad hoc classification" that helps sort the specifics of Simmons' case from others, much as we might sort anything else and make distinctions along the way (Bowker and Starr 1999, 2).

Justices in the Simmons case utilized the border search exemption in *Ramsey* – borders are legally distinctive—and held the two sections of the *Customs Act* up to the that standard. The bracket of the border as legally distinct is then used to test in particular s.143 of the *Customs Act*, which granted Canada Customs inspectors authority to search incoming travellers and goods. Section 143 brackets itself in the idea of 'reasonable suspicion', that agents must have 'reasonable grounds to suspect', which all can agree is a reduced expectation of privacy. The *Customs Act* imagined a setup where a lesser standard could apply merely for entering the country. By the time Laura Simmons arrived at the customs hall in Toronto, US courts would have been extensively stretching the parameters of reasonable suspicion and the searches that such suspicions can permit. Dipping their toes into the current of search and seizure, justices in Canada would have seen 'reasonable suspicion' and the searches it permits altered from the source. For street-level policing, the bracket had been stretched to a fairly lax reduction of "location plus evasion", where the individual to be searched "1) is in a crime-prone location, and 2) moves away from the police" (Harris 1994, 660).

Back in Canada and decades after *Terry,* Ms. Simmons and Mr. Monney are subjected to more invasive investigations than a simple frisking; for Ms. Simmons, a strip-search, and for Mr. Monney, a detention in a so-called 'drug-loo facility', otherwise called the 'bedpan vigil', where the suspect is placed in a secure facility to excrete narcotics and contraband. (In Mr. Monney's case, it was 84 condom-wrapped heroin

pellets.) In its life within the *Customs Act*, reasonable suspicion came with few limits, and there is no reason to believe border officers would need to be constrained, as American police were, to a pat-down or a frisking for weapons. Rather than take from *Terry* an onus to limit reasonable suspicions to 1) pat downs and to 2) imminent threats, the Crown in Canada advocated for a reading closer to the border search exemption as defined in *Ramsey,* but did so by plucking phrases and concepts from both.

By the time judges take up Isaac Monney's detention in a drug loo facility, 'reasonable suspicion' had already been considered and elaborated on in *Simmons* where judges in the Supreme Court established a border search principle*.* Still, the question of how such suspicion was made was central to the case. In this exchange from Monney's first trial in the Ontario Court of Justice (General Division)[26] in November, 1993, Monney's lawyer Russell Silverstein pokes holes in the concept of reasonable suspicion:

> Russell Silverstein, Counsel for Isaac Monney: Well, let's back up again. You know, don't you, that not everybody who presents at secondary can be detained. You have to…there are certain…
>
> Inspector Thomas Roberts: Reasonable grounds.
>
> Mr. Silverstein: Reasonable grounds, all right. And your arrival at reasonable grounds, do you feel that's something that's entirely up to you or is it something that you get some guidance from, from other officers or your superiors?
>
> Mr. Roberts: Well, we are taught what reasonable grounds are.
>
> Mr. Silverstein: All right, and you're taught what reasonable grounds are how?
>
> Mr. Roberts: By the courses that we took.
>
> Mr. Silverstein: That's back in Rigaud [CBSA College] in the 1980's. All right, anything since then?
>
> Mr. Roberts: No, through experience and the Enforcement Manual I believe. I really can't…I can't say exactly.

[26] The predecessor to the present-day Ontario Superior Court of Justice. See *Courts of Justice Act* [1990], R.S.O. 1990, c. C.43

> Mr. Silverstein: You don’t know?
>
> Mr. Roberts: I can’t say I don’t know. I can’t say I’m absolutely sure. (R v Monney 1997 1 SCR 652) [27].

This interaction pokes at the problems that the bracket of reasonable grounds to suspect (or reasonable suspicion) holds, namely, that reasonableness cannot be clearly and judiciously bracketed off from other methods of discernment and police work. Evidence has been admitted and decisions have been made on the basis of reasonable suspicion and so that reasonableness is expected to itself ‘bracket off’ the personal, the gut impulse, and the feelings. By speaking to manuals and training, reasonable suspicion becomes something that can be authoritatively surmised. That’s the idea, of course. In actuality, as in this cross-examination, suspicion is made reasonable by frontline workers who draw on a vocabulary of cold science and uniform training to turn ‘doubt’ into something that can legally be taken up in a courtroom and something that can legitimize further police action.

Waiting and Detention

Monney and *Simmons* both raise a *Charter* claim of locating the point at which waiting becomes detention and what we call the various kinds of waiting and holding practices one might be subjected to at a border. Most of us have waited at the border—in lineups to cross, or, in more exceptional circumstances, in secondary inspection, as documents are checked and the contents of our luggage subjected to more intense scrutiny. This (strangely) serves as the backdrop for the Canadian reality TV show, *Border Security,* where an entertaining mashup of stories of secondary inspection are presented as common border practice when, in fact, they are exceptional and selected for their entertaining lack of banal reality.

[27] The Ontario Superior Court maintains continuous coverage of decisions from 2005. Any information from Monney’s trial has been gained through the Ontario Court of Appeal, which maintains decisions from 1994, and from the Supreme Court of Canada microfilms for *Monney,* which include trial evidence from lower courts.

The cases provoke important questions about the intention and the characteristics of search and seizure at ports of entry. The cases of *Simmons* and *Monney* both contribute to a discussion of what constitutes 'detention' and openly wonder as to where the border sits in relationship to a formal and strict sense of detention. Where 'detention' calls in rights—to counsel, specifically—the debate to their detention offers a view of how the border can be a space of curtailed rights. Still, as their cases are heard in the Supreme Court, there is at least a tacit acknowledgement that borders are spaces within the reach of Canadian law and thus, the *Charter.* The invocation of the *Charter* serves as a reminder that borders can be imagined as spaces of rights. When the *Charter* is called in, lawyers suggest that border spaces are not liminal, but settled Canadian territory, and the time spent waiting and held there is not to be bracketed off from other forms of detention and incarceration. Much of what guided judges in making sense of the waiting and detention experienced by Simmons and Monney were cases that occurred far away from the border line. By drawing on cases of traffic stops, judges and legal actors connect the detention of Laura Simmons and Isaac Monney to other hotly contested detentions from well within Canada.

Chomiak **and** ***Therens*****: Parsing the language of 'detention'**

To talk about legal distinctions drawn around detention, we need to go back a step to two earlier decisions that set out the Court's early thinking on detention. The *Chromiak* (1980) decision offers a clear bracket for what constitutes 'detention'. Perhaps most instructive though is the *Therens* decision, for it reinterprets *Chromiak* after the adoption of the *Charter*. Together, the two cases offer useful guidance into how the Court imagined bracketing 'detention', though it is without question that the significance wrapped up in that distinction changes from the *Chromiak* decision before the *Charter* in 1980 to the *Therens* decision just after in 1985.

In *Chromiak,* a car is noticed driving erratically in the early morning on the streets of Edmonton. Police pulled the automobile over, and road-side sobriety tests were conducted. Finally, police requested a breathalyzer test to assess blood-alcohol content but the driver, Kenneth Robert Chromiak, refused:

> …he wanted his lawyer present on the street before he did any tests. Sergeant Tidridge wrote out an appearance notice for impaired driving and requested that the accused sign the same and indicated that it was an offence not to do so, and that he was merely signing a receipt of receiving an appearance notice. He declined to sign the appearance notice; as a result, Sergeant Tidridge just gave him the appearance notice without having it signed…(Chromiak v R 1980, 474)

Mr. Chromiak's insistence on having a lawyer present hinges on whether or not the road-side sobriety test represented a detention or arrest. The Supreme Court seeks to clarify what they see as the intent of Parliamentarians in using the word 'detention'. One could be detained without their holding necessarily rising to the kind judges deemed to merit a right to counsel. *Chromiak* asks if the detention involves some form of physical restraint—can the accused leave? It follows, then, that *Chromiak* makes a distinction around being detained and accompanying a peace officer:

> The provision under consideration applies to "a person who has been arrested or detained". Such is not, it appears to me, the legal situation of one who has been required "to accompany" a peace officer for the purpose of having a breath test taken. (R. v. Chromiak 1979, 313)

The idea of accompaniment, is undoubtedly germane for search and seizure cases at the border, where individuals 'accompany' a peace officer into secondary inspection. Still, it highlights how the Court wanted to focus on a kind of detention that they saw as an "actual physical restraint":

> It appears to me to be obvious that the word "detention" does not *necessarily* include arrest, but the words "detain" and "detention" as they are used in s. 2(*c*) of the *Bill of Rights,* in my opinion, connote some form of compulsory restraint and I think that the language of s. 2(*c*) (iii) which guarantees to a person "the remedy of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful", clearly contemplates that any person "detained" within the meaning of the section is one who has been detained by due process of law. (Chromiak v R 1980, 478)

Within that quote from Justice Ritchie, I would argue, we find the basis of what we might call the Chromiak Test. While *Chromiak* is working from the *Bill of Rights* and we today speak of the *Charter*, the terms and language are similar, so an analysis of bracket-making by the Court in *Chromiak* should reasonably hold. Ritchie notes firstly that "detention" should involve some sort of physical restraint. Secondly, a person is entitled to counsel and to contest their detention, but this presumes that their detention follows a

legal arrest. While Mr. Chromiak is 'held' to a road-side test, he isn't physically restrained, and his detention doesn't follow being charged with a crime. The Court unanimously rejected the idea that Mr. Chromiak was 'detained' in any meaning of the word so as to connote access to legal standing.

Therens allowed the Court to reconsider *Chromiak* post-*Charter*, where the right to counsel upon detention was now a constitutionally protected right. Despite now drawing on the *Charter*, the term 'detention' persists, leaving jurists with the work of trying to make sense of Parliamentary intent—does every detention rise to meet the use of the term in the *Charter? Therens* represents a significant pivot away from the Court's perspective on 'detention' in the Bill of Rights, and the broad interpretation offers guidance for the border cases I consider. *Therens* begins, like *Chromiak*, with a road-side breathalyzer test, this time in Moose Jaw, Saskatchewan. The driver, Paul Therens, is compelled to submit to a breathalyzer test, and upon refusing, accompanies the officer to the police station, where his blood alcohol is finally measured and he is charged accordingly with impaired driving[28]. Again, the Court is asked to consider whether this road-side traffic stop or the time spent in the police station qualifies as 'detention'—now as is meant in the *Charter.* The Court, in its decision, offers a broader interpretation:

> The word "detention" in s.10 is directed to a restraint of liberty of varying duration other than arrest in which a person may reasonably require the assistance of counsel and might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee. In addition to the case of deprivation of liberty by physical constraint, there is also a "detention" s.10 when a police officer assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel. There must, however, be some form of compulsion or coercion. (R v Therens 1985, 614)

This broader interpretation is valuable to bracketing Ms. Simmons' experience as a kind of detention and to ensuring that her waiting and referral to secondary inspection affords

[28] So as to not create confusion—many jurisdictions use and have historically used a litany of terms to refer to drunkenly operating a motor vehicle—I am using the term impaired driving with the understanding that his blood-alcohol content surpassed the legal limit to be broadly understood as illegal. The use of the term "impaired" is also meant to more closely align Mr. Therens' charge of the day with what would today be understood as "Operation while impaired", s.253 of the Criminal Code RSC 1985.

her a right to counsel. The change, from *Chromiak* to *Therens*, comes from a Court ready to imagine the *Charter* as a malleable, adaptable document, that will evolve over time. Justices in *Therens* recognized that the new *Charter of Rights and Freedoms* was a distinctly different tool from the prior *Bill of Rights,* and we should see in their expanded interpretation, a willingness to imagine the *Charter* responding to a broader mandate of legal questions:

> The premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature, a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the court. (R v Therens 1985, 615)

Waiting and Section 10: *Habeas Corpus* at the border

When we think about waiting, holding, or detention practices at the border, we again can see the border as a complex arrangement of both spatial and temporal relationships. Much as we must ask what are reasonable suspicions, we find in the being held or detained that border work utilizes both reconfigurations of time—of lining up, of being held, of having your car or person searched—alongside reconfigurations of space—opening up new spaces of holding, waiting, and jail-like conditions. These cases ask questions both about what constitutes detention in a border setting and whether those detaining practices are legally justifiable. 'Detention', unlike waiting, is a legal position that triggers certain obligations and protections of rights from the state. Section 9 of the *Charter* protects individuals from arbitrary detention; Section 10 of the *Charter* provides for counsel upon detention (or arrest), and to be informed of the reasons you are being detained. In so asking such questions, we draw brackets and aim to call attention to distinctions. We must be able to bracket off everyday waiting, where "individuals arriving at the border are subject to a form of restraint at the outset, in that they will be denied entry to the country until immigration and customs officials are satisfied" with their responses (L'Heureux-Dube, in the judgement p. 462), from 'detention'. Once again, we enter the black box of legal meaning-making, where 'detention' is defined not as what it is, but by what it is not, with lawyers for the Crown

working to distinguish the processes through which Simmons and Monney are held from something called ‘detention’.

The cases here consider two facets—whether detention, if it is called such, was legal, and if so, if the rights of the detained under the *Charter* were granted and protected. Where the border renders this tricky is in the step before detention. Outside of border spaces, we may speak of arrests, and courts are well versed in the rights that follow from an arrest. But the detention practices of enhanced searches and bedpan vigils are not arrests in the conventional sense—most importantly, perhaps, the individual has not (yet) been charged with a crime. Rather, as *Monney* demonstrates, officers detained someone suspected of a crime “until the suspicions have been confirmed” or negated (Rosenberg, J in R v Monney 1997 CarswellOnt 4461 OCA, 419 of decision).

Given the demands placed on the state when holding an individual in detention, it is not surprising, that the bracket slips, from “was the detention legal and was the detained person informed of their rights” to something else—was this detention at all? The two case here problematize detention as a practice and attempt to insert brackets around ways a person can be held at a border as distinct from other legal definitions of detention. The distinction, after all, matters. Distinguishing waiting from detention practices is a bracket derived from the *Charter*, which specifically legislates something called ‘detention’ and calls out the protections that must come when one is detained. While Section 9 provides that those detentions should not be arbitrary, Section 10 of the *Charter* declares that “everyone has the right on arrest or detention to (a) be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.” This is not to say that detaining an individual suspected of criminal activity is itself contrary to the individual’s *Charter* rights, but that detention as a legal concept presents clear and specific demands on the state (and those doing state-work) that waiting would otherwise not. If we characterise the spaces that Monney and Simmons are held in as detention, then officers at the border would have needed to clearly enumerate the rights the detained hold and would need to make counsel available to the accused. Instead, both are held—

Simmons to a strip search, and Monney, to excrete drug packets in a drug loo facility, and in both instances, officers do not inform the accused of any rights to counsel or to challenge their being held. These rights are dependent on what you call the spaces and conditions to which travellers are held. And while most travellers are not Isaac Monney or Laura Simmons, their cases and the practices of bordering they are held to have widespread implications to the travelling public.

Before considering how these two cases have drawn lines around particular kinds of detention, it is useful to explain detention in the context of the *Customs Act.* The *Customs Act*, then as now, is the major legislation supporting the work of federal authorities at the border, but of course today, the *Customs Act* is related to a broader range of policies, agencies, and laws that define border work. Secondary inspections in 1982 would have been provided for in Sections 143 and 144 of the *Customs Act*; the search provisions of the *Customs Act* are, however, to be bracketed by the *Charter*, which affords Ms. Simmons, Mr. Monney and all who enter Canada with certain rights of due process that govern all searches and detentions. Section 143 of the *Customs Act* [1970] stipulated a right of customs inspectors to "search any person…who has come into Canada from a foreign country in any manner or way", but this search privilege is first bracketed by the litmus test of 'reasonable suspicion'. Section 144 offers the person to be searched the right to first see a police magistrate or justice of the peace to rule on the legality of the search. While the *Customs Act* predated the *Charter*, the 1982 passage of the *Charter* would strengthen judicial review as a means enforcing and adjudicating rights claims.

In *Simmons*, the Supreme Court views the appellant's trip to secondary inspection as detention opening up the grounds for Section 10 claim. As detention activates rights to counsel and due process, was Ms. Simmons made aware of those rights? Or, was she not detained but rather made to wait? The Court notes in taking up *Simmons* that the question here is "whether a failure to inform a person who is searched…of his or her right to retain counsel is in violation of s. 10 of the *Charter?"* These brackets are, of course, up for debate. At trial, the waiting and holding of Ms. Simmons is read as a Section 10 claim, that she was detained within the meaning of the term. Yet on appeal, the section 10 claim is set aside:

> It would be wrong to conclude that the brief restraint involved in the ordinary progressive border search for contraband conducted by a customs officer pursuant to ss.143 and 144 of the *Customs Act* constitutes a detention within the meaning of s.10 of the *Charter.* It is not a detention of the character in respect of which *habeas corpus*[29] would be appropriate to obtain the release of the necessity of the person from undergoing the search as a condition of entry into Canada. It is difficult to believe that Parliament contemplated such border searches would automatically give rise to the right to counsel and a corresponding right to test the validity of the restraint by an application for *habeas corpus.* (R v Simmons [1984], para. 55)

While we undoubtedly expect judges to disagree—the scales of justice a real visual metaphor for the balancing of competing arguments—their ability to pull in and push out brackets reveals how brackets are open for debate and renegotiation. The judge at appeal suggests that Parliament could not have intended every traveller who waits or faces additional questioning to have an automatic right to counsel, and so his suggestion then offers another bracket we may try out around border searches. We might ask, 'do we have a decreased expectation of privacy at the border' or are such searches an expected part of appearing at the border or a port of entry? The question here revolves around distinguishing the treatment that Ms. Simmons received from other travellers or from prisons and jails and to criticize the character of her being held as something other than 'detention' in the strict sense of the term. That in and of itself demands that the state demonstrate that borders are spaces of heightened vigilance that require something more exhaustive. By this line of thinking, the fact that the search occurred without a warrant or serves as a basis to bracket a border search from a criminal arrest. Given the age of *Simmons* (the events of the case date back to 1982), the case touches upon the earliest challenges between bordering and the *Charter*, namely clarifying the detention practices of Canada Customs and Revenue agents. Canada Customs agents understood that there was a requirement to make individuals aware of their rights to counsel upon arrest, but not detention, and secondly, agents on

[29] From the Latin for 'you have the body', habeas corpus is the legal norm through which the detained or incarcerated seek hearing before a court to the validity of their detention. To state that habeas corpus would not be appropriate is to suggest that the kind of holding or waiting to which Ms. Simmons was subjected is not detention in the strict legal sense of the term and as such she has no automatic right to counsel as provided under s.10.

the ground at the airport were unclear how their search work as part of a secondary inspection could be understood as detention.

