

# ARABS, MUSLIMS, HUMAN RIGHTS, ACCESS TO JUSTICE AND INSTITUTIONAL TRUSTWORTHINESS: INSIGHTS FROM THIRTEEN LEGAL NARRATIVES

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*Canada's human rights regime may be failing Arab and Muslim communities just when they need it the most. This paper analyzes the barriers to justice faced by 13 Arab or Muslim individuals who turned to human rights law for remedy following a perceived discriminatory event after 9/11. As critical theorists have long argued, human rights "law on the books" differs from "law in action". The majority of the 13 claimants spent between two and 15 years pursuing a human rights claim, most did not secure the remedies they requested and many found their experiences minimized or misunderstood by adjudicators.*

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*Le régime canadien des droits de la personne pourrait bien ne pas répondre aux attentes des communautés arabe et musulmane alors qu'elles en ont justement le plus besoin. Cet article analyse les obstacles à l'accès à la justice auxquels ont été confrontées treize personnes appartenant à la communauté arabe ou musulmane qui ont tenté d'invoquer la protection des droits de la personne pour remédier à une situation perçue comme discriminatoire après les événements du 11 septembre. Comme le soutiennent les théoriciens critiques depuis longtemps, la « théorie » et la « pratique » en matière de droits de la personne sont deux choses bien différentes. La majorité des treize demandeurs ont consacré entre deux et quinze ans à régler leurs réclamations au titre des droits de la personne. La plupart d'entre eux n'ont pas obtenu la réparation demandée et plusieurs ont constaté que les décideurs minimisaient leur vécu ou le comprenaient mal.*

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\* Faculty of Law, University of Windsor. I would like to thank Claire Mummé, Sujith Xavier and Michael Lynk for numerous helpful conversations. I am indebted to Suzanne McMurphy for pointing me to literature about trust and trustworthiness. Finally, I owe an expression of thanks to Samantha Hale and Terra Duchene for invaluable research assistance. I appeared as an expert on American national security and racial profiling practices in *Commission des droits de la personne et des droits de la jeunesse* v *Bombardier Inc* (Bombardier Aerospace Training Center), 2010 QCTDP 16, [2011] RJQ 225, and my report was referenced by the Quebec Court of Appeal and the Supreme Court of Canada in their review of the case. This paper constitutes part of a larger project about Arab and Muslim access to justice and human rights claims. I use the term "complainants" throughout to refer to the individuals who filed a human rights complaint in response to a perceived injurious event; different terms are used in different jurisdictions.

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## 1. Introduction

Human rights law offers Arab and Muslim communities the possibility of redress and vindication for the significant discrimination they face in schools, workplaces, service counters, airports and other sites. But, Canada's human rights regime may be failing Arab and Muslim communities just when they need it the most. This paper analyzes the barriers to justice faced by 13 Arab or Muslim individuals who turned to human rights law for remedy following a perceived discriminatory event and whose claims were adjudicated by a British Columbia ("BC"), Ontario, Quebec or Canadian human rights tribunal between 2002 and 2017. Their journeys through the human rights regime reinforce that, as feminist, critical race, disability and other critical theorists have long argued, human rights "law on the books" differs from human rights "law in action."<sup>1</sup> The majority of the 13 claimants spent between two and 15 years pursuing a human rights claim, most did

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<sup>1</sup> On gap studies in general, see Jon B Gould & Scott Barclay, "Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship" (2012) 8:1 Annual Rev L & Social Science 323; Christine Rothmayr Allison, "Law in Books Versus Law in Action: A Review of the Socio-Legal Literature" in Louis M Imbeau & Steve Jacob, eds, *Behind a Veil of Ignorance? Power and Uncertainty in Constitutional Design* (Heidelberg: Springer, 2015) 35; Michael Lynk, "Chapter 5: Human Rights in the Canadian Workplace" in Peter Barnacle & Michael Lynk, revising authors, *Employment Law in Canada*, 4th ed (Toronto: LexisNexis, 2005) (loose-leaf revision 2018) (an excellent analysis of human rights in the employment context) [Lynk]; Jennifer Raso, "From Enforcement to Integration: Infusing Administrative Decision-Making with Human Rights Values" (2015) 32:1 WYAJ 71 which critiques the turn to rights enforcement or adjudication as a mechanism for achieving social justice.

not secure the remedies they requested and many found their experiences minimized or misunderstood by adjudicators.

Part 2 of this paper discusses the methodology developed to identify the 13 legal narratives and discusses the access to justice framework adopted to assess the legal narratives, including a framework for integrating institutional trustworthiness scholarship into access to justice analysis. Since tribunals and courts, including the Supreme Court of Canada, approach Arab and Muslim claimants as abstract, isolated individuals whose narratives are unconnected to the narratives of their larger communities, Part 3 highlights the value of social context analysis for human rights adjudication. It illustrates that the complainants' experiences reflect broader community experiences and reinforces the importance of access to justice for Arab and Muslim communities in post 9/11 Canada. Part 4 identifies three significant access to justice barriers facing the 13 claimants: delay; gaps between remedies requested and remedies secured; and shortcomings in the reasoning employed by adjudicators. Studies of civil litigation in Canada suggest that unresolved legal problems can cluster and spiral out of control.<sup>2</sup> These 13 legal narratives suggest the opposite: using the system can also have a "spiraling and multiplying" effect, worsening a litigant's life significantly.<sup>3</sup> Ultimately, the 13 legal narratives highlight the need for more scholarly and policy attention to the barriers facing Arab and Muslim communities who seek justice in Canada and more analysis of the trustworthiness of Canadian human rights regimes as an aspect of access to justice.<sup>4</sup>

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<sup>2</sup> See generally Canadian Forum on Civil Justice, "[Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#)", by Trevor CW Farrow et al (Toronto: CFCJ, 2016), online: <[www.plecanada.org/wp-content/uploads/2017/12/Everyday-Legal-Problems-and-the-Cost-of-Justice-in-Canada-Overview-Report.pdf](http://www.plecanada.org/wp-content/uploads/2017/12/Everyday-Legal-Problems-and-the-Cost-of-Justice-in-Canada-Overview-Report.pdf)>. This report does not break down results by social markers.

<sup>3</sup> Canadian Bar Association Access to Justice Committee, "[Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations](#)", by Amanda Dodge (Ottawa: CBA, March 2013), online: <[www.cba.org/CBA/cle/PDF/JUST13\\_Paper\\_Dodge.pdf](http://www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf)> at 8 [footnotes omitted] [Dodge]. Dodge's report was part of a larger study, see Canadian Bar Association, "[Reaching Equal Justice Report: An Invitation to Envision and Act](#)", (Ottawa: CBA, 2013), online: <[www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/CBA\\_equal\\_justice.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/CBA_equal_justice.pdf)>.

<sup>4</sup> On the call for more informed and expansive access to justice research methods, see Catherine R Albiston & Rebecca L Sandefur, "Expanding the Empirical Study of Access to Justice" [2013]:1 Wis L Rev 101.

## 2. Methodology<sup>5</sup>

### A) Identifying The 13 Legal Narratives

The 13 legal narratives that form the basis of this study were identified through CanLII's human rights database. Cases decided between January 1, 2002 and July 20, 2017 by the BC,<sup>6</sup> Ontario, Quebec and Canadian human rights tribunals were searched using the terms "Arab" or "Muslim" or "Islam". Though the search strategy, on its face, risks an Orientalist turn by drawing Arab and Muslims together as a unit of analysis,<sup>7</sup> attention to intersectionality helps negate the risk of conflation and facilitates an examination of how religion, ethnicity and gender factored into the complainants' experiences.<sup>8</sup> Three legal narratives from the BC, Quebec and Canadian tribunals were identified while four narratives were identified from Ontario where the largest Arab populations reside.<sup>9</sup> The number of cases chosen allowed for comparative analysis across jurisdictions alongside a detailed consideration of the relevant facts of each case.<sup>10</sup> The particular jurisdictions chosen also allow for the identification of themes across a maximum variation of institutional procedures.<sup>11</sup>

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<sup>5</sup> See Paul Chynoweth, "Legal Research" in Andrew Knight & Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008) 28 (for a discussion of the differences between social science and legal research methods).

<sup>6</sup> Since the BC CanLII database provides partial coverage until 2008, the results in this jurisdiction were cross-referenced using the BC Human Rights Tribunal database from 2002 to 2008. This cross-reference produced no additional cases meeting the search criteria.

<sup>7</sup> Edward W Said, *Orientalism* (New York: Pantheon Books, 1978) (Said identifies and critiques essentialist attitudes towards Arabs and Muslims, including the conflation of the two groups).

<sup>8</sup> Peter Gottschalk & Gabriel Greenberg, *Islamophobia: Making Muslims the Enemy* (Lanham: Rowman & Littlefield Publishers, 2008) at 78.

<sup>9</sup> The 2016 National Household Survey, formerly known as the Census, identified Arabic as the second most popular language spoke at home, after English, in major Ontario cities including Windsor, London, Hamilton, Kitchener-Waterloo and Ottawa.

<sup>10</sup> For a discussion of the merits and pitfalls of interpretive case methods compared to more quantitative approaches to law and content analysis, see Mark A Hall & Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96:1 Cal L Rev 63.

<sup>11</sup> Both BC and Ontario permit complainants to directly access a human rights tribunal, though BC adopted the direct access model in March 2003 while Ontario adopted it in June 2008. Other jurisdictions, such as Quebec, give carriage of complaints to a human rights commission that brings a case on behalf of the aggrieved parties if it determines that there is sufficient merit to do so. All four jurisdictions prohibit discrimination on similar grounds. See Heather MacNaughton, "[Lessons Learned: The BC Direct Access Human Rights Tribunal](http://www.justice.gov.yk.ca/pdf/Heather_MacNaughton_Article.pdf)", online: <[www.justice.gov.yk.ca/pdf/Heather\\_MacNaughton\\_Article.pdf](http://www.justice.gov.yk.ca/pdf/Heather_MacNaughton_Article.pdf)> (for a clear and succinct overview of the basic differences between a direct access and commission

Inclusion and exclusion criteria were applied to identify the cases. First, leading cases within each jurisdiction were included.<sup>12</sup> Citation count stood as proxy for case significance. In other words, the cases with the most citations were deemed to be leading cases.<sup>13</sup> Cases were sorted by citation count within each jurisdiction. Second, only decisions made on the merits were included. Preliminary matters or motions were excluded to produce a data set that included relatively rich facts and legal analysis. Third, duty to accommodate cases were also excluded because the tests for discrimination in accommodation cases and discrimination vary more broadly. Finally, Internet hate speech cases were excluded because they tend not to focus exclusively on Arabs or Muslims. This process was continued until 13 claims were identified. Sorted by jurisdiction and identified by the key decision on the merits, these claims are:

BC: *Elmasry (No 4)*,<sup>14</sup> *Asad*,<sup>15</sup> *Falou*<sup>16</sup>

Canada: *Caza*,<sup>17</sup> *Tahmourpour*,<sup>18</sup> *Salem*<sup>19</sup>

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controlled model as well as some of the differences between Ontario and BC's direct access procedures). For a discussion of maximum variation as a sampling method, see Lawrence A Palinkas et al, "Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research" (2015) 42:5 Administration & Policy in Mental Health and Mental Health Services Research 533.

<sup>12</sup> Although this paper refrains from drawing generalizations about human rights law from the 13 cases studied, some urge reassessment of the reluctance to generalize from specific cases. See Bent Flyvbjerg, "Five Misunderstandings About Case-Study Research" (2006) 12:2 Qualitative Inquiry 219. Certainly, interpretive legal scholarship does not shrink back from generalizing from case law. Implicit within this method is the theory that legal precedents cannot be treated like social science data.

<sup>13</sup> If two or more cases had the same citation count, the case that included the most agreed upon statement of facts between respondent and complainant was preferred. I acknowledge the difficulty in identifying leading cases in all contexts but particularly the administrative context where precedents, the conventional method for identifying leading, key or critical cases, cannot be readily defined.

<sup>14</sup> *Elmasry and Habib v Roger's Publishing and MacQueen (No 4)*, 2008 BCHRT 378, 64 CHRR D/509 [*Elmasry (No 4)*].

<sup>15</sup> *Asad v Kinexus Bioinformatics*, 2008 BCHRT 293, 63 CHRR D/423 [*Asad*].

<sup>16</sup> *Falou v Royal City Taxi*, 2014 BCHRT 149, [2014] BCWLD 5481 [*Falou*].

<sup>17</sup> *Caza v Télé-Métropole Inc*, 2002 CanLII 61831, 43 CHRR 336 [*Caza*].

<sup>18</sup> *Tahmourpour v Royal Canadian Mounted Police*, 2008 CHRT 10, 64 CHRR D/448 [*Tahmourpour* CHRT].

<sup>19</sup> *Salem v Canadian National Railway*, 2008 CHRT 13, 2008 TCDP 13 [*Salem*].

Ontario: *Abdallah*,<sup>20</sup> *Ibrahim*,<sup>21</sup> *Yousufi*,<sup>22</sup> *Saadi*<sup>23</sup>

Quebec: *Bombardier*,<sup>24</sup> *Rezko*,<sup>25</sup> *Filion*<sup>26</sup>

Each case was then noted-up to produce the 13 legal narratives. As some of the community members' claims resulted in more than one decision by a human rights tribunal, adjudicator or both, the decisions related to each claimant are referred to as "legal narratives" throughout this paper. Noting up means that any tribunal decisions involving the same claimant and same perceived discriminatory event, including preliminary decisions, were added to the set of cases considered. In addition, judicial review decisions by courts were also included to ensure a fuller understanding of the complainants' experiences across the legal system.<sup>27</sup> Significantly, nine of the claims resulted in more than one decision. Tahmourpour's claim, for example, generated 16 different decisions by different Canadian human rights adjudicators, the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. In total, 60 discrete cases were examined.

The methodology used to identify the 13 legal narratives that ground this qualitative study of Arab and Muslim experiences with access to justice in the context of Canadian human rights law has limitations. First, as already suggested, the legal narratives do not necessarily represent broad Arab or Muslim experiences with the Canadian human rights regime. Thus, this paper offers empirical observations sparingly to compare complainants' experiences but not to generalize about community experiences with the human rights system. Second, by definition, the experiences of the 13

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<sup>20</sup> *Abdallah v Thames Valley District School Board*, 2008 HRTO 230, 65 CHRR D/91 [*Abdallah*].

<sup>21</sup> *Ibrahim v Hilton Toronto*, 2013 HRTO 673, 77 CHRR D/1 [*Ibrahim* April 2013].

<sup>22</sup> *Yousufi v Toronto Police Services Board*, 2009 HRTO 351, 67 CHRR D/96 [*Yousufi*].

<sup>23</sup> *Saadi v Audmax*, 2009 HRTO 1627, 68 CHRR D/442 [*Saadi*].

<sup>24</sup> *Commission des droits de la personne et des droits de la jeunesse v Bombardier Inc (Bombardier Aerospace Training Center)*, 2010 QCTDP 16, [2011] RJQ 225 [*Quebec v Bombardier QCTDP*].

<sup>25</sup> *Commission des droits de la personne et des droits de la jeunesse (Rezko) v Montreal (Service de police de la ville de) (SPVM)*, 2012 QCTDP 5, 75 CHRR D/194 [*Rezko*].

<sup>26</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Filion*, 2004 CanLII 468 (QCTDP), JE 2004-477 [*Hakim*]. I refer to this case as "Hakim" in the body of the paper so as to use the complainant's name.

