

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

BETWEEN:

**COMMISSION DES DROITS DE LA PERSONNE
ET DES DROITS DE LA JEUNESSE**

Appellant
(Respondent)

-and-

**BOMBARDIER INC.
(BOMBARDIER AEROSPACE TRAINING CENTER)**

Respondent
(Appellant)

-and-

JAVED LATIF

Respondent
(Respondent)

-and-

**CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN HUMAN RIGHTS
COMMISSION, CENTER FOR RESEARCH-ACTION ON RACE RELATIONS,
NATIONAL COUNCIL OF CANADIAN MUSLIMS, CANADIAN MUSLIM LAWYERS
ASSOCIATION and SOUTH ASIAN LEGAL CLINIC OF ONTARIO**

Interveners

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LAWYERS ASSOCIATION (CMLA)

(filed pursuant to Rules 37 & 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

**FACTUM OF THE INTERVENERS
NCCM and CMLA**

PAGE

PART I – OVERVIEW..... 1

PART II - STATEMENT OF ISSUES..... 2

PART III - STATEMENT OF ARGUMENT..... 2

 A. *“MUSLIMS” ARE AN INTERSECTIONAL SOCIAL GROUP 2*

 B. *NEGATIVE MUSLIM STEREOTYPES ARE PREVALENT IN CANADIAN SOCIETY 3*

 C. *ELIMINATING STEREOTYPES FROM DECISION-MAKING IN THE PROVISION OF SERVICES IS A PRIMARY
 PURPOSE OF ANTI-DISCRIMINATION LAW..... 6*

 D. *FALSE SUSPICION COUPLED WITH NEGATIVE STEREOTYPING PRODUCES DISCRIMINATORY OUTCOMES 7*

 E. *NON-DISCRIMINATION REQUIRES PROCEDURAL FAIRNESS 9*

PARTS IV AND V - COSTS AND ORDER SOUGHT 10

PART VI – TABLE OF AUTHORITIES..... 11

PART I – OVERVIEW

1. It is now well known that false designations occur in national security enforcement. Security intelligence can be notoriously unreliable. Mistaken identity and overbroad suspicion harm innocent people. Since the tragic attacks in the United States on September 11, 2001, errors in national security policy have overwhelmingly harmed innocent Muslims.

2. Due to official secrecy, when errors and false alarms concur with stereotypes about members of distrusted groups they can be very difficult to identify and cure. This exacts a toll on liberty and security of the person interests. It also causes humiliation, offends human dignity, and leads to material deprivation for individuals wrongly named.

3. Uncorroborated and false suspicion of individuals solely from a particular identifiable community tends to reinforce stereotypes about the entire group. The cascading effects of stereotyping and discriminatory stigma easily become routinized in society and embedded in common assumptions. This has been the experience of North American Muslims in the post-9/11 era. Canadian Muslims have experienced heightened vulnerability as a result of the reproduction of stereotypes linking Muslims to radical ideology and national security threats. These stereotypes have persisted despite the fact that the overwhelming majority of Canadian Muslims are peaceful, law-abiding citizens and residents, who pose no greater risk of harm to the public than members of any other group.

4. Human rights law exists to prevent discriminatory attitudes and practices from taking hold in society. It protects vulnerable minorities from majoritarian whims and invidious treatment. While Canadian Muslims have been concerned about potential *Charter* breaches in national security enforcement by state authorities, their lived reality has been equally shaped by everyday discrimination faced in civic life: in the receipt of services, in employment, in housing and in commercial activity.

5. As a result, Muslims are more likely than other Canadians to be affected by errors in national security and to be tainted in their everyday life by the stigma of suspicion. Erroneous designations of Muslims, especially those of particular ethnic or national origin, are less likely to be detected because of prevalent stereotypes that align with the “terrorist” profile. Consequently, such mistakes are also less likely to be cured expeditiously, if at all.

6. False security designations cause harmful consequences for innocent people despite purported best intentions. Intent is not necessary to prove discrimination, nor is good faith exculpatory. The focus of the discrimination enquiry is on the effect of the decision at issue, not the intent of the service provider.