This is explored extensively in Ms. Simmons initial trial in the County Criminal Court for the Region of Peel (where Toronto Pearson Airport is located). During these hearings, Barry Fox for Laura Simmons speaks with Frank Corvese, primary search officer for Canada Customs. Mr. Corvese would have seen Ms. Simmons first and referred to Kathlene Badham, who conducted the secondary search:

> Mr. Barry Fox (for Laura Simmons): Okay, now when you conduct that search on their body, I gather you take them to a room?
>
> Mr. Frank Corvese (Canada Customs): Yes we do.
>
> Mr. Fox: Okay, and the door is closed and the search is conducted?
>
> Mr. Corvese: Yes sir.
>
> Mr. Fox: Would you agree with me sir, that when you take them into that room that they cannot leave? They can't just get up and walk out and say, "I'm not going to go on with that search", right?
>
> Mr. Corvese: They could ask to speak to a peace officer if they don't like me.
>
> The Court: Just answer the—
>
> Mr. Corvese: Sorry.
>
> Mr. Fox: Would you agree with me that they can't get up in that room and just walk out permission?
>
> Mr. Covese: Yes.
>
> Mr. Fox: They have to stay there, right?
>
> Mr. Corvese: Yes, yes they do.
>
> Mr. Fox: Whether they want to or not, right?
>
> Mr. Corvese: Yes.

> Mr. Fox: Okay, so they're detained at that point in time, are they not? According to your definition.
>
> Mr. Corvese: Yes. (R v Simmons 1983 CarswellOnt 1471, Ont. Co. Ct., 109, in trial transcript)

There are a few details to draw our attention to, firstly, that Mr. Corvese would not have been the one conducting Ms. Simmons' secondary search. What he would or would not do in a secondary search are interesting, but by themselves do not demonstrate how Ms. Simmons was (or was not) detained. Still, Mr. Fox is interested in showing the Canada Customs operation at Pearson to be inconsistent at best, bumbling at worst. Mr. Fox's conjectures as to what happens in a detention are useful to create a sense of disorganization, inconsistency, and an amateurish relationship to the rights of travellers and the accused. Still, Mr. Fox does begin to characterize the secondary inspection process—the waiting, the staying put—finally conceding that individuals are in fact detained. This is a striking admission and one Mr. Fox has fought hard to get: you can give it any name you would like, but the secondary inspection procedures at the airport, at least on the day Ms. Simmons crossed, amount to detention. That bracket—detention—brings in specific legal avenues for redress and helps Mr. Fox align Ms. Simmons' experiences at the airport within something legally intelligible. If one of the constitutional questions for justices was whether or not Ms. Simmons was detained as the term is used in the *Charter,* Mr. Fox might well believe that this cross-examination of Mr. Corvese puts any doubt to rest. Justices writing in the Supreme Court decision agree that Ms. Simmons had been detained. The detention, Chief Justice Dickson notes, commences "when she was forced to undergo a strip search" (R v Simmons [1988] 2 SCR 495, 22 in decision). However, counsel for the Crown argue that to call a strip search a detention would mean "all travellers passing through customs must be seen to be detained and there, to have a right to counsel" (R v Simmons [1988] 2 SCR 495, 23 in decision). In the mind of the Crown, we should have an expectation of reduced privacy at the border and a strip search such as the one Ms. Simmons undergoes represents border vigilance broadly, not a particular presumption of guilt by the person to be searched. Of course, there is a problem with this re-bracketing; if a strip search is a general, common practice of border work, then the grounds upon which one is searched cannot be logically called reasonable. Either the search occurs randomly and often as a core facet of bordering or it is a targeted and judiciously deployed investigative tool; it

cannot be both. The Crown has several ways into shoring up this rebracketing. They can continue to remind the Court of the border search exception US courts defined in *Ramsey,* that border searches are unique for their very fact of happening at a border and the kinds of delays through the processing of people and goods entering cannot be equated to detention in the legal sense. Supporting that argument is the fact that Ms. Simmons and those delayed in secondary inspection at the border are not arrested, but instead talked to and questioned as part of the regular activities of regulating people and goods coming into Canada.

While counsel for Ms. Simmons could get customs agents to see their body search procedures as detention, Mr. Corvese and his co-workers still drew a distinction between the strip-searches they did and an arrest. The searches they did at the Toronto airport were bracketed off from arrests easily because there was no warrant. What they did was simply part of their regular work and since no one had been charged with a crime, Ms. Simmons entered an examination room not as a criminal per se but as a traveller for whom they had more questions. In fact, Ms. Simmons was later arrested and notified of a right to counsel; the detention and search that yielded incriminating evidence, however, came before being charged with a crime. The term 'arrest' undoubtedly proved confusing, then as now. Whereas an arrest is the culmination of investigation, secondary inspection is in many ways, the beginning. We can draw several other lines and brackets around the kind of detention that Ms. Simmons was exposed to. Canada Customs inspectors and counsel distinguish the body search that Ms. Simmons undergoes from other searches—where the searched are told what they are accused of, where grounds are of course reasonable and probable, and where and how individuals are made aware of their rights. In one such exchange, lawyers attempt to distinguish notifying someone of their rights verbally but more passive forms of notice:

> Mr. Barry Fox (for Laura Simmons): And when you take someone into a room and search them physically, do you advise them of their rights under Section 144 [of the Customs Act]?
>
> Mr. Frank Corvese (Canada Customs, Primary Inspector): Yes we do.
>
> Mr. Fox: You do? How do you do that sir?

> Mr. Corvese: We post it on the…it's posted on the wall in the search room and we refer to it and we point to it.
>
> Mr. Fox: You point on the wall?
>
> Mr. Corvese: If they have any further questions, we will explain to them. It is hanging up on the wall, the two sections of the *Customs Act*—143 and 144.
>
> Mr. Fox: So it's posted somewhere on the wall, right?
>
> Mr. Corvese: Right where the person being searched can see it. It's directly in their view.
>
> Mr. Fox: It's posted on the wall, and you read it to them?
>
> Mr. Corvese: We don't read it to them, we advise them of it.
>
> Mr. Fox: Well what do you say?
>
> Mr. Corvese: We advise them that if they do not agree with the search that they can call a Justice of the Peace or a senior officer. (Preliminary Hearing on Appeal R v Simmons 1988, 105)

Before commencing their strip search, customs inspectors informed Ms. Simmons of their authority to do so, Section 143 and 144 of the *Customs Act,* by gesturing to a placard on the wall of the room where she would be searched. Justice Wilson, writing in the *Simmons* judgement, suggested that this kind of notice would not compromise an individual's rights to counsel. By inadequately informing the detained of their rights to seek redress through a peace officer or to hire counsel, "there is no indication that the appellant even read the provisions of ss. 143 and 144 of the *Customs Act* posted on the wall let alone exercised the legal options and rights conferred in these provisions" (Decision in R v Simmons 1988, para. 75). In this case, judges draw a bracket around the ways one can be made aware of their rights and determines that pointing at a sign is an insufficient reminder to those undergoing a search of their "right to demand a second authorization" from a magistrate or justice of the peace. Amazingly, the *Customs Act* placed "no onus on the officers to explain the limits of their authority" or to inform individuals detained of their rights before proceeding with a search. When asked to submit to a strip search, Laura Simmons asked the customs inspector, "Is this

really necessary?" The answer to that question is far less simple than the one she was given and reveals that while she "complied with their demands throughout", Ms. Simmons "was unsure of the officer's authority" (R v Simmons 1988, 446). If it was really necessary, and it appears that it was, then Ms. Simmons needed to be informed, truly and actively, of her rights. When she was pulled out of the regular inspection queue, she entered a distinct legal space and it afforded her with specific rights that might have prevented her from incriminating herself as she eventually did. Ultimately, the value of counsel is irrelevant; and it is hard to imagine that any lawyer would have been able to prevent Ms. Simmons from being searched. Rather, she was entitled to make use of the advice of counsel, and, having been denied this right, the detention itself and the resulting search are compromised.

Customs staffers in *Monney* do not dispute that the accused was detained; here, the Court must look at a particular kind of border detention—the drug loo facility—as a specific kind of detention and consider whether the basis for detention was arbitrary. The drug loo is unquestionably detaining if not embarrassing—suspects are kept and monitored until suspected contraband can be excreted and captured. While questions of legality and arbitrariness veer close to justifications of 'reasonableness', the trigger here has moved to the detention in particular. While judges apply a bracket to test the rigors of 'reasonable and probable' grounds to suspect, detention demands a unique test in its own regard, where unreasonable becomes 'arbitrary'.

Monney builds on the questions around detention and search raised in *Simmons*, but the material conditions have become more exceptional as the accused is put in a position that is, by all definitions, more confining and restrictive. Unlike the pat down and secondary inspection of *Simmons*, Isaac Monney undergoes a kind of search that is more time-consuming, more invasive, and more restrictive. *Monney* undergoes a search that meets the Court's standard set out in *Chromiak* that the detention be physically restrictive; Mr. Monney was confined to a cell to monitor his excretions in a controlled environment under Canada Customs surveillance over a 6 hour period. While *Simmons* largely stands as a guiding set of principles for CBSA work in 2017, the particulars of *Monney* offer a useful case study in extremes. Mr. Monney's detention is longer and in every way, more physical and it is worth considering whether the brackets hold or the

arguments change form in this case. Judges at the Ontario Court of Appeal and the Supreme Court dismiss a s.10 claim and the right to counsel upon detention is only called upon to distinguish *Monney* from *Simmons*. Instead, the argument is offered that the nature of the detention—rather than the detention itself—the length of time, the lack of medical supervision—are a basis for *Charter* claims. Where *Simmons* argued for the right to counsel while detained, *Monney* instead looks at s.9, protecting those within Canada from arbitrary detention. Once Mr. Monney is left to excrete heroin pellets—a potentially dangerous process—without medical supervision in a way that the defence at trial argued "violated his s.7 right to life, liberty and security of person" (R v Monney [1999], 1).

There is a least one good reason that Mr. Monney's lawyers largely avoided a s.10 claim—he was given his rights to counsel quickly, read his rights a second time, and finally asked to sign a consent form to collect his urine:

He was detained and given his rights to counsel. He was turned over to the Interdiction and Intelligence, ("I and I"), Unit about two hours later.

At 6:30 p.m. he was again read his rights and detained in the customs "drug loo". This is an area equipped with a toilet to facilitate the retrieval of drugs passed in bowel movements. About 8:30 p.m. he was given a consent form for a urine test. He then spoke with counsel, signed the form and gave the urine test. At about 9:15 p.m. the test showed positive. He was then arrested for importing under S.5(1) of the Narcotic Control Act. He was again given his rights to counsel and again exercised those rights.

Figure 5 Describing the chain of events in *Monney*, the trial judge notes the ways in which the defendant is made aware of his rights. (From the trial decision at page 4).

This is starkly different than Ms. Simmons' strip search that occurred simply in eyeshot of a sign that stated her rights. So the detention that Mr. Monney experience was longer, more invasive, and even more potentially dangerous, but at least on the point of *habeas corpus*, Mr. Monney's experience can be distinguished from that of Ms. Simmons.

Bracketing the Border Through Precedent

It's fair, though perhaps not always well received, to ask why the substantive and procedural due process rights of two admitted drug smugglers matters, and what if anything, their border experiences tell us that can be extrapolated to a wider audience. I

told the passenger I sat next to on a plane that I think it matters how this work is done because so much of our current bordering will be tested and amended on the appeals and efforts of individuals who have undoubtedly done bad things. In Canada particularly, our clearest path to legal recourse is through rights-based claims, where we must argue for the rights of the individual against the prevailing interests of the state. Today we commonly speak about measures and policies that have framed individual rights in opposition to a sovereign state interest, in control, in safety, and security. As Anderson (2013) notes, the modern approach to border control relies on "rights restrictive policies to limit the ability of individuals, interest groups, and the courts to engage in rights-based politics—to challenge state control measures through the promotion of rights of non-citizens (and, in some cases, non-citizens as well)" (2013, 1). Cases like *Monney* and *Simmons* test the limits of state against itself; as both arbiter and protector of rights and as sovereign with a particular interest in controlling its territory. The either/or discourse of border security is pervasive—either rights or security—that we can, and I think at times do, lose sight of what these terms mean and how they function on individual Canadians everyday. So these cases create real tests to the expansion of rights-restrictive policies at the border, by flagging particular moments in border work—the grounds to search, the spaces of holding and inspection—and bringing those policies to scrutiny of a rights-positive appeals process. We benefit and the border is corralled against modern rights-restrictive tendencies by the precedent that cases like *Simmons* or *Monney* set.

As a steward of our rights, the state is a lazy guardian. Proclamations, charters, and codes live in a world of 'set and forget', where prevailing political and state interests are actively opposing the protection and safeguarding of individual rights. So we must, as Donnelly (2003) offers, "activate rights", we must mobilize rights into being as brackets and frames of problem solving. We must use rights as frames to build knowledge of what constitutes right and social wrongs. Rights teach us what we value as a society and provide the language to actualize those ideals. When we run our challenges through the sieve of the *Charter*, we keep the *Charter* vital by bringing it to all aspects of modern Canadian society. The border is no different here; and by bringing *Charter* claims to the border, appellants force jurists to extend the reach of the *Charter* and to see the border as well within the spaces of rights within the purview of our legal system. Once a case is decided, that decision and the deliberations that undergird it

become part of an expanding legal canon that will look upon precedent as guidance to answering future similar (but distinct) questions.

Precedent means that *Simmons* and *Monney* have had an immediate and real influence on the law—the cases have resulted in changes to the *Customs Act*—but as well on border work more broadly. And of course, it would be disingenuous to put these two cases into a vacuum; plenty of cases place travellers in conflict with the state's border security interests, though few rise through the appeals process to the Supreme Court. But decisions and the deliberations that support decisions become legal knowledge—knowledge that informs the way borders are made and administered and the kinds of questions future judges and lawyers will ask. Future jurists will look at these cases—both in lower courts and in the Supreme Court itself—for interpretive guidance to help translate new questions into the language and relationships—brackets—of the past.

A decision in *Simmons* does not end deliberations on what constitutes the border and the character of work that goes in on these spaces. Quite the contrary, as the development of precedent within Canada only creates more bracketing and new decisions for lawyers to use. Further cases have come quickly and those arguing cases of border searches before the Court now need to reason through *Simmons* in addition to all that had come before it. Each case that follows needs to ask a legally unique question, lest judges simply refer back to their decision in *Simmons*. From the outset of appeal and through argumentation, cases that follow from *Simmons* have to be able to show they are unique, or, depending on whose arguing, how *Simmons* provides a clear answer to the question(s) raised. The variety of these cases alone speaks to the way *Simmons* in particular continues to set precedent, as it continues to be drawn upon, followed, or distinguished by judges making sense of border searches. It is important too, to note that *Simmons* has managed to be a current and useful test for border work even as bordering evolves and technology changes. Today, border work is supported by entry/exit information sharing with the United States and more detailed information sharing (discussed in Chapter 3). The recent decision in *Dhillon* (Navjeet Singh Dhillon v. Canada (Attorney General) 2016) demonstrates this well. While in *Simmons*, 'doubt' was scribbled on a paper declaration card, *Dhillon* involved a Canadian traveller intercepted before boarding a flight to Europe because of notes BSOs had maintained in

ICES, the primary immigration database. The Federal Court, in its 2016 *Dhillon* decision, noted that *Simmons* had long ago provided a set of expectations at the border and that secondary referrals "arising out of a practice or policy does not remove it from the first category of border search" (Navjeet Singh Dhillon v. Canada (Attorney General) 2016, para. 35) Provincial courts across the country have considered *Simmons* as well, tackling a broader range of issues: child pornography in BC (R v Buss [2014] BCPC 16) and Ontario (R v Leask [2008] ONCJ 25), the use of sniffer dogs to detect drugs and firearms (R v Lozano [2013] ONSC 1871), and child abduction (R v Hudson [2005] CarswellOnt 7378). In all these cases, the brackets made through *Simmons* remain a starting point for how legal actors begin to conceptualize a border search. For *Monney* 11 years later, it was important to be able to draw on the protections *Simmons* offered while also being able to distinguish the events as answering a new legal question. Lawyers for Isaac Monney made use of the way the Court pulled in the border as a space of rights in *Simmons,* but sought to clarify Mr. Monney's four hours chained to toilet bowl as distinct from the pat down that Laura Simmons underwent in the same airport more than a decade earlier. Today, judges in contemporary border search cases ask how new rights breaches at the border are legally distinguishable from the experiences of Laura Simmons over 30 years ago.

Chapter 5. Deportation and the Security Certificate Scheme

Border work is defined by its paradoxes, between openness and opportunity on one side, closure and threat on the other. *Simmons* and *Monney* are cases that wrestle with this tension at the port of entry. In those instances, the border is a site of customs and excise work, and the parties on both sides work to bracket the border as a distinct legal space. The cases that follow here similarly tackle the tensions of bordering and the work of bracketing the border as a particular legal and spatial set up. The difference, however, as we will see, is a broad range of War on Terror rhetoric that has pushed the border out and prodded it deeper into intimate corners of Canadian daily life. There is, no physical port of entry to investigate here; instead, Canada, like the US, Britain, Australia, among others, have beefed up its *internal* border enforcement, promoting bordering and border work far off the edges of the nation-state. In the years following 9/11, that paradox has been laid bare and brought to the migrant, who has become a test site for the ongoing conflation of border enforcement with securitization. Today "immigration policy has become increasingly bifurcated" with clear winners and losers meeting the Janus-face of the border (Bosworth 2008, 204). On the one hand, trusted traveller programs have promoted seamless cross-border travel and trade for some, while at the same time "states have resorted to extraordinary spatial tactics to prevent irregular migrants from accessing the legal rights conferred by territorial presence" (Coutin 2010, 200). Arguably, this split personality of border work is a deep expression of state power. That some "reap the benefits" while others "are more likely to be excluded at the border or monitored for the duration of their stay" demonstrates the way sovereignty is wrapped up in who can enter, who can stay, and who can move freely through a state (Bosworth 2008, 205).