<sup>27</sup> Cost rules, for example, vary between courts and tribunals even within the same jurisdictions. A complainant from Ontario may choose to file a complaint with a human rights tribunal and, even if she loses, remains responsible only for her own costs. The two-way cost rule, however, applies in court proceedings even if the case under review originated from a human rights tribunal. If the complainant loses on judicial review, she can be held responsible for costs of the opposing party even if she did not initiate the judicial review. See e.g. *Saadi*, *supra* note 23.

complainants as told through the reported cases will be mediated by the legal process. Thus, only aspects of access to justice can be addressed through this methodology.<sup>28</sup> Case law reveals little about how or why the complainants chose to transform their perceived discriminatory experiences into legal claims, the costs, financial and otherwise, of pursuing a legal remedy, whether the complainants were subjectively satisfied with their experiences within the system, whether they trust the system moving forward, the impact of the decision on their families and friends or broader communities' attitudes towards the legal system.<sup>29</sup>

However, the methodology adopted also has benefits. First, the process by which the cases were selected suggests that the barriers that the claimants faced were not unique to the 13 narratives studied, though the depth of the experiences cannot be determined from these narratives. The sampling was not motivated; the cases were not chosen because they illuminated a certain result or theme. Instead, themes were pulled out of the cases.<sup>30</sup> Moreover, the cases identified are leading cases and many were judicially reviewed. At minimum, the 13 narratives illustrate the risks associated with using the human rights regime to remedy a perceived discriminatory event.

Second, the methodology highlights the value of studying access to justice through case law. Access to justice research often relies on interviews, surveys, focus groups, quantitative analysis of cases or archive analysis. Case law analysis is not often harnessed to qualitative access to justice analysis but has traditionally been the subject matter of doctrinal legal scholars. Nonetheless, case law can help illuminate important features of the access to justice terrain. The next section of this paper identifies the features of access to justice that can be addressed through case law.

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<sup>28</sup> Access to justice scholarship often proceeds through document analysis and interviews. See e.g. Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 *Osgoode Hall LJ* at 957.

<sup>29</sup> As noted below, institutional trustworthiness and trust are overlapping but distinct concepts. On this distinction, see Suzanne McMurphy, "[Trust, Distrust, and Trustworthiness in Argumentation: Virtues and Fallacies](#)" (2013) OSSA Conference Archive 113, online: <[scholar.uwindsor.ca/ossaarchive/OSSA10/papersandcommentaries/113/](http://scholar.uwindsor.ca/ossaarchive/OSSA10/papersandcommentaries/113/)> [McMurphy].

<sup>30</sup> The Supreme Court of Canada's decision in *Bombardier* hinted at many of the themes that were identified in this paper. See generally Reem Bahdi, "Narrating Dignity" [forthcoming in *Osgoode Hall LJ*] [Bahdi]. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Aerospace Training Center*, 2015 SCC 39, [2015] 2 SCR 789 [*Quebec v Bombardier SCC*].

## B) What Can Case Law Tell Us About Access to Justice?

Case law analysis is integral to the study of barriers to accessing legal processes or “procedural access to justice.”<sup>31</sup> Procedural access to justice concerns itself primarily with barriers to accessing the legal system. Within this access to justice tradition, scholars and policy makers frequently raise delay or the length of time engaged with the legal system as key access to justice considerations. The Supreme Court, for example, notes the link between delay and access to justice: “Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice.”<sup>32</sup> Recognizing prompt resolution of disputes as an access to justice marker, this paper measures the length of time that passed between the complainant’s perceived discriminatory event and the legal system’s final resolution of their claim. But, “much more is going on that impedes their access to justice.”<sup>33</sup>

“Substantive access to justice” can also be studied through case law.<sup>34</sup> Substantive access to justice scholarship developed primarily as a critique of access to justice scholarship that focused too narrowly on ensuring access to lawyers or legal processes.<sup>35</sup> As Professor Roderick Macdonald puts it, “[i]t is no solace to anyone to have easily accessible judicial remedies if the substance of the law that gave rise to these remedies is unjust” or if the law is applied unevenly or arbitrarily.<sup>36</sup> In other words, substantive access to justice

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<sup>31</sup> The phrase “procedural access to justice” was used by Roderick A Macdonald, “Access to Justice in Canada Today: Scale, Scope and Ambitions” in Julia Bass, ed, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2015) 19 [Macdonald]. Macdonald emphasized that access to justice must be understood in holistic terms and proposed a 3-part framework for thinking about access to justice: procedural, substantive and symbolic. See Emily Bates, Jennifer Bond & David Wiseman, “Troubling Signs: Mapping Access to Justice in Canada’s Refugee System Reform” (2016) 47:1 *Ottawa L Rev* 5 (for a paper that adopts Macdonald’s framework in the context of access to justice for refugees).

<sup>32</sup> *Hryniak v Mauldin*, 2014 SCC 7 at para 25, [2014] 1 SCR 87.

<sup>33</sup> Janet E Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners” (2015) 32:2 *Windsor YB Access Just* 149 at 151 (Mosher provides an excellent critique of prevailing approaches to access to justice that focus on factors such as cost, complexity and delay) [Mosher, “Grounding Access to Justice”].

<sup>34</sup> The phrase “substantive access to justice” was used by Macdonald, *supra* note 31.

<sup>35</sup> See e.g. Rebecca L Sandefur, “Access to Justice: Classical Approaches and New Directions” in Rebecca L Sandefur, ed, *Access to Justice: Sociology of Crime, Law and Deviance* (Bingly: Emerald, 2009) ix.

<sup>36</sup> Macdonald, *supra* note 31.



examines the relationship between law and justice<sup>37</sup> and law's impartiality or whether the law treats individuals equally regardless of social markers.<sup>38</sup> This paper examines substantive access to justice through case law in two ways. First, it identifies gaps between remedies requested by complainants and remedies granted by adjudicators. Second, it examines the 13 legal narratives for inconsistencies in the presentation and treatment of facts or anomalies in the application of norms to facts. Since the cases derive from different jurisdictions with different precedential and jurisprudential frames, the analysis focuses on the adjudicator's assessment of facts rather than analysis of the coherence between adjudicative reasoning and established precedent.<sup>39</sup>

Case law can also facilitate a study of what can be called "sociological access to justice". Unlike procedural and substantive access to justice, sociological access to justice does not address legal processes or results *per se*. Instead, it examines the social conditions that shape "access" and "justice". This rich branch of scholarship includes studies of the incentives and disincentives that drive individuals to transform a perceived injurious experience into a legal claim.<sup>40</sup> Scholarship exploring the psychological and emotional costs of using the legal system also falls within the scope of sociological access to justice and includes studies of "litigation stress syndrome," a medical term used to describe the compounded but independent harm that may arise from participating in legal proceedings as distinct from facing a discriminatory experience.<sup>41</sup> Though case law analysis can give only a partial and limited glimpse into the psychological or

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<sup>37</sup> Bethany Hastie, "The Inaccessibility of Justice For Migrant Workers: A Capabilities-Based Perspective" (2017) 34:2 Windsor YB Access Just 20 at 25.

<sup>38</sup> Rebecca L Sandefur, "Access to Civil Justice and Race, Class, and Gender Inequality" (2008) 34:1 Annual R Sociology 339 at 350.

<sup>39</sup> For an overview of the Canadian human rights system see Lynk, *supra* note 1; Richard W Bauman, "Human Rights Protection in Canada" (2009) 14: 2 European R Fundament Rights 15.

<sup>40</sup> The classic work in this area is William LF Felstiner, Richard L Abel & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming" (1980) 15:3 Law & Soc'y Rev 631. See also Rebecca L Sandefur, "The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy" (2009) 42:4 Loy LA L Rev 949; American Bar Foundation, "[Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study](#)", by Rebecca L Sandefur (Chicago: ABF, 8 August 2014) online: <[www.srln.org/system/files/attachments/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.srln.org/system/files/attachments/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf)>; Rebecca L Sandefur, "Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 222.

<sup>41</sup> Michaela Keet, Heather Heavin & Shawna Sparrow, "Anticipating and Managing the Psychological Cost of Civil Litigation" (2107) 34:2 Windsor YB Access Just 73 at 76-77; see also Larry H Strasburger, "The Litigant-Patient: Mental Health Consequences of

emotional stress that might arise as a product of using the legal system, it can provide unique insights into the ways in which the legal system responds to the possibility of such stress.

Sociological access to justice also includes studies of attitudes towards the legal system. Valuable research has demonstrated that trust is an access to justice issue.<sup>42</sup> For example, *Access to Justice Metrics Informed By Voices of Marginalized Community Members*, a Canadian Bar Association's discussion paper based on 13 community consultations with marginalized peoples across Canada, found that members of marginalized groups do not trust the legal system.<sup>43</sup> Similarly, Janet Mosher's study of racialized youth in Toronto concludes that "it matters little if the governing legislation provides the most finely crafted legal procedures—absent widespread knowledge of the procedures and without hope and trust that invoking them might make a difference, such procedures have little utility or value, and there is no access to justice."<sup>44</sup> Another study found that past experiences with the legal system determine attitudes towards the system even when those experiences have nothing to do with the present experience and even when the past legal issues are unconnected with the present one.<sup>45</sup>

Though it draws inspiration and insights from this invaluable trust research, this paper is more concerned with institutional trustworthiness

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Civil Litigation" (1999) 27:2 J American Academy Psychiatry & Law 203; Diane Grant, "[Representing Yourself Popular But Risky](#)", *CBC News* (31 December 2015), online: <[www.cbc.ca/news/canada/representing-self-court-lawyers-1.3375609](http://www.cbc.ca/news/canada/representing-self-court-lawyers-1.3375609)>. Grant chronicles the experiences of self-represented litigants such as Kevin and Fay Hope and her article demonstrates the increased interest in mental health and access to justice. The Hopes were handling their own appeal when Fay, "under a great deal of stress, became ill and died. Kevin Hope can't blame the litigation directly for her death, but now he looks back at their six years of litigation with regret." Kevin Hope is quoted as saying: "If I could go back six years and start over, I would have nothing to do with litigation. No amount of money is worth what I've gone through and losing my wife, and here I am; I am no closer to justice."

<sup>42</sup> See Janet E Mosher, "Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools" (2008) 46:4 *Osgoode Hall LJ* 807 [Mosher]; American Bar Foundation, "[Focus on the Client: Why They Are Not Calling You](#)", by Rebecca L Sandefur (Chicago: ABF, May 2015), online: <[www.americanbar.org/content/dam/aba/images/office\\_president/sandefur.pdf](http://www.americanbar.org/content/dam/aba/images/office_president/sandefur.pdf)>; Rebecca L Sandefur, "Bridging the Gap: Rethinking Outreach for Greater Access to Justice" (2015) 37:4 *U Ark Little Rock L Rev* 721.

<sup>43</sup> Dodge, *supra* note 3.

<sup>44</sup> *Supra* note 42 at 843.

<sup>45</sup> Sara Sternberg Greene, "Race, Class, and Access to Civil Justice" (2016) 101:4 *Iowa L Rev* 1263. See also Rebecca L Sandefur, "The Importance of Doing Nothing: Everyday Problems and Responses of Inaction" in Pascoe Pleasence, Alexy Buck & Nigel J Balmer, eds, *Transforming Lives: Law and Social Process* (Belfast: Legal Services Commission, 2007) 112 [Greene].

than trust.<sup>46</sup> Of course, trust and trustworthiness intersect; participants may not trust a system that has not proven its trustworthiness.<sup>47</sup> But, they do not always align. Participants may give their trust naively, for example. Or, they may prove skeptical about a system. Institutional trustworthiness research centers the locus of analysis on the institution and its ability to earn participants' trust. Institutional trustworthiness analysis posits that if a trust deficit exists, the institution and not the trustor may need to alter its behaviour.<sup>48</sup>

Drawing on foundational institutional trustworthiness literature from sociology and management studies, this paper suggests a preliminary framework for studying institutional trustworthiness through case law. This literature identifies three components of institutional trustworthiness: ability, integrity and benevolence.<sup>49</sup> "Ability" includes criteria such as competence and efficiency.<sup>50</sup> "Integrity" relates to the extent that the system operates on shared values, principles and achieves fairness.<sup>51</sup> "Benevolence" points to the extent that the system expresses care and concern for those within it.<sup>52</sup> Since case law represents one of the primary vehicles through which the human rights system conveys its attributes, case law provides partial but unique insights into institutional trustworthiness. The analysis of delay presented in this paper speaks to the "ability" of the system; the ultimate outcomes of the cases and the reasons given by adjudicators as presented in this paper speak to "integrity"; and the emotional costs of using the system speak to "benevolence". To be sure, case law can provide deeper insights about institutional trustworthiness than are offered in this paper. This paper provides a tentative first step towards defining and measuring institutional trustworthiness in the context of Canadian human rights law. It calls out for a more detailed framework and metric for thinking about institutional trustworthiness as an aspect of access to justice.

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<sup>46</sup> On the distinction, see McMurphy, *supra* note 29.

<sup>47</sup> This line of analysis builds on research that posits that people obey the law because it has legitimacy. See e.g. Tom R Tyler, "Why People Obey the Law" (Princeton: Princeton University Press, 2006); Tom R Tyler, "Psychological Perspectives on Legitimacy and Legitimation" (2006) 57:1 Annual Rev Psychology 375. The question in the human rights context is not about compliance with the law but rather willingness to use available systems to resolve disputes and claim one's rights.

<sup>48</sup> McMurphy, *supra* note 29 at 6.

<sup>49</sup> Roger C Mayer, James H Davis & F David Schoorman, "An Integrative Model of Organizational Trust" (1995) 20:3 Academy Management Rev 709 at 717-21; Jason A Colquitt & Jessica B Rodell, "Justice, Trust and Trustworthiness: A Longitudinal Analysis Integrating Three Theoretical Perspectives" (2011) 54:6 Academy Management J 1183.

<sup>50</sup> *Ibid* at 1184.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*; McMurphy, *supra* note 29 at 6 [footnotes omitted].

### 3. Law's Mirror: Reading The 13 Legal Narratives in Social Context

Notwithstanding the rich social science literature detailing the post 9/11 experiences of Arabs and Muslims in Canada, few of the adjudicators who ruled on the 13 legal narratives considered social context in analyzing the facts before them; only one case uses the term “Islamophobia” to signal an awareness of social context, and only the Quebec Human Rights Tribunal, in *Bombardier*, provided sustained social context in its analysis.<sup>53</sup> Even there, however, the social context analysis was focused on the United States. The Supreme Court, for its part, effectively ignored social context in delivering its reasons in *Bombardier*. Given that the case involved the profiling of a Pakistani-Canadian pilot as a potential terrorist, one might presume that the Court would have acknowledged that Muslims are stereotyped as terrorists and would have considered the impact that such stereotyping might have had on *Bombardier's* decision making. But, the Court offered no social context analysis in reaching its conclusion. Instead, it referred to social context to critique the Quebec Human Rights tribunal's reference to it. This section highlights the need for more attention to social context analysis in legal practice, including the litigation and adjudication of Arab and Muslim human rights claims. To that end, it surveys the social science literature in the hopes of making it more accessible in legal circles.

Legal scholars, judges and practitioners draw on social science analysis to present legal claims in social context. Social context helps explain the relationship between identity, perspective and experience—“[s]ometimes, the full contours of a legal question can best (or only) be seen from the perspective of those who are most affected.”<sup>54</sup> Social context, moreover, can help justify systemic remedies.<sup>55</sup> This section also aims to contribute to social science scholarship by making legal analysis more widely accessible to social scientist scholars by providing examples of Arab and Muslim post

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<sup>53</sup> On Islamophobia generally, see Peter Gottschalk & Gabriel Greenberg, *Islamophobia: Making Muslims the Enemy* (Lanham: Rowman & Littlefield Publishers, 2008); Khaled A Beydoun, *American Islamophobia: Understanding the Roots and Rise of Fear* (Oakland: University of California Press, 2018); Reem Bahdi & Azeezah Kanji, “What Is Islamophobia?” [forthcoming in UNBLJ] [Bahdi & Kanji].