7. For these reasons, service providers have a duty under human rights law to adopt practices that do not reinforce stereotypes. A failure to abide by fair procedures increases the likelihood of discrimination, can perpetuate disadvantage for individuals, and heightens the vulnerability of associated groups. A service provider's refusal to consider all relevant factors and to tailor the provision of services to the circumstances of the individual affected can properly give rise to a finding that a decision to deny service was discriminatory.

PART II - STATEMENT OF ISSUES

8. The interveners accept the issues as stated by the appellants, Latif and the Commission.

PART III - STATEMENT OF ARGUMENT

A. *“Muslims” are an intersectional social group*

9. Canadian Muslims constitute an identifiable social group, whose members share a variety of intersecting grounds of common identity. Canadian Muslims are not, however, a homogeneous community. The group includes individuals of varying levels of faith and practice, as well as those with no faith whose heritage or cultural identity is identified, at least in part, as “Muslim”.

10. For many Muslims, ethnic and national origin are interwoven with their identity as Muslims. Some countries in which Muslims are born, including Pakistan, are constitutionally established as “Muslim” countries. The Organisation of Islamic Cooperation is an international organization consisting of 57 member states with considerable Muslim populations. It describes itself as “the collective voice of the Muslim world”. Pakistan is the second-largest member state of the OIC.

11. Discrimination can occur as a result of a combination or an intersection of prohibited grounds, including race, colour, ethnicity, ancestry, religion, or place of origin:¹ “Categories of

¹ Ontario Human Rights Commission, “Policy and Guidelines on Racism and Racial Discrimination” (June 2005), online:

discrimination cannot be reduced to watertight compartments, but rather will often overlap in significant measure.”² Overlapping grounds should be used to better understand the context in which the impugned distinction was made, not to force a categorical, single-ground approach.

12. The fact that Canadian Muslims are a diverse group constituted by an array of cultural, linguistic, racial, ethnic and national origins does not diminish the fact that Muslims may be discriminated against *as Muslims*. At the same time, Canadian Muslims of Pakistani and Arab birth or heritage have become the primary focus of national security attention.³ As a result, Muslims of these ethnic or national origins are more likely to be adversely affected by national security law and policy than others.

B. *Negative Muslim stereotypes are prevalent in Canadian society*

13. Canadian Muslims have been subject to heightened suspicion since the 9/11 attacks on Washington and New York, and the US war on terror. As a result, Canadian Muslims have experienced distrust and discrimination within Canadian society.⁴ Pakistan has been described in the media as a collaborator with al-Qaeda. As a result, Canadian Muslims of Pakistani origin are especially distrusted and are more likely to be associated with “Islamic terrorism”.

14. Islamophobia has, like anti-Black racism and anti-Semitism, gained widespread recognition as a social fact in contemporary Canadian society. In its 2005 *Policy and Guidelines on Racism and Racial Discrimination*, the Ontario Human Rights Commission (OHRC) highlighted Islamophobia as a “contemporary and emerging form of racism [against Muslims] in Canada.”⁵ In 2008, the OHRC expressed concern about the promotion of “societal intolerance towards Muslim, Arab and South Asian Canadians.”⁶ In Quebec, a public Commission found in 2008 that

http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf at 16 [“OHRC Racism Policy”], Book of Authorities of the Intervenors (“Book of Authorities”), Tab 15.

² *Egan v. Canada*, [1995] 2 SCR 513 at 563 (per L’Heureux-Dubé J, in dissent), Book of Authorities, Tab 3.

³ Amnesty International, “Matching International Commitments with National Action: A Human Rights Agenda for Canada” (December 2012) at 24, online: <www.amnesty.ca/sites/default/files/canadaaihra19december12.pdf>, Book of Authorities, Tab 9.

⁴ Wayne Hanniman, “Canadian Muslims, Islamophobia and national security” (2008) 36:4 *International Journal of Law, Crime and Justice* 271 at 273-75, Book of Authorities, Tab 13.

⁵ OHRC Racism Policy, *supra* at 10.

