

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

TOM LE

**Appellant
(Appellant)**

-and-

HER MAJESTY THE QUEEN

**Respondent
(Respondent)**

FACTUM OF THE INTERVENER THE URBAN ALLIANCE ON RACE RELATIONS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. OVERVIEW

“A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified “low visibility” police interventions in their lives [...] Courts cannot presume to be colour-blind in these situations.”¹

1. The Urban Alliance on Race Relations (“UARR”) submits that the majority in the Ontario Court of Appeal (“ONCA”) ruling incorrectly found that the Appellant, Mr. Le, did not have a reasonable expectation of privacy while present as a guest in the backyard of the home of his childhood friend, Mr. Dixon.² The UARR submits that the majority’s entrenchment of ‘control’ as a determining factor for establishing a reasonable expectation of privacy when real property is the subject matter of inquiry has a discriminatory effect on civilians who identify as a member of a group that has been historically marginalized on the basis of race, national or ethnic origin, and/or colour. The UARR submits that the police officers who entered Mr. Dixon’s backyard conducted an unreasonable search given that they had no lawful authority to interfere with Mr. Le’s privacy rights, and the search was conducted in an oppressive and intimidating manner.

2. Further, UARR submits that the majority should have explicitly applied s. 27 of the *Canadian Charter of Rights and Freedoms*³ (*Charter*) in their adjudication of Mr. Le’s *Charter* rights in these proceedings. Such an analysis was necessary given the racialized identities of Mr. Le and his four friends, and the fact that they were engaged by police while in a highly racialized low-income community known for experiencing high levels of gun, drugs, and gang crime. In light of this factual context, the majority inappropriately failed to conduct a racially contextualized analysis of Mr. Le’s *Charter* rights, and thereby came to an incorrect conclusion on the question of whether Mr. Le’s *Charter* rights were in fact breached.

3. Ultimately, if permitted to stand, the majority’s findings will likely have the effect of fundamentally compromising police-community relations by undermining trust and confidence in the police. The decision also condones policing that is inconsistent with the principles of modern policing in a free, fair and democratic country. The Courts cannot be seen to tolerate such outcomes, and therefore the incriminating evidence seized from the Appellant should be excluded, pursuant to s. 24(2) of the *Charter*.

¹R. v. Grant, [2009 SCC 32, at 154](#).

²R. v. Le, [2018 ONCA 56 at 50](#).

³*Charter of Rights and Freedoms*, s 27, Part 1 of the *Constitution Act, 1982*, [being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#)[*Charter*].

2. STATEMENT OF FACTS

4. The UARR accepts the facts as set out in the Appellant and Respondent parties' facts. The UARR takes no position on disputed facts.

PART II - POSITION ON THE APPELLANT'S ISSUES

5. The UARR takes the following position on the questions raised in this appeal:
- a. The Appellant had a reasonable expectation of privacy in his friend's backyard, and the unlawful police entry into the backyard violated his s. 8 *Charter* rights.
 - b. The breaches of the Appellant's s. 8 and s. 9 rights require exclusion of the seized evidence under s. 24(2) of the *Charter*.

PART III - STATEMENT OF ARGUMENT

1. THE ONTARIO COURT OF APPEAL'S FOCUS ON "CONTROL" AS THE DETERMINING FACTOR OF MR. LE'S PRIVACY RIGHTS WILL HAVE A DISCRIMINATORY EFFECT ON RACIALIZED MINORITIES

6. Justice Doherty, writing for the majority, found that Mr. Le did not have a reasonable expectation of privacy in Mr. Dixon's backyard because, as a guest of Mr. Dixon's, he was without the "ability to control, in some way, those who can enter upon, or remain on, the property."⁴ The problem with this reasoning and Justice Doherty's overall grounding of his analysis of Mr. Le's s. 8 rights in a framework of control over property (see paras 45-54 of ONCA decision) is the discriminatory effect they have on racialized Canadians. Due to poverty, racialized Canadians are significantly more likely than the average Canadian to live without access to property over which they can exercise control and regulate access.