<sup>54</sup> The Honourable Richard Wagner, “[How Do Judges Think About Identity? The Impact of 35 Years of Charter Adjudication](#)” (2017) 49:1 *Ottawa L Rev* 43 online: <[www.canlii.org/t/729](http://www.canlii.org/t/729)> at 52. See also Janet E Mosher, “Grounding Access to Justice”, *supra* note 33 (for an excellent example of analysis that centers access to justice on the needs of marginalized groups).

<sup>55</sup> Gwen Brodsky, Shelagh Day & Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6:1 *Canadian J Human Rights* 1 (for a critique of the narrow remedies granted by tribunals and an argument that only systemic remedies can achieve the stated ends of human rights law and policy).

9/11 experiences based on detailed facts that have been tested through the legal process.

Arabs and Muslims face significant discrimination in Canada across a range of contexts. A 2016 Environics survey of Muslims in Canada found that one in three Canadian Muslims reported experiencing discrimination based on religion or ethnicity—well above the levels of mistreatment experienced by the general Canadian population.<sup>56</sup> The report confirmed that these negative experiences take place in a variety of settings including public spaces, retail stores, workplaces, schools and universities.<sup>57</sup> Private and public forms of discrimination often invoke Orientalist tropes that pre-date 9/11 and that have historically been harnessed to reject Arabs and Muslims as violent, undesirable and uncivilized.<sup>58</sup>

Educational institutions can perpetuate Islamophobia.<sup>59</sup> In 2015, a Richmond Hill teacher was fired for racist tweets that included comments such as “There is an absolute s\*\*\*-ton of Muslims at Ikea tonight. Any special occasion?” and “I’m sorry but sharia law is incompatible with my democratic secular nation. You can have it, but keep it over there in backward land.”<sup>60</sup> A study of “textbook Orientalism” in Ontario revealed that “Muslims were consistently placed in inferior and dependent positions in relation to ‘white folks’ by focusing on their origins in violent and backward societies, their cultural deficits, social ineptitudes, conflicted identities, and low-status jobs.”<sup>61</sup>

Service providers also perpetrate discrimination against Arabs and Muslims in Canada. Marketplace discrimination is receiving increasing attention in Canada. However, a 2016 Ontario Human Rights Commission

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<sup>56</sup> Environics Institute for Survey Research, “[Survey of Muslims in Canada, 2016: Final Report](#)” (Toronto: Environics Institute for Survey Research, 2016), online: <nsiip.ca/wp-content/uploads/survey\_of\_muslims\_in\_canada\_2016\_final\_report.pdf>.

<sup>57</sup> *Ibid* at 38.

<sup>58</sup> See generally Bahdi & Kanji, *supra* note 53.

<sup>59</sup> See e.g. Jasmin Zine, “Muslim Youth in Canadian Schools: Education and the Politics of Religious Identity” (2001) 32:4 *Anthropology & Education Q* Q 399.

<sup>60</sup> David Bateman, “[High School Teacher Fired after Investigation into ‘Racist’ Tweets](#)”, *Toronto Star* (9 September 2015), online: <[www.thestar.com/yourtoronto/education/2015/09/09/high-school-teacher-fired-after-investigation-into-racist-tweets.html](http://www.thestar.com/yourtoronto/education/2015/09/09/high-school-teacher-fired-after-investigation-into-racist-tweets.html)>.

<sup>61</sup> Mehrunnisa Ahmad Ali, “Representation of Muslim Characters Living in the West in Ontario’s Language Textbooks” (2013) 24:5 *Intercultural Education* 417 at 417; see also Lisa Zagumny & Amanda B Richey, “Textbook Orientalism: Critical Visuality and Representations of Southwest Asia and North Africa” in Heather Hickman & Brad J Porfilio, eds, *The New Politics of the Textbook: Problematizing the Portrayal of Marginalized Groups in Textbooks* (Rotterdam: Sense Publishers, 2012) 195; Canadian Arab Federation, *Arabs in Canada: Proudly Canadian and Marginalized* (Toronto: Knowledge Centre, 2002) at 18.

report found that Arabs and Muslims experience discrimination in the provision of services.<sup>62</sup> Similarly, a Nova Scotia Human Rights Commission's 2013 report documents that Muslims in Nova Scotia are ignored, refused service, provided with slow service, subject to racial slurs or subject to over-surveillance in retail and service settings.<sup>63</sup>

Employers and co-workers also engage in discrimination. In addition to discrimination at the point of hiring, Arabs and Muslims have reported denial of promotions, exclusion from activities both on and off the job, xenophobic jokes and prejudicial discourse that link Muslim or Arab identity and terrorism.<sup>64</sup> A Quebec study found that job applicants with Arab sounding names are less likely to be called for an interview notwithstanding their skills or qualifications.<sup>65</sup> Muslim women face a "triple threat" in the workplace because they experience bias on the basis of religion, gender and sometimes race.<sup>66</sup>

Arabs and Muslims are also targeted by their neighbours and random strangers. A 2017 Statistics Canada study of police reported hate crimes found an overall 5% increase in such crimes, and "[m]uch of this increase was a result of more hate crimes targeting Arab or West Asian populations (+33%)."<sup>67</sup> Reports of hate crimes against Muslims also rose significantly,

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<sup>62</sup> Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (Toronto: OHRC, 2017), online: <[www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario](http://www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario)> at 58 [OHRC, *Under Suspicion*].

<sup>63</sup> Nova Scotia Human Rights Commission, "[Working Together to Better Serve all Nova Scotians: A Report on Consumer Racial Profiling in Nova Scotia](http://www.nshrc.ca/sites/default/files/crp-report.pdf)", (Halifax: NSHRC, May 2013) at 29, online: <[humanrights.novascotia.ca/sites/default/files/crp-report.pdf](http://humanrights.novascotia.ca/sites/default/files/crp-report.pdf)>. The report notes: "Participants attributed their experiences of consumer racial profiling to the creation and maintenance of stereotypes through social structures such as the educational system, media, justice system, immigration system, and economic institutions" (at 76).

<sup>64</sup> Denise Helly, "Are Muslims Discriminated Against in Canada Since September 2001?" (2004) 36:1 *J Can & Ethnic Studies* 24.

<sup>65</sup> Yosie Saint-Cyr, "[Applicants Excluded From Hiring Process When Name Identified With a Racialized Group](http://www.slaw.ca/)", *Slaw* (7 June 2012), online: <[www.slaw.ca](http://www.slaw.ca/)>. See also Diane Dechief & Philip Oreopoulos, "Why do Some Employers Prefer to Interview Matthew but Not Samir? New Evidence from Toronto, Montreal and Vancouver" (2012) Canadian Labour Market & Skills Researcher Network Working Paper No 95.

<sup>66</sup> Ontario Human Rights Commission, "[Paying the Price: The Human Cost of Racial Profiling](http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf)", (Toronto: ONHRC, December 2003), online: <[www.ohrc.on.ca/sites/default/files/attachments/Paying\\_the\\_price%3A\\_The\\_human\\_cost\\_of\\_racial\\_profiling.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf)>. See also *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, December 1995) at 40–41.

<sup>67</sup> Statistics Canada, "[Police-Reported Hate Crime in Canada, 2015](http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14832-eng.htm)", (Ottawa: Statistics Canada, 13 June 2017), online: <[www.statcan.gc.ca/pub/85-002-x/2017001/article/14832-eng.htm](http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14832-eng.htm)> [Statistics Canada].

culminating in the January 2017 killing of six Muslim men at a Quebec City mosque when Alexandre Bissonnette shot the men in the back while they were praying. A few months earlier, a pig's head was left on the steps of the same mosque.<sup>68</sup> That same community continues to be terrorized. In August 2017, the car of Mohamed Labidi, the president of Quebec's Islamic Cultural Center, was set on fire and the mosque's doors had excrement flung at them.<sup>69</sup> Other mosques have also reported violent incidents.

Media portrayals of Islam and Arabs also perpetrate stereotypes.<sup>70</sup> Hollywood commonly portrays Arabs and Muslims as violent, barbaric fanatics whose lives matter little.<sup>71</sup> Sixty-seven percent of Canadian Muslims worry about media portrayals of their communities. Professor Yasmin Jiwani found that the *Globe and Mail* disproportionately reported on the killing of Muslim women by family members as opposed to the “murder of women and domestic violence” by non-Muslims.<sup>72</sup> A study by Noor Cultural Center had similar findings:

[T]he Quebec mosque shooting (January 2017) received approximately five minutes of airtime on CBC's flagship news program, *The National*, the night that it occurred—while the London Borough attacks in the UK (June 2017) received several hours of live reportage ... Searches for terms related to the Quebec mosque shooting on the websites of the CBC, the *Globe and Mail*, and the *Toronto Star* yielded 194 relevant results, in contrast to 768 for the Boston Marathon bombing—even though the Quebec mosque shooting occurred in Canada, and was more fatal.<sup>73</sup>

The report also found qualitative differences in the reporting on Muslims who are victims of violence and Muslims who perpetrate violence; perpetrators receive more attention than victims.

<sup>68</sup> “[Quebec City Mosque Attack Victims Shot in the Back as they Prayed](#)”, *National Post* (30 January 2017), online: <[www.nationalpost.com](http://www.nationalpost.com)>.

<sup>69</sup> Philip Authier, “[Head of Quebec City Mosque Latest Target in Apparent String of Hate Crimes](#)”, *Montreal Gazette* (30 August 2017), online: <[www.montrealgazette.com](http://www.montrealgazette.com)>; Statistics Canada, *supra* note 67.

<sup>70</sup> See e.g. Shelina Kassam, “Settling the Multicultural Nation-State: *Little Mosque on the Prairie*, and the Figure of the ‘Moderate Muslim’” (2015) 21:6 *Social Identities* 606.

<sup>71</sup> Jack G Shaheen, “Reel Bad Arabs: How Hollywood Vilifies a People” (2003) 588:1 *ANNALS Academy Political & Social Science* 171 [Shaheen].

<sup>72</sup> Yasmin Jiwani, “A Clash of Discourses: Femicides or Honor Killings?” in Mahmoud Eid & Karim H Karim, eds, *Re-Imagining the Other: Culture, Media, and Western-Muslim Intersections* (New York: Palgrave Macmillan, 2014) 121.

<sup>73</sup> Noor Cultural Centre, “[Islamophobia in Canada](#)”, by Azeezah Kanji et al, (North York, ON: Noor Cultural Centre, 2017), online: <[www.noorculturalcentre.ca/wp-content/uploads/2018/01/Islamophobia-in-Canada-2017.pdf](http://www.noorculturalcentre.ca/wp-content/uploads/2018/01/Islamophobia-in-Canada-2017.pdf)> at 4–5 (report submitted to the parliamentary Heritage Committee, for its Motion M103 hearings on Islamophobia in Canada).



Political leaders and public institutions help entrench and reflect the unequal status of Arab and Muslim communities. Scholars use the terms “exceptionalism” and “respectable racism” to describe the special systems and legal regimes that apply largely to Arabs and Muslims and to describe the tendency of those who hold power in society to justify different treatment for Arabs and Muslims.<sup>74</sup> On July 13, 2017, five CSIS employees provided a glimpse into the culture at Canada’s national security agency. The employees filed a statement of claim in Federal Court indicating their intent to pursue, *inter alia*, damages in excess of \$35 million dollars against CSIS, which is described in the claim as “a workplace rife with discrimination, harassment, bullying and abuse of authority.”<sup>75</sup> Indeed, Canadian Arabs and Muslims have long complained about being stereotyped and profiled by national security agencies as terrorists for innocuous conduct that would not likely raise suspicion except for the identity of the actors. Even before 9/11, the Canadian Arab Federation and CAIR-CAN distributed a pocket guide for Canadian Arabs and Muslims advising them of what to do if contacted by CSIS or the RCMP given community reports about profiling and intrusive interviews by police and national security agents.<sup>76</sup> Arabs and Muslims report racial profiling by border security and airport officials<sup>77</sup> and discriminatory treatment, detention, interrogation and fingerprinting by immigration and consular officials.<sup>78</sup> Arabs are also singled out disproportionately for “carding” by police<sup>79</sup> and a Canadian Agricultural Review Tribunal noted

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<sup>74</sup> Rachad Antonius, “Un Racisme ‘Respectable’” in Jean Renaud, Linda Pietrantonio & Guy Bourgeault, eds, *Les Relations Ethnique en Question: Ce qui Change Depuis le 11 Septembre 2001* (Montreal: Les Presses de l’Université de Montreal, 2002) 253 [Antonius]. See also Reem Bahdi, “Before the Law: Creeping Lawlessness in Canadian Anti-Terrorism Law and Policy” in Vida Bajc & Willem de Lint, eds, *Security and Everyday Life* (New York: Routledge, 2011) 143.

<sup>75</sup> [John Doe #1 et al v Canada \(Canadian Security Intelligence Service\)](#) (13 July 2017), Toronto T-1032-17 (FCTD), online: <[www.scribd.com/document/353767258/CSIS-harassment-lawsuit-statement-of-claim#from\\_embed](http://www.scribd.com/document/353767258/CSIS-harassment-lawsuit-statement-of-claim#from_embed)> at para 10.

<sup>76</sup> Faisal Kutty, “[Goodale Must Investigate Racism Allegations Against CSIS](#)”, *Toronto Star* (30 July 2017), online: <[www.thestar.com/opinion/commentary/2017/07/30/goodale-must-investigate-racism-allegations-against-csi.html](http://www.thestar.com/opinion/commentary/2017/07/30/goodale-must-investigate-racism-allegations-against-csi.html)> (“Other problematic practices include: showing up at homes and workplaces unannounced at odd hours; speaking with family, friends, colleagues and even employers (who may be ordered to keep it secret); offering incentives for ‘information’; intimidating newcomers; questioning people about specific institutions; inquiring about one’s religiosity; and discouraging legal counsel”).

<sup>77</sup> OHRC, *Under Suspicion*, *supra* note 62 at 58. Respondents describe being stopped, followed by air marshals, placed on “no fly” lists, having their names flagged or their identification questioned and not being believed, all without justification.

<sup>78</sup> *Report of the Independent Expert on Minority Issues, Addendum*, UNGAOR, 13th Sess, UN Doc A/HRC/13/23/Add.2 (2010) 1.

<sup>79</sup> In each of the city’s 74 police patrol zones, the *Toronto Star* analysis shows that blacks were documented at significantly higher rates than their overall census population by zone, and that in many zones, the same holds true for “brown” people—mainly people of



the existence of an “Arab line” at Pierre Trudeau International Airport in Montreal.<sup>80</sup>

Discrimination hurts individuals and disempowers communities. According to the 2011 National Household Survey, Arabs face the highest rate of unemployment (14.2%) in Canada even compared to Black and South Asian workers who stand at 12.9 and 10.2% respectively.<sup>81</sup> Moreover, discrimination generates a cycle of human rights violations. Disproportionate scrutiny of Arab and Muslim community members reflects and reinforces the belief that Arabs and Muslims are “‘accidental’ citizens who are not ‘real’ Canadians and, hence, can be legitimately treated as different.”<sup>82</sup> Maher Arar was tortured because CSIS and the RCMP stereotyped him a terrorist without justification. This notion that Arabs and Muslims do not merit the benefits of Canadian citizenship was reflected in the Harper government’s

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South Asian, Arab and West Asian backgrounds: Jim Rankin, “[Race Matters: Blacks Documented by Police at High Rate](#)”, *Toronto Star* (6 February 2010), online: <[www.thestar.com/news/gta/raceandcrime.html](http://www.thestar.com/news/gta/raceandcrime.html)>.