⁶ Ontario Human Rights Commission, “Commission statement concerning issues raised by complaints against Maclean’s Magazine” (9 April 2008), online: <www.ohrc.on.ca/en/news_centre/commission-statement-concerning-issues-raised-complaints-against-macleans-magazine#sthash.JzhYC3JL.dpuf>, Book of Authorities, Tab 15.

most Muslims recounted personal experience with discrimination.⁷ The Commission’s Report concluded that Muslims “are, with Blacks, the group hardest hit by various forms of discrimination.”⁸ It further raised concern about the adverse implications of humiliations to which Muslims have unjustly been subjected, above all since the September 11, 2001 attacks.⁹ A 2012 report by Amnesty International concluded that “Muslim communities in Canada have understandably come to worry that their rights as citizens might not be protected as equally as the rights of other citizens.”¹⁰

15. National security policies that are focused on Muslims operate in this social climate of fear, distrust and bias against Muslims.¹¹ Providers of services to the public are not immune from the effects of the negative social climate. They can develop and act upon unconscious attitudinal bias: “A decision-maker who harbours attitudinal bias filters information through the lens of preconceived stereotypes and presuppositions.”¹² This bias can influence decision making in individual cases that involve Muslims.

16. In the context of anti-black racism, the courts have taken specific notice of the many ways that race can be a factor in law enforcement decisions. In *R v Parks*, Doherty JA noted that racism manifests in three ways: there are those who overtly express racist views; there is systemic racism in our institutions that reinforces racist beliefs; and there are those who subconsciously hold racist views based on stereotypical assumptions.¹³

17. This Court in *R v S (RD)* upheld the reasoning of a trial judge whose characterization of anti-black racism as “the prevalent attitude of the day” led her to question the credibility of a white police officer accused of racially profiling a young black male.¹⁴ This Court adopted Doherty JA’s observation that “[r]acism, and in particular anti-black racism, is a part of our

⁷ Gérard Bouchard and Charles Taylor, “Building the Future: A Time for Reconciliation (Quebec: Bibliothèque et Archives nationales du Québec, 2008) at 234, online: <collections.banq.qc.ca/ark:/52327/bs1565996>, Book of Authorities, Tab 11.

⁸ *Ibid* at 234-35.

⁹ *Ibid*.

¹⁰ *Supra* note 3.

¹¹ Reem Bahdi, “Racial Profiling of Arabs and Muslims: The American Experience After 9/11” [unpublished, archived at the University of Windsor] at 32, Book of Authorities, Tab 10.

¹² *Ibid* at 32-33.

¹³ *R v Parks* (1993), 15 OR (3d) 324 at para 43, 65 OAC 122 (Ont CA), Book of Authorities, Tab 6.

¹⁴ *R v S (RD)*, [1997] 3 SCR 484 at para 4, 161 NSR (2d) 241, Book of Authorities, Tab 7.

community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes."¹⁵

18. In *R v Brown*, the Ontario Court of Appeal noted that evidence of racial profiling could be inferred from the surrounding circumstances especially where supported by social science research that confirms the prevalence of relevant group stereotyping.¹⁶ In *R v Williams*, McLachlin J [as Her Honour then was] highlighted the toxic effects that unconscious, discriminatory assumptions can have on everyday behaviour:

[R]acial prejudice... rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so... Racial prejudice and its effects are as invasive and elusive as they are corrosive.¹⁷

19. Anti-Muslim bias, like other forms of prejudice, often operates on an unconscious level. The Court of Appeal for Ontario has recently affirmed in *Peel Law Association v Pieters* that unconscious bias deriving from stereotyping can lead to unintentional forms of discriminatory treatment within the meaning of the Ontario *Human Rights Code*.¹⁸ Racial bias can influence a service-provider's decision-making even without the individual being aware of its influence.

20. In his testimony before the tribunal in the instant case, the Bombardier employee, Mr. Gignac, described his decision with respect to the appellant's application as "nothing against him personally". The witness then segued to the story of an operator he knew personally who worked at the training school of one of the 9/11 attackers: "...[the attackers] learned how to take off, not even to land, and they flew into the tower. It was shocking. That couldn't happen. It was inconceivable. Those things just can't happen. But they did."¹⁹ Such testimony illustrates the unconscious cognitive associations that can and often do lead to discriminatory decision-making.

¹⁵ *Ibid* at para 46.