The drawing closer of state security practices to migration (and by extension, border work) is exemplified through the expansion of Canada's security certificate

regime, under which Canadian residents holding other citizenships can be called out as a threat—named on a certificate—with proceedings immediately initiated to see their removal from Canada. This is a peculiar policy device, that names individuals for deportation without the need for said individuals to have been charged with a crime. Unlike an expired visa or a criminal arrest, security certificates seem to offer a broad discretionary authority to the Minister of Public Safety to deport individuals from within Canada. Because these individuals are not criminal cases so much as they are suspected potential criminal cases, the typical bounds of criminal law don't quite fit. Neither does the administrative procedures should a person be residing in Canada on an expired visa. Security certificates are a whole unique 'other'. Although security certificates sound like the kind of public policy conceived in a post-9/11 anxiety echo chamber, they have existed as a legal instrument for over 40 years. This is hardly a new phenomenon. While greater attention is now brought to racialized and inflammatory rhetoric that ushers in immigration law, "the development of deportation policies and practices have always contained many political overtones" (Chan 2006, 154). Security certificates exist, then, as but a condensation point of a decades-long discursive push of racialization and securitization that "continue to shape the construction of the Canadian citizen" (Chan 2006, 162). While the Harper Government was not shy about aligning deportation to larger law-and-order approaches to government (Kenney 2010; Kenney 2012; Canada 2013b), deportation and the security certificate regime have largely existed in the periphery of bigger policy shifts and discursive moves. In this way, security certificates are but another rights-restrictive policy that imagines border enforcement through the "rights/control nexus" (Anderson 2013, 1). Still, security certificates have been, until recently, a seldom considered part of the government's border control work. In part, this could be because deportation and security certificates remain a small facet of Canada's immigration policy. More likely, this is because the work to make the deported 'undesirable' has been long baked into the pie. From the outset, deportation has been cast as "an exceptional and infrequent occurrence, caused by the failings or malfeasance of individual immigrants" (Roberts 1988, 2). Rather than speaking about deportation policies as indicative of larger trends, much of the conversation shifts to the 'ticking time bomb' of the imminent threat posed by particular individuals. Security certificates represent a small fraction of deportation practices more broadly, but have persisted by bracketing certain kinds of people (read: Muslim men) particularly

dangerous. While the Court has sent the Crown back to fix the security certificate regime, its existence speaks to a kind of hyperbolic connecting of immigration to securitization and the questions raised by security certificates (and the case I focus on in this chapter, *Charkaoui v. Canada)* persist broadly in policy and law that increasingly frames the migrant as dangerous.

Rob Aitken notes that indefinite detention like the kind Jackman describes "is a familiar narrative that fully situates the terrain of Canadian immigration and national security policies within, and not in some way outside of the most dubious aspects of the global war on terror" (Aitken 2008, 382). Where sites like Abu Ghraib and Guantanamo Bay are symbols for a generation-long war on terror, Canada's own use of indefinite detention certainly draws on the violation of human rights and due process as part of larger global security and anti-terror objectives.[30] Arguably the fact that Canada's detention practices merely exist but, as Aitken suggests, avoid the most loathsome and horrendous of injustices experienced elsewhere may be part of their resonance and staying power. What's happening outside the prison, what makes the bracket of 'dead time' hold together, is a rhetorical environment where "bordering, ordering and othering have been central to the intense debate on immigration and refugee reform in Canada" (Gilbert 2016, 204). As Judith Butler reflects, there are brackets, possibly extra-legal, but perhaps not, beyond the particular organizational framing of detention and dead time that are informing the prolonged detention and making such practices unremarkable. She notes: "The 'frames' that work to differentiate the lives we can apprehend from those we cannot not only organize visual experience but also generate specific ontologies of the subject" (Butler 2009, 3). Many have noted the history of citizenship as antagonistic to racialized others (for instance, Thobani 2011). In the post-9/11 era, the war on terrorism has made such racialized exclusion a common, everyday experience.

[30] The Court has wrestled with this fact—but some alternatives have been just as restrictive and punitive. Researchers have noted, for instance, the use of intricate house arrest setups often involving a massive upkeep of CBSA resources to monitor and guard the home of those on a certificate (Larsen and Piché 2009). I will later discuss the Court's worry that carceral time was a particularly punitive kind of waiting, what has been called 'dead time'. While courts have been trying to make sense of the prolonged time individuals spend in jail, governments have been more circumspect, choosing instead to see 'indefinite detention' as a punishment of the individual's own making—as their incarceration drags on precisely because they seek legal redress.

Collectively, citizens and aliens alike implicated in the ongoing production and maintenance of images and practices of an anxious world, a world with omnipresent if not vague and indiscriminate threats. To quote Cindi Katz, this is “banal terrorism” (Katz 2007). Worry is made intimate, even boring, through “material social practices” like colour-coded threat assessments and public displays of militarization and surveillance. All of this, Katz argues, “not only enables them to authorize and reinforce each other but naturalizes their acceptability and seeming common sense” (Katz 2007, 351). Arguably, as well, the responses to the emergency and the extraordinary have become themselves naturalized and expected. To carry Katz a step further, we may say that today we have banal activism. Since her election as the Green Party leader in 2011, Elizabeth May has risen 12 times in the House of Commons, nearly each time repeating the same text:

> Mr. Speaker, the second petition is primarily from residents of the Ottawa and Gatineau area. It calls for this House to review security certificates, which the petitioners believe violate the Canadian Charter of Rights and Freedoms and violate fundamental human rights. The petitioners are calling on Parliament to abolish the security certificates process (Canada 2013a, 477).

Any member of the House can rise to present any questions and petitions during these times, and in fact many do. Ms. May stands alone to oppose the security certificates regime, well into the present day and current Parliament. But as soon as she is finished raising her point, another member rises to share their own cause or complaint—everything from outrage over the end of door-to-door mail delivery to complaints about “the way in which the marina [on Mississippi Lake, ON] is operating” (Canada 2012, 4839). Just like that, Ms. May’s call to scrutinize our counterterrorism measures is boxed up, bracketed, and set aside along with angry boaters in Ontario.

It is into these frames of xenophobia and anxiety that immigrants are bounded and most notably geographically framed through the creation of the US Department of Homeland Security (Kaplan 2003). While Canada does not share America’s linguistic bravado—no homelands, motherlands, or similarly dubbed departments as of yet—it has nonetheless latched on to the geographies that an American homeland have offered to help map out the world as safe/unsafe. There is often then a suggestion of mistrust and deceit that demands, as Gilbert notes, a range of practices through which prolonged or indefinite detention no longer appear exceptional: “restrictive legislation (e.g., imposing

visas, restricting admission and citizenship), precarisation (expansion of temporary migrant workers programs, shrinking of social services), securitization (increased deportation and detention), and criminalization of migrants (through a politician-led public rhetoric of abuse and fraud)" (2016, 204). Hanging certainly outside the Court and beyond the walls of the Kingston Immigration Holding Centre is the rhetoric of former Minister for Immigration, Citizenship and Multiculturalism, Jason Kenney, who was expertly successful at connecting (or conflating) immigration and particularly racialized migrants to expanded scrutiny and mistrust, broadly. In 2010, speaking at an event in Ottawa, the Minister discussed the government's plan to overhaul (read: dismantle) the asylum process in Canada by referring to their new plans as more "fair and balanced" (Kenney 2010). No doubt much of the room understood that phrase as the tagline of the conservative US cable network, Fox News, but to make his point salient Kenney spent the next 20 minutes discussing plans to shore up the system for "bona fide applicants" as opposed to those who "jump the queue", "come in the back door", and thus "undermin[e] the integrity of our immigration system" (Kenney 2010). Kenney's approach is two-fold: first, to connect this structural unfairness with the system to challenges to Canadian economic prosperity and secondly, that such a broken system represents a crack in our armour against a dangerous, threatening other. Of course, Jason Kenney is not the first (nor the last) to connect racialized immigration to the dour job prospects and home economics of voters, but by repeatedly invoking calls for 'fairness', Kenney's rhetoric helped justify and rationalize expanding techniques of state power to monitor, detain, and deport.

Unknown Knowns, or Secrecy as Security

Security certificates can be viewed as "products of systems of exclusion based on race thinking and the securitization of migration", where central to the coupling of immigration law to counterterrorism strategy is the production of secret data (Larsen and Piché 2009, 204). A security certificate is issued—and made reasonable—through the use of secret evidence, material gathered through clandestine intelligence-gathering practices and that presents its own security risk to share. In *Charkaoui*, the case that forms the basis of this chapter, three individuals face deportation for a loosely defined

terrorist threat to Canada, a reminder that post-9/11, “counter-terrorism policy has been pursued primarily through immigration law” without addressing the evidentiary differences when immigration law “perform[s] criminal-law functions” (G. Hudson 2010, 129). Each of the named individuals in *Charkaoui* is left to guess at the veracity of this secret evidence, most of which the Crown maintains cannot be released for matters of national security. Still, the Government has told the court that these men cannot remain in Canada either, but explaining why that is the case, the government contends, jeopardizes public safety. The security certificate regime calls in a broad assemblage of intelligence and surveillance techniques—named persons are so named because of something from CSIS, CSEC and implicates Canada’s own intelligence gathering bureaucracy in global surveillance organizations and partnerships. Notably among them is the Five Eyes (FVEY or originally known as UKUSA), through which Canada shares intelligence with the US, the UK, Australia, and New Zealand. Security certificates represent a modest slice of the “military-industrial-communications-complex”, but by drawing on top-secret and classified information, connect arguments in the courtroom back to the ongoing expansion of information gathering as a counter-terrorism approach (Mazepa 2015, 11). The partnership—and indeed, Canada’s intelligence gathering work domestically is often discussed as neatly ordered and organized. Such an approach usually divides intelligence between CSIS on human intelligence and CSEC on signal intelligence[31]. To the contrary, a cursory scan of IRPA finds bureaucracies and agencies popping up. A copy of the 2013 CIC field officer’s guide to Evaluating Inadmissibility (ENF 2) offers a number of agencies and acronyms: “The Security Screening Intelligence Analysis Section (SSIA) within NSID is the primary point of contact at the CBSA for all operational screening-related issues…” (Government of Canada 2013a, 15). Not to be outdone, there’s also the “Temporary Resident Assessment Intelligence Section” to evaluate newcomers and visa holders and “the Contraband Intelligence Unit of the Intelligence Operations and Analysis Division (IOAD)” to focus on organized crime

[31] CSEC’s mandate is explicitly foreign, with an emphasis on foreign threats to Canada, but may work, in the words of CSEC Chief Greta Bossenmaier, “in concert with” other intelligence agencies. This creates possibilities for slippages from CSEC’s foreign mandate to agencies whose work is more domestic in nature. A later comment in the same Senate testimony that CSEC aims to see “how we can share our knowledge or expertise” speaks to this tension. Senators in the Standing Committee on Security and National Defence expressed worry that CSEC’s mandate could slip into the domestic realm (Parliament of Canada 2016b).

(2013a, 15–16). Perhaps most broadly, and charged with authority over security admissibility under IRPA,

> The Security Intelligence Section provides analysis, intelligence, and field support for inadmissibility under sections 34 and 35 of IRPA by:
>
> - Analyzing national security intelligence issues related to counter-terrorism, foreign interference/espionage, war crimes/crimes against humanity and producing intelligence products.
>
> - Conducting trend analysis and producing threat assessments and screening aids on emerging and current issues and/or groups with respect to inadmissibility on national security grounds (Government of Canada 2013a, 19).

If you're a bit confused how all these components click together to produce a cogent national security strategy, you probably aren't alone. Instead, Canada has produced a broad collection of security-like agencies doing work that is at least intelligence in name and producing and sharing secret or secret-ish information. Of course, the first step to making information public is knowing where to find it, and given a wide assemblage of information gathering agencies, locating information within the security-information bureaucracy can be a challenge unto itself. It is hard to interrogate the growth of global espionage from Canada when the landscape is a complicated patchwork of organizations and acronyms. By this measure, Canada employs the complexity as security strategy, where a cumbersome intelligence apparatus becomes prohibitive to asking too many questions about who is gathering information where and to what end. Glimpses into Canada's complicated and interconnected intelligence interests arose in the Arar Commission. Tracing the facts that led to Arar's deportation from Kennedy Airport to face torture reveals a cumbersome intelligence bureaucracy with cozy ties across the border. Commissioner Dennis O'Connor traces a baffling array of intelligence and law enforcement agencies and a sloppy handling of information across agencies and borders in the name of an exceptional threat:

> The [investigative] team was instructed to use every tool possible, within the bounds of the law, to ensure that 9/11 was not repeated. This included sharing information with other domestic and foreign agencies. (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar 2006, 1:36)

Investigators would testify that they were fast and loose with what they shared, that they embraced a comfortable working relationship across the border. Still, when Canadian authorities requested a border lookout on Mr. Arar, they had implicated him as a "possible Muslim extremist" within the US' Treasury Enforcement Communications System (TECS). Canadian authorities could not have fully appreciated the publicity of that information:

> Nineteen U.S. federal agencies provide information for TECS. The RCMP also provides information, although the exact nature of this information is not clear. All told, more than 30,000 people have been authorized to input in formation into TECS. (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar 2006)

Beyond a "self-image as neutral and effective forms of expertise, however, intelligence has increasingly become questioned as partial and arbitrary" where the rigors of the material gathered is viewed as questionable at best (Aitken 2008, 392). Intelligence is a clever set-dressing, a means of speaking authoritatively about the disorganized, sloppy, and increasingly racialized work of counter-terrorism prevention. Ever the tautological technicians, intelligence experts become "the sole agents able to assert, with some success rate, their definition of what inspires unease" (Bigo 2006, 26–27). The courts are to quickly follow, but given that their information cannot be viewed, their narrative—both of exceptional threats and predicated on pseudo-science—cannot be countered.

Security certificates are a small, but useful window into Canada's expanded interest in surveillance and intelligence as a counter-terrorism strategy. Certificates arise from secret evidence, and as *Charkaoui* offers, the government wishes to take great pains to keep hidden the means through which individuals are made 'dangerous' and the information gathered on non-citizen residents. Their 'reasonableness' is couched in the pseudo-science of the militarization of security, in an earlier case, *Suresh:*

> The s. 40.1 certificate was based on the opinion of the Canadian Security Intelligence Service ("CSIS") that Suresh is a member of the LTTE, an organization that, according to CSIS, is engaged in terrorist activity in Sri Lanka and functions in Canada under the auspices of the World Tamil Movement… (Suresh v Canada (Minister of Citizenship and Immigration and the Attorney General) [2002], 14).

In typical criminal cases, the veracity of CSIS' opinion could be rigorously tested. However, under the valence of national security, security certificate legislation "authorizes a fully secret judicial practice" where the government is under no obligation to share the material justifying its case (Aitken 2008, 384). Holding firm to the belief that matters of national security trump a need for disclosure, security certificates and their hearings mobilize tropes of exception and terrorist anxiety to justify their secrecy. Outside the brackets of the courtroom is all the imminent threats real and imagined; but inside, making the claim to secrecy viable, is the vast intelligence network who can trade on jargon and the veneer of science. Certificates demand a highly technical, impartial, apolitical, data gathering system. The program "installs the gaze of intelligence expertise as the center of national security practices, and, in so doing, equips a unique, highly unaccountable and often contestable form of knowledge and practice" (Aitken 2008, 393). My word is good, because I speak with the hard data of CSIS in my corner, and so my word can be taken without being held to the same rigorous tests that it would—and should—in a criminal trial.

The impartial, scientific quality of intelligence as an evidentiary source allows the government to gloss over one of the most pernicious facts of security certificates; that they often use the veneer of science to disguise a racialized legal process. Most of those named in certificates are Muslim males, facing extradition to parts of the world where torture is permitted at worst or inadequately prohibited at best. By all outward appearances *Charkaoui* is about the 'reasonableness' of a certificate; the length, as well as the human and financial costs of defending that reasonableness point to the nastiest elements of the certificate provisions in their ability to pluck particular kinds of people from within Canada and subject them to heightened surveillance and hybrid-criminal-immigration trials. Part of this is done though 'nationality', by reflecting on countries and causes that promote terrorism, rather than race explicitly. A discussion of Mr. Arar or Mr. Charakoui's nationality of Syria almost certainly does the discursive bracketing of race as a kind of metric in security calculations. CSIS and CSEC would lead one to believe that race is not a determinant in security assessments, but nationality becomes a useful mechanism to justify enhanced surveillance:

> The institutional legitimacy of intelligence-based criminal profiles based on nationality and sometimes continents (such as those

> produced by CSIS and CISC and circulated through the CBSA and its security partners) thus trickles down to the frontline in interesting ways. The slippage between race and nationality becomes more evident, while the enforcement rationale remains stable. (Pratt 2008, 628)

This use of 'nation' as a slippage toward racial profiling is predicated, as well, on a construction of 'national security' on the performance of "so-called Canadian values" (Burman 2010, 208). Intelligence performs 'nation' insofar as it declares what is threatening. As Burman notes:

> …the national in 'national security'—premised on the idea that the porousness of borders is threatening and on a racialized understanding of a deserving citizen—is another site where Canadian, non-Canadian and 'Canadian-born' are pitted against one another…(Burman 2010, 202).

Intelligence actors effectuate the national in where they direct their gaze, in what gets made suspicious (ostensibly the first step before being made dangerous). Intelligence gathering post-9/11 has promoted national security interests, but it has done so by obliquely defining what constitutes threatening and suspicious within the nation.

It is the perceived "institutional legitimacy" of intelligence that security certificate hearings like *Charkaoui* call into question (Pratt 2008, 628). However, it is a question courts have been hesitant to fully take up. Governments, Canada being no exception, have lobbied hard for greater executive latitude in exceptional times. Much of the government's case in *Charkaoui* is premised on an emergency need to take extraordinary actions to protect 'national security' or 'the public', again, yet another racialized construction of threats and of the nation itself.

What is a 'security certificate'?