<sup>80</sup> *Bougachouch v Canada (Canada Border Services Agency)*, 2013 CART 20, [2013] DCRAC no 20, rev’d *Canada (AG) v Bougachouch*, 2014 FCA 63, 243 ACWS (3d) 867. The Federal Court of Appeal sent the case back for reconsideration in a way that restrained the Tribunal from finding improper state conduct: [translation] “Since the Tribunal was satisfied that the respondent committed the alleged act, I would allow the application for judicial review, set aside the Tribunal’s decision and refer the matter back to the Tribunal with instructions for reconsideration giving effect to the finding that it is satisfied that the violation was committed” (at para 37). The reconsideration decision only consists of the imposition of a penalty against the plaintiff. See *Bougachouch v Canada (Canada Border Services Agency)*, 2014 CART 7, [2014] DCRAC no 7.

<sup>81</sup> Andrew Jackson, “[Canadian-Born Visible Minority Youth Face an Unfair Job Future](#)”, (3 June 2014), *The Broadbent Blog* (blog), online: <[www.broadbentinstitute.ca/andrew\\_ajackson/canadian\\_born\\_visible\\_minority\\_youth\\_face\\_an\\_unfair\\_job\\_future](http://www.broadbentinstitute.ca/andrew_ajackson/canadian_born_visible_minority_youth_face_an_unfair_job_future)>; Gada Mahrouse, “Reasonable Accommodation’ in Québec: The Limits of Participation and Dialogue” (2010) 52:1 *Race & Class* 85. For an interesting discussion of the events giving rise to the Commission, see Tim Nieguth & Aurélie Lacassagne, “Contesting the Nation: Reasonable Accommodation in Rural Quebec” (2009) 3:1 *Can Political Science Rev* 1 (concluding that the events must be read as part of the larger anxiety about nation and belonging in Quebec); Alessandro Acquisti & Christina M Fong, “[An Experiment in Hiring Discrimination Via Online Social Networks](#)” (2012), online: <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031979)>; Neha Sahgal, “[Study: Muslim Job Candidates May Face Discrimination in Republican States](#)”, (26 December 2013), *Pew Research Center Fact Tank*, online: <[www.pewresearch.org/fact-tank/2013/11/26/study-muslim-job-candidates-may-face-discrimination-in-republican-states/](http://www.pewresearch.org/fact-tank/2013/11/26/study-muslim-job-candidates-may-face-discrimination-in-republican-states/)>; Cathy Lynn Grossman, “[Identifying as Muslim On Resumes May Lead To Fewer Job Opportunities, Survey Says](#)”, *Huffington Post* (20 June 2014), online: <[www.huffingtonpost.com](http://www.huffingtonpost.com)>;

<sup>82</sup> Baljit Nagra & Paula Maurutto, “Crossing Borders and Managing Racialized Identities: Experiences of Security and Surveillance Among Young Canadian Muslims” (2016) 41:2 *Can J Sociology* 165 at 179.

approach to Abousfian Abdelrazik's citizenship rights.<sup>83</sup> Discrimination also negatively affects health by triggering a stress response: "even the anticipation of discrimination is sufficient to cause people to become stressed."<sup>84</sup> Studies in the United States link Islamophobia to adverse health.<sup>85</sup>

If, as Laurence Friedman famously declared, "law is a mirror held up against life,"<sup>86</sup> one would expect the human rights system to receive complaints that reinforce the social science literature and demonstrate that Arabs and Muslims face significant forms of discrimination across a variety of contexts. The 13 legal narratives that form the basis of this study do precisely that; they reinforce the picture of hardship and exclusion painted by the social science literature and provide a glimpse into Arab and Muslim financial disempowerment and social exclusion.

First, the cases reinforce that Arabs and Muslims are stereotyped as terrorists by their co-workers and employers. Five of the 13 cases involved the terrorist stereotype, drawing on the longstanding Orientalist trope of the violent and untrustworthy Arab and Muslim. These cases illustrate how the terrorist trope affects individuals' lives outside of the national security context. Javed Latif's claim against Bombardier Aerospace Training Center arose from the fact that he had been wrongly labelled as a potential threat to national security by American officials.<sup>87</sup> Latif had sought to renew his pilot license so that he could secure an employment contract. He asked Bombardier's Montreal facility to allow him to train under his Canadian license in Canada. Americans had no jurisdiction over Latif's Canadian license in Canada and nothing in either Canadian law or policy prevented Bombardier from training Latif in Canada under his Canadian license. Bombardier's Head of Standards and Regulatory Compliance, Stephen Gignac, however, denied Latif's training request. In so doing, Gignac acted without legal authority. Gignac claimed to regard Latif "like a brother," but he concluded that Latif, as a Muslim, represented a terrorist threat even though "[h]e had no idea of the objective reasons that Latif was considered a threat to the national security of the United States. What is more, he never showed any interest in finding out those reasons."<sup>88</sup> Gignac did not

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<sup>83</sup> *Abdelrazik v Canada (Minister of Foreign Affairs & International Trade)*, 2009 FC 580, [2010] 1 FCR 267.

<sup>84</sup> American Psychological Association, "[Stress In America: The Impact of Discrimination](http://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf)" (Washington: APA, 10 March 2016), online: <[www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf](http://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf)> at 8.

<sup>85</sup> See e.g. Goleen Samari, "Islamophobia and Public Health in the United States" (2016) 106:11 *American J Public Health* 1920, n 15, 16.

<sup>86</sup> Lawrence M Friedman, *A History of American Law* (New York: Simon and Schuster, 1973) at 595.

<sup>87</sup> See generally Bahdi, *supra* note 30.

<sup>88</sup> *Quebec v Bombardier QCTDP*, *supra* note 24 at para 335.

contact Canadian national security officials to inquire about Latif or seek their advice about whether to offer him training. He simply accepted that Latif had a propensity for violence. Gignac's willingness to discount Latif's interests had disastrous consequences for Latif; it undermined his ability to work in his chosen field, ruined his personal and professional reputation, and diminished his dignity.

Latif's experiences of being falsely labelled a terrorist broadly parallel those of other Muslim men who found themselves at the receiving end of workplace suspicion. In Ontario, a tribunal heard a complaint by a civilian member of the Toronto Police who had been labelled a terrorist by a police detective, reportedly as a joke.<sup>89</sup> In *Yousufi v Toronto Police Services Board*, a human rights tribunal found that the Toronto Police Services ("TPS") failed to take steps to quell speculations that the complainant might be a terrorist.<sup>90</sup> The complainant, a Muslim and civilian employee of the TPS was the subject of a professed joke by a TPS Detective. On September 12, 2001, one day after the downing of the Twin Towers in New York, Detective Keith Bradshaw left a phone message for another detective in an accented voice:

I have a tip for Abi Yousufi taking secret airline pilot lessons at Buttonville Airport to fly 767's and 757's for knockdown twin towers. You will search his locker immediately for Arabic flight manual and he must be interned like the Japanese do during the Second World War. He must be interned. He is evil, evil Islamic militant goodbye.<sup>91</sup>

Following this incident, the complainant's co-workers began taunting him about being a 9/11 terrorist suspect. Yousufi's co-workers repeatedly played the Bradshaw message to each other in the workplace and Yousufi became the subject of workplace gossip.<sup>92</sup> A supervisor testified that he referred to the complainant as the "Persian Prince of Passion" as a joke.<sup>93</sup> Other evidence indicated that the complainant's photo hanging in the hallway was often turned upside down and superimposed with a picture of a goat on at least one occasion.<sup>94</sup>

In BC, another Muslim man also found himself the subject of workplace speculation about his links to terrorism in the wake of 9/11. The facts are nothing short of bizarre. The complainant, Ghassan Asad, complained that he was discriminated in employment because of his race, ethnicity, place of

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<sup>89</sup> *Supra* note 22.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid* at para 17.

<sup>92</sup> *Ibid* at para 53.

<sup>93</sup> *Ibid* at para 57.

<sup>94</sup> *Ibid* at paras 64–65.

origin and creed/religion.<sup>95</sup> Asad worked as a biochemist for the respondent company, Kinexus Bioinformatics. The good working relationship he had cultivated with his colleagues changed dramatically after 9/11. One of his co-workers identified him as a potential terrorist based on the fact that he was a single, young Palestinian, Muslim man who had lived in Saudi Arabia, criticized the United States, openly expressed views of the politics of the Middle East and had taken a trip to Washington DC in the summer weeks before 9/11.<sup>96</sup> The adjudicator found that the co-worker turned virtually every experience with Asad into evidence of suspicious behaviour. His decision to stop eating candy became a “fast” to purify himself for September 11; his overseas conversations with family were deemed sinister because they were conducted in Arabic; the relocation of his roommate to another apartment was defined as “the strange disappearance of a ‘secretive’ roommate”; his passion for the Middle East was turned into hatred for North America; and, his willingness to work weekends was translated into a suspicions about his access to the company computer system.<sup>97</sup> As a result of the allegations, Asad suffered health impacts, worried that he would be named a potential 9/11 terrorist and his relationship with his co-workers and employer deteriorated.<sup>98</sup>

Asad’s co-worker *did* report him as a 9/11 suspect to the RCMP, which took those allegations seriously and interviewed him at work about his associations and political and religious views. This interview fueled the conviction amongst other employees that the complainant should be viewed with suspicion. Other co-workers made hurtful comments about Asad’s race and religion.<sup>99</sup> The employer dismissed Asad’s complaints with the observation that he looked like the September 11 terrorists so it made sense that someone would report him.<sup>100</sup> In short, “Mr. Asad was transformed from a popular, competent, valued and respected employee into an object of suspicion, speculation and mistrust.”<sup>101</sup> Asad was eventually dismissed from his employment.

The association between terrorism and identity was not always specific to men. *Elmasry (No 4)* concerned an article entitled “The New World Order”, published by *Maclean’s Magazine*.<sup>102</sup> The article argued that Muslim immigrants bear no allegiance to their adopted home countries but rather share a common bond over their dedication to “violence or armed

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<sup>95</sup> *Asad, supra* note 15.

<sup>96</sup> *Ibid* at paras 501–06.

<sup>97</sup> *Ibid* at paras 19, 414, 509, 512.

<sup>98</sup> *Ibid* at para 975.

<sup>99</sup> *Ibid* at para 25.

<sup>100</sup> *Ibid* at para 31.

<sup>101</sup> *Ibid* at para 27.

<sup>102</sup> *Supra* note 14 at para 2.

struggle.”<sup>103</sup> The article also warned about Canadian immigration and the threat posed by growing Muslim populations. It described “the larger forces at play in the developed world that have left Europe too enfeebled to resist its remorseless transformation into Eurabia and that call into question the future of much of the rest of the world.”<sup>104</sup> It also argued that “Muslims, adherents of the religion of Islam, have serious global ambitions for world religious domination” by “demographically outnumbering the populations in traditional Western cultures” and in their general capacity as Muslims “if necessary, by the use of violence.”<sup>105</sup> In short, the article linked Muslims in Canada to terrorism and violence and specifically warned of the threat that Muslim women’s reproductive capacity posed to Canada and Canadians.

Associations between identity and terrorism were not always limited to Muslims. In *Caza v Télé-Métropole Inc*, a woman from Egypt who identified as Christian faced a set of assumptions that also emerged in the complainant-respondent interaction in *Bombardier, Yousufi, Asad* and *Elmasry*.<sup>106</sup> Caza had an Egyptian Muslim father and Egyptian Christian mother. The comment connecting her to terrorism was made by the tribunal chair, not the respondent employer. In trying to understand why the complainant felt that a co-worker was biased towards Arabs and Muslims, the tribunal chair himself interfered in the complainant’s cross-examination 294 times. He also suggested to her that if someone randomly but jokingly connected her to Bin Laden, she need not feel insulted or concerned about the association since it was offered in jest: “Madam, I can tell you with a smile this afternoon, as you have told us that you are of Moslem origin, that you are a Muslim, I can still make a joke and ask you if you have connections to Bin Laden.”<sup>107</sup>

Nine of the 13 cases examined revealed negative effects on the complainants’ employment status and/or earning capacity, thus reinforcing the social science literature’s conclusion that discrimination leads to the social and economic disempowerment of Arab and Muslim communities. *Yousufi, Asad* and *Caza* arose out of allegations of discrimination in the workplace. While *Yousufi* and *Caza* ultimately settled, *Asad* and *Latif* lost employment and employment opportunities. Similarly, *Jamel Ben Salem* brought a complaint against the Canadian National Railway (“CNR”) for denying him employment.<sup>108</sup> Salem alleged that he was denied because of his race and national or ethnic origin. CNR contended that Salem was denied because he lacked the requisite English language skills, was overqualified for the

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<sup>103</sup> *Ibid* at para 19.

<sup>104</sup> *Ibid*, Appendix.

<sup>105</sup> *Ibid* at para 2.

<sup>106</sup> *Caza v Télé-Métropole Inc*, 2003 FC 811, 126 ACWS (3d) 541 [*Caza FC*].

<sup>107</sup> *Ibid* at para 18.

<sup>108</sup> *Salem, supra* note 19.

position, and was only interviewed to help the company meet government mandated interview quotas.<sup>109</sup> The respondent pointed to hiring two Arabs between 2005 and 2007 to counter the claim of biased decision-making.<sup>110</sup> The complainant, a self-represented litigant, managed, it seems, to speak English well enough to present his case before the tribunal.

Seema Saadi was also terminated from her position.<sup>111</sup> She complained of her employer's inordinate surveillance of her and its vague workplace policies. Her complaint alleged that she was subject to arbitrary restrictions and requirements about her food and dress along with unnecessary surveillance at her workplace and that she had been terminated because of her Muslim identity. The respondent, for example, introduced new procedures for accessing files and went through Saadi's computer when she left the office.<sup>112</sup> The respondent sought to justify its conduct by alleging that the applicant had proven herself "unscrupulous, untrustworthy, unethical and unprofessional"<sup>113</sup> and by invoking the bona fide occupation requirement defence in defence of its policies.<sup>114</sup>

Tarek Ibrahim, a kitchen employee at Hilton Toronto, brought a complaint alleging discrimination on the basis of "race, colour, place of origin, ethnic origin, creed, sex, and family status" for management refusal to take seriously the harassment that he endured.<sup>115</sup> For example, Ibrahim alleged that one of the employees refused to accept that Ibrahim would convey instructions to him from the head chef. He "yelled and swore at the applicant, pointed his finger in the applicant's face, called the applicant a liar and alleged that the applicant was stealing money from the respondent."<sup>116</sup> The complainant believed that his complaints were not taken seriously by management but any complaints made against him were thoroughly investigated. For example, he pointed out that homophobic graffiti in the bathroom directed at him was not cleaned up.<sup>117</sup> Indeed, he faced the humiliation of trying to clean it up himself when management failed to respond.<sup>118</sup> Other employees in the workplace would taunt him about the graffiti but management failed to act quickly or appropriately.<sup>119</sup> A further example of a negative implication for employment status is where Wissam

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<sup>109</sup> *Ibid* at para 20.

<sup>110</sup> *Ibid* at paras 50–51.

<sup>111</sup> *Saadi, supra* note 23.

<sup>112</sup> *Ibid* at para 19.

<sup>113</sup> *Ibid* at para 81.

<sup>114</sup> *Ibid* at para 65.

<sup>115</sup> *Ibrahim* April 2013, *supra* note 21.

<sup>116</sup> *Ibid* at para 19.

<sup>117</sup> *Ibid* at para 183.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid* at para 183–84.