7. Due to the racialization of poverty in Canada, access to housing is also significantly racialized. Statistics Canada reports that racialized Canadians have a greater risk of living in poverty than non-racialized Canadians. In terms of the national scope of the racialization of poverty in Canada, the most recent Statistics Canada data indicates the following;

There were 1.1 million racialized persons living in poverty in Canada in 2006. They made up: 4% of the total population; 22% of all racialized persons; 32% of all persons living in poverty. Just over half (52%) lived in Ontario, followed by British Columbia (20%) and Quebec (18%). Toronto was home to 41% of all racialized persons living in poverty. Vancouver was a distant second, with 18%, followed by Montreal at 17%. Together, these three cities were home to 76% of racialized persons living in poverty.⁵

8. Further, Statistics Canada also reports that:

⁴ *R. v. Le*, [2018 ONCA 56 at 50](#)

⁵ Webpage: "Snapshot of Racialized Poverty in Canada", National Council of Welfare, Government of Canada, August 16, 2013.

People living in poverty tend to move more often than people who don't live in poverty. People living in poverty may be forced to move in search of more affordable and suitable housing, or if they are dissatisfied with neighbourhood conditions. They may move in search of better employment opportunities or better access to services.⁶

9. In the City of Toronto, the racialization of poverty is particularly acute, as 33% of racialized Torontonians live in poverty.⁷ Given the relative youth of Mr. Le at the time of the incident (20 years old), and the fact that Mr. Dixon was child of 17 years of age, it is also important to note that child poverty in Toronto is also highly racialized.

10. Statistics Canada's 2016 Census is reported as finding that in Toronto, children in racialized families are more than twice as likely to be living in poverty compared to children in non-racialized families (25.3% compared to 11.4%).⁸ This is particularly relevant in this case because children and youth in families that live in poverty are forced to move frequently, have substantial problems securing housing, and are more likely to be involved in violence.⁹

11. Justice Doherty's strict adherence to a 'property control' framework cannot determine Mr. Le's s. 8 *Charter* rights. Accepting this analysis would lead this Honourable Court to hold that individuals' s. 8 rights are proportionate to the degree to which they have control over real property. This is in direct contradiction to Justice Cory's statement on behalf of the majority in *Edwards*, namely that "s. 8 is a personal right. It protects people and not places."¹⁰ Because control over property is a deeply racialized phenomenon in Canada, racialized Canadians are disproportionately vulnerable to having their s. 8 *Charter* rights unduly compromised and limited by Justice Doherty's reliance on an assessment of 'property control' as the determining factor of Mr. Le's *Charter*-protected right to privacy.

2. The Appellant's Subjective expectation of privacy was objectively reasonable

12. The Appellant testified at trial that he thought that he had the same level of privacy in Mr. Dixon's backyard that he would have had in his own backyard, and further testified that he was surprised that the police could just enter the backyard - stating that he believed that that was a power that they did not possess.¹¹ This was an objectively reasonable belief for the Appellant to have. The

⁶ Webpage: "Snapshot of Racialized Poverty in Canada", National Council of Welfare, Government of Canada, August 16, 2013.

⁷ Poverty Reduction Strategy, 2015, City of Toronto, at 5, 10.

⁸ Michael Polanyi, et. al, "UNEQUAL CITY: The Hidden Divide Among Toronto's Children and Youth 2017 Toronto Child and Family Poverty Report Card", 2017, at 1.

⁹ Toronto Youth Equity Strategy, 2014, City of Toronto, at 7.

¹⁰ *R. v. Edwards*, [1996] 1 S.C.R. 128 at 45.

¹¹ *R. v. Le*, 2014 ONSC 2033 at 52.

premises of a private individual's home was the only dependable refuge (while in a high-crime) area from the widespread police practice known as carding (also known as street checks).

13. The Government of Ontario defines carding as the “arbitrary and race-based collection of identifying information by police.”¹² Ontario has also defined the practice as an instance “when a police officer asks someone for identifying information (ID) in a particular type of situation.”¹³ A ground-breaking March, 2012 investigative report by the *Toronto Star* revealed that the police disproportionately targeted racialized youth in Toronto with this practice:

A Star analysis of Toronto police stop data from 2008 to mid-2011 shows that the number of young black and brown males aged 15 to 24 documented in each of the city's 72 patrol zones is greater than the actual number of young men of colour living in those areas¹⁴

14. The *Toronto Star* conducted a follow-up investigation and found that though the overall instances of carding dropped in the year following the publication of their March, 2012 findings, the proportion of carding instances involving Black Torontonians actually rose to 27.4 per cent, which was 3.4 times the proportion of Toronto's overall Black population at the time. The *Star* also reported that from 2008 to November 2013, Toronto police filled out 2.1 million contact cards, involving 1.2 million different individuals.¹⁵ The Toronto Police focused the majority of their carding activities in neighbourhoods known to have high levels of crime.¹⁶