¹⁶ *R v Brown* (2003), 64 OR (3d) 161 at paras 44-45, 173 CCC (3d) 23 (Ont CA), Book of Authorities of Bombardier Inc, Vol. V, Tab 49.

¹⁷ *R v Williams*, [1998] 1 SCR 1128 at para 21-22, 56 BCLR (3d) 390, Book of Authorities, Tab 8.

¹⁸ *Peel Law Association v Pieters*, 2013 ONCA 396, 116 OR (3d) 81 rev'g 2012 ONSC 1048 (CanLII) (Div Ct), aff'g 2010 HRTO 2411 (CanLII) [*Pieters*], Book of Authorities of Bombardier Inc, Vol. IV, Tab 42.

¹⁹ *Commission des droits de la personne et des droits de la jeunesse v Bombardier Inc*, 2010 QCTDP 16 (CanLII) at para 142, Book of Authorities, Tab 2.

21. The history of 9/11 and the threat of Islamic aviation terrorism has produced a powerful stereotype of the dangerous Muslim man.²⁰ When official suspicion concurs with that stereotype, this effectively imposes a presumption of guilt on the innocent Muslim caught by false information or mistaken identity. This presumption of guilt generates disadvantaging social stigma that produces discrimination, regardless of whether the basis for suspicion is sound, erroneous or spurious.

C. *Eliminating stereotypes from decision-making in the provision of services is a primary purpose of anti-discrimination law*

22. This Court has recognized the fact that a mere accusation that one is a suspected terrorist can “cause irreparable harm to the individual”.²¹ The view that Muslims are associated with “terrorism” is one of the most prevalent stereotypes today.²² Ensuring that this stereotype is not endorsed or reinforced by private actors providing services to the public is a central purpose of human rights legislation.

23. The goal of substantive equality requires transforming social practices that define, maintain, and regulate oppressive categorizations. Systemic inequality is not only perpetuated by directly discriminatory action. It is also maintained by the “neutral” practices and background assumptions that influence the ways in which individuals in society view members of particular groups. Invisible or unconscious discrimination infects social relations and affects the manner in which service providers interact with consumers who are identified with stereotyped groups.

24. In *Pieters*, Juriensz JA noted that when baseless or erroneous suspicion occurs in a social context of stereotyping, the discrimination enquiry must look behind the stated reasons for decision.²³ Discrimination can lurk in the unstated assumptions of individuals wielding discretionary power.

25. The Court in *Pieters* also recognized the value of social science evidence, which “can deepen the understanding of interactions between individuals generally, thus assisting the adjudication of a

²⁰ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) at i, Book of Authorities, Tab 16.

²¹ *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 14, [2007] 1 SCR 350, Book of Authorities, Tab 1.

²² *Supra* note 20 at 19 and 33.

²³ *Supra* note 18 at paras 105-07.

particular case.”²⁴ Where an individual’s personal characteristics converge with prevalent stereotypes, the likelihood of discrimination increases. In a decision concerning aviation security and a person with a national or ethnic origin and religious identity that converge with prevalent stereotypes about the profile of a terrorist, it is more likely that a protected ground will be a factor in a decision to deny a service.

26. The convergence of a social context of stereotyping and a decision that confirms a stereotype does not, on its own, establish *prima facie* discrimination in a particular case. The evidence must also disclose that the service provider adopted the truth of the stereotype without giving consideration to plausible alternatives. This is a factual enquiry that is best undertaken by an expert tribunal hearing the evidence.

27. The function of a human rights tribunal is to consider the individual’s subjective allegation of discrimination. Where the allegation of discrimination resides in a discretionary decision to deny services, the necessary objective enquiry for the tribunal is to unearth any unstated, discriminatory factors that confirm the complainant’s experience of discriminatory impact. Uncovering objective discriminatory factors can only occur by making reasonable inferences based on assessments of all the evidence.²⁵ Expert tribunal members are well equipped to determine whether the facts support such inferences, and meet the relatively low threshold to establish a *prima facie* case of discrimination.

D. *False suspicion coupled with negative stereotyping produces discriminatory outcomes*

28. In both the United States and Canada, Muslims of Pakistani and Arab origin are subject to direct and unconscious bias that presumes they are potential terrorists. As a result, this segment of the population are at risk of being erroneously designated as potential security threats.