Falou's employer falsely reported him to the police for stealing a taxi cab and allegedly called him "a dumb Muslim."<sup>120</sup>

While the workplace represented a site of conflict and misunderstanding between human rights claimants and their employers or co-workers, discrimination was found in other places of daily living. Ahmed Abdallah's conflict with Joanne Thomas, an English as a Second Language ("ESL") teacher at the Thames Valley District School Board sheds light on a discrimination experience in the education context.<sup>121</sup> The conflict arose when Thomas accused Abdallah of cheating on an assignment and then lying to cover up his deceit.<sup>122</sup> Unwilling to listen to Abdallah's defense, Thomas declared that she was "sick and tired of immigrants crying discrimination."<sup>123</sup> The *Abdallah* tribunal found the comment about immigrants complaining about discrimination amounted to coded language about citizenship and immigration status.

A self-represented litigant, Ahmed Abdullah could not muster the evidence to demonstrate that his teacher, Joanne Thomas, harboured animus towards him because of his Arab and Muslim identities and not simply because of his immigration status. However, the animus that Joanne Thomas harboured against Arabs and Muslims was documented in a different proceeding several years later. Thomas was terminated from her employment on March 1, 2013 for harassment. Several years after Abdallah's complaint, evidence about Thomas' Islamophobia and anti-Arab animus was put before a labour arbitrator who found the Thames Valley District School Board justified in terminating Thomas' employment.<sup>124</sup> In providing his reasons, the arbitrator made note of Thomas' "scornful attitude towards the decision of the Human Rights Tribunal of Ontario,"<sup>125</sup> and also noted that her anti-Muslim behaviour had been longstanding.<sup>126</sup> For example, an e-mail sent by Thomas to colleagues in 2010 was among the documents presented to justify the decision to terminate Thomas. Though long, the e-mail is worth considering in its entirety because it conveys the depth of Thomas' ignorance and vitriol towards Arabs and Muslims:

Subject: Fwd: Can Muslims be good Canadians?

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<sup>120</sup> *Falou*, *supra* note 16 at paras 17, 37. There was no finding of fact made on the last point because the adjudicator determined that the comment, even if made, did not rise to the level of discrimination.

<sup>121</sup> *Abdallah*, *supra* note 20.

<sup>122</sup> *Ibid* at paras 4–5.

<sup>123</sup> *Ibid* at para 37.

<sup>124</sup> *Thames Valley District School Board v Ontario Secondary School Teachers' Federation*, District 11, (2016) CanLII 31772 (ON).

<sup>125</sup> *Ibid* at 28.

<sup>126</sup> *Ibid*.

Date: Thu, 7 Jan 2010 20:08:27-0500

Maybe this is why our Canadian Muslims are so quiet and NOT speaking out about any atrocities perpetrated in the name of Allah.

Can a Muslim be a good Canadian?

Theologically—no ... Because his allegiance is to Allah, The moon God of Arabia.

Religiously—no ... Because no other religion is accepted by His Allah Except Islam (Quran, 2:256)-Koran.

Scripturally—no ... because his allegiance is to the five Pillars of Islam and the Quran.

Geographically—no ... Because his allegiance is to Mecca, to which he turns in prayer five times a day.

Socially—no ... Because his allegiance to Islam forbids him to make friends with Christians or Jews.

Politically—no ... Because he must submit to the mullahs (spiritual Leaders), who teach annihilation of Israel and destruction of America, the great Satan.

Domestically—no ... Because he is instructed to marry four women and beat and scourge his wife when she disobeys him (Quran 4:34)

Intellectually—no ... Because he cannot accept the Canadian Constitution since it is based on Biblical principles and he believes the Bible to be corrupt.

Philosophically—no ... Because Islam, Muhammad, and the Quran does Not allow freedom of religion and expression.

Democracy and Islam cannot co-exist. Every Muslim government is either dictatorial or autocratic.

Spiritually—no ... Because when we (in Canada/USA) declare 'one nation under God,' the non-Muslim/esp. Christian God is loving and kind, while Allah is NEVER referred to as Heavenly father, nor is he ever called love in the Quran's 99 Excellent names.

Therefore, after much study and deliberation ... perhaps we should be very suspicious of ALL MUSLIMS in this country. ... They obviously cannot be both



'good' Muslims and good Canadians. Call it what you wish, it's still the truth. You had better believe it.

The more, who understand THIS, the better it will be for our country and our future, WE ARE AT WAR. Like it or not ... The religious war is bigger than we knew, know or care to understand ... And don't confuse this with Nazis' perpetrated atrocities on European Jews. This is NOT a proposal for CAN-konzentrationslagers (concentration camps) for Canadian Muslims.

\*Footnote: The Muslims have said they will destroy us from within. SO FREEDOM IS NOT FREE.

Please don't delete this until you send it on.<sup>127</sup>

Evidence presented at Thomas' termination hearing painted a picture of anti-Muslim and anti-Arab animus dating back to her conflict with Ahmed Abdallah. Indeed, the labour arbitrator's decision referenced Abdallah's claim several times and cast doubt on the human rights tribunal's finding that Abdallah's behaviour had been problematic.<sup>128</sup> But, because he lacked standing in the labour arbitration, Abdallah received no remedy beyond ex post facto vindication.

Conflict and misunderstandings between claimants and others also arose on the streets and close to their homes. Sometimes neighbours instigated the conflict and perpetuated the discrimination. Sophie Hakim, a Lebanese Quebecois woman, was told to "go back to where you came from" when she confronted her neighbour who had taken to piling snow on her property following snow storms.<sup>129</sup> The altercation, which resulted after Hakim called the police, left her angry and humiliated; she had lived in Quebec for almost 50 years and was a local business owner.

At other times, public officials perpetrated the discrimination, demonstrating that racism against Arabs and Muslims is often "respectable" or openly perpetrated by public officials.<sup>130</sup> Three of the 13 legal narratives involved serious acts of discrimination by police. Milad Rezko, a Syrian, Christian man who had lived in Quebec for most of his life, was exiting a passenger seat of a parked car when Montreal Officer Dominique Chartrand stopped his patrol car and demanded to see Rezko's identification.<sup>131</sup> Though Rezko had the door open and was preparing to put his feet on the sidewalk, Chartrand issued Rezko a ticket because he was not wearing a seat

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<sup>127</sup> *Ibid* at paras 25–26.

<sup>128</sup> *Ibid* at 4.

<sup>129</sup> *Hakim, supra* note 26.

<sup>130</sup> Antonius, *supra* note 74.

<sup>131</sup> *Rezko, supra* note 25 at para 249.

belt.<sup>132</sup> Using this pretext, Chartrand questioned Rezko without reasonable grounds, investigated Rezko and his brother for criminal records without justification and issued a ticket to Rezko. Chartrand also directed a racist slur at both Rezko and his brother, telling them “[a]ll Arabs Are Liars.”<sup>133</sup>

Ali Tahmourpour’s discriminatory experience involved the RCMP.<sup>134</sup> A trainee or cadet at the RCMP Training Academy in Regina, Tahmourpour was terminated in 1999 prior to completion of the training program. Corporal Dan Boyer taunted Tahmourpour; he screamed into “into his [Tahmourpour’s] ear that he was a ‘loser’, a ‘coward’, ‘fucking useless’ and ‘incompetent.’”<sup>135</sup> Corporal Boyer specifically set out to embarrass Tahmourpour based on his religious and ethnic identity. At one point, for example, he questioned Tahmourpour about the manner in which he signed his signature, asking “What kind of fucking language is that, or is it something that you’ve made up?”<sup>136</sup> Tahmourpour signed from right to left, invoking the conventions of the Persian language. Corporal Boyer’s aggressive conduct undermined Tahmourpour’s performance and ensured that he could not perform to his full capacity. Though it advanced a case alleging discrimination in the workplace, Abdi Yousufi’s complaint also shed light on some troubling behaviour and broad culture within the TPS. Detective Bradshaw deemed it appropriate to plot a practical joke in the hours following 9/11 while much of the world was still reeling from the attacks. Reminiscent of a time when women were told that sexual harassment constituted innocent flirting,<sup>137</sup> Detective Bradshaw and some of his colleagues expected Yousufi to endure comments about terrorism because they claimed to be joking.

Consistent with the literature on discrimination stress, the case law reveals that the perceived discriminatory experience also caused significant emotional harm. Javed Latif eloquently conveyed the pain that he felt from the treatment he received at the hands of Bombardier. At the hearing before the Quebec Human Rights Tribunal, he explained:

I felt humiliated because people that I had known, worked with, was associated with, had interacted with, they washed their hands off me. They won’t recognize me or say they didn’t have time for me.

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<sup>132</sup> *Ibid* at para 46.

<sup>133</sup> *Ibid* at para 31.

<sup>134</sup> *Tahmourpour* CHRT, *supra* note 18.

<sup>135</sup> *Ibid* at para 29.

<sup>136</sup> *Ibid* at para 32.

<sup>137</sup> See e.g. Miranda Fricker, “Powerlessness and Social Interpretation” (2006) 3:1 *Episteme* 96.

This was a humiliation. There were other factors. When there was no response from many agencies, many other people, I was humiliated because it became common knowledge that I had been probably as people understood it, a suspect, maybe a terrorist, maybe links with something.<sup>138</sup>

The Quebec Tribunal recognized that Latif's dignity had been violated:

More than the BATC's [Bombardier's] refusal itself, it was the consequences of the refusal on one of the most important facets of his life that was the most serious. In that regard, Dickson C.J. in *Reference Re Public Service Employee Relations Act (Alta.)* said that "[a] person's employment is an essential component of his or her sense of identity, selfworth and emotional wellbeing."<sup>139</sup>

The *Tahmourpour* tribunal also noted the impact of discrimination on the claimant as he described it:

Mr. Tahmourpour stated that he went to the Medical Treatment Centre on only one occasion on October 15, 1999, for treatment of vomiting, hyperventilation and shaking. He stated, however, that he did not meet with a psychologist or a doctor. He denied that suicide had ever entered his thoughts. He was sick, exhausted and upset about the discrimination he had experienced at Depot and the termination of his training contract.<sup>140</sup>

Social science paints a picture of communities struggling with social, economic and political disempowerment. The 13 legal narratives help put a human face on these experiences; the reported cases convey stories of individuals who face stereotypes, biases, isolation and sometimes hatred across a spectrum of everyday life. When understood against the social science literature, the 13 legal narratives reinforce the importance of ensuring access to the human rights regime for Arab and Muslim communities. The Canadian human rights regime was borne to counter the stigmatization of identities and to facilitate, in the words of the Ontario Human Rights Code, "the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community."<sup>141</sup> Human rights law promises personal vindication and affirmation for the equal worth and respect of all members of Canadian

<sup>138</sup> *Quebec v Bombardier* QCTDP, *supra* note 24 at para 410.

<sup>139</sup> *Ibid* at para 414 [footnotes omitted].

<sup>140</sup> *Tahmourpour* CHRT, *supra* note 18 at para 176.

<sup>141</sup> Human Rights Code, RSO 1990, c H 19. Chief Justice of Canada Beverly McLachlin (as she then was) has emphasized that public confidence in the justice system is essential but put in jeopardy if the system shuts people out: Michael McKiernan, "[Lawyers Integral in Making Justice Accessible: McLachlin](#)", *Law Times* (21 February 2011), online: <[www.lawtimesnews.com/author/michael-mckiernan/lawyers-integral-in-making-justice-](http://www.lawtimesnews.com/author/michael-mckiernan/lawyers-integral-in-making-justice-)

society.<sup>142</sup> Accordingly, “A primary purpose of human rights legislation is to prevent discrimination against identifiable protected groups and individuals belonging to these groups, rather than to punish wrongdoing.”<sup>143</sup> Ensuring access to the human rights regime helps prevent further harms to individuals and their communities.<sup>144</sup> The remainder of this paper examines the 13 legal narratives for the lessons they reveal about human rights and access to justice for Arabs and Muslims in Canada.

Analysis reveals that, with one exception, the claimants became embroiled in the legal system for several years notwithstanding the fact that they had legal representation. With two exceptions, both from Quebec, the claimants do not secure the remedies that they sought to achieve. Across jurisdictions, moreover, adjudicators tend to misunderstand or minimize the complainants’ experiences.<sup>145</sup> In the end, some of the complainants emerged from their legal encounters clearly traumatized.

#### 4. Three Significant Access to Justice Barriers

##### A) “Get On With their Lives”: Measuring Delay

A relatively simple concept on its face, delay proves difficult to define and measure within human rights regimes. The choice of dates chosen to

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accessible-mclachlin-8327/>. See also: Tracy Tyler, “[Access to Justice a ‘Basic Right’](#)”, Toronto Star (12 August 2007), online: <[www.thestar.com/article/245548](http://www.thestar.com/article/245548)>.

<sup>142</sup> The preamble to the Ontario *Human Rights Code*, *supra* note 141, reads: Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

<sup>143</sup> Lynk, *supra* note 1, §5.132, citing *CNR v Canada (Human Rights Commission)*, [1987] SCJ No 42, [1987] 1 SCR 1114.

<sup>144</sup> Canadian Forum on Civil Justice, “[The Costs of Justice: Weighing The Costs of Fair & Effective Resolution to Legal Problems](#)”, (Toronto: CFCJ, 2012), online: <[www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA\\_background\\_doc.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA_background_doc.pdf)> (“[e]arly, accessible and effective resolution to legal problems is key to avoiding problems clustering and escalating, but not knowing where to seek help or feeling powerless to do so are significant reasons given for inaction” at 3).

<sup>145</sup> Alyssa Clutterbuck, “Rethinking Baker: A Critical Race Feminist Theory of Disability” (2015) 20:1 Appeal 51 (even successful litigation can “fail to unpack how administrative systems are violent towards people at the margins” at 51).

measure delay depends on the purpose of the measurement. Some measures assess the system's efficiency. The clock begins ticking when a complaint is filed and stops when a human rights adjudicator issues a decision. For example, Andrew Pinto's 2012 Report of the Ontario Human Rights Review reviewed changes made to the human rights regime pursuant to the *Human Rights Code Amendment Act, 2006*.<sup>146</sup> Pinto gauged delay by measuring the time lapses between filing date, first hearing date and date of final decision or disposition of the case by a human rights tribunal. He examined 143 cases decided after the Ontario system moved to a direct access model and found that "it takes 16.5 months from the initial application filing date (not the application acceptance date) to get to the first hearing date; and another 6.9 months from the first hearing date to the decision, for a total of 23.4 months, or just under 2 years."<sup>147</sup> Delay is measured from the perspective of the human rights system itself and is most concerned with identifying and removing barriers to justice that exist within the justice system itself.<sup>148</sup>

A complainant-centric approach,<sup>149</sup> however, might adopt different start and end dates; the date of the perceived injurious event starts the clock ticking. The clock stops with the final disposition of a claim by the larger legal system rather than the date on which the administrative regime issued a final decision because some cases enter the courts on judicial review. Delay, under this approach, measures the length of time that an individual who used the legal system needed to invest in pursuing remedy for their perceived injurious event. This investment begins before any claim is filed. Before a claim is filed, individuals need time to name the wrong, identify a respondent to blame and file a claim. Within this framework, the key

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<sup>146</sup> Attorney General of Ontario, *Report of the Ontario Human Rights Review*, 2012, by Andrew Pinto (Toronto: Ontario Ministry of the Attorney General, November 2012) online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human\\_rights/#top](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/#top)> (see "Findings and Recommendations, 1. Efficiency of Tribunal").

<sup>147</sup> *Ibid.*

<sup>148</sup> A good overview of the various approaches to access to justice can be found in Greene, *supra* note 45.