15. Both the Court of Appeal and the trial judge recognized that incidence of drug, gun and gang crime is high in the area where the Atkinson Housing Co-Operative is located.¹⁷ The neighbourhood is officially named Kensington-Chinatown. The neighbourhood's high crime rate is undoubtedly connected to the fact that the community is among Toronto's most impoverished, with 44% of households spending more than 30% of their income on shelter costs, and 69% of individuals living in rental housing.¹⁸ According to the *Toronto Star*, between 2003 and 2008, the Toronto Police conducted almost 32, 000 carding stops in the neighbourhood of the Atkinson Housing Co-Operative.¹⁹

¹² News Release: “Ontario Prohibits Carding And Street Checks, Sets Out New Rules For Police Interactions”, Government of Ontario, March 22, 2016 .

¹³ Webpage: “Changes to Policing,” Government of Ontario.

¹⁴ Jim Rankin, Patty Winsa, “Known to police: Toronto police stop and document black and brown people far more than whites,” *Toronto Star*, March 9, 2012.

¹⁵ Jim Rankin, Patty Winsa et. al., “Carding drops but proportion of blacks stopped by Toronto police rises,” *Toronto Star*, July 26, 2014.

¹⁶ Kevin Masterman, “Fair Policing Not Black and White”, Toronto Police Service, July 25, 2014.

¹⁷ *R. v. Le*, [2018 ONCA 56 at 12](#); *R. v. Le*, [2014 ONSC 2033 at 112](#).

¹⁸ TOcore Neighbourhood Population Profiles, City of Toronto, July 4, 2016 at 16.

¹⁹ Toronto Star Analysis of Toronto Police Service Data – 2010: Advanced Findings, *Toronto Star*, 2010, at 11.

16. The Appellant and his four friends are all racialized (the Appellant identifying as Asian, while his four friends identify as Black), and gave evidence at trial about being incessantly stopped, questioned, asked for identification, and sometimes subjected to a police search while walking through the Atkinson community. The accused witnesses gave evidence at trial stating that they assumed these interactions were due to them being young Black males walking around in a high-crime area.²⁰ The accused witnesses' evidence was found by the trial judge to be "strikingly similar in content" in relation to the police stops and questioning. The trial judge attributed the consistency in their testimonies to the evidence being "manufactured,"²¹ despite the phenomenon of carding being a well-known practice regularly reported on by mainstream media, and widely discussed by the Toronto public and politicians at the time of Mr. Le's trial.²²

17. Carding was a practice ostensibly implemented as a public safety measure.²³ Police were not known to card civilians while they were on or in the property of a private residence, such as inside a home or in the yard of a home. Moreover, in high crime neighbourhoods such as the one where the Atkinson Housing Co-Operative is located, the practice and expectation was that police interactions are restricted to public spaces, and could therefore be avoided by remaining within the boundaries of a private residence, whether one's own or that of someone else. In communities like this, presence at a private residence is the only reliable way to enjoy a safe zone of privacy, and to feel like one has the "right to be left alone"²⁴ from the police. This is because the police generally focused their attention and activities exclusively on public areas, such as on open cul-de-sacs, streets, alleys, narrow walkways, playgrounds and courtyards in these high-crime communities. One report of the Ontario Government explains this retreat from public space within high-crime neighbourhoods in the following way:

As fewer people use the public areas for socialization, the space is ceded to those who want to use it for crime. This of course fuels the sense that the area is unsafe, and discourages more people from using it, thus driving the downward cycle for the area. This makes it easy for gangs to control, or appear to control, access to public spaces.²⁵

²⁰ *R. v. Le*, [2014 ONSC 2033 at 112](#).

²¹ *R. v. Le*, [2014 ONSC 2033 at 112](#).

²² Patty Winsa, "Police carding: Toronto board seeks a legal opinion on Charter-friendly street checks", *Toronto Star*, December 18, 2013.

²³ "The Police and Community Engagement Review (The PACER Report) Phase II—Internal Report & Recommendations", Toronto Police Service, at 7.

²⁴ *R. v. Orlandis-Habsburgo*, [2017 ONCA 649 at 42](#).

²⁵ Roy McMurtry, Dr. Alvin Curling, *The Review of the Roots of Youth Violence* (Toronto: Queen's Printer for Ontario, 2008), Vol. 1, page 50.