29. The same biases that can lead to increased security scrutiny also make it more difficult to overcome or otherwise challenge an erroneous designation. When the error confirms a stereotype, the member of the stereotyped group will be differentially impacted by the error as compared to members of non-stereotyped groups. This is because a service provider is more likely to accept the likelihood of error and the possibility of accommodation if the adverse designation does not align with a stereotype. On the other hand, for members of a vulnerable group, such as Muslims in the context of aviation security, when an adverse designation confirms the stereotype, it can be near impossible to

²⁴ *Ibid* at para 120.

²⁵ *Ibid* at paras 86-89.

refute allegations. This is especially true under national security regulation, where mere suspicion is often sufficient to warrant exclusion, and official secrecy makes it impossible to know the substance of allegations.²⁶

30. For these reasons, to ensure non-discrimination in the provision of services, greater procedural vigilance is required when service providers are dealing with members of vulnerable groups in the context of pervasive stereotyping and known risks of targeted over-inclusiveness.

31. A well-known case of false security intelligence is that of Maher Arar, a naturalized citizen who was illegally transferred to Syria in 2002, where he was tortured for nearly a year.²⁷ It was later revealed that false assumptions about his associations within Ottawa's Muslim community had turned him, an innocent man, into a suspected terrorist. Information disclosed in the course of a public inquiry implicated Canadian officials in shoddy intelligence work and the production of misinformation.²⁸ Mr. Arar was later cleared of any association with terrorism, and received a multi-million dollar settlement and an official apology from the Prime Minister.

32. The revelations from the Arar Commission demonstrate that decisions that acutely impact the dignity and liberty interests of an individual can be made on the basis of unreliable intelligence and erroneous information. An individual's life can be destroyed, and a minority community scapegoated. The Arar case also demonstrates how a series of inter-dependent decisions across jurisdictions, without any meaningful mechanism for fact-checking or internal review, combined to produce grave consequences. Commissioner O'Connor observed that innocent Muslims are most adversely affected by such errors: "Given the tendency thus far of focusing national security investigations on members of the Arab and Muslim communities, the potential for infringement on the human rights of innocent Canadians within these groups is higher."²⁹

33. In the human rights context, tribunals have recognized that decisions that act solely on suspicion in a racialized context are likely to be found discriminatory. In *Nassiah v Peel (Regional Municipality of) Services Board*, the HRTO found that a police officer had discriminated against a black, foreign-accented woman during a shoplifting investigation despite the woman's denials and no

²⁶ *Latif, et al. v. Holder, et al.* (24 June 2014), Oregon 3:10-cv-00750-BR (U.S. District Court) at pages 37-38, 60, Book of Authorities, Tab 4.

²⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report on the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Services Canada, 2006) at 14, online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf>, Book of Authorities, Tab 12.

²⁸ *Ibid* at 13-14, 324-325.

²⁹ *Ibid* at 324.

proof that she had stolen anything.³⁰ The HRTO ruled that the white male police officer undertook the investigation with the discriminatory assumption that the store security guard's suspicion was correct and the suspect was guilty.³¹ The officer's behaviour in conducting the search also betrayed his discriminatory mindset. He ignored videotape evidence exonerating the suspect and ordered two body searches that produced no evidence. Looking behind the officer's stated motives and actions, the tribunal relied on expert evidence to accept as fact that, "statistically, racial minorities, particularly Black persons, are subject to a higher level of suspicion by police because of race, often coupled with other factors."³² The HRTO went on to conclude that "police officers, like all members of society, develop unconscious stereotypes about racial groups and subconsciously act on those stereotypes during routine police investigations."³³

34. In *Pieters*, the Ontario Court of Appeal cited *Nassiah* approvingly, noting that unconscious bias can influence not only an initial decision, but also subsequent action in respect of a member of a stereotyped group.³⁴ This is why the confluence of stereotypes and mistakes create special disadvantage for members of identifiable social groups. When a decision-maker's false assumptions converge with erroneous suspicion leading to a decision to deny service, discriminatory factors are likely at play.