<sup>149</sup> My proposed complainant-centric approach shares Tilburg University's Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution principles for measuring access to justice defined in "Measuring Access to Justice" (MA2J) project. See Martin Gramatikov et al, *A Handbook for Measuring the Costs and Quality of Access to Justice* (Apeldoorn: Maklu, 2009). For a discussion of the Tilburg principles, see Canadian Bar Association, "[Access to Justice Metrics: A Discussion Paper](#)", (Ottawa: CBA, April 2013), online: <[law.anu.edu.au/sites/all/files/coast/access\\_to\\_justice\\_metrics\\_3.pdf](http://law.anu.edu.au/sites/all/files/coast/access_to_justice_metrics_3.pdf)> at 10. While rule of law projects funded by international development agencies have long paid attention to metrics, Canadian jurisdictions have more recently begun to develop measures and metrics for accessing justice. See e.g. A2JBC Working Group, "[Access to Justice BC: Access to Justice Measurement Framework](#)", (Vancouver: A2JBC Working Group, 2017), online: <[icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework\\_Final\\_2017.pdf](http://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework_Final_2017.pdf)>.

question is: how long does it take complainants to “get on with their lives” after they become embroiled in a perceived injurious event? The benefit of this approach is that it broadens scholarly and policy discussions of delay to include the time and resources that a complainant may spend engaging with the legal system before a complaint is actually filed.<sup>150</sup> The point of this inquiry is not necessarily to assign blame to the system for delays but to better gauge, from a complainant’s perspective, the costs of experiencing discrimination and the costs of turning to the human rights system for a remedy.

Assuming a complainant-centric approach to measuring delay, the following chart summarizes the time that lapsed between a complainant’s perceived discriminatory event and the final disposition of the matter by a tribunal or court, organized by date of perceived injurious event and jurisdiction.

Delay defines almost all of the cases. Falou, a BC decision, was decided in the shortest period of time; approximately 14 months elapsed between the perceived discriminatory event and the final decision. Six of the complaints

Case Name	Date of Alleged Discrimination (A)	Date of Final Disposition (C)	Approximate # Years Between (A) & (C)
Elmasry (BC)	October 23, 2006	October 10, 2008	2
Asad (BC)	September 17, 2001	January 12, 2010	8+
Falou (BC)	April 16-18, 2013	June 26, 2014	1+
Caza (Can)	May/June 1990	January 21, 2004	5
Tahmourpour (Can)	July 12 - October 20, 1999	March 26, 2015	15+
Salem (Can)	March/April 2005	May 8, 2008	3
Abdallah (On)	November 8-11, 2004	November 10, 2008	4
Ibrahim (On)	November 26, 2009	August 22, 2017	8
Yousufi (On)	September 12, 2001	Settled, 2009	8
Saadi (On)	May/June 2008	January 18, 2011	3
Bombardier (Que)	April 23, 2004	July 23, 2015	11
Rezko (Que)	March 30, 2007	August 22, 2012	4+
Filion (Que)	January 5, 2002	February 4, 2004	2

<sup>150</sup> Not all human rights decisions indicate the date on which the complaint was filed. Information about the date of the perceived injurious event has been gleaned from the facts of each case.

were resolved within five years. The rest had to wait more than five years to “get on with their lives.” *Tahmourpour*, a case in the Canadian human rights system, took more than 15 years between the perceived discriminatory event and the final disposition of his case. Even when the date of complaint is considered as the starting point for measuring delay, Tahmourpour found himself embroiled in the human rights legal system for 14 years, almost to the day. He lodged his initial complaint with the Canadian Human Rights Commission on March 21, 2001, 18 months following the termination of his cadet contract. On March 26, 2015, the Supreme Court dismissed Tahmourpour’s application “for leave to appeal from the judgment of the Federal Court of Appeal, Number A-382-13, 2014 FCA 204 (CanLII), dated September 17, 2014 ... with costs to the Royal Canadian Mounted Police.”<sup>151</sup>

Of course, the complexity of legal proceedings can exacerbate delay. Human rights decisions are subject to judicial review and remedies on judicial review include sending a case back to the tribunal for reconsideration. Claims can therefore weave their way back and forth between administrative tribunals and courts. Tahmourpour’s story illustrates the point. Tahmourpour wove his way back and forth between human rights tribunals and courts. The Canadian Human Rights Tribunal originally dismissed Tahmourpour’s initial discrimination claim.<sup>152</sup> But, judicial review proceedings before the Federal Court and Federal Court of Appeal eventually resulted in a new hearing before The Canadian Human Rights Tribunal.<sup>153</sup> This hearing resulted in the discrimination finding.<sup>154</sup> The Federal Court then overturned the Tribunal’s holding.<sup>155</sup> The Federal Court of Appeal disagreed with the Federal Court and restored the Tribunal order with one exception—the remedial order involving the calculation of lost wages.<sup>156</sup> The Federal Court sent the matter back to the Canadian Human Rights Tribunal where the original adjudicator declined to hear the matter again and a new adjudicator was assigned to hear the case. The third adjudicator determined that the original order for lost wages had not been properly calculated.<sup>157</sup> Tahmourpour’s attempt to have that ruling quashed on judicial review proved unsuccessful before the Federal Court of Appeal

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<sup>151</sup> *Tahmourpour v Canadian Human Rights Commission*, leave to appeal to SCC refused, 36172 (26 March 2015).

<sup>152</sup> Dismissal of Tahmourpour’s Complaint (30 July 2003) [unreported].

<sup>153</sup> *Tahmourpour v Canada (Solicitor General)*, 2004 FC 585, 2004 CF 585 (judicial review), rev’g 2005 FCA 113, 2005 CAF 113 (appeal of judicial review).

<sup>154</sup> *Tahmourpour* CHRT, *supra* note 18.

<sup>155</sup> *Royal Canadian Mounted Police v Tahmourpour*, 2009 FC 1009, 2009 CF 1009 (judicial review).

<sup>156</sup> *Royal Canadian Mounted Police v Tahmourpour*, 2010 FCA 192, 2010 CAF 192 (appeal of judicial review).

<sup>157</sup> *Tahmourpour v Royal Canadian Mounted Police*, 2010 CHRT 34, 2010 TCDP 34 (reconsideration).

and his application for a hearing before the Supreme Court of Canada was denied.<sup>158</sup> But, the matter did not end there. The parties then became involved in a series of disputes over whether the 2008 Tribunal order had been respected by the RCMP.<sup>159</sup>

Milestones in Tahmourpour's legal journey included:

- July 30, 2003: Dismissal of Tahmourpour's Complaint (Unreported)
- 2004 FC 585: Judicial Review
- 2005 FCA 113: Appeal of Judicial Review
- 2008 CHRT 10: Decision \*\*\*
- 2009 FC 1009: Judicial Review
- 2010 FCA 192: Appeal of Judicial Review
- 2010 CHRT 34: Reconsideration
- 2012 FC 378: Judicial Review
- 2013 FCA 2: Appeal of Judicial Review
- 2013 CarswellNat 2105: Leave to Appeal Refused (SCC)
- 2013 FC 622: Motion for Contempt Order
- 2013 FC 1131: Appeal of Contempt Order Motion Dismissal
- 2014 FCA 204: Appeal of Contempt Order Motion Dismissal Appeal
- 2015 CarswellNat 645: Leave to Appeal Refused (SCC)

While Tahmourpour's claim moved between administrative and judicial review, Tarek Ibrahim's case never left the human rights system. However,

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<sup>158</sup> *Tahmourpour v Royal Canadian Mounted Police*, 2012 FC 378, 2012 CF 378 (judicial review), aff'd 2013 FCA 2, 2013 CAF 2 (appeal of judicial review), leave to appeal to SCC refused, 35255 (27 June 2013).

<sup>159</sup> *Tahmourpour v Royal Canadian Mounted Police*, 2013 FC 622, 2013 CF 622 (motion for contempt order) [*Tahmourpour FC*], aff'd 2013 FC 1131, 2013 CF 1131 (appeal of contempt order motion dismissal), aff'd 2014 FCA 204, 2014 CAF 204 (appeal of contempt order motion dismissal appeal), leave to appeal to SCC refused, 36172 (26 March 2015).



his legal journey also involved a long and complicated trail of milestones. The following is the list of decisions issued by the Human Rights Tribunal of Ontario in Ibrahim's legal journey:

- 2010 HRTO 1671: Interim Decision (Adding Parties)
- 2011 HRTO 2109: Interim Decision (Production of Documents)
- 2011 HRTO 2312: Interim Decision (Production of Documents)
- 2012 HRTO 740: Interim Decision (Request to Amend Application and Witnesses)
- 2012 HRTO 1534: Interim Decision (Request to Amend Application)
- 2012 HRTO 1670: Interim Decision (Request to Amend Application; Vexatious Litigant Motion)
- 2012 HRTO 1972: Interim Decision (Abeyance Order)
- 2012 HRTO 2160: Interim Decision (Request for Interim Remedy)
- 2013 HRTO 673: Decision<sup>160</sup>
- 2013 HRTO 981: Interim Decision (Request to Reactivate Application)
- 2013 HRTO 2028: Interim Decision (Request to Amend Application)
- 2014 HRTO 154: Interim Decision (Whether Amendments are Permitted)
- 2016 HRTO 627: Decision
- 2016 HRTO 1262: Reconsideration Decision
- 2017 HRTO 1096: Decision
- 2017 HRTO 1539: Decision

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<sup>160</sup> *Ibrahim* April 2013, *supra* note 21 (this is the tribunal decision in which a finding of discrimination was found on the merits).

Self-represented at various points in the proceedings, Tarek Ibrahim was among the claimants whose case resulted in a finding of discrimination. Like most of the claimants, however, his journey through the system left him without the remedy that he hoped to secure. The next section of this paper reviews the results of the cases in light of the decisions rendered. It compares the remedies requested with the remedies sought for each of the complainants and charts their path through the human rights system, marking whether, in the end, the complainant won or lost their case. Ultimately, the analysis raises questions about the ability of the human rights system to understand the discrimination experiences of Arab and Muslim claimants.

## B) Results On The Merits

When human rights tribunals report on their progress, they provide statistics about the number of cases in which discrimination was found by their adjudicators.<sup>161</sup> However, dispositions on judicial review are not considered. Using only findings of discrimination by human rights tribunals as the measure, Arab and Muslim human rights complainants fared well. Eight of the 13 claimants secured a finding of discrimination at the tribunal level. The chart below summarizes the results of the 13 cases following a tribunal ruling on the merits. The dark grey shading indicates cases in which the complainant lost before the tribunal. Light grey indicates the two cases that were settled or withdrawn. White represents cases where a tribunal made a finding of discrimination.

Name (Jurisdiction)	Discrimination found?
Asad (BC)	Yes
Elmasry (BC)	No
Falou (BC)	No
Caza (Can)	No
Tahmourpour (Can)	Yes
Salem (Can)	No
Abdallah (Ont)	Yes
Yousufi (Ont)	Settled
Saadi (Ont)	Yes
Ibrahim (Ont)	Yes
Bombardier (Que)	Yes
Rezko (Que)	Yes
Hakim (Que)	Yes

<sup>161</sup> See e.g. Social Justice Tribunals Ontario, "[Social Justice Tribunals Ontario 2015–2016 Annual Report](http://www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html#hrto7)", (Toronto: SJTO, 2016) online: <[www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html#hrto7](http://www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html#hrto7)> [SJTO].

Only Elmasry (BC), Falou (BC), Caza (Canada) and Salem (Canada) failed to secure a finding of discrimination.<sup>162</sup> Yousufi settled. The remaining complainants secured a discrimination ruling. Moreover, in some cases, adjudicators ordered significant remedies against respondents. Five of the 13 cases, including all three of the decisions from Quebec, resulted in notable remedies. In a decision released on November 10, 2010, that spanned 120 pages, a Quebec tribunal ordered corporate giant, Bombardier Aerospace, to pay \$25,000 in moral damages and \$309,798.72 USD for material prejudice less \$66,639 CAD; \$50,000 in punitive damages; and also issued an order requiring Bombardier to “cease applying or considering the standards and decisions of the US authorities in ‘national security’ matters when dealing with applications for the training of pilots under Canadian pilot’s licenses.”<sup>163</sup> Latif became one of the first successful, high profile Muslim human rights claimants. His story, which was carried by national papers,<sup>164</sup> offered hope to individual members of Arab and Muslims communities that Canadian human rights law would remedy wrongs and educate against discrimination.<sup>165</sup> The Quebec tribunal in *Rezko* also ordered a significant and substantial remedy in response to Rezko’s humiliating experience, ordering \$18,000 in total damages.<sup>166</sup> But, *Rezko* fell short of *Bombardier* in one crucial respect: unlike the *Bombardier* tribunal, the *Rezko* Tribunal declined to order punitive damages against Chartrand’s employer, Ville de Montreal. Though the Tribunal encouraged the police to consider its institutional responsibility to change the relationship with racialized communities, it determined that the employer did not intend to cause

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<sup>162</sup> The Elmasry tribunal held that the publications at the heart of the complaint evoked common Muslim stereotypes but declined to find that the article exposed Muslims to hatred or contempt on the basis of their religion: *Elmasry (No 4)*, *supra* note 14 at para 160. Specifically, the tribunal concluded that the complainants “did not link [the] stereotype[s] with the impact its use might have on an objective reader of the article” (at para 142). The Falou tribunal determined that the “dumb Muslim” comment, if made, did not constitute discrimination. Salem (Can) was unable to muster the evidence to prove his case. Yousufi (ON) settled. Caza (Can) brought a motion alleging apprehension of bias against the tribunal chair that delayed a finding on the discrimination claim for which she had originally filed.

<sup>163</sup> *Quebec v Bombardier* QCTDP, *supra* note 24 at paras 395–426.

<sup>164</sup> “[Bombardier Fined for Discrimination: Company to Pay Highest Punitive Penalty Ever Awarded by Quebec Tribunal](#)”, *CBC News* (8 December 2010), online: <[www.cbc.ca/news/business/bombardier-fined-for-discrimination-1.932063](http://www.cbc.ca/news/business/bombardier-fined-for-discrimination-1.932063)>; Ari Altstedter, “[Blacklisted Pilot Wins Rights Case Against Bombardier](#)”, *Globe and Mail* (26 March 2017), online: <[www.theglobeandmail.com/news/national/blacklisted-pilot-wins-rights-case-against-bombardier/article1318877/](http://www.theglobeandmail.com/news/national/blacklisted-pilot-wins-rights-case-against-bombardier/article1318877/)>.

<sup>165</sup> In addition to my own report, the Tribunal considered a report by Bernard Siskin who testified on behalf of Bombardier. See *Quebec v Bombardier* QCTDP, *supra* note 24 at paras 209–16.

<sup>166</sup> *Rezko*, *supra* note 25.

harm to Rezko.<sup>167</sup> Sophie Hakim was granted \$1,000 in moral damages. In short, all three cases examined in Quebec resulted in a significant remedy for the complainant. Hakim's treatment at the hands of her neighbour was recognized as an attempt to make her feel unwelcome rather than a dispute over snow removal.<sup>168</sup> Bombardier's treatment of Captain Latif was recognized as an affront to dignity and Officer Chartrand's treatment of Rezko was recognized as the intentional planting of a "seed of doubt in his mind as to whether he truly belonged in Québec society, in which he has lived for some 20 years."<sup>169</sup>

In Ontario, Saadi also secured a significant remedy. The Tribunal ordered the respondents to pay \$15,000 for "violation of her inherent right to be free from discrimination, and for injury to her dignity, feelings and self-respect" and ordered the corporate respondent to pay Saadi a further \$21,070 for lost wages.<sup>170</sup> Tahmourpour also won on the finding of discrimination before a Canadian tribunal level. The Tribunal's order included damages as compensation for two years of lost wages and, significantly, an opportunity for Tahmourpour to re-enroll in the RCMP training program.