18. With respect to assessing the reasonable expectation of privacy, the Ontario Court of Appeal has said that the “inquiry is factual and the specific circumstances of the case are crucial.”²⁶ This Honourable Court has also affirmed that privacy is a “normative standard.”²⁷ The high-contact practice of carding in the public spaces of low-income, high-crime Toronto neighbourhoods like the one where the instant case originates, created the community norm of private homes being a sanctuary safe-zone from carding. As such, it was reasonable for the Appellant and his young racialized friends to expect to enjoy the right to be left alone while hanging out as social guests in the private backyard of their friend. The police officers in this case violated this norm when they entered Mr. Dixon’s backyard and began questioning and obtaining identification from the Appellant and his friends. According to police in this matter, they were doing nothing wrong, were just talking, were not recognized as fitting the description of any suspect or person of interest that was at large, and were not subject to any complaint or concern.²⁸ Given these facts, the breach of the Appellant’s right to privacy was unreasonable.

3. The Appellant’s Rights Should Have Been Interpreted Through an Application of s. 27 of the Charter

19. The racialized identities of the Appellant and his friends, the highly racialized composition of the neighbourhood where the Atkinson Housing Co-Operative is located, and the racialized public safety context of the police practice of carding are significant contextual factors in this case. These factors created circumstances that should have directed the trial judge and the majority to interpret the Appellant’s rights in a “manner consistent with the preservation and enhancement of the multicultural heritage of Canadians” pursuant to s. 27 of the *Charter*.

20. Justice Cory in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 wrote that:

Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the Charter. Section 27 provides that the Charter itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet **our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.**²⁹ (emphasis added)

21. In their concurring reasons, Justices L’Heureux-Dubé and McLachlin supported Justice Cory’s reasons:

²⁶ *R. v. Orlandis-Habsburgo*, 2017 ONCA 649 at 41.

²⁷ *R. v. Tessling*, 2004 SCC 67 at 42; *R. v. Gomboc*, 2010 SCC 55 at 34, 15; *R. v. Spencer*, 2014 SCC 43 at 18; *R. v. Jones*, 2017 SCC 60 at 47-51.

²⁸ *R. v. Le*, 2018 ONCA 56 at 15.

²⁹ *R. v. S. (R.D.)*, [1997] 3 SCR 484 at 95.

We endorse Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity.³⁰

22. Being fair, and appearing to be fair to the Appellant, justly adjudicating his *Charter* rights in the factual circumstances of this case requires avoiding a colourblind analysis and adopting a socially contextualized one. Determining whether the Appellant had a reasonable expectation of privacy and/or was psychologically detained could not be reasonably assessed without explicitly factoring in the racialized identity of the Appellant and his friends, the racialized geography where they were engaged by police, and the racialized policy and practice of police carding. Directly and indirectly, these factors were before the trial judge in evidence, but were unreasonably ignored at first instance and in the majority reasons of the Court of Appeal. The dissenting opinion of the Court of Appeal's Justice Lauwers however, points accurately to how social context should have informed the lower courts' analysis:

I doubt that the police would have brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community. The occupant of a residence might tolerate sudden police intrusion into private space if there were an emergency or the police were in hot pursuit of a suspect or fugitive, however shocking they might find it. There is no such pretext in this case.³¹

Given the specifics of this case, failing to apply a social context analysis that openly considers whether race was a factor in the Appellant's s. 8 and s. 9 *Charter* rights fundamentally threatens and undermines Canadian multiculturalism by erasing or denying the lived and relevant social experiences of the Appellant, and by extension, those of a rapidly increasing number of Canadians.

4. The Court of Appeal's Ruling Will Seriously Compromise the Effectiveness of Police

23. Providing license to police to enter the private yards of civilians not suspected of being involved in, or having knowledge of, active or imminent criminal activity, and to do so without permission or lawful authority so that they can question these civilians and obtain their identification, poses a dramatic threat to the effectiveness of policing. Such police activity unjustifiably limits civilians' human rights, and decreases the likelihood that members of the community will co-operate with police. This kind of activity also disregards the fact that racialized communities experience policing in a unique way, and ignores the fact that the police must be attentive to these unique, racialized experiences. In cases like the instant one, without due regard to the racialized experiences of policing, police are left operating outside of their legislated authority.

³⁰ *R. v. S. (R.D.)*, [1997] 3 SCR 484 at 28.

³¹ *R. v. Le*, 2018 ONCA 56 at 162.