35. Without a public inquiry, it is doubtful that the truth about Maher Arar would have ever been officially acknowledged. Even with a public inquiry and a government apology, Mr. Arar is still on a US no-fly list. Vindication and release does not erase stigma. A false accusation of "suspected Islamic terrorist" creates long-term legal and social disadvantage.

36. Stigma caused by a "suspected terrorist" designation not only marks the affected individual, but also his family, associates and community. For this reason, incidences of individual discrimination risk heightening group vulnerability and further entrenching systemic discrimination. The only way to offset the adverse effects of stigma and stereotyping is to verify information related to allegations and to require sound grounds for exclusion.

E. *Non-discrimination requires procedural fairness*

³⁰ *Nassiah v Peel (Regional Municipality of) Services Board*, 2007 HRTO 14 at para 2, 61 CHRR 88 [*Nassiah*], Book of Authorities, Tab 5.

³¹ *Ibid* at para 85.

³² *Ibid* at para 126.

³³ *Ibid* at para 129 [emphasis added].

³⁴ *Supra* note 18 at para 123.

37. Incorrect assumptions, myths and stereotypes can only be dispelled by probing information. If a service provider voluntarily adopts a standard that has the effect of reinforcing patterns of stereotyping, the provider should be held accountable for administering the standard in a non-discriminatory manner. This requires, at minimum, demonstrating that the provider considered the possibility of accommodating those who are adversely affected by the standard. It also requires that a decision to deny a service on the basis of third-party information includes an independent assessment of the veracity of the information in the context of all additional relevant facts.

38. Abdicating the responsibility of independent enquiry can produce discrimination. A non-discriminatory process would at minimum provide a forum for considering the credibility of the person's claims and denials; to perform additional reference and security checks; and to take further action as appropriate to independently determine whether there is a defensible basis to deny service.

39. When the service provider does nothing to investigate and adopts unquestioningly an uncorroborated and un-particularized designation that confirms a stereotype, the likelihood is high that discriminatory factors have influenced the decision. The proof of discrimination is found in the assumptions and connections at play in the decision maker's mind. Evidence of discriminatory decision-making often lies in what is not stated, but which may be inferred by an expert trier of fact.

40. An inference that discriminatory assumptions were a factor in decision-making can reasonably be made on the basis that the service provider dismissed the credibility of the affected individual out of hand and without any process. Where a trier of fact has drawn such an inference, a reviewing court should not interfere with a conclusion that assumptions relating to protected grounds were a factor in the decision to deny service.

PARTS IV AND V - COSTS AND ORDER SOUGHT

41. The interveners do not seek any order as to costs, but do seek leave to make oral submissions of ten (10) minutes in length, and otherwise support the remedial requests of the Commission and Mr. Latif.

All of which is respectfully submitted this 11th day of December, 2014.

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PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE	TAB
<i>Charkaoui v Canada (Citizenship and Immigration)</i> , 2007 SCC 9, [2007] 1 SCR 350	22
<i>Commission des droits de la personne et des droits de la jeunesse v Bombardier Inc</i> , 2010 QCTDP 16 (CanLII)	20
<i>Egan v. Canada</i> , [1995] 2 SCR 513 at 563	11
<i>Latif, et al. v. Holder, et al.</i> (24 June 2014), Oregon 3:10-cv-00750-BR (U.S. District Court)	29
<i>Nassiah v Peel (Regional Municipality of) Services Board</i> , 2007 HRTO 14, 61 CHRR 88	33
<i>Peel Law Association v Pieters</i> , 2013 ONCA 396, 116 OR (3d) 81 rev'g 2012 ONSC 1048 (CanLII) (Div Ct), aff'g 2010 HRTO 2411 (CanLII)	19, 24-25, 27, 34
<i>R v Brown</i> (2003), 64 OR (3d) 161, 173 CCC (3d) 23 (Ont CA)	18
<i>R v Parks</i> (1993), 15 OR (3d) 324, 65 OAC 122 (Ont CA)	16
<i>R v S (RD)</i> , [1997] 3 SCR 484, 161 NSR (2d) 241	17
<i>R v Williams</i> , [1998] 1 SCR 1128, 56 BCLR (3d) 390	18

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