But, the results for the complainants appear less promising upon closer inspection. First, reviewing courts overturned the most significant tribunal decisions. The findings of discrimination in *Saadi* and *Bombardier* were eventually overturned on judicial review and the finding of discrimination was quashed. As a result, the claimants not only lost the significant remedies ordered by the human rights tribunals but also had costs ordered against them. An Ontario court ordered \$10,000 in costs against Saadi while the Supreme Court ordered costs against Latif and the Quebec Human Rights Tribunal on a solidary basis. In both cases, the respondents initiated judicial review and the courts proved willing to closely examine the tribunal decisions. Although more research is needed to explore the outcomes on judicial review based on the identity of applicants, the 13 legal narratives suggest the possibility that reviewing courts adopt a deferential stance vis-à-vis tribunal holdings when Arab or Muslim complainants petition for review. Ghassan Asad sought judicial review of the Tribunal's decision that his conditions of employment had been tainted by discrimination but the ultimate decision to terminate his employment had been made for bona fide reasons.<sup>171</sup> The Supreme Court of British Columbia determined that the tribunal was owed

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<sup>167</sup> *Ibid* at para 284. See also, "[Montreal and Two Police Officers Ordered to Pay \\$45,000 for Racial, Social Profiling](#)", *Montreal Gazette* (29 August 2017), online: <[montrealgazette.com/news/local-news/montreal-and-two-police-officers-ordered-to-pay-45000-for-racial-social-profiling](http://montrealgazette.com/news/local-news/montreal-and-two-police-officers-ordered-to-pay-45000-for-racial-social-profiling)>.

<sup>168</sup> *Hakim*, *supra* note 26 at para 33.

<sup>169</sup> *Rezko*, *supra* note 25 at para 281.

<sup>170</sup> *Saadi*, *supra* note 23 at para 114.

<sup>171</sup> *Asad*, *supra* note 15.

deference as the decision about the reasons for termination constituted findings of fact that attracted a reasonableness review.<sup>172</sup> On this standard, the Court declined to alter the Tribunal's ruling.<sup>173</sup> The Court accepted that Asad was terminated for insubordination. But, like the Tribunal, the Court did not venture an analysis of whether or how this cause could be separated out from the discriminatory attitude that the employer had consistently expressed towards Asad. The Court also noted that Asad was not terminated immediately after he was reported to the RCMP and that he received a pay increase after that period but did not explain how these factors negated the bias that the adjudicator had elaborately detailed, using almost 227 pages to do so.<sup>174</sup> Like the Tribunal, the Court did not fully consider the significance of the finding that Asad had been kept on staff because he served as a useful pawn in a power struggle between Kinexus management.<sup>175</sup> Similarly, the Federal Court reviewing Caza's claim found no reason to interfere with the finding that the Canadian human rights adjudicator had demonstrated a reasonable apprehension of bias by asking the complainant if she could distinguish between a joke and a serious inquiry into whether she was connected to Osama Bin Laden. The Court held that the reference to Bin Laden was unfortunate but did not raise the spectre of apprehension of bias.<sup>176</sup> Having lost her case on judicial review, Caza ultimately withdrew her complaint.<sup>177</sup>

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<sup>172</sup> The Supreme Court's recent jurisprudence on standard of review is set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293.

<sup>173</sup> *Asad*, *supra* note 15 at para 172.

<sup>174</sup> *Ibid* at para 933.

<sup>175</sup> *Ibid* ("Dr. Pelech was prepared to tolerate Asad's insubordination for a time, particularly because he was useful during Dr. Pelech's dispute with Dr. McDermott. As noted, that usefulness ended with Dr. McDermott's departure from Kinexus" at para 950).

<sup>176</sup> The test for reasonable apprehension of bias was laid out in *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716 ("the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly'").

<sup>177</sup> The following list of cases marks the milestones in Caza's legal journey, culminating in her decision to withdraw her complaint:

- 2001 CanLII 38319 (CHRT)—Ruling on Jurisdiction
- 2002 CanLII 61831 (CHRT)—Ruling on Motion for Disqualification
- 2002 FCT 547—Motion to Stay Proceedings
- 2002 FCT 584—Motion for Intervenor Status—Canadian Human Rights Commission
- 2003 FC 811—Judicial Review

In other cases, even when a tribunal made a finding of discrimination, the remedies secured sometimes differed drastically from the remedies requested. Ghassan Asad, for example, was awarded \$5,000 in costs, \$6,000 for dignity, feelings and self-respect and \$599 for the costs of a medical report.<sup>178</sup> A cost award was also made because the corporate respondent had significantly obstructed the tribunal's proceedings. Asad was denied, however, the approximately \$81,000 he sought in lost wages.<sup>179</sup> Similarly, Abdallah sought \$11,500 for "injury to dignity, feelings and self-respect" but was granted \$1,500 in part because his behaviour was described as "suspicious" by the adjudicator.<sup>180</sup> Ibrahim, for his part, sought \$25,000 for injury to dignity; \$11,000 for loss of wages including the time he took off work following the November incident; human rights training to all the respondent's employees, including management; and promotion into a sous chef position.<sup>181</sup> He was partially successful. The Tribunal ordered \$5,000 against Hilton for failing to investigate Ibrahim's complaint about racist and homophobic graffiti. In addition, Hilton was ordered to retain a human rights expert to revise its harassment policy and train select staff about harassment in the workplace.<sup>182</sup>

In some cases, even where a tribunal ordered a remedy that was not overturned on judicial review, the tribunal's order did not come to pass. Media reported on Tahmourpour's legal victory against the RCMP but the force resisted Tahmourpour at every turn.<sup>183</sup> In the end, the RCMP had the last word; the force advised Tahmourpour on September 24, 2012, that his medical evaluation rendered him unfit to perform RCMP duties.<sup>184</sup> He was therefore denied the opportunity to re-enroll at the RCMP training course notwithstanding that the adjudicator who heard Tahmourpour's case in 2008 had determined that he should be given the opportunity to prove himself in a less discriminatory environment.<sup>185</sup> Four years of litigation

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• 2003 FCA 466—Application by Human Rights Commission to Suspend Proceedings

• 2004 CHRT 3—Decision on Withdrawal of the Complaints

<sup>178</sup> *Asad*, *supra* note 15 at paras 970, 973, 1009.

<sup>179</sup> *Ibid* at paras 837–39.

<sup>180</sup> *Abdallah*, *supra* note 20 at paras 108–09.

<sup>181</sup> *Ibrahim* April 2013, *supra* note 21.

<sup>182</sup> *Ibid*.

<sup>183</sup> "[RCMP Faces \\$1M Payout on Discrimination Case](#)", *CBC News* (17 April 2008), online: <[www.cbc.ca/news/canada/saskatchewan/rcmp-faces-1m-payout-on-discrimination-case-1.733877](http://www.cbc.ca/news/canada/saskatchewan/rcmp-faces-1m-payout-on-discrimination-case-1.733877)>; Gilbert Ndikubwayezu, "[Expelled RCMP Cadet Wins His Job Back](#)", *Globe and Mail* (26 March 2017), online: <[www.theglobeandmail.com/news/national/expelled-rcmp-cadet-wins-his-old-job-back/article1387395/](http://www.theglobeandmail.com/news/national/expelled-rcmp-cadet-wins-his-old-job-back/article1387395/)>; San Grewal, "[Federal Court Finds RCMP Guilty of Racism](#)", *Toronto Star* (20 July 2010), online: <[www.thestar.com/news/crime/2010/07/20/federal\\_court\\_finds\\_rcmp\\_guilty\\_of\\_racism.html](http://www.thestar.com/news/crime/2010/07/20/federal_court_finds_rcmp_guilty_of_racism.html)>.

<sup>184</sup> *Tahmourpour* FC, *supra* note 159 at paras 35, 48.

<sup>185</sup> *Ibid* at para 36.

later, Tahmourpour's health had deteriorated, according to the RCMP, to the point where he was no longer trainable and the RCMP did not have to give Tahmourpour an opportunity to re-train. The tribunal's order that he be permitted the chance to prove himself in a non-discriminatory environment became unenforceable.

Ibrahim's victory before a human rights tribunal similarly proved less significant than might first appear. Ibrahim had secured a finding of discrimination because of Hilton's failure to investigate his complaint about harassing graffiti in the washroom. But, he had been fired from his job by Hilton and the consequences of his termination were to be considered as part of a second complaint in which he alleged "discrimination with respect to employment because of family status, marital status, and reprisal."<sup>186</sup> The tribunal decided to hold the second claim in abeyance pending a ruling on the initial claim. Ibrahim's second claim then became the subject of settlement negotiations. Ibrahim, who was partially self-represented against corporate giant Hilton, tried, unsuccessfully to repudiate the settlement agreement on the basis that he signed it under significant stress:

During the mediation-adjudication, he began to experience anxiety and stress. He signed the settlement documentation because he wanted the proceeding to be over and he wanted to go home ... when the two remaining allocations were being discussed, he could not understand words, but did not tell anyone that he was having difficulty understanding words.<sup>187</sup>

Hilton, through its lawyer, sought, unsuccessfully, to declare Ibrahim a vexatious litigant. Ultimately, two decisions about the settlement were released in 2016, both in favour of Hilton, before the file was closed in the public interest in 2017.<sup>188</sup>

Only Hakim and Rezko left the human rights system with what may reasonably be called unqualified victories when measured in light of remedies secured. Hakim's claim ended when the human rights tribunal ordered the remedy that the Quebec human rights commission had requested as compensation for Sophie Hakim. Similarly, the Quebec commission secured a remedy for Rezko and successfully represented his claim on judicial review. The personal respondent's conduct no doubt contributed to this result. Officer Chartrand, whose testimony was found to be lacking credibility by the tribunal, called no witnesses even though

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<sup>186</sup> *Ibrahim v Hilton Toronto*, 2013 HRTO 2028 at para 1, [2013] OHRTD No 2232 (QL) [*Ibrahim* December 2013].

<sup>187</sup> *Ibrahim v Hilton Toronto*, 2016 HRTO 627 at para 161, 83 CHRR D/20 [*Ibrahim* May 2016].

<sup>188</sup> *Ibrahim v Hilton Toronto*, 2016 HRTO 1262, [2016] OHRTD No 1274 (QL); *Ibrahim* May 2016, *supra* note 187.

one of his colleagues had witnessed his interactions with Rezko. Chartrand, moreover, disclosed before the tribunal a record of complaints against him that included “six or seven” ethics complaints; “most of them were settled through conciliation.”<sup>189</sup> As the tribunal explained: “[o]ne, regarding a black individual who alleged having been beaten because of the colour of his skin, led to a trial, which ended with the acquittal of Officer Chartrand and his partner. In criminal matters, Officer Chartrand faced one charge of aggravated assault and two charges of assault; none of them made it to trial.”<sup>190</sup> An explicit racist slur, an obvious pretext stop and a police officer with a questionable employment record helped shield Rezko’s favourable human rights decision from judicial review.

Abdi Yousufi, for his part, appears to have settled his complaint against the Toronto Police Service at least in part to avoid the stress of litigation. Yousufi’s first complaint alleging discrimination, harassment and a poisoned work environment had been filed in 2002 and was followed by a second in 2004 alleging reprisals. By 2009, hearings were still being held. Suggesting that Officer Bradshaw had suffered enough, Gary Clewley, Bradshaw’s lawyer, reportedly remarked, “[w]hat the hell does (Yousufi) want? It seems gratuitous to me.”<sup>191</sup> Bradshaw had been docked several hours pay and asked to apologize.<sup>192</sup> Yousufi declined to comment as his case crawled through the human rights process. Undoubtedly exhausted as approximately eight years had passed since Bradshaw’s racist September 12, 2001, message with no human rights resolution on the immediate horizon, Yousufi told *Toronto Star* crime reporter, Michele Henry, “I’m in a really bad situation right now ... I have to take the stand, but I still have to earn a living.”<sup>193</sup> Yousufi’s case then disappeared from the human rights radar. It is possible that Yousufi received fair compensation from the TPS. It is equally possible that time and circumstances had taken their toll and he settled largely to end his entanglement in the legal process.

The following chart identifies in dark grey those cases in which the complainant was left without a remedy following judicial review, those cases in which a substantial gap exists between remedy sought and remedy granted and those cases in which the remedy though secured, proved illusory.

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<sup>189</sup> *Rezko*, *supra* note 25 at para 128.

<sup>190</sup> *Ibid.*

<sup>191</sup> Michele Henry, “[Detective’s Prank Spurs Human Rights Complaint](http://www.thestar.com/news/gta/2009/01/31/detectives_prank_spurs_human_rights_complaint.html)”, *Toronto Star* (31 January 2009), online: <[www.thestar.com/news/gta/2009/01/31/detectives\\_prank\\_spurs\\_human\\_rights\\_complaint.html](http://www.thestar.com/news/gta/2009/01/31/detectives_prank_spurs_human_rights_complaint.html)>.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*



Name (Jurisdiction)	Discrimination found at tribunal level?	Complainant—partial or complete remedy granted by tribunal	Gap between remedy sought and ordered?	Judicially Reviewed?	Complainant—partial or complete remedy after final determination of case?
Asad (BC)	Yes	Partial	Yes—significant	Yes—complainant	Partial
Elmasry (BC)	No	No			No
Falou	No	No	Yes	No	No
Caza (Can)	N/A	No – withdrew complaint	N/A	Yes—complainant	No
Tahmourpour (Can)	Yes	Complete	Yes	Yes—respondent	Partial—re-training order not given effect
Salem (Can)	No	No	N/A	No	No
Abdallah	Yes	Partial	Yes	No	Partial
Yousufi (Ont)	N/A	N/A – settled	N/A	N/A	Settled
Saadi (Ont)	Yes	Partial	Yes	Yes—respondent	No
Ibrahim (Ont)	Yes	Partial	Yes		Partial—fired and settlement disputed
Bombardier (Que)	Yes	Complete	No	Yes—respondent	No
Rezko (Que)	Yes	Complete	Yes—individual, limited systemic	No	Yes—application for JR denied
Hakim (Que)	Yes	Complete	No	No	N/A

The results on the merits raise some important questions about intersectionality.<sup>194</sup> The most significant victory out of the 13 cases examined was secured by Rezko. Rezko, clearly, is Christian. The second most significant victory was secured by Sophie Hakim. Hakim's religion is not identified. Khaled Beydoun's fascinating study of the historic Whiteness requirement in the context of American immigration law points out that Christians sought to secure citizenship by emphasizing their Christianity

<sup>194</sup> See Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6:1 CJWL 25; Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38:4 Signs: J Women in Culture & Society 1031.

while Muslims sought to secure citizenship by hiding their religion.<sup>195</sup> Though the Christians were not always successful and the Muslims were sometimes successful, these cases point to the role that religion can play in national belonging and emphasizes the need for more sophisticated intersectionality analysis in claims involving Arabs and Muslims in Canada.

Given the egregious set of facts that accompanied many of the claims, one might have hypothesized that the human rights process might have produced more legal victories for the complainants. But, only two complainants, Rezko and Hakim, exited the system with a finding of discrimination and a remedy that approximated the remedy requested. Notably, both cases arose out of Quebec and neither was judicially reviewed. These results suggest the need for more research around the conditions under which judges grant deference to human rights tribunal findings in cases involving Arabs and Muslims. The limited sample used in this study suggests that reviewing courts may defer to tribunal rulings where the respondent seeks judicial review but not when the complainant does so. The *Saadi* court overturned the tribunal decision notwithstanding the strong privative clause protecting Ontario human rights tribunal decisions.<sup>196</sup> The Quebec Court of Appeal overturned the Quebec Human Rights Tribunal decision in *Bombardier* notwithstanding the fact that a highly experienced, respected and senior judge had rendered the tribunal decision.<sup>197</sup> A Federal Court also overturned the 2008 human rights tribunal ruling in *Tahmourpour*, sending Tahmourpour on the next step in his overall 15 year journey through the human rights system.