24. According to Ontario's *Police Services Act*, police services in this province *must be* provided in accordance with the following principles:

1. **The need to ensure the safety and security of all persons and property in Ontario.**
2. **The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.**
3. **The need for co-operation between the providers of police services and the communities they serve.**
4. The importance of respect for victims of crime and understanding of their needs.
5. **The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.**
6. The need to ensure that police forces are representative of the communities they serve.
RSO 1990, c P.15, s. 1
(emphasis added)

25. It cannot be reasonably held that the officers in the instant case served the Appellant and his friends in a manner consistent with these obligatory requirements of service for policing in Ontario. As such, the majority's reasons err by being inconsistent with the fundamental principles of delivering police services in Ontario.

26. Further, allowing the decision to stand will likely cause civilians, especially racialized civilians who experience higher rates of police interactions, to lose trust and confidence in the legitimacy of the police, and thus lead them to avoid working with the police to maintain or enhance public safety.

27. A recent report of the Toronto Police Service highlights why the public's healthy interactions with police is a critically important factor in the effectiveness of policing:

The Service relies on the trust and cooperation of Torontonians to "co-produce" public safety in the city. In order to preserve and enhance the level of public trust and police legitimacy currently experienced, the Service must constantly adapt to the needs of the community by acknowledging and addressing concerns that are raised. This sentiment is embodied in the Service Mission Statement, "We are dedicated to delivering police services, in partnership with our communities, to keep Toronto the best and safest place to be."³²

28. As the Ontario Human Rights Commission points out, "the worst enemy of effective policing is the absence of public confidence."³³ This Honourable Court affirmed this point at paragraph 52 in *Wood v. Schaeffer*, 2013 SCC 71, as follows:

Sir Robert Peel, the father of modern policing, is credited with having said that "the police are the public and . . . the public are the police" (C. Reith, *The Blind Eye of History: a study of the origins of the present Police era* (1975), at p. 163). The wisdom of this statement lies

³² "The Police and Community Engagement Review (The PACER Report) Phase II-Internal Report & Recommendations", Toronto Police Service, at 3.

³³ Webpage: "The Existence of Racial Profiling," Ontario Human Rights Commission.

in its recognition that public trust in the police is, and always must be, of paramount concern.

29. Rooting out criminal activity in high-crime communities is a valid and urgently needed public safety activity of policing. However, this purpose should not be pursued through gross violations or unreasonable restrictions on the *Charter* rights of civilians. This is the current effect of the Court of Appeal's reasons and disposition in this matter.

30. A foundational principle of policing is policing by the consent of the policed. In urban centres across Canadian cities, this is the core of community-based policing. The model of community-based policing is fundamentally compromised where *Charter* rights of civilians are diminished while civilians are at a private residence. Community-based policing is only possible where police engage with communities and community members in a transparent, proactive and cooperative manner. Embedded in the community-policing model is the sanctity of the inherent dignity and self-worth that privacy interests help protect and promote. Where civilians have limited and narrowly-construed *Charter* rights while on the premises of a private home, the modern model of community policing is lost and replaced with a now outdated and discredited model of reactive, enforcement-focused, and target-driven policing of civilians.³⁴

31. Policing by force, instead of policing by consent, is a model of policing that has historically had disproportionately negative impacts on racialized communities, and has posed a serious threat to the ability to maintain peace and public security in advanced liberal democratic societies. The policing by force model, which is facilitated by restricted *Charter* rights of civilians, is also strongly and causally related to overrepresentation of racialized people, especially Indigenous Peoples and African Canadians in instances of racial profiling, police use of lethal force, and incarceration in provincial and federal institutions.³⁵

32. Considering the above, this Honourable Court should find that the Appellant's *Charter* rights were unjustifiably restricted or violated and that the evidence was obtained through this unjust intrusion on his rights. A fair and balanced assessment of the context of all the circumstances of the infringement of his rights and the fact that these violations were the vehicle through which the police obtained its incriminating evidence against the Appellant, this Honourable Court should find that the admission of the evidence brings the administration of justice into disrepute.³⁶

³⁴ Alok Mukherjee, Tim Harper, *Excessive Force: Toronto's Fight to Reform City Policing* (Madeira Park: Douglas & McIntyre, 2018) at 81-82, 221-222, 247-248.

³⁵ *R. v. Jackson*, [2018 ONSC 2527 at 27](#).

³⁶ *R. v. Grant*, [2009 SCC 32 at 67-68](#).