As a tool of counterterrorism, security certificates occupy a thin slice of Ottawa's strategy and prior to 2001, had operated with little attention or public scrutiny. A security certificate could be issued under the "joint powers of the Ministers of Citizenship and Immigration and of Public Safety and Emergency Preparedness and were issued against non-citizens who were alleged to be inadmissible to Canada on the grounds of national

security, the violation of international human rights, serious criminality, or organized crime" (Hudson 2009, 174). The initial certificate regime, the policy that rounded up the appellants discussed here, distinguished between foreign nationals and permanent residents, and the latter were guaranteed certain rights while their certificates were under review.

Security certificates derived their legal authority from the Immigration and Refugee Protection Act (IRPA):

> The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80. (Government of Canada 2001, sec. 77)

The *Charkaoui* case tests these two clauses of IRPA that follow under the headings, "review of decision for detention" and "release", sections 83 and 84 of IRPA. From the outset, this is an important consideration: the constitutionality of the certificate is not in question; what is in question is the means through which those named in certificates have access to legal redress. Section 83 addresses procedural due process—how do those named on certificates answer the claims raised on said certificates and advocate for their interests. Section 84 addresses substantive due process and challenges the use of immigration detention as a temporary 'in between' condition while named individuals petition the government:

> 83(1) Not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the reasons for the continued detention. Section 78 applies with respect to the review, with any modifications that the circumstances require.
>
> 83(2) The permanent resident must, until a determination is made under subsection 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize.
>
> 83(3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.

> 84(1) The Minister may, on application by a permanent resident or a foreign national, order their release from detention to permit their departure from Canada.
>
> 84(2) A judge may, on application by a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, order the foreign national's release from detention, under terms and conditions that the judge considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person (Government of Canada 2001).

This is not a fast process precisely because of problems addressed in s. 83: material was kept from the individuals named, and tribunals conducted in secret, with secret evidence that the government did not need to share with opposing counsel. Such an opaque legal setup—with the stakes so high—means that individuals are detained for long stretches in places that are, or work like, a prison. However, unlike criminal prisoners, those named on certificates have never been charged with a crime, have not been able to review the evidence against them, and have no idea how long they will remain detained. I will skip ahead to the end of *Charkaoui* to note that the Court did rule that the security certificate regime as it existed in 2007 was unconstitutional, finding that the secretive nature of security certificate proceedings went too far: The government had a year from the *Charkaoui* to remedy the constitutional concerns raised in the Supreme Court case and to propose new legislation, which they quickly did.

One of the distinctive post-*Charkaoui* changes is the creation of a cadre of special advocates, who are given access to confidential evidence and able to cross-examine witnesses on behalf of the subjects named in a certificate. An internal presentation within the CBSA discussed how special advocates would work:

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The New Legislation on Special Advocates

- Minister of Justice establishes the list of independent, qualified special advocates – set out in the IRPA Regulations
- Qualifications:
  - Membership in good standing in a law society of Canada
  - At least five years of relevant litigation experience
  - No conflicts of interest
  - Appropriate security clearance
- Before seeing the confidential information, special advocate's ability to communicate with the subject of the security certificate is unrestricted
- After seeing the confidential information, the special advocate is unable to communicate with the person named in the certificate or his counsel regarding the case, except with the prior approval of the Court

13

PROTECTION • SERVICE • INTEGRITY

Figure 6 An internal CBSA presentation discusses the special advocates legislation for security certificates (obtained via ATIP)

The special advocate system addresses concerns raised in *Charkaoui,* but it does not change the circumstances for Charkaoui and his co-appellants. My analysis, then, is focused on pre-2007 security certificate legislation and adjudication processes. Following the reinstatement of security certificates, many of the constitutional questions still persist—the shoring up of access to a defense vis-à-vis a special advocate does not allay all concerns—and the *Charkaoui* case offers a rich data set to consider Canada's role in the global war on terror and to what extent the border can be made a test site for anti-terrorism anxieties, as well as providing insights into the way in which the judiciary brackets the border. That remains true, and the staggering latitude a security certificate offers a minister to call out an individual as dangerous and deportable persists through the post-2007 reinstatement of security certificates. It is still a bit early to critique the special advocates program—it has been hardly tested—but so much of the structure of

security certificates remains in place and so many of the questions judges wrestled with in *Charkaoui* remain contentious and unresolved. There have been four security certificates issued since the *Charkaoui* decision, including a reissuance for Mohamed Harkat and two that occurred toward the end of my research. The *Charkaoui* case and decision remain significant because it represents the only Supreme Court case to take up the entire constitutionality of certificates; subsequent sittings of *Charkaoui II* and *Harkat II* have asked more focused questions about individual appellants and their procedural due process. I focus here on *Charakoui I* (simply known as *Charkaoui*) because this case invites for the first time, broad commentary and questioning on the security certificate program writ large. It is beyond the scope of this work to investigate where individual appellants sit today. While interesting, it shifts attention off of the judiciary and ends up doing the Crown's work of testing the validity of an individual certificate. Rather than critique the grounds by which Adil Charkaoui is named, I want to consider the legal moves at work to reconcile dangerousness and non-citizens by the courts. This means my analysis is one of the mechanics of security certificates—how do they work—and of the kind of legal questions their use triggers in Canadian courtrooms. I accomplish this in much of the same way as in Chapter 4; by parsing out the compelling and popular bracketings that guide legal questioning and decision-making.

By the time we arrive then at the security certificate/deportation hearings for Adil Charkoui, Mohamed Harkat, and Hassan Almrei in 2002 and onward, little attention is brought to their cases, or to the seemingly clandestine nature of their trials. The conflation of immigration work to law-and-order politics is complete. The named men were detained preventively and separately over a period of from 1999-2001, on the belief that they might cause harm given suspected, but untested, claims connecting each to terrorism. By 2008, the then MP for Burnaby-Douglas Bill Siksay noted, "Hassan Almrei remains in jail at the Kingston Immigration Holding Centre, a double maximum security prison. He has been there for almost seven years now, ever since just immediately after September 11, even though he has never been charged with, let alone convicted of, any crime" (Government of Canada 2008, 5100). Even for those not detained, Susan Coutin argues that "the increased securitization of immigration makes national spaces akin, in certain respects, to detention" (Coutin 2010, 200). What the security certificate adjudication process reveals is that the Charter rights associated with

being physically present in Canada are no longer a guarantee, at least not for those the government calls out as dangerous. What one may take for granted as the rights of all when in Canada are being called into question through a series of legal moves and re-bracketings that aim to place some beyond the spaces of legal protection.

The outcry on the lack of substantive due process of migrants in this country has been minimal. Despite occasional mentions in the House, the idea that a political underclass has been made by those detained within Canada awaiting deportation receives little scrutiny. My interest in this case, then, concerns the decay of procedural due process for certain groups within Canada. Security certificates represent a dangerous performance of a separate (and by no means equal) legal system, justified through discursive performances of post-9/11 anxiety. Attempting to critique security certificates and their precarious position in Canadian law meant wading into a mess of motions, briefs—lawyers often launch simultaneous appeals to disclosure alongside calls for individuals named to be released—and accepting that much of the evidence that supported a certificate was to remain secretive.

The post-9/11 era has brought to North America broadly a dislocated and generalized unease, often misdirected at immigrants as examples of lax screening measures at our ports of entry, cracks in the armor of fortress North America. It is this backdrop that allowed the concept of security certificates to be dusted off and brought back into use—whereby plucking Canadian residents out from homes, schools, workplaces and initiating deportation proceedings seems banal if not completely justified. While the border appears to move and capture migrants far from ports of entry, security certificates also subject the named parties to legal processes that prize secrecy as a stand-in for safety. My goal here is to then consider the way security certificates bracket off certain kinds of legal possibilities or moves—namely transparency and procedural due process—and to look at how the very nature of the trials forecloses and brackets certain lines of questioning and outcomes. When evidence is secret and individuals are believed to represent a national security danger in their presence, the burden of proof has shifted and the ability to rebalance the scales becomes increasingly challenging. The invocation of *Charter* assumes access to substantive and procedural due process that is openly challenged by their indefinite detention without trial.

In 2014, courtesy of the *Access to Information and Privacy Act,* we now know the CBSA was engaged in a bit of a media relations campaign to clean up the sullied image of their security certificate program. It's a haphazardly thrown together PowerPoint—the audience of which remains unclear—that attempts to set the record straight on the perceived injustices in a secret trial system and the ability to pull migrants out from within the territory. Migrants removed from Canada, after quick and clandestine tribunals are referred to as 'achievements':

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Achievements

- Statistics:
  - 27 cases (persons) since 1991
    - 19 have been found reasonable and have been removed
    - 2 have been found reasonable and have yet to be removed
    - 3 have been found not to be reasonable
    - 2 were invalidated on constitutional grounds
    - 1 is currently before the Court
- Three active cases:

Figure 7 Keeping score—the government was actively selling the Security Certificate program to Canadians in this now public May 2014 presentation.

In *Charkaoui et. al. v. Minister of Public Safety and Emergency Preparedness* [2007], enough of the rules of the game remain the same to make the resulting proceedings vexing. The cases of security certificates do not start with a wholesale disregard of the norms, language, maneuvers, and trappings of Canadian law. Rather, there exists just enough of the familiar—the defense, the Crown, the appeals, the stacks of factums—to make one think what follows would be governed by the predictable rules, norms, and procedures of Canadian jurisprudence. It is for this reason, then, that *Charkoui* becomes a case of and about due process. The consequences of the way procedural due process is either afforded or denied to Charkoui and his co-appellants

reaches far beyond the tiny crop of individuals targeted through security certificates or the slightly larger selection of residents eyed for deportation. As evidence against the named men is hidden, the case appears to shift before our eyes, from an immigration hearing to a referendum on the limits of 'security' in our legal system.

As a facet of bordering, the controls to which people and bodies must submit are complex. Among the many technologies of surveillance and control now deployed, it is safe to say that security certificates represent a very marginal subsection of the overall immigration and border work. It would be easy, then, to write off security certificates as so fractional within the many policies and tools of immigration enforcement and to disregard the program altogether. However, I see security certificates as a form of 'bordering' in several senses. Firstly, we can think of security certificates here as part of a larger goal of controlling and monitoring the movement of people – including or spatially expelling designated threats. Secondly, security certificates illustrate the way in which the work of bordering extends beyond the 49th parallel, through the use of detention facilities etc. Thirdly, security certificates create new classifications—bracketing certain kinds of information, people, movement, and potential future as dangerous and threatening. That security certificates attempt to draw distinctions around certain kinds of people and movements, bracketing off individual rights from collective rights, and make use of secretive trials under the guise of national security are all facets of many forms of migration control. Like so much of post-9/11 immigration enforcement, the security certificate program is built on racializing an enemy and creating a violent other. Where it serves as a meaningful example in this regard is how far states are willing to go in that othering discourse. By naming violent threats among non-citizens living in Canada and creating trials shrouded in secrecy to determine their status, security certificates attempt to draw brackets around non-citizens, and around the institutions of law that every individual in Canada expects to have equal and impartial access to. And while so many programs and policies point to issues in the way people move across our borderlands, few have been so deeply implicated in the politics and problems of the global war on terror as the security certificate regime. In this way, security certificates feel more like a test site for many of the broader global war on terror policies and techniques. Investigating then, as I do here, how security certificates are their own Guantanamo Bay of quasi-legal positioning, draws attention to the ways the

entire global war on terror has demanded and produced new brackets around people, institutions, and spaces. Much can and is said about the state violence this entails; my goal is situate a criticism very squarely on the way legal practice is worked and managed to produce new security, economy, and legal ends.

Chakaoui v. Canada [2007]

The 19 hours of transcribed testimony across two days in June 2006 reveal a Supreme Court grappling with the sense of a looming terrorist threat and obligations to protect a fair and impartial judiciary even in the face of the perception of overwhelming threats to democratic institutions. So much of this is optics—that the threat to Canada is real and imminent, and warrants decisive, exceptional action. It is as Matt Hannah (2006) described it, “the ticking-bomb scenario”, a discursive move that “prompts a reimagining of the landscapes of everyday life as suffused with an unacceptably high level of risk” (2006, 623). In the post-9/11 United States, Hannah notes, the rhetorical construction of terrorism as a ticking bomb helped legitimize torture as a reasonable reaction to the threat of terrorism. While the reaction has been less severe in Canada, the thought that the global war on terror(ism) could be ‘won’ has remained a powerful discursive performance even as the name and nature of the threat evolved. The ticking bomb serves as a backdrop and justification for the security certificate program, where an existential terrorist threat must be battled by any means necessary.

Charkaoui represents three somewhat simultaneous security certificate cases, eventually coming to a head and merged as one in the Supreme Court. Moroccan-born Adil Charkaoui, Hassan Almrei from Syria, and Mohammed Harkat of Algeria had been named subjects of security certificates between 2001 and 2003. Harkat and Almrei were temporary residents, while Adil Charkaoui was a permanent resident, though “all three were at one time recognized as Convention refugees” (G. Hudson 2009). This distinction does matter—permanent residents are guaranteed, then and now, more rights and protections within security certificate proceedings, than non-citizen temporary residents. As refugees, of course, they demonstrated a well-founded fear of persecution in their home countries and slightly more than a decade later, a new Prime Minister Trudeau has aimed to repair Canada’s sullied global image by welcoming refugees in from the

very place Hassan Almrei left before he was detained in a Toronto holding centre for 8 years (Shephard and MacCharles 2009). While their cases dragged through courts, the men were detained, raising questions about the legality of their seemingly never-ending detentions as their lawyers fought for their eventual release. The case of Mohammed Harkat remains unresolved, with Alexandre Trudeau appealing to his brother for the release of Harkat after 14 years in deportation proceedings (Duffy 2016). (As of March 2016, the Government seems unlikely to release Mr. Harkat and has taken steps to see him repatriated to Algeria).

There are some key differences with the research materials here. Unlike the search cases discussed in Chapter 4, I have been able to obtain a full transcript from the Supreme Court proceedings in *Charkoui.* To that end, we know not only how judges were rationalizing the material in a polished decision, but on the fly, in the courtroom. As a PDF file with Opitical Character Recognition (OCR), the transcript is searchable in a way microfilms cannot offer. So, although the transcription runs over two days and 360 pages, the modern technology built into the transcription of this more recent document (2006) means that I am able to engage with it in a way that is more detailed and focused. This is important because much of the lower court material in the cases that are amalgamated as *Charkaoui* remain sealed. Another key difference is that *Charkaoui* has plenty of intervenors, 11 actually. While the intervenors fall generally behind the main arguments made by counsel for the Crown and the appellants, factum on appeal do offer a broader set of arguments and help demonstrate the range of ways the legal issues are bracketed and taken up.

Courts have heard several cases on security certificates, but *Charkaoui* is notable as a wholesale referendum on the entire security certificate regime. To that end, it is helpful to discuss some of the facts of the case. As has been noted, the case is actually three separate cases, joined together when reaching the Supreme Court: the Federal Court cases of Mohammed Harkat, Hassan Almrei, and Adil Charkaoui were heard together as *Charkaoui*. Each appellant came to the Supreme Court with their own counsel; while they collectively represent an interest to undermine the security certificate system, they can approach this differently and make use of the brackets or arguments that they find most compelling for their client.

I identify a number of crucial forms of bracketing at issue in the case. Firstly, I note the framing of citizens and non-citizens, which obviously undergirds a security certificate regime. The state cannot, after all, deport citizens[32], so it's clear that this particular (and peculiar) legal treatment is something that effects non-citizens distinctly and differently from citizens. The bracket of the non-citizen is fixed to scary potentialities that legitimate unique treatment to non-citizens in the name of national security. A second bracket arises around what to call the carceral spaces in which individuals wait, and perhaps more to the point of social justice, whether or not prolonged time spent behind bars constitutes something akin to 'detention'. This leads into the last distinctive organizing bracket, the temporal bracketing of prevention and pre-emption. The individuals named in certificates are detained preventatively, before a crime has been committed and certainly before charges or a trial. This gives some insights into some of the admittedly clunky language around certificate cases: individuals are named, they aren't accused. Certificates imply a suspicion of a broader 'dangerousness' than a particular act. So Charkaoui and others are named, not arrested, and not even suspected in a way that has been rigorously tested or agreed to. We cannot speak of them as 'suspects' because their 'suspectedness' is not really at issue. They are named, issued a certificate, and believed to be dangerous. The term 'suspect' at once suggests an investigative process that is not present—'the police department named a suspect…'—and at once unfairly assumes the suspicion is local or specific.

Two Kinds of Canadians: Not-So Equal Protection Under the Law

One of the first realities we have to accept is that security certificates, by definition, perform (and rely upon) two very distinct legal systems—one for Canadians, and another for non-citizens. Perhaps obviously, but worth repeating, Canadian citizens

[32] The Canadian government has expelled or deported citizens before, specifically in the case of Canadians of Japanese ancestry during the Second World War. But here too we see how brackets are redrawn to include and exclude, and Canadian citizens of Japanese parentage are renamed 'Enemy Aliens'. The creation of this group of people necessitates special wartime policy to expedite their removal and the liquidation of their property. See, for instance, Stanger-Ross, Adams, and Madokoro 2016.

cannot be named on a security certificate. The stakes are not the same, obviously; a 'dangerous' Canadian (more on that term later) is assured, by virtue of their citizenship, a criminal trial only for dangerous acts committed, not for the potentiality of danger. This limits the ways Canadian citizens can be called into courtrooms under any of the post-9/11 antiterrorism provisions.. Security certificates call out what is actually a wide spread issue where "non-citizens' rights claims are rejected, sidelined, or even ignored" within the Supreme Court (Dauvergne 2013, 666). What Dauvergne sees as "*Charter* hubris" is a Court less likely to draw upon international agreements and treaties, while at the same time seeing within the *Charter* meaningful distinctions between aliens and citizens (2013, 667). Revocation of citizenship became a buzzy topic in the waning days of Harper's government. MPs rose 107 times in the second sitting of the 41st Parliament alone to discuss the means through which the government would work to strip citizenship from those suspected of terrorism. Much of this due in no small part to Bill C-44 and Bill C-51, two counterterrorism measures the Conservatives quickly moved through Parliament in the months after a shooter opened fire inside Centre Block's Hall of Honour and at the nearby War Memorial. The Tories' response to a flare-up of violence and danger at home was predictable. Similar to American reactions more than a decade earlier, the days after the October 22, 2014 shooting lead to another spat of "heightened nationalist discourse, extended surveillance mechanisms, suspended constitutional rights, and developed forms of explicit and implicit censorship" (Butler 2004, xi). Judith Butler was reflecting on the United States in the days following 9/11. Unfortunately, her analysis functions just as well as a critique of Canada as the tough on crime Conservatives dealt with the symbolic and real losses following a shooting down one of the country's most storied streets. That the shooter, Michael Zehaf-Bibeau, was not a foreign national, but a lost soul from Burnaby, British Columbia should have been an opportunity for pause and introspection, but that detail was lost in the news that fed an insatiable craving for grainy photos of a disenfranchised kid who turned to Islam. As Michael Zehaf-Bibeau stormed the War Memorial in Ottawa, his mother was heading to work as a senior executive at the Vancouver office of the Immigration and Refugee Board (IRB). A Canadian citizen, Zehaf-Bibeau's entry and movements could not be reasonably corralled, but post-trauma, Canadian discourse entered a fact-averse space where the 'securitization of migration' became directly aligned with antiterrorism interests although there is no

factual basis to suggest any further immigration controls would have prevented the shootings in Ottawa.