5. Conclusion: Quelling the Crisis of Confidence in Policing

33. Ontario is currently facing a considerable crisis of confidence in policing.³⁷ Since the *Toronto Star*'s March 2012 bombshell report on carding, the City of Toronto has been deeply embroiled in much public and political rancour and protest regarding the conduct, power and accountability of police. The debate that erupted over carding has since extended to concerns of police impunity regarding use of lethal force on racialized civilians and continues to plague and paralyze police-community relations. So raucous has this public debate been that it has led the Ontario Government to undertake comprehensive reviews of police oversight in the province, as well as a review of the practice of carding. These reviews have formed part of dramatic legislative and regulatory changes to policing practices, oversight, governance and accountability, with much attention going to police interactions with racialized members of the community.³⁸ After several decades of being at the forefront of these issues, the UARR is confident that the majority's ruling in the Court of Appeal's decision will fracture the prospect of restoring public trust, confidence in policing in Ontario, especially in vulnerable and racialized communities. This Honourable Court can restore the ruptured rights of Canada's racialized communities, and thereby protect the rights of all Canadians now left asking themselves, "Do *Charter* rights really matter?"

PART IV - COSTS

34. It is requested that no costs be ordered against the UARR.

PART V - REQUEST FOR ORAL SUBMISSIONS

35. The UARR requests permission to make oral submissions and 5 minutes of time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 20th day of August, 2018.



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³⁷ Alok Mukherjee, Tim Harper, *Excessive Force: Toronto's Fight to Reform City Policing* (Madeira Park: Douglas & McIntyre, 2018) at xi-xxv.

³⁸ Alok Mukherjee, Tim Harper, *Excessive Force: Toronto's Fight to Reform City Policing* (Madeira Park: Douglas & McIntyre, 2018) at 231-248.

PART VI - TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<i>R. v. Edwards</i> , [1996] 1 SCR 128	45
<i>R. v. Gomboc</i> , 2010 SCC 55	34, 15
<i>R. v. Grant</i> , 2009 SCC 32	67, 68, 154
<i>R. v. Jackson</i> , 2018 ONSC 2527	27
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<i>R. v. Le</i> , 2018 ONCA 56 .	12, 15, 50, 52, 162
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<i>R. v. Spencer</i> , 2014 SCC 43	18
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<i>Wood v. Schaeffer</i> , 2013 SCC 71	52

Secondary Sources

<u>Source</u>	<u>Reference</u>
Alok Mukherjee, Tim Harper, <i>Excessive Force: Toronto's Fight to Reform City Policing</i> (Madeira Park: Douglas & McIntyre, 2018)	Pages xi-xxv, 81-82, 221-222, 231-248
"Changes to Policing," Government of Ontario.	
Jim Rankin, Patty Winsa et. al., "Carding drops but proportion of blacks stopped by Toronto police rises," <i>Toronto Star</i>, July 26, 2014.	
Jim Rankin, Patty Winsa, "Known to police: Toronto police stop and document black and brown people far more than whites," <i>Toronto Star</i>, March 9, 2012.	
Kevin Masterman, "Fair Policing Not Black and White", Toronto Police Service, July 25, 2014.	
Michael Polanyi, et. al, "UNEQUAL CITY: The Hidden Divide Among Toronto's Children and Youth 2017 Toronto Child and Family Poverty Report Card", 2017	1
News Release: "Ontario Prohibits Carding And Street Checks, Sets Out	

New Rules For Police Interactions”, Government of Ontario, March 22, 2016.	
Patty Winsa, “Police carding: Toronto board seeks a legal opinion on Charter-friendly street checks”, <i>Toronto Star</i>, December 18, 2013.	
Poverty Reduction Strategy, 2015, City of Toronto	5, 10
Roy McMurtry, Dr. Alvin Curling, <i>The Review of the Roots of Youth Violence</i> (Toronto: Queen’s Printer for Ontario, 2008), Vol. 1.	50
“Snapshot of Racialized Poverty in Canada”, National Council of Welfare, Government of Canada, August 16, 2013	
The Existence of Racial Profiling,” Ontario Human Rights Commission,	
The Police and Community Engagement Review (The PACER Report) Phase II–Internal Report & Recommendations”, Toronto Police Service.	3, 7
TOcore Neighbourhood Population Profiles, City of Toronto, July 4, 2016	16
Toronto Star Analysis of Toronto Police Service Data – 2010: Advanced Findings, <i>Toronto Star</i>, 2010, at 11.	11
Toronto Youth Equity Strategy, 2014, City of Toronto.	7

Legislation

1. *Charter of Rights and Freedoms* [*Charter*], s 27, Part 1 of the *Constitution Act*, 1982, being [Schedule B to the Canada Act 1982 \(UK\), 1982, c 11.](#)
2. [Police Services Act, RSO 1990, c P.15](#)