"*Charter* hubris" aligns, then with a Canada looking inward to protect its borders and security by stridently asserting sovereignty and national security discourses that valued secrecy and insularity. Security certificates, and the *Charkaoui* cases then raise an opportunity to map the persuasive quality of international law over the Supreme Court in protecting the rights of non-citizens. While the Court, particularly in the post-*Charter* era had been actively reaching beyond its borders to test and work out its own legal sense of self (see previous chapter), the rights of non-citizens and the conflation of migration to questions of counterterrorism have offered major setbacks for non-citizens, as "judges have often accepted that national security concerns can justify the limitation of their human rights" (G. Hudson 2009). Cases like those of Adil Charkaoui and his co-apellants trigger international as well as federal legal considerations—of non-refoulement, of indefinite detention, of statelessness, while revealing the inefficiencies of the *Charter* to protect non-citizens when the stakes are high enough.

The View from the *Charter*

The *Charter* is generally seen as expanding the reach of Canadian courts to hear issues that reach into the very intimate spaces of where law meets everyday life. Without question, the *Charter* expanded the breadth of questions that could be articulated as rights questions. That's the good news. Where the *Charter* has been more of a mixed bag has been for non-citizens, where courts have accepted that the *Charter* itself does distinguish between citizens and those otherwise legally present in Canada. The bad news though: "non-citizens' Charter claims have rarely been successful" (Dauvergne 2013, 667). Some of these rights are common sense facts of citizenship, such as the right to vote and the right to return back to Canada. Still, it is well worth considering that the US Bill of Rights (drafted 190 or so years earlier) avoids language of citizenship. The substantive and procedural protections in the *Charter* mirror many of the rights conferred in the first ten amendments to the US Constitution. I see this as a distinction of citizenship in the background versus citizenship in the foreground; where the Bill of Rights leaves citizenship to interpretation and argumentation, the *Charter* puts the rights

of citizens front and center. Scholars have noted that the *Charter* represents a "strong commitment to civil citizenship rights", where many of the protections conferred in the *Charter* were tied to citizenship rather than mere legal presence (O'Connor, Orloff, and Shaver 1999, 192).

Non-Refoulement in the Exception

One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security, and it is worthwhile to contextualize the use of 'national security' as a turn of phrase and how domestic anxieties around security are bracketed and stymied by international commitments to human rights. We can think about security certificate cases spatially, as questions of coming and going, of detention and removal. We can also think of these cases temporally, as cases of imminent and immediate danger. When we do this, when we think about the way security certificate proceedings are framed as issues of 'protecting citizens' (as opposed to non-citizens) and how the justification of national security coupled with a sense of an impending threat creates as many legal challenges as possibilities. It is useful to contextualize the reality of these certificate cases and to acknowledge that so much of their legal difficulty is rooted in questions of security at every scale: national security, security of the person, both the citizen and the non-citizen refugee who sought safety in Canada.

One of the facts coursing under the surface of most security certificate cases is the reality that these non-citizens will most likely be sent back to face torture; often in countries they fled as refugees. This is not often discussed outright but undergirds questions from judges who openly wonder what to do with those who are perceived to pose a danger here but came to Canada seeking protection from regimes and states that practice torture. For others, by the mere naming of these individuals as dangerous, their certificates make real the possibility of returning to places where they will face severe harm and persecution. Security certificates make use of emergency provisions and they suggest that these particular threats and geopolitical conditions warrant a new set of tools. As Colleen Bell notes, "simply calling the imperative of national security, the

opportunity for actions that are outside of the realm of routine governance strategies is made available" (Bell 2006, 77). Borders, as Salter (2008b) offers, are fixtures of exceptional politics themselves, "a permanent state of exception, which makes the 'normal' biopolitical control of government inside the territorial frontier of the state possible" (2008b, 365). As a means to "constituting the population through the decision to admit or exclude" borders function as exceptional spaces in much of the ways Agamben defines. While borders were not the focus of his study, several scholars have rightly drawn parallels between his "zone of indistinction, between inside and outside" and the juridical and governmental work wrapped up in borders (Agamben 1995, 181). 'Inside and outside' of the brackets of jurisdiction and scale, borders are bracketed within Canada's federal court system by a larger collection of international agreements and legal norms. Chief among these is the tacit willingness to send individuals to face torture. There is of course a legal and moral argument to be made. Canada has signed numerous international legal commitments that prohibit the practice of *non-refoulement,* the 'sending back' of the persecuted to face torture. Considered a "fundamental tenet of refugee law", non-refoulement as a legal principle is set out in the 1951 United Nations Convention on the Status of Refugees and the resulting 1967 Protocol:

> No Contracting State shall expel or return a refugee ("refouler") in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (UN General Assembly 1967, sec. 33)

Canada has curtailed—or sought to curtail—its commitments under the Refugee Convention and Protocol. In employee training materials given to CIC staffers, Canada's responsibilities to protect individuals from torture are bracketed once more:

> Consequently, a protected person, or a person who has been recognized as a Convention refugee, cannot be removed from Canada unless:
>
> - they are determined to be inadmissible on grounds of serious criminality and constitute, in the opinion of the Minister of C&I, a danger to the public in Canada; or
>
> - they are determined to be inadmissible on grounds of security, violating human or international rights or organized criminality and, in the opinion of the Minister of C&I, they should not be

> allowed to remain in Canada on the basis of the nature and severity of acts committed or on the basis of being a danger to the security of Canada. (Government of Canada 2013a, 54).

The operational bulletin opens up a discretionary exceptional space where borders can be folded up and international commitments can be excluded and excepted, bypassed under conditions that allow the border to go about its banal exceptionalism. By its very threat of removal, security certificates undermine non-refoulement as an exceptional case that demands new sovereign controls of people and place. Their implicit willingness to subvert international law and policy for security also speaks to a tiered immigration system where some individuals are rendered as dangerous, violent, and as such to be subjected to a distinct immigration system that will bracket their rights within a larger operational mandate of 'safety'. As Kruger, Mulder, and Korenic (2004) suggest, "the association of foreign national and terrorist allows the terrorist threat to become an imported problem, encouraging a security-driven, regulatory mentality that seeks to prevent and deter outsiders from entering Canada" and allows their movement and rights to be limited under the guise of exceptional security demands (2004, 78). All three men in *Charkaoui* had at one point been refugees who had successfully demonstrated a fear of persecution at home; there could be no doubt by the appraisal of the IRB that they would face severe personal risk in their return. With few exceptions, the security certificate program undermines IRB decisions and refugee status within Canada as suspected individuals are "removed to jurisdictions that are likely to persecute, torture or mistreat" those named (Aitken 2008, 384).

What Counts as a Prison?

Brackets are, of course, never tidy—and while they seek to stabilise bits of material together, they are helping make sense of the untidy, messy, and heterogeneous world in which people, places, and things come into contact. As sightlines, they are privileged views that advance a particular narrative arc. In this section, I aim to unravel bracketings around substantive due process and look at a few instances where lawyers and intervenors attempt to organize their clients in particular ways in relation to the question of detention and incarceration. Perhaps it is here that *Charkaoui* the case frays the most; each of the men named has had different detention outcomes, often resulting

in what Mike Larsen sees as a “make-it-up-as-you-go-along-policy” that creates “extremely strict forms of house arrest” for some, and detention in purpose built centres, such as the Kingston Immigration Holding Centre[33] (Freeze 2008, A7).

Quickly after individuals are named in a security certificate, proceedings are begun to facilitate their removal. This often involves the use of detention centers, holding facilities and even house arrest—all techniques of securitization of migration that make the administrative work more akin to the criminal justice system. These entail forms of bordering, even if at a remove from the formal ‘border’. They speak to the ways in which law produces both space and time (for example, Valverde 2015). The expansive use of local prisons and police departments in the United States as immigration deputies has been actively criticized by critical geographers and academics (Coleman 2013; Coleman 2008; Coutin 2010; Labove 2011). Still, far less has been said about the “dead time” that immigration detainees face in Canada, or the way facilities like the Kingston Immigration Holding Centre look, feel, and are run like putative, carceral spaces (Charkaoui 105). Immigration detention is structurally distinct from other kinds of waiting or delay travellers may experience when crossing into Canada; where Simmons was delayed in her travels and ultimately faced a secondary inspection, the objective there is to search and remove illicit materials from entering Canada; immigration detention centres represent a confused shrug from policy-makers: deemed too dangerous to roam freely but unable to be immediately deported, particularly as proceedings meander over multiple courtrooms and many years, individuals named on certificates aren’t simply detained but caught in between. Their time, often spent in one the few immigration holding centres in Canada and sometimes far from family and lawyers, is viewed as particularly troublesome and excessively puntative.

[33] Kingston Immigration Holding Centre had a short life and incurred a nasty reputation as ‘Guantanamo North’, for its housing of men named in security certificates. KIHC opened in 2006 a “$3.2 million facility within Millhaven penitentiary” , and was run by the CBSA “especially for security certificate detainees” (Kinsman 2010, 162; Walia and Tagore 2012, 81). The Centre was closed with little fanfare in 2012. Today, purpose built facilities in Rexdale (near Toronto), Montreal Vancouver shoulder much of the work KIHC was designed for and the Minister for Public Safety has vowed to overhaul the immigration detention system still further.

"Dead time" is not simply a descriptive turn of phrase but a legal bracket of its own. In *R. v. Rezaie*, Judge Laskin notes that time spent in custody prior to sentencing (and, of course, in immigration proceedings, there is in fact no sentencing) is particularly burdensome:

> In two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining, or rehabilitation programs to an accused in custody waiting trial (R v Rezaie [1996] 112 CCC (3d) 97, para. 25 in decision).

Dead time then is a conceptual bracket through which we can examine the detention practices of the government in security certificate and deportation cases. In *R. v. Wust,* Judge Arbour notes that "dead time" refers to any "time spent by an accused person in detention prior to conviction and sentencing" (R v Wust [2000] 1 SCR 455, para. 29). In his testimony before the Supreme Court, Hassan Almrei's attorney, John Norris, notes that one of the paradoxes of the security certificate regime is that appellants like Mr. Almrei are held "responsible for the delay in the removal when they are contesting that removal", so prolonged time spent in detention is rationalized as "if you're going to put up a fight, well you have to pay the price" (Charkaoui v. Canada 2007, 88 in transcription of cassettes) Put simply, if you choose to argue for a trial before you are forced out of the country, you'll have to do so behind bars. Bracket off, for now, that these arguments are often long and protracted as the government's attorneys work diligently to keep evidence from disclosure. Bracket as well that the men named on security certificates face the all-but-certain prospect of deportation to torture, forcing courts to at least weigh heavily the prospect of their rendition. Lawyers for Hassan Almrei wish to bracket his time in detention as dead time, applying the legal principles and arguments developed in *Rezaie* [1996] and *Wust* [2000] to that end. Though, the brackets get messy quickly; *Rezaie* and *Wust* were criminal proceedings, and the accused could be credited 'double time' served on their eventual sentences. But, Hassan Almrei hasn't been charged, never mind convicted of a crime. When Judge Laskin notes the oppressive quality of 'dead time' he is speaking about the "accused in custody waiting trial". Hassan Almrei represents something entirely different, something

potentially beyond the bracket; not accused and yet in custody. Judges in the Charkoui case then are forced to reconcile several competing brackets—one on the relative deadness of their time in detention (best summarized as the 'well, how bad is it' question) as well as one that seeks to equate those held to practices broadly under the securitization of immigration to the due process of criminal law. Immigration proceedings, not even the most putative, are criminal law—which carries its own burdens and responsibilities but also provides for an accepted standard of procedural and substantive due process. Immigration law, particularly where immigration meets security and anti-terrorism anxieties, is less well trodden terrain.

It is important when we discuss detention—incarceration, really—that we keep in mind, as Barbara Jackman reminds us, that there has been no conviction of these men. They spend time behind bars but there has been no conviction for which to serve time:

> Ms. Barbara Jackman: The issue is in a country like Canada, has it gone beyond unacceptable to be cruel and unusual treatment? I say that it is, if you look at the facts of it. The test that this court has applied, mostly in the criminal context in terms of sentencing, is whether its grossly disproportionate or excessive. *R v Wiles*, we put in the condensed book, sets out that test. And sets out a number of factors that need to be considered. And I want to take you through those factors. One is the gravity of the offence. What you have here is of course no offence at all. There is no conviction (Charkaoui v. Canada [2007], 92 in transcription of cassettes).

Jackman also offers a 'test', a kind of bracketing for cruel and unusual punishment by calling in *R v Wiles* ([2005] 3 SCR 895). *Wiles* is not an immigration case nor is it a case involving detention, but it asks the court to consider what kinds of punishment are acceptable responses to a criminal conviction and, in this way, serves as a helpful point of contrast between the rights of criminals and the rights of Barbara Jackman's clients. In *Wiles*, a Nova Scotia man convicted of growing marijuana appeals the mandatory weapons provisions of the Criminal Code which prohibits those convicted of a crime from owning and possessing a firearm. The appellant, Mr. Wiles, had many firearms—all legally registered—but claims that the automatic prohibition is cruel and unusual, if only because the prohibition is automatic, general, and stringent. But the Court says in *Wiles:*

> This Court has dealt with s. 12 on many occasions and there is no controversy on the test that must be met. Treatment or punishment which is disproportionate or "merely excessive" is not "cruel and unusual" (R v Wiles [2005], para. 4)

Excessive punishments do not by themselves mean cruel and unusual, but these punishments—in criminal cases—weigh the gravity of the offense. But what, after all, did her client do? Jackman contends the offense is hardly established here:

> Ms. Barbara Jackman: You have a person who is possibly a terrorist. Possibly a member of a terrorist organization. No more than that. In Mr. Almrei's case, J.P., the CSIS officer who testified said he fits a profile. Your client fits a profile. (Charkaoui v. Canada [2007], 95 in transcription of cassettes).

Jackman's emphasis here is on the 'possibly', which is, strangely, not contested. Security certificates call out 'possible' terrorists, 'possible' threats to Canadian safety. However, certificates are challenged in courtrooms where offences or crimes are assumed to have actually, not possibly, been committed. Jackman's insistence that Almrei's terrorist label is at best 'possible' undercuts the Crown's argument that these are actually dangerous men. Jackman asks the Court to consider, how dangerous can someone be if they haven't actually committed a crime? Her argument holds the possible in stark contrast to what is actual—that these possibly dangerous individuals have spent time behind bars and in spaces that look and feel like prisons.

The question remains how to legally conceptualize the time Hassan Almrei has spent in jail. The "dead time" bracket, while compelling, has its own holes, notably that being 'named' on a security certificate is a different legal position than being accused. Perhaps a better way of stating it would be to say that being accused is an established bracket and relational position; being 'named' exists in the interstices of accusation and conviction. Because in fact, being 'named' on a security certificate means a belief by the government of one's ability to eventually commit a crime, but not that the crime has already been committed. If it had, the logic would follow, the 'named' could become simply 'accused'.

While the idea of indefinite detention did theoretically trouble the justices, so too did the idea of "truly dangerous" individuals living among us in free society. Rather than

first accept Almrei's extended detention as a narrative of dead time, justices in the Supreme Court wanted to know about the special, purpose-built immigration detention centres where the men were being held as their cases moved through appeal. Could detainees under a security certificate be sent to purpose built centres to handle these types of cases? Were these 'purpose built centres' legally different, such that they should be distinguished from other forms of detention? Could a category of 'immigration detention' be distinguished?

> Chief Justice McLachlin: There is something about having established a new detention centre for these kind of cases. And that things are getting better or maybe better. Do you have any comments on that? (Charkaoui v. Canada [2007], 100 in transcription of cassettes)

Of course, Ms. Jackman did have comments to offer, notably that while it is an improvement not to be incarcerated with the general prison population, the new immigration detention centres were creating an experience far more isolating:

> Ms. Barbara Jackman: So I think it was a year or year and a half and he couldn't have contact with his family. He's back in the same situation. Since he got moved to the Kingston Immigration Holding Centre (KIHC) he can't call his family.
>
> Mr. Justice Bastarache: We can't have one in every city, either, eh? (Charkaoui v. Canada [2007], 100–101 in transcription of cassettes)

Justice Bastarache's question snaps the bracket back. By one measure, men could be detained locally, but in more punitive, correctional facilities. Immigration holding centres aim to correct the 'imprisonment' of immigration detainees by taking them out of prison, and into specialized centres. But then that solution reaches a simple problem of geography and you can almost imagine the frustration in Justice Bastarache's question. These men—security certificate detainees—are quickly becoming bracketed out of any good options in their detention or removal. No, of course, an immigration detention centre cannot be in every city, but his question points to an inclination to bracket immigration detention as a distinct place and series of protocols. If immigration detention is legally distinct from other kinds of detention or holding, does it also have to be materially distinct, in special purpose-built facilities?

The Supreme Court justices also wondered if the confinement and prolonged detention of those in security certificate cases was unique or somehow offered a legal precedent to all cases involving detention? In other words, had the bracket of immigration detention been expanded? Can we pull in a broader cross-section of cases involving prolonged or indefinite detentions? Such a broadening would raise new questions for the justices to consider, undoubtedly. If the bracket were to be a statement on the detention practices writ large in Canada, their decision could have ripple effects throughout every level of policing and law enforcement. Barbara Jackman, aims to winnow that bracket back down to something more specific:

> Madam Justice Charron: No, my question is if this court were to hold that this is cruel and unusual treatment.
>
> Ms. Barbara Jackman: Right.
>
> Madam Justice Charron: Because they are in detention for a certain period of time, that would be the same for any prisoner who is under a sentence?
>
> Ms. Barbara Jackman: No, I don't think that applies at all.
>
> Madam Justice Charron: That's what I'm asking. How do you distinguish it then? How do we distinguish it if we're going to accede to your argument?
>
> Ms. Barbara Jackman: First of all, anybody who is under sentence, is in the criminal—the penitentiary system or the provincial system where they.
>
> Madam Justice Charron: Are subject to the same conditions with no access to the canteen.
>
> Ms. Barbara Jackman: They are not. They have access to education, they have access to the canteen, they have psychologists, anger management programs, they have all sorts of things in the jails that these men [Charkoui, Harkat, and Almrei] can't use. (Charkaoui v. Canada [2007], 102 in transcription of cassettes)

Jackman's move there, to focus justices in on solving an issue of the constitutional rights of a very select few, is an attempt to concede that trying to address bigger brackets such as the entire detention and correctional system is bound to produce excess heterogeneity and more competing factors. By focusing on the detention practices of Canada in these handful of security certificate cases, justices do not need—theoretically—to reinvent the wheel but instead find a better way to legally bracket back in the few men who are named in certificate cases. Surmising that these named men are impossible legal subjects—bracketed in Canada, but out of its legal protections, in jail but without a release date—Justice Abella voices the frustration of the Court to solve this puzzle, wondering if there is a fix:

> Madam Justice Abella: Ms. Jackman, I guess this is a struggle for solutions.

It is unclear what that solution is, so Justice Abella's 'struggle' is felt by all parties. A solution here has to sort through three conflicting legal quandries: Firstly, there are people, however few, who need to be within Canada but outside its constitutional protections. Secondly, Charkaoui and his fellow appellants are detained in a carceral space, but having not been charged with crimes, they are not technically jailed. Finally, the three men are deemed, at least by the Crown, as 'dangerous', but have not been charged with a specific violation of the *Criminal Code*. With these conflicts in mind, a solution here might foreclose as much as it offers; solutions that afford the appellants standing in Canadian courts necessarily locate them within Canada and within the reach of *Charter* protections. On the other hand, a solution that denies Charkaoui and his fellow appellants standing in Canadian courts would undercut arguments by the Crown to detain indefinitely those named on a certificate. You cannot, as it were, not have and yet also have something at the same time. The Crown envisions a struggle for judges here to make space for liminality in border work—for how a both/and logic makes possible the conflation of security to immigration. However, non-citizens, such as those named on a security certificate, are only protected by the *Charter* while legally present in Canada. The fact that this case is heard in the Supreme Court of Canada establishes however, that the men are not in a liminal space, but actually within Canada and, it follows, protected by the *Charter.* The Crown has an interest in complicating, but not entirely disavowing their legal standing. For the Crown, it is useful that the men be within

Canada if only to be within the legal reach of the Minister of Public Safety and Emergency Preparedness who names them on a certificate. The Crown, after all, needs these men to be within Canada to detain them in specifically designed holding centres. The legal-geographic gymnastics required to excise the Kingston Immigration Holding Centre from outside Kingston, Ontario, Canada simultaneously challenges the authority of a Canadian cabinet minister over the holding centre space.

Minority Report, or Counterterrorism as 'PreCrime'

Importantly, then, security certificates traffic in anti-terrorism and crime discourse but function as a technique of pre-emption. If this all sounds a little like *Minority Report,* where a cop played by Tom Cruise works in Washington, DC's PreCrime division, and aided by his 'precogs', can make arrests on future offences, that is because pre-emption has become a powerful tool of the Global War on Terror. Scholars have noted that the slippage from discourses of anti-terrorism and threat mitigation to PreCrime out of a science-fiction film is quite real, particularly in the United States where significant re-bracketings of people and spaces of US interest and involvement became the backbone of what come to be known as the Bush Doctrine (McCulloch and Pickering 2009; Weber 2005; Coleman 2007). The global war on terror has pulled new people and places into objects, relations, and sites of worry or control. New brackets of time, of threats, of and space, of the Coalition of the Willing, of the Axis of Evil, reflect new ways of seeing and speaking. For our purposes here, it is useful to consider how the legal rejigging toward pre-emption has created more complicated brackets. As judges and lawyers argue toward a making of legal space, pre-emption has created new and complex spaces of border and challenges our assumptions about how space is constituted and performed.

Frequently, counsel for the appellants remind the judges that unlike other cases involving criminal convictions, the men they represent have not been charged with a crime. That is a stipulated fact—both parties accept that—and yet, security certificates create a new slice of the legal system where some individuals can be rounded up and detained before ever having committed a crime. I note this exchange between the Court and counsel for the intervenor CAIR-CAN, David Baker, here for two reasons. Firstly, Mr. Baker is trying to poke at the preventative nature of security certificates, and it shouldn't

be surprising given his client that he takes particular issue with the way certificates unequally target some over others. Secondly, though, I offer it as an example of being called to stay in your bracket. The *Charkaoui* case raises several compelling, big, and interconnected issues. Most of the lawyers slip between one bracket or another and start connecting brackets in ways that add complexity but offer no further clarity. The Court will have none of it as a testy Justice Binnie at the end of this volleying demonstrates:

> Mr. David Baker: Following a fair trial that we would recognize in this country as complying with section 7, convicted and deported following conviction, absolutely. That would be what would be consistent with the Charter in our submission.
>
> Mr. Justice Binnie: The whole point is that its intended to be preventative. I mean does the state sit on its hands until something terrible happens and then prosecute if anybody is alive, the so-called perpetrators, to prosecute?
>
> Mr. David Baker: With respect, that's precisely the point the House of Lords was making. It is preventative.
>
> Mr. Justice Binnie: I read the brief.
>
> Mr. David Baker: But the prevention is not confined to one group within our society. It is prevention within our society as a whole. There is nothing that rationally connects the issue of prevention to one group within the society.
>
> Mr. Justice Binnie: Accepting that it is the group who can, are
>
> Mr. David Baker: That, as I say, the issue of deportation is not disputed. But that would be following what we would recognize as a fair trial.
>
> Chief Justice McLachlin: But there's nothing to try, as far as immigration matters. I mean if any cases.
>
> Mr. Justice Binnie: Well prevention.
>
> Mr. David Baker: The UK has introduced a system which is common to both nationals and non-nationals. There is no reason why this country could not do the same thing.

> Mr. Justice Binnie: That's the equivalent of the terrorism legislation, not the Immigration Act. We do have legislation addressing activities on the part of citizens that are thought to threaten national security. This happens to be a different channel because the remedy of deportation is available for these foreign nationals that is not available for citizens, as my colleague pointed out. But you seem to be fixing a lot of different strands in a big ball of spaghetti here. (Charkaoui v. Canada 2007, 132–33 in transcription of cassettes)

I'm sympathetic to Mr. Baker's 'big ball of spaghetti' because the issue of the ways in which certificates are preventive quickly becomes an issue of immigration versus criminal law, racial profiling, and detention is easy to understand. But the Court demands their issues framed out neatly and it is prevention that gets muddled along the way. The distinction Mr. Baker attempts to make, before potentially calling in too many other issues, is between lawful conviction under the Criminal Code and the preventive nature of security certificates. Amnesty International, in its submission to the court connected the preventative detention to a violation of an individual's rights under the International Covenant on Civil and Political Rights as well as the Charter. The preventative element of security certificates can be critiqued through the use of detention, and the use of detention before criminal charges then creates a useful bracket through which attorneys can argue security certificates violate the rights of the individuals named:

> …it is the categorical nature—the very absence of criteria to determine an individual's security risk and consequent need for preventative detention that renders the detention arbitrary. Drawing on the principles under article 9 of the *ICCPR,* the decision to detain must be particularized to the individual concerned: it must be necessary and proportional in all the circumstances of the case, in order to conform with section 9 of the *Charter.* (Charkaoui v. Canada [2007], 28 in the factum of the intervenor, Amnesty International)

There is a nuanced link made in the above argument—that the general use of detention is not particular to the individual therefore it cannot be said to be "proportional" because the individual is detained as a matter of fact not based on a careful

consideration of their individual case. If the detention is not specific, then it is arbitrary and violates section 9[34] of the Charter which protects against arbitrary imprisonment.

I want to try and split—if it is even possible—detention from the naming of an individual pre-emptively, as a means of suggesting that the detention is but a consequence of the pre-emption, a consequence that is prolonged by the way security certificates are adjudicated in long, protracted hearings over a series of years. As Justice Binnie notes:

> Mr. Justice Binnie: But here the purpose of the legislation, as its put forward, is to prevent. The Criminal Code doesn't really deal with, except in odd provisions, with prevention. It deals with after the fact punishment. (Charkaoui v. Canada [2007], 127 in transcription of cassettes)

How, then, to critique not the consequences, but the purpose of the legislation? As Justice Binnie notes, the Criminal Code doesn't address preventing crime so much as it does deal with meting out punishment to crimes that have been committed. And here is how the temporal bracket of pre-emption is open to so much pulling open. In order to function, the bracket calls in other bracketings of information: the men can be preventively detained precisely because they are not citizens, so the alien/citizen distinction persists. Security certificates are signed off on by the ministers of Public Safety and Immigration jointly; authority to issue certificates comes from *IRPA*, Canada's omnibus legislation on immigration. So there is something particular about security certificates and their ability to call out dangerous non-citizens that cannot be split from its temporal bracket of prevention. The same could be said for their detention, because it is the detention that activates a rights claim. Pre-emptive surveillance? Not likely. But lawyers for those named have to point to a discrete preventative activity that violates a specific right. And so here again the brackets blur, twist around each other in ways cantankerous judges call a 'big ball of spaghetti'. To split them into independent strands

[34] We can square this reading of detention against one that makes a s.12 claim, against cruel and unusual punishment. The fact that counsel brackets preventative detention at once as 'arbitrary' and at once 'cruel' speaks to porousness of the brackets. Certainly the s.9 claim is most compelling, but both turn on the fact that detention—of any kind of length—should follow a conviction. Security certificate detainees are not convicted, not even arrested in the traditional sense of the word—so their time in jail, whatever the length, could be both arbitrary as much as it could be cruel.

fails to acknowledge how each bracket informs the other, how the bracket of prevention relies on the act of indefinite detention, all relying on legislation that finds its authority in immigration, not criminal, law. We can hear the Court trying to slice out discrete questions and answers from within the impassioned arguments:

> MADAM JUSTICE ABELLA: Ms. Jackman, can you help me frame what it is that you're saying into a legal analysis? What does this go to?
>
> MS. BARBARA JACKMAN: I think it goes to his personal characteristics on the test that was set out in R. vs. Smith. That you've got to look at what the dynamics are in terms of his characteristics. He's Arab and Muslim. He's profiled.
>
> MADAM JUSTICE ABELLA: No, but so therefore? Therefore.
>
> MS. BARBARA JACKMAN: Section 82(2) is not? No, no, no. I'm just talking, I'm going to mix the two between what's happening to him personally and the statutory scheme. (Charkaoui v. Canada [2007], 94 in transcription of cassettes)

The Court isn't interested in a 'mix', but in a frame of legal analysis. Counsel for the named men like Jackman realize the frames of legal analysis are inadequate and have the unenviable task of trying to reframe the argument into brackets that hold all the legal positions. Because this is so challenging, because these men fall into a gap between immigration law and criminal law, detention and incarceration, prevention and punishment, we consistently see lawyers trying to 'just talk' in a way that contextualizes that oddity of security certificates. It is that 'talk', unfortunately, that trips up the work to undo the certificate regime. Unable to bracket off prevention as a discrete violation and injustice—away from detention and away from questions of citizenship—means that the preventative nature of security certificates, in some ways, the most contrary to human rights broadly, fails to get a sufficient hearing in the courtroom.

We'd be well advised to think how the increased reliance on prevention changes the dynamics of the bracket from criminality to potentiality. What, after all, kind of legal classification is a future criminal? Conceptually, interception demands, as I will discuss later, at least the presentation of impartial intelligence that justifies state intervention in the lives of those who have not (yet) broken the law. On the flip side, what does the *Charter* say of criminals-to-be? Rights in the *Charter* are activated upon arrest, after all,

and security certificates name and detain, but do not arrest as a matter of speaking. The ambiguity stands to work both ways, but as has been the case in permitting expanded state powers to police terrorism, the executive is given a broad mandate to follow its hunches.

Locating Danger in National Security

> As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. (U.S. Department of Defense 2002)

Taking a philosophy lesson from former US Secretary of Defense Donald Rumsfeld, the global war on terror could be best imagined as worlds—people, ideologies, concepts, places—known, and those beyond the easy and immediate grasp of media and politics, at least in the immediate aftermath of the 9/11 attacks. Mocked though Rumsfeld was, his musings represent well the anxiety of nations like the US and Canada to identify their geopolitical blind spots and the way that not-knowing produces fear and worry. Indeed, it is that last column, the unknown unknowns that stir the most panic. At the heart of counterterrorism measures, of which security certificates must be seen as, is a discursive turn that imagines terrorism as requiring new (and exceptional) policies "because of its shadowy character and its incalculable dangers" (Daase and Kessler 2007, 412). 'Danger' is seemingly everywhere and, therefore, nowhere in particular, allowing legal actors to tether to the term a litany of post-9/11 fears and anxieties that allow the bracket of 'danger and dangerousness' to take on a legal quality. Of course, there is no such legal position as 'dangerous' and there are no good tools to make dangerousness into something that can be empirically found and measured.

Danger has a rich topography within the post-9/11 world. Civil servants in Ottawa and judges hardly invented the term but rather draw on a vast and messy series of allusions to the term 'danger', allowing the word to operate with a quasi-legal position that packages security worries as legally intelligible data. Spaces are characterized as "zones of instability, as rogue states, ''states of concern'', as ''global hotspots'', not to

mention most famously the ‘axis of evil’ and its nationalist distinction, ‘the homeland’, which has served to domesticate geopolitical anxieties at the level of home and body (Bialasiewicz et al. 2007, 411). Regimes and governments are thought to be ‘cradles of terrorism’, or as the Joint Chiefs of Staff mapped it:

> There exists an ‘arc of instability’ stretching from the Western Hemisphere, through Africa and the Middle East and extending to Asia. There are areas in this arc that serve as breeding grounds for threats to our interests. Within these areas rogue states provide sanctuary to terrorists, protecting them from surveillance and attack (Joint Chiefs of Staff 2014, 5).

Note as well the term ‘rogue states’, which helps tether danger to a particular geopolitics. The shadowy quality of ‘danger’ meets the equally shadowy quality of ‘rogue’ in a ‘breeding ground’ that must be met with increased surveillance and militarization. The terms are not so much as defined as they are co-located and reiterated. The dots connect themselves. There are places that are not be trusted—I note here as well that ‘danger’ is often thought of in highly contingent forms. So a lack of knowing can be refracted as a lack of trusting to create spaces of heightened threat and fear and then embodied in particular racial and ethnic groups. If the US homeland stands in distinction to such dark sites, then Canadians should find moral security in any utterance of the bond between the US and Canada as a ‘special relationship’, or better still, as somehow genetically the same, or at least from the same home, with a statue at the Peace Arch Port of Entry declaring the two nations ‘children of a common mother’.

Figure 8 **Embodying the Canada-US Relationship at the Peace Arch Border Crossing. (Photo credit: Government of Canada)**

In the years since 9/11, Canadian and US officials have worked to push the border out and to reiterate their cooperation in constructing new, broader geographies of (in)security. Canada has plodded ahead with programs to develop new borders that both signal a depth of partnership with the United States while continuing to avoid the seemingly most controversial policies of the global war on terror. Programs like 'Beyond the Border' and the 'Security Perimeter Partnership' traffic in the same tropes of us/them as the 'axis of evil' while existing in its own increasingly fuzzy geography alongside 'green zones' and 'the West'. Safety and danger-free, then, could be wherever Canada and its allies find themselves—from a Tim Hortons in Kandahar to a naval base off the BC coast. This only further complicates where, exactly, is safe, where danger takes hold. It pulls people and spaces into zones of Canadian influence while expelling others to 'beyond the border'. In *Canada Council for Refugees v. Canada*, the border is pushed inward to deny a refugee claimant legal access to Canada. In other instances, notably the Trudeau government's work to accept Syrian refugees, mobile immigration processing centres have been opened up in Amman and Beirut, in what the Government has self-titled "#WelcomeRefugees". The social-media readiness of the campaign is transparent but the work very much ties into discourses that see some places as

dangerous and scary, and subjects refugees to immigration screenings prior to arriving in Canada:

> Security screening will include collecting biographical information and biometrics, such as fingerprints and digital photos, which will be checked against immigration, law enforcement and security databases. Sharing biometric data collected from persons applying for refugee resettlement to Canada will allow visa officers to establish identities, determine the existence of a criminal record and make sound decisions. (Government of Canada 2015)

The media angle on the Trudeau government's handling of refugees has been largely positive—with plenty of hash-tagged photos of the new Prime Minister greeting arriving passengers and 'welcoming' them to Canada, with far less said about how we had conflated those seeking asylum with terrorists. But the United States took notice and in February of 2016, as Canada prepared to welcome its' 25,000th refugee, the U.S. Senate Committee on Homeland Security and Governmental Affairs convened to discuss, in their words: *Canada's Fast-Track Refugee Plan: Unanswered Questions and Implications for U.S. National Security.* Before formal proceedings begin, Senator Ron Johnson (R-WI) engages in a little extemporary riffing, a kind of off the cuff geographic association:

> We had a foiled terrorist plot in Milwaukee, Wisconsin. This wasn't Israel, it's not Syria, it's not Afghanistan, it's not Iraq, wasn't San Bernardino. It was Milwaukee, Wisconsin. (U.S. Senate Committee on Homeland Security and Governmental Affairs 2016).

The Senator—from Wisconsin—is incredulous his Midwestern city could be a terrorist hotspot and he demonstrates this by comparing the setting for *Laverne & Shirley*, a bastion of post-industrial whiteness, to deeply racialized sites across the globe where terrorism in the name of Islam has occurred. Curious too that San Bernardino makes the list, but the comparison draws attention to Wisconsin's staggering whiteness. (Wisconsin is 82% white, one of the whitest states in the US, while California is a 'majority-minority' state where non-whites make up over 60% of the population.) But the Senator turns his attention to the guests of the day—academics and experts mostly from Canada to discuss the threat to the US posed by Canada's impressively fast refugee resettlement—and so he continues his geographic free association with some thoughts on the relative danger of Canada and Canadians:

> Canada? Generally not a threat. I go up fishing there, you got great wildlife. I love Canadians. We've got a very special relationship with Canada. As a result, we have a pretty unsecure border with Canada, just never really represented much of a threat. (U.S. Senate Committee on Homeland Security and Governmental Affairs 2016)

To this Senator, and indeed enough of his colleagues to justify a hearing, Canada doesn't normally qualify as 'dangerous' but when the borders remain lax and Canadians look to take in 25,000 Syrian refugees, Washington grows uneasy.

Yet the fact that 'danger' is very much of concern to the *Charkaoui* court acknowledges how national security concerns are read through a lens of 'dangerousness', whereby the two concepts are inextricably linked. In this way, it is useful to consider how post-9/11 counterterrorism measures traffic in a discourse of danger and to begin to ascertain what kind of discursive and legal work 'danger' is being set to do. At one end, terrorism is conceived of as especially dangerous because it seems to be, at least in part, beyond knowing. When "there is empirical knowledge about the 'things' that could pose a danger", there is a measured precision to one's response and a security that comes from knowing. At the other end, lawyers (today) admit that cases against Charkaoui, Almrei, and Harkat were based on "outdated and sketchy knowledge of Al Qaeda and other extremist Islamic groups" (Shephard and MacCharles 2009). Ottawa wasn't simply not playing with a full deck; they had no clue how many cards come in the package. In developing their cases, secrecy becomes a central national security tactic, predicated on the assumption that all the unknown variables about threats to Canada could be gleaned. In this way, the unknowable quality of terrorism attempts to make permissible an equally shadowy approach to counterterrorism where the production of secret knowledge remains a key instrument in the war on terror. Those suspected of being dangerous or involved broadly in terrorism then are to be kept away from knowledge—the crux of *Charkaoui* is actually about the way knowledge—evidence—itself represents a danger, should it fall into seemingly already dangerous hands. (Far less, unfortunately, is said about the danger to democracy that occurs when the accused are unable to mount a fair defense based upon the evidence held against them.)

A brief exchange in the Supreme Court in *Charkaoui* gives us some insights to the strategic coupling of danger to immigration as much as it begins to pick at the concept of 'danger' as a broad rhetorical move that stands in for a broader constellation of extralegal and social brackets.

> Mr. Justice Bastarache: You seem to say that a security certificate is not really turning on the question of security. But when I read section 77(1) it says inadmissible on grounds of security. That's the first issue. And then when you look at the warrant provision, or that has to do with the detention, it says the Minister may issue a warrant if there are reasonable grounds to believe the resident is a danger to national security.
>
> MS. BARBARA JACKMAN, defence counsel for Charkaoui: But you know Justice Bastarache, this court in *Suresh vs. Canada* (Minister of Citizenship and Immigration) made a distinction. Its in your own reasons. That the finding that a person is subject to a security certificate is a finding of the inadmissibility. But it doesn't decide the danger issue.
>
> MR. JUSTICE BASTARACHE: No, but what I'm saying is that when the Minister is issuing this certificate its because he's made a determination with regard to national security. Its right there.
>
> MS. BARBARA JACKMAN: Its true. National security in that sense. But not that they're a danger to national security. They're inadmissible on national security grounds.
>
> MR. JUSTICE BASTARACHE: Well that's the same thing.
>
> MS. BARBARA JACKMAN: Well I'm taking it from your reasoning in Suresh vs. Canada (Minister of Citizenship and Immigration). That you made a distinction. Someone may be inadmissible on security grounds but it doesn't mean they're a danger, that they should be deported to torture. That they're not the same thing. So Court of Appeal in this case adopted that test. (Charkaoui v. Canada 2007, 107–8 in transcription of cassettes)

Jackman is moving here to uncouple danger from inadmissibility on national security grounds and, in so doing, hits against a challenge of the security certificate hearing process, that her client's relative dangerousness is actually not on trial. Instead, judges are parsing the bracket of a 'reasonably issued certificate'. The justices want to consider whether the certificate was issued in a reasonable way and Jackman wants to

trouble the reasonableness of the certificate itself by contending that the assumption that her client is dangerous because he is named on a certificate does little to actually prove his dangerousness—which, should be the whole point of this legal exercise to begin with. Why would her client be deportable under expeditious and exceptional circumstances if he wasn't dangerous? Shouldn't that be on trial? It stands to reason, then, that if you can split the bracket such that not all named on security certificates are by default dangerous, you can undermine the grounds by which they are marked for deportation from Canada. For Jackman, there are two concurrent arguments—the admissibility question, which would question whether or not the security certificate was issued legally and fairly and thus her client would be inadmissible to Canada, and secondly, the danger issue, which would suggest that her client is perhaps not dangerous.

The invocation of *Suresh* is useful to think through because it reveals two brackets operating outside the courtroom that Jackman is angling to pull back into the universe of relevant case law[35]. First, *Suresh* forces distinctions on the term 'dangerous' and clarifies scales of dangerousness and the kind of legal action that can then follow. For example, 'a danger to Canadians' is clarified from 'a danger to Canada'. Second, *Suresh* raises the *Charter* question of deporting a Convention refugee to a state known to practice torture. The Court in Suresh raised some objections and unease, but ultimately "sent mixed messages regarding the possibility of deportation to torture" (Thwaites 2014, 246). Her client, Hassan Almrei, along with Mohammed Harkat, came to Canada as refugees and would be going back to places where their life would be in danger. On this second front, much had changed in short course—four years prior, the justices seemed deeply conflicted at the prospects of sending anyone to face torture. Two years later, the Governor General ordered an investigation into the events that sent Maher Arar to face torture in Syria while transiting through the United States and in the weeks and months that saw the *Charkaoui* case culminate at the Supreme Court, the

[35] Note as well that Barbara Jackman served as lead counsel for Manickavasagam Suresh, an earlier case involved the determination of an individual as dangerous and as such, inadmissible to Canada. See Suresh v Canada (Minister of Citizenship and Immigration and the Attorney General) [2002].

Arar Commission released a damning indictment of Canada's role in sending one of its citizens to torture and imprisonment in Syria.

On the first question through, to what qualifies as dangerous, the arguments raised in *Suresh* of vagueness demonstrate the way brackets are made and worked through. Writing in the judgment for the Federal Court of Appeal, Justices Décary, Linden, and Robertson note:

> In the absence of a statutory definition, the courts are required to supply the legal parameters as to a term's meaning by resorting to traditional and accepted judicial techniques including the common law, dictionaries, or a contextual analysis of the legislation. (Suresh v Canada (Minister of Citizenship and Immigration) [2000] 2 FCR 592, para 60).

Of course, we know by now that parameters—brackets—help make legal meaning. Here, in the Federal Court of Appeals' work to define 'danger'—or more fully, "danger to the security of Canada"—we hear directly from a judge on how those brackets are shaped and utilized. In working through the bracket of danger, Federal Court judges make a distinction:

> …simply because a person falls within an inadmissible class, it does not follow that he or she represents a danger to Canadian security (Suresh v Canada (Minister of Citizenship and Immigration) [2000] 2 FCR 592, para 62).

Herein begins some of the definition searching judges do around 'danger', trying to bracket off or bracket in something called 'danger to the security of Canada' from all other dangerous acts. Judges in Suresh uncoupled 'danger' from admissibility, and by extension, call in question the grounds by which security certificates are made 'reasonable'. In the Supreme Court oral arguments during *Suresh,* Justice Arbour suggested that the uncoupling reveals both inadmissibility and a particular degree of dangerousness is necessary and that "it's not enough to say because you're one [inadmissible], you're necessarily the other [dangerous]. Something else has to be found" (Suresh v Canada (Minister of Citizenship and Immigration and the Attorney General) [2002], 33 in transcription of cassettes). It does, after all, seem a little unreasonable that one could be inadmissible on security grounds but somehow not a danger to the security of Canada. By testing the limits of the bracket of dangerous and

then separating it from questions of admissibility, judges in *Suresh* were caught playing with the bracket, openly musing about the limits of words like ‘danger’ and ‘security’: given the chance four years later, Barbara Jackman, now arguing for Hassan Almrei, was going to hold them to their thinking out loud. The idea that one could be deported (inadmissible) but somehow not a danger to Canada, would seem on its surface, to be a failing of the way the brackets had been structured. By invoking *Suresh,* Jackman drives a wedge in between the bracket of ‘reasonably issued certificates’ and ‘admissibility’ on one side versus ‘dangerous’ on the other. While it is unclear how much legal weight such a clarification will offer on its own, it helpfully muddies the water and demonstrates how messy and heterogeneous these bracketings can be. The invocation reveals as well that there are multiple meanings of ‘danger’. I don’t mean that the term is vague, which is certainly a point of debate in these cases, but that the judges are preoccupied by framing the extent of the danger—temporally (is this an imminent danger?) and geopolitically (to the safety of Canada? to the people of Canada?).

Chapter 6. Conclusion

There is no 'conclusion', as it were, to a drama that churns along with banal predictability. Nor is there for Mohammed Harkat, who as of this writing, still sits in KIHC awaiting deportation—making Justin Trudeau the third Prime Minister who has worked on his exit. By taking on these cases, the Supreme Court is drawing a useful distinction of where border spaces can sit legally, perhaps the most important bracket of all, the granting of leave to an appeal.

There a feeling of infiniteness in the way we speak about the border, a thing so massive and yet so taken-for-granted, that it can seem downright futile to critique it or the way it gets made. Borders are important, and yes, maybe too massive to speak of wholly, fully, or in a way that elevated this conversation past buzzwords or the anxieties that seem to accompany (certain kinds of) mobility in 2016. Borders are, after all, spaces of potential, and promise, of expectation, and liminality. As New (1998) reflected in his book, *Borderlands: How We Talk About Canada:*

> …boundaries seem to be to me more metaphors than fixed edges: *signs* of limits more than limits themselves—but signs of what kind? Perhaps of reach, accessibility, appreciation, understanding, perhaps of size, power, acknowledgement, permission, perhaps of possibility, territoriality, allowance, refusal (1998, 4).

I've started to wonder if all that metaphoric, discursive work doesn't trip us up, doesn't hold us back from asking really pointed and focused questions about the behaviour of the border, or about the way particular people and institutions are implicated in making these lines and spaces come into being. I never wanted to take away from the magic, expectation, and worry tied up in bordering but I slowly acclimated to the idea of telling a really focused story, a story of particulars, like a police procedural. The details, I hoped, would provide a more honest accounting of some of the ways borders are made real and vital around us. In my case, I wanted to focus on jurists because in a world where American presidential candidates can whip up voters with

simplistic cries of "build that [border] wall", academic research holds the promise of complicating our taken for granted narratives (Preston, Rappeport, and Richtel 2016). Answers and hope rest on that complexity and I recognize that the answer to challenging border walls sits in the academic work of raising good questions. That has meant a quiet diligence to challenge the held expectations of how borders work and who is active in their making and, sometimes in their most pernicious, racist, and xenophobic moments.

The end result is not a total accounting of what borders are or what borders mean, or, really, anything so much about borders at all, but instead, a methodical consideration of the way political space is made. The cases I considered have had long legal lives, turning names like Simmons and Charkaoui into principles and concepts that go far beyond the people they first referenced. By doing so, my goal has been to pull back the curtain and to bring into our discussions of territory and state power a sense that the law and the institutions and actors wrapped up in legal work, have a role to play that is often ill considered and overlooked. Judges and lawyers do not alone make borders, or parks, or cities, or townships, but their role—particularly in the negotiation of contested spaces—is decidedly important because it falls so often beyond the reporting. I consider the cases here momentous in their effect for the way borders are called in or out as spaces of rights. The fact that these cases were barely referenced in the pages of Canada's major daily newspapers is telling in its own right and served as a call and cause for this work. Too little attention was given to the banal geographers in courtrooms who have made sense of the spaces of bordering.

Still, this isn't really about the border, but about what conversations about the border reveal about the way we make and justify legal space in Canada. To that end, the border is simply an interesting case study in the way spaces big and small are being effectuated and performed. The stakes are high, the threats seem imminent, and border work continues to touch more and more corners of Canadian daily life. Rather, talking about the moves lawyers and judges make to draw in the border or push people and spaces outside of Canadian jurisdiction raise, I hope, bigger questions about how space is made and defended and the politics that undergird that claiming of space. In that way, talking about the border is essential, if not elemental, but the story goes far beyond immigration and customs work. My efforts here were to catalogue that process with

enough detail and description that others may begin to see and imagine how space is adjudicated across a more diverse geography. In questions of resource extraction, municipal politics and federalism, the rights of Canada's First Nations, and climate change, it is my hope that scholars will take from my work at the border a desire to interrogate the way in which legal spaces are made and defended.

In fact, many agencies do border work, and my decision to put the CBSA in greater context is at once exceedingly practical—poor record keeping and information sharing practices—as much as it also recognizes that the CBSA is among a larger alphabet soup of actors at the border. It is my hope that by talking about the judiciary, I have been able to demonstrate that bordering marshals a broad complement of governmental projects to task. The way judges and lawyers work through this is at times conflicted, and recognizes the multiplicity of actors and policies that are brought to bear on the border.

One of the pleasure and pains of this work is how quickly change occurs at the border. There was a Conservative government, then a Liberal government, a reality TV show, and then a cancelled TV show. There have been countless immigration ministers since I started this work (four, actually), and with them, a seemingly never-ending supply of new immigration schemes, new policies to 'express' or 'fast track' some. Not to be outdone, CBSA and Public Safety have answered to three different ministers since this work began, and today, every BSO now carries a sidearm. The US-Canada relationship has see-sawed too during my time—and bilateral border agreements between the US and Canada reached a fever pitch after the election of Justin Trudeau. After years in the cold, where bad feelings over pipelines gave way to frosty Ottawa stonewalling—phone calls unanswered and a US ambassador who sat waiting for meetings around town—the relationship in recent months moved to a kind of hyper productivity (Canadian Broadcasting Corporation 2017). In the waning months of this research, MPSEP Ralph Goodale announced new policies to modernize the way immigration detainees like Charkaoui, Harkat, and Almrei are held, creating what is to be dubbed a "new national framework for immigration detention":

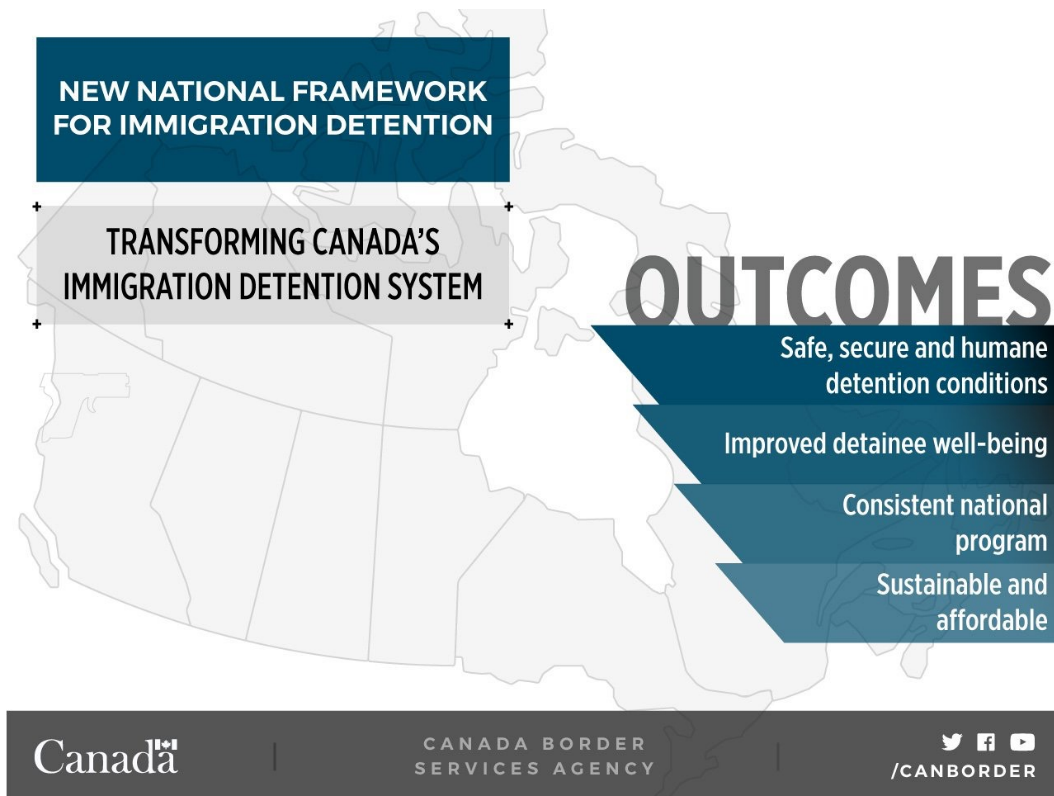

Figure 9 The CBSA announces a new approach to immigration detention, August 2016. (Source: Government of Canada)

This is entirely a domestic decision, but it is possible because of big moves forward between the US and Canada on their shared border agreements and policies. The two—Canada's bilateral border work and Canada's domestic border policy—are deeply interlinked. There is little question that a new President Donald Trump will exert influence over the 49th parallel just as so many before him have. Had the government asked me, I might have called for a 'new national bracket', but their use of 'framework' feels close within the permitted bounds of bureaucratic jargon. In this way, a new framework represents new enclosures, new cuts, and new organizations (real and discursive) that will help sort border work into its discrete juridical actions.

All these quick changes, large and small, will have legal and spatial consequences that cannot yet be assessed in this research. We cannot yet know, for instance, what role the Beyond the Border Action Plan will play in the way border work is

taken up across the country, and most of all, in Canada's courtrooms. What will judges make, for instance, of the work Canada and the US have done to share the entry and exit information of travellers and goods, amending the Customs Act in Canada to allow for greater data collection of those appearing at Canadian ports of entry. It may well be a while before we know how greater latitude to the CBSA will be viewed by the courts and whether these greater means of gathering information and data will be viewed as prudent in the name of public safety, run afoul of well-established norms (or constitutionally codified rights) around privacy, or if such means of data trawling once again puts the CBSA in a position to explain how 'reasonable suspicion' is produced. It's all well and good to say that people present themselves suspiciously, it may well be another to suggest that a person's movements open them up to greater scrutiny. Bill C-21, *An Act to Amend the Customs Act,* sits at a stall in House of Commons, but its eventual passage does suggest new points of tension between the way the CBSA does its job and our understanding of *Charter* rights. As part of an overall "entry/exit initiative" with the United States, the CBSA seeks to "collect basic departure information (found on page 2 of a passport) on all travelers" in all modes of travel (Canada Border Services Agency 2016). Presently the US CBP and CBSA in Canada are only sharing biographic data on the movement of non-citizens. Bill C-21 aims to expand that data collection and provide the CBSA with both more information and earlier. C-21 also expands the border upon exit, and as greater information is collected on who is leaving and for where, also extends the rights of CBSA officers to question those leaving Canada:

> Every person who is leaving Canada shall, if requested to do so by an officer, present themselves to an officer and answer truthfully any questions asked by an officer in the performance of their duties under this or any other Act of Parliament. (Parliament of Canada 2016a, sec. 94)

CBSA officers have found themselves questioning exiting travelers, particularly in airports (for instance, Supreme Court Reporter 2016) but this clause now legally expands CBSA authority to police at exit as a matter of fact and across all modes of travel. It's hard to know what the CBSA would do with the expanded power to detain a car, intercept a cruise passenger, or hold a traveler from a foreign-bound plane, but there is little question that C-21 represents an expansion of bordering that is just beginning to take shape.

Bill C-21 is complemented by Bill C-23, which aims to expand preclearance operations, whereby US-bound travelers are pre-cleared for admission in Canadian points of departure. The Minister of Public Safety reiterates the powers asserted in Bill C-21 to bring Canadian border staff closer to exit and departure *from* Canada:

> Only the following persons may enter a preclearance area:
>
> **(a)** travellers bound for the United States;
>
> **(b)** preclearance officers;
>
> **(c)** police officers and border services officers, for the purposes of exercising powers and performing duties and functions under this Part;
>
> **(d)** persons who are authorized by the Minister under section 45 or by regulation; and
>
> **(e)** subject to any regulations, persons who are authorized by the operator of a facility (Parliament of Canada 2016a).

Again, the insertion of CBSA staff into a preclearance area is not by itself newsworthy, but as preclearance areas are, as subsection (a) notes above, only for US-bound travelers, "border services officers"[36] would be interacting and intercepting travelers bound for, and possibly already cleared for, arrival in the United States.

We might take away from this work a productive tension around rights—how they operate and who they serve. It is, after all, the *Charter of Rights and Freedoms* that undergirds legal arguments and brackets put forth by lawyers in the courtrooms considered here, but activating those rights calls into relief the limitations of rights talk, the ways in which rights foreclose as much as they open up. When we think, for instance, of a cruel or unusual punishment, we have to agree on what constitutes a 'punishment'—is secondary inspection a punishment? What about a bedpan vigil? There is a productive power in rights discourse to pull issues, people, and spaces into a Canadian jurisdiction. But to what end? Given the liminal condition of bordered

[36] I take this to refer to CBSA staff, as US CBP officers are firstly never called border services officers and secondly, are referred to as "preclearance officers" in subsection (b).

subjects—waiting, in transit—they are brought into Canadian courtrooms if only to find out that rights discourse doesn't apply. The invocation of 'national security' or sovereignty allows lines to be drawn around certain individuals, to expel them from the legal norms of rights and due process.

If "boundary making is an other-forming process, and plays a vital role in the construction of Us and Them" (Kaiser 2002, 234), then the border might well become a test site against the kinds of ethnonationalism espoused by Donald Trump and his cronies. In many ways, Trump and others pull from a tired narrative that ties the protection of territory to national sovereignty. It is well expected that the Trump administration will be hawkish on immigration and "monitoring when visa recipients leave" so we can expect too that there will be greater stresses on Ottawa to acquiesce to the American vision of the border as "security first, travel and trade second" (Macchi 2017; Heyman in Canadian Broadcasting Corporation 2017). Border talk is getting more polarized and discourses around the migration and control of people will continue to run hot and divisive. This heightened rhetoric around the securitization of immigration inevitably will inform how we speak of customs work as well. As Kaiser reflects, there is an increasing "hardening of borders between us and them, and between ours and theirs" (Kaiser 2002, 233). All of this will surely test the law and ideology at work in bordering from Canada, producing in its wake no shortage of cases through which courts and lawyers will be asked to balance individual rights against mounting anxieties about security that are brought to the border.

Beyond Walls: Borders as Process

One of the goals and results of this work was to further complicate the way we think about the political spaces of bordering. I entered an academic conversation already in progress and have chosen to find my own way in; Other researchers have admirably hunkered down in holding cells, ridden in the backseat on deportation raids, and conducted investigations that centred on the people and their experiences caught in and at the border. My work is indebted to these scholars and their efforts. To the existing research, I have added a dissection of judicial power at the border, which I believed would be its own kind of social justice. By examining the law, it is my sincere hope that

we move beyond the pretenses that seem to guide so much of the way we speak of borders—experienced, made, crossed, and managed. In the United States, President Trump imagines “a great, great wall along [the] southern border” and in Canada, Prime Minister Trudeau has changed the name of the organization handling Citizenship and Immigration to Immigration, Refugees, and Citizenship Canada (Office of the Press Secretary 2017). Both leaders are trafficking in pretense—while there is no doubt that discourse can have real effects, neither Trump’s wall nor Trudeau’s name change say much about the on-the-ground experiences of those crossing borders. I am all too mindful that when it comes to considering the ways people and goods are bordered, and in particular, to consider the many rights questions wrapped up in their detention, searches, and deportations, that we would be well advised to look beyond the surface. In this way, law represented a fertile ground for investigation.

This work enters and contributes to a range of conversations and encourages further scholarship. The work of courts (particularly in Canada) has not gotten the same degree of critical attention as other branches of government and state work; while legal studies and sociolegal scholars have been asking after the *Charter*, I saw an opportunity for a social scientist and so this work complements exhaustive research in law and brings social science methods to the task. The social science approach is distinctive—while legal scholars have written on all the cases mentioned here, none have coupled these cases, over three decades in the Supreme Court, together as one research question. And unlike others, I am principally interested in the how of the law and fixate uniquely on the talk and discourse of courtrooms, far more than the decisions. For me and hopefully other social scientists, the how is an under-studied aspect that only serves to extend the work of sociolegal studies. To border studies, I aimed to bring an entirely new venue—and have: the courtroom as having any story to tell in the way borders are made is a novel intervention in to conversations around borders that have largely centred on ‘the state’ or legislative bodies. My goal was not to dispute the role of other areas of government, but to bring in the law, and to demonstrate that a critical engagement with the law and its practices was possible, methodologically practical (most of the time), and intellectually valuable.

To the vibrant, interdisciplinary, and creative work happening in legal geography, this project aimed out the outset to take the border seriously as a legal geographic site. That has surely been accomplished and to that this project asks legal geography to engage with the *Charter* not simply as a legal instrument but as a geographic one. In doing so, this thesis hopefully proposes more questions than it answers, and my use of *Charter* as deeply geographic bracket should serve to animate future discussions about where legal geographic research can go. When I began thinking of myself as legal geographer, the discipline had been at the forefront of noting the relational quality between the law and space. In this project, drawing on the concept of bracketing, I have been able to analyze and critique these relational qualities a bit further and ask after process more than outcomes. I wanted to, and have, asserted a dynamism around law and space by offering research that takes neither as settled fact.

I had a hunch that important questions were being asked in courtrooms—and I remain convinced that scholars and activists alike would be well advised to listen. While the law is highly particular, it is also impressively lasting. The questions take years to unfold through numerous appeals. The decisions and legal arguments made resonant long after elections end. So an inventory of legal actors and actions implicated in border work brings the highly technical and methodical work of the law out of the courtroom and into (a more) public scrutiny. It allows me to argue, as I do here, that beyond pretense, an often disregarded facet of government is having an effect on the way the border is effectuated and experienced.

I investigated two legal functions of borders, the regulation of goods and the regulation of people. While I had previously approached such questions from the frame of mobility studies, I instead here assumed the (im)mobility was implicit and looked at the institutions that were at work on people and goods at the border. I worked from the Supreme Court because I wanted to place our questions of bordering in conversation with the Court's expanded mandate of individual rights under the *Charter.* To that end, I subtitled this dissertation, *Reading the Charter at the Canada-US Border*, because it is the reading, the invoking, and the use of rights rhetoric that calls in the Supreme Court. I also believed that this fact should not be lost on us—no matter how easy it could very well be in the present moment—that borders are spaces of rights, formed through

articulating checks against state power at the port of entry. It might be a complicated space or one that causes judges sufficient frustration, but we turn 'border stories' into court cases through our ability to thread through those narrations a breach of our constitutional rights.

I began by examining the way customs searches and seizures are conducted by looking at two cases that still today serve as the legal basis for much of the work at the primary inspection line. While these cases ultimately result in the control of people, we can distinguish them from immigration case law; in both cases I consider in an analysis of search and seizure at the border, those searched are Canadian citizens. While the *Charter* does not distinguish between citizens and those otherwise legally present in Canada, it is important to note that although these cases speak to the work of regulating goods and material—be that commercial or illicit—they both have the effect of controlling the mobility of individuals. Obviously it is the individual that can activate a rights claim, not a suitcase, but the questions of individual mobility serve as a means to examine the way Canada controls *what* enters its borders. My objective was to look at the ways arguments are constructed as a way to appreciate how courts approach the border, as a thing, as a space, as a concept. By identifying the brackets that underpin arguments about the particularities of border work, I aimed to identify the ways courts hold several competing ideas of what borders do and how they function. My accounting could in no way be exhaustive, but rather illustrative; the court cases considered offer but a way into border work and border talk.

As a second site of inquiry, I considered the use of security certificates to detain and deport individuals marked as dangerous on national security grounds. Security certificates are, I concede, a thin slice of the securitization of migration, and with but a handful of certificates issued, represent a particular if not somewhat obscure piece of a national security strategy. No matter, I say; their existence and continued place as part of the way immigration and counterterrorism issues are coupled is valuable in its own right. Security certificates are a small facet of immigration and counterterrorism work, but their existence at the meeting point of anti-terrorism anxieties and xenophobia speaks to larger discourses at work throughout Canada. The conflation of immigration work to security and public safety has had a hand in the broad refashioning of border work and

the mandate of the CBSA as a public safety agency. Analyzing the security certificate program is a way of critiquing divisive discourses that "heighten racial hysteria in which fear is directed everywhere and nowhere, in which individuals are asked to be on guard but not told what to be on guard against" (Butler 2004, 39). The perpetually scared citizen has sanctioned a slippage in the way we talk about security and migration and that slippage has supported a range of policies and programs on and against the non-citizen.

In this thesis, I have attempted to answer the following questions: How do judges and lawyers make sense of legal space? And, what role does the *Charter* serve in this legal space-making? I have engaged with the way that courts think through these questions themselves. The moves made by lawyers and judges—which I have identified as brackets—go a ways to showing how courts conceptualize borders and the laws that either do or do not apply there.

Next Steps: Points Forward for Future Research

This work productively raises perhaps more questions than it could reasonably answer. I would argue that this research brings us closer to understand some of the ways in which space is made, contested, and made again. In an era where the President of the United States is finding his power to build borders and expel migrants curtailed by courts[37], this research contributes to what is bound to become a much-needed line of inquiry, where we can further appreciate the role of the judiciary in bordering. The cases I consider demonstrate how rights discourses can call in judicial action and how courts are positioned to bracket the work at the border in ways that limit the range of possible actions. As states' attorneys general become powerful adversaries to a new President

[37] As I write this conclusion, President Donald Trump's 'travel ban' has been halted by the legal action of the attorney general of Washington, representing the first major challenge to the new President's executive actions. While the Washington case has proved the most successful, other states attorneys general are marshalling their resources to chip away at several other actions by the new President that target migrants and unfairly, unevenly, or unconstitutionally expand border work (see, for example, Burns 2017).

intent on expanding the border and executive action, research like that offered here begins to offer us some insights into how executive power might be critically countered.

Other Areas of Law

When I proposed this project, I imagined discussing a third facet of bordering, looking at the way indigenous people of North America move across the 49th parallel. One of my committee members generously noted that this was a project unto itself, and I have come to appreciate that there is far more nuance, detail, and complexity caught up in the way the US and Canada approach their respective first peoples than this humble dissertation could handle. This remains an important series of questions, and I would encourage a line of analysis that looks at aboriginal and indigenous law against the colonial construct of a border. That is, similar to the ways in which this dissertation considers how courtrooms in Canada make legal space, additional attention should be brought to critiquing the contours of the relationships that Canada and the US inherit, foster, and revise with their respective indigenous populations.

While I began this research with a genuine interest about First Nations mobility—their legal position not only transcends but also negates borders—such an inquiry takes this research beyond the courtrooms I focused in. I opted to engage with, by and large, one canon of law, and for the most part, one courtroom, the Supreme Court of Canada. But the free passage rights of indigenous people engages Aboriginal Law and demands an expertise I could not offer. Future work in this area will require an unraveling of what we call 'aboriginal law' and an investigation of the many adjacent legal norms that govern diverse native practice and culture across North America. Aboriginal and indigenous mobility rights at the border will remain a timely and complex question—one that circles back to many of the questions this research dared to consider. Future research is needed to critique the role of Jay Treaty passage rights in the current political climate as well as the diversity of perspectives and relationships that North America's first peoples have to the borders that have cropped up around them. As an illustration of this, I proposed this project in the unceded Coast Salish Territories, moved to work in Dish in One Spoon Treaty Lands, and now write this conclusion amidst the marshlands of the Seminole Tribe of Florida. Each of these groups raise their own

unique, individual questions about the border and sovereignty, based in no small part on their own distinct geographies.

Thinking Ahead about Borders and Law in the Age of Trump

I could not have appreciated how much customs law and immigration policy could be conflated to fit within larger platforms of economy and security when I began on this work, and I am not naïve enough to imagine that the recent uptake of walls, fences, embargoes, deportation raids, and executive orders are the work of one individual. For all my best efforts to call attention to the ways Canada has been complicit in the criminalization of migration, the United States holds an impressive ability to set discourse throughout the neoliberal democracies. The 'age of Trump' may well be, then, a new era in nationalism around the world, and borders take on a kind of national metaphor to that end. It is not one man, but a taking up of discourses that (once again) frame the West as under threat, at odds, and defenders of precariously held 'freedom'. It is under this newly reset sense of threat—from 'yes we can' to 'great again' (greatness coming soon)—that Americans find themselves seeking problems rather than solutions and repurposing the rhetoric of borders as a powerful line of defense against outsiders. Canada, not to be outdone, finds itself in a liminal moment of sifting through Harper government border work while a new flock of Conservative party leadership candidates are buoyed by a rise of nationalism that seems to have undergirded Donald Trump's path to the White House.

It is easy to be dejected in the current climate, but I am reminded in this work of the rights wrapped up at the border and in the courtroom. I am convinced that the best antidote I can offer is to thoughtfully offer up another interpretation, a timely and critical reminder of the rights we have and the tools available to protect them. Marches and protests at international airports call attention to the ways in which borders are spaces of rights—of mobility rights, of citizenship rights, of rights of refugees and asylum seekers—and the ways in which these rights and many others will be called into

question in the present era. With this in mind, I can only hope[38] that work like this—a critical dissection of the way courts and lawyers are making arguments that make space—contributes to a conversation that is not dejected but energized, not dispirited but hopeful.

[38] I am reminded here of the work of Rebeca Solnit, who insists that "hope is an act of defiance, or rather as the foundation for an ongoing series of acts of defiance, those acts necessary to bring about some of what we hope for while we live by principle in the meantime" (Solnit 2016, 110). Solnit's "Hope in the Dark" is a rally cry for the tired and the dejected, and I can only aspire to follow her thoughtful message, and put forward this work with hopefulness amidst no shortage of political, social, and ethical darkness.

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Appendix.
Using and Citing Canadian Legal Materials

Early Post-Charter Cases

In cases that are particularly old, the Supreme Court Records Centre maintains a microfilm of the full case materials. Depending on the age and the issues raised in the case, this may include lower court transcriptions and evidence, but almost certainly includes reasons for decisions (which are freely available through Westlaw Canada), factums for the appellant and respondent, and applications for leave to bring a case to the Court. Where possible, I have cited all case materials culled from these microfilms by directing attention to the original document—and using original page numbering—for instance, a factum or transcript.

Audio Transcriptions

The Supreme Court of Canada has been slower than the Supreme Court of the United States in bringing in recording devices and transcriptions of Court proceedings are not guaranteed to appear in a case file at the Records Centre. In some cases, such as *Charkaoui*, cassettes are transcribed. In *Charkaoui,* for instance, while we know that each day's recordings were roughly 9.5 hours, the Court does not provide time-stamping along the way. For this reason, in Canadian cases, I speak of audio transcriptions as a paper file and direct readers back to this document.

Paragraphs, Pages, and Lines

There are multiple court reporters—the Supreme Court Reports (SCR) being perhaps the most prominent—that I have drawn on in my research and analysis. Some use consistent page numbering, but many do not. My goal is to ensure that I have directed the reader to the material cited in a way that is easiest to locate and identify; sometimes, this means making use of multiple court reporters in addition to the Supreme Court's own microfilms.

Citation Styling

The Crown, Her Majesty in Right of Canada, is represented in criminal cases as 'R' for Regina; in immigration proceedings, 'Canada' and any number of Ministers may be named. Where such a distinction is helpful to finding the materials, I have noted this. Following *the Canadian Guide to Uniform Legal Citation* (*8th edition*, 2004(*Canadian Guide to Uniform Legal Citation* 2014)) better known as the McGill Guide, periods are not used in the abbreviations of court reporters nor are they used in party names. This is different than in the United States, where periods are used, for example, 'U.S.'.