Overall, the 13 legal narratives reinforce conclusions drawn by human rights scholars who note that “[s]ome rights have been treated by legislatures or legal decision-makers at various times as less worthy or less important.”<sup>198</sup> Peter Barnacle and Michael Lynk have noted a distinct trend of constrained interpretation of race related human rights adjudication in the workplace:

Some human rights—religion and gender are examples—achieved a relatively early recognition by the courts and tribunals respecting their broad reach, even as aspects of these rights have continued to be refined and enhanced over the years. Other

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<sup>195</sup> Khaled A Beydoun, “Between Muslim and White: The Legal Construction of Arab American Identity” (2013) 69:1 *New York U Annual Survey American L* 29.

<sup>196</sup> *Human Rights Code*, *supra* note 141, s 45.8 (“Subject to section 45.6 of this Act, section 21.1 of the *Statutory Powers Procedure Act* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable”).

<sup>197</sup> Justice Michelle Rivet was a judge of the Quebec Court, first President-judge of the Quebec Human Rights Tribunal from 1990 to 2010, past President of the Canadian Institute for the Administration of Justice and Vice President of the International Commission of Jurists in Geneva.

<sup>198</sup> Lynk, *supra* note 1, §5.10.

rights—disability, sexual orientation and family status are examples—endured a number of years of constrained and pinched interpretation before achieving seminal litigation victories that have resulted in a more comprehensive and liberal application. And still other rights—age and race are examples—have yet to achieve a liberal and vibrant interpretation that would place them on a level field with these other human rights grounds.<sup>199</sup>

Critical race scholars question law's impartiality vis-à-vis race more generally.<sup>200</sup>

Of course, that most complainants lost their claims does not, in and of itself, demonstrate unfairness in the decision-making process. After all, good cases settle and mediation or settlement opportunities are offered in all of the jurisdictions under consideration. But, not all good cases settle and some meritorious claims proceed to a hearing. The Human Rights Tribunal of Ontario, for example, found discrimination in 39 of 113 cases heard on the merits in 2015–16, 43 in 110 cases in 2014–15 and 56 out of 143 cases in 2013–14.<sup>201</sup> This represents a finding of discrimination in 35% of the cases heard on the merits in 2015–16 and 39% in 2014–15 and 2013–14. Since the 13 legal narratives studied do not constitute a sufficiently broad sample, it is not possible to draw reliable conclusions about the fairness of the decision making by comparing the percentage of cases in which discrimination is found in the 13 cases (15%) with the findings in Ontario involving the total number of cases decided on the merits (35–39%). An analysis of the legal reasoning employed is needed. A closer examination of the 13 cases raises questions about the reasons given by tribunals and courts to justify their decisions. The next section of this paper highlights instances where adjudicators minimized the complainant's harm or misunderstood their experiences.

### **C) Adjudicators Minimizing Harm, Ignoring Facts**

Several of the claimants were denied a remedy because the complainant was unable to prove that the harm they alleged was causally connected to the respondent's conduct, however egregious. Asad's case against Kinexus most clearly illustrates this point. In a decision that spans a stunning 1,013 paragraphs, a BC human rights tribunal found that Ghassan Asad's employer had discriminated against him through its employees:

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<sup>199</sup> *Ibid.*

<sup>200</sup> See e.g. Constance Backhouse, *Colour Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999); Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858–1958* (Toronto: University of Toronto Press, 2010).

<sup>201</sup> SJTO, *supra* note 161, table 2.

Because of discriminatory racial profiling, he was unfairly and without justification subjected in the workplace to suspicion of involvement in horrendous terrorist acts. Virtually overnight, Mr. Asad was transformed from a popular, valued and respected employee into an object of suspicion, speculation and mistrust. That caused Mr. Asad hurt, humiliation, anxiety, and isolation in the workplace.<sup>202</sup>

But, the Tribunal declined to find Asad's race, ethnicity, place of origin and/or religion factored into the corporate respondent's decision to terminate his employment. Instead, the Tribunal held the employer terminated Asad's employment for non-discriminatory reasons since he was defiant, failed to comply with company procedures and undermined management.<sup>203</sup>

Most of the tribunal's 227 page decision detailed the profiling, targeting and collusion against Asad by co-workers and supervisors. Only a few paragraphs address Asad's behaviour. In the end, however, the adjudicator seemed to ignore his own observation that the alleged ground of discrimination need only be a factor, not the sole or even the main factor in the impugned discriminatory act; the adjudicator ruled that the corporate respondent had terminated Asad's employment for non-discriminatory reasons.<sup>204</sup> The adjudicator reached this conclusion even though he found that the employer "admitted to ongoing suspicions about Asad even as he gave his testimony."<sup>205</sup> The decision to terminate Asad was chalked up to a personality clash between Asad and his employer. That Asad had been given a raise when other employees' salaries remained the same and that Asad had at times refused to cooperate with his employer by, for example, completing time sheets were also considered.<sup>206</sup> However, the adjudicator did not explain why these facts overwhelmed and neutralized as causes the clearly biased and discriminatory attitudes that Asad's employers and co-workers held towards him. The adjudicator also did not consider whether the discrimination Asad suffered at the hands of his co-workers and management contributed to relationship breakdowns and defined Asad's behaviour and responses to workplace events. Neither did the tribunal explain how or why the discriminatory reasons could be isolated from the non-discriminatory ones. It simply asserted this to be the case.

An Ontario tribunal also discounted the significance of Yousufi's experience.<sup>207</sup> In addition to being called names such as "Persian Prince of Passion," Yousufi had been subjected to a series of racist pranks including having his picture turned upside down and superimposed with a picture

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<sup>202</sup> *Asad*, *supra* note 15 at para 974.

<sup>203</sup> *Ibid* at paras 380, 443.

<sup>204</sup> *Ibid* at para 923.

<sup>205</sup> *Ibid* at para 964.

<sup>206</sup> *Ibid* at paras 951–56.

<sup>207</sup> The following analysis of *Yousufi* also appears in Bahdi & Kanji, *supra* note 53.

of a goat.<sup>208</sup> The adjudicator did not remark on or appear to recognize the full significance of these acts.<sup>209</sup> Jack Shaheen demonstrates that Hollywood pictures frequently associate Arabs and Muslims with animals, particularly dogs and goats.<sup>210</sup> In this particular case, the morphing of goat and man sends a clear message: Yousufi is regarded as abnormal, different, unwanted and alien. By superimposing a picture of a goat on Yousufi's picture, the perpetrator(s) conveyed their attitude about Yousufi's claims to belonging and also linked themselves, likely unknowingly, with a long history of "monstrification"<sup>211</sup> or dehumanization of others through animalistic associations.<sup>212</sup> His picture is made into a monster and, as Joanne Landes has observed, "whatever a monster is, it is not one of us."<sup>213</sup> The adjudicator recognized none of these things.

In *Salem v Canadian National Railway (CNR)*, an adjudicator appeared to want direct evidence to substantiate the claim that Salem had been denied employment because of his Arab identity.<sup>214</sup> CNR alleged that Salem, a self-represented litigant, lacked the requisite English language skills. The complainant insisted that he had the skills and presented a certificate from the British Counsel in support of his contention. The adjudicator concluded, however, that "[n]o evidence was filed that would support my determining that Ms. O'Neill arrived at this conclusion based on the complainant's national or ethnic origin."<sup>215</sup> By contrast, the adjudicator gave weight to a respondent's witness testimony that one other Arab candidate had been interviewed in 2005 and hired in 2007 without considering the established human rights principle that discrimination against some members of a group is sufficient to establish discrimination against the group.<sup>216</sup>

As with some tribunals, some courts also minimized the complainants' experiences. Any optimism that Captain Latif might have felt about the Canadian human rights system following the Quebec human rights tribunal order proved short lived as the Quebec Court of Appeal overturned the

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<sup>208</sup> *Yousufi*, *supra* note 22 at paras 64–65.

<sup>209</sup> *Asad*, *supra* note 15 at para 65.

<sup>210</sup> *Supra* note 71.

<sup>211</sup> See e.g. Safwat Marzouk, *Egypt as a Monster in the Book of Ezekiel* (Tübingen: Mohr Siebeck, 2015).

<sup>212</sup> Nick Haslam, "Dehumanization: An Integrative Review" (2006) 10:3 *Personality & Social Psychology Rev* 252.

<sup>213</sup> Joan Landes, "Revolutionary Anatomies" in Laura Lunger Knoppers & Joan B Landes, eds, *Monstrous Bodies / Political Monstrosities: In Early Modern Europe* (Ithaca: Cornell University Press, 2004) 148 at 154.

<sup>214</sup> *Supra* note 19.

<sup>215</sup> *Ibid* at para 70.

<sup>216</sup> *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

2010 tribunal ruling in 2013.<sup>217</sup> Then in 2015 the Supreme Court upheld the Court of Appeal's finding of no discrimination. Though it rejected the Court of Appeal's doctrinal analysis, the Supreme Court nonetheless agreed that the Quebec Tribunal had made an unreasonable decision because it based its finding of discrimination on "no evidence."<sup>218</sup> The Court determined that Captain Latif's experiences at the hands of American national security agencies came as the result of a simple mistaken identity or "identification error."<sup>219</sup> In the process, the Court ignored that American law permitted racial profiling in national security. Though it had before it a human rights case involving a Muslim Pakistani pilot who had been labelled a terrorist, the Court did not consider or address the social context and stereotyping that Muslims face in Canada even though intervenors put this issue before it. The Court also diminished the impact of the respondent's conduct, ignoring that mistaken identities are themselves the product of discriminatory profiling.

Like in *Latif*, Saadi's vindication also proved short lived. An Ontario court overturned the Tribunal's finding as unreasonable. The Court rejected the Tribunal's observations about the relationship between food and belonging partly on the basis that Saadi, a Bengali woman, had been taken to task for heating food given to her by a Tunisian co-worker.<sup>220</sup> The Court engaged with the tribunal's decision through *reductio ad absurdum*: "I do not see how the ethnicity and ancestral rights of a Bengali-Canadian Muslim are adversely affected by being prevented from reheating somebody else's Tunisian food."<sup>221</sup> Much like the Supreme Court in *Bombardier*, the reviewing court in *Saadi* filtered out important nuances that had been captured by the adjudicator. He noted, for example, that the complainant had been rebuked for her use of the microwave on at least two occasions—not one as the Court's *reductio* statement indicated—and that she had taken to being selective in the foods that she brought from home.<sup>222</sup> The

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<sup>217</sup> *Bombardier Inc (Bombardier Aerospace Training Center) v Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 1650, [2013] RJQ 1541.

<sup>218</sup> *Quebec v Bombardier SCC*, *supra* note 30 at para 99. For a critique, see Paul Daly, "[Discrimination, Deference and Pluralism: Quebec \(Commission des droits de la personne et des droits de la jeunesse\) v Bombardier Inc. \(Bombardier Aerospace Training Center\)](#), 2015 SCC 39" (24 July 2015), *Paul Daly: Administrative Law Matters* (blog), online: <[www.administrativelawmatters.com/blog/2015/07/24/discrimination-deference-and-pluralism-quebec-commission-des-droits-de-la-personne-et-des-droits-de-la-jeunesse-v-bombardier-inc-bombardier-aerospace-training-center-2015-scc-39/](http://www.administrativelawmatters.com/blog/2015/07/24/discrimination-deference-and-pluralism-quebec-commission-des-droits-de-la-personne-et-des-droits-de-la-jeunesse-v-bombardier-inc-bombardier-aerospace-training-center-2015-scc-39/)>.

<sup>219</sup> *Quebec v Bombardier SCC*, *supra* note 30 at para 13. For an analysis of the Supreme Court's *bombardier* decision, including the Court's silence about the stereotyping of Muslims, see Bahdi, *supra* note 30.

<sup>220</sup> *Audmax Inc v Ontario Human Rights Tribunal*, 2011 ONSC 315 at para 53, 328 DLR (4th) 506 [*Audmax*].

<sup>221</sup> *Ibid* at para 53.

<sup>222</sup> *Ibid* at paras 49–58.

question at issue for the adjudicator was not whether Bengali identity and Tunisian food are sufficiently connected to engage the *Human Rights Code* (“*Code*”).<sup>223</sup> The issue was whether the policy had been arbitrarily applied so as to adversely affect a racialized employee. In the end, the adjudicator based his conclusions on the vagueness and arbitrariness of the policy itself and the unwelcome environment it created for the complainant. He drew the connection between food and the *Code* by observing that “[a] policy permitting the heating of some foods but not others, without adequate clarity about what constitutes acceptable ingredients and without providing a discernable rationale for the rule, creates the conditions for arbitrary or discriminatory enforcement.”<sup>224</sup>

The court reviewing the 2008 Canadian Human Rights Tribunal’s ruling that Tahmourpour had suffered discrimination at the RCMP training depot also determined that the tribunal decision did not merit deference. The Federal Court objected to the human rights adjudicator’s finding that Tahmourpour’s performance at the depot had been compromised by the discrimination that he had faced.<sup>225</sup> The Tribunal had concluded that Tahmourpour’s performance could not have been properly assessed given the harassment to which he was subjected. The Federal Court, however, rejected the conclusion that Tahmourpour’s performance had suffered as a result of the harassment. The Court noted that Tahmourpour did not claim that his performance suffered, though it also pointed to at least one instance where Tahmourpour had made this claim.<sup>226</sup> Nonetheless, the Court determined that the Tribunal’s conclusion that harassment had undermined Tahmourpour’s performance was based on nothing but speculation.<sup>227</sup> In finding the Tribunal’s decision unreasonable, the Court did not consider that Tahmourpour’s assessment of his own performance did not bind the adjudicator. Indeed, she had not relied on it. Instead, she accepted the RCMP’s assessment that Tahmourpour had performed poorly.<sup>228</sup> However, she reached the conclusion that a proper assessment of Tahmourpour’s potential could not be made in the discriminatory environment in which he had been forced to perform. The adjudicator wrote:

[I]n a training environment where derogatory comments about race are condoned and directed at people like Mr. Tahmourpour, where evaluations are inaccurate and improper, and where instructors take pride in being “politically incorrect”, it is difficult for someone like Mr. Tahmourpour to develop and demonstrate his skills in these areas. I find it reasonable to infer that such conditions erode one’s

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<sup>223</sup> *Supra* note 141.

<sup>224</sup> *Audmax*, *supra* note 220 at para 45.

<sup>225</sup> *Tahmourpour FC*, *supra* note 159.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Tahmourpour CHRT*, *supra* note 18 at paras 73–75.

<sup>228</sup> *Tahmourpour FC*, *supra* note 159.

confidence and ability to perform well. Therefore, the Respondent's explanation that Mr. Tahmourpour's performance at Depot was weak is not satisfactory. *Mr. Tahmourpour's performance was more likely than not affected by the discrimination to which he was exposed.*<sup>229</sup>

The Federal Court, however, deemed this inference to be unreasonable.

## 5. Conclusion

Society's limits are also human rights law's limits; social science literature and reports by community organizations conclusively demonstrate that Arabs and Muslims face significant discrimination post-9/11. An examination of 13 legal narratives from four Canadian jurisdictions between 2002 and 2017 reveals that the Canadian human rights system, precisely when it was needed the most, has fallen short of providing access to justice. Most of the Arab or Muslim human rights claimants did not secure the remedy that they had sought from the legal system despite spending several years pursuing their claims. The reasons advanced to deny the complainants the remedies requested proved faulty in at least half the cases. Moreover, some of the cases examined point to the possibility that the human rights system may itself be traumatizing at least some human rights claimants.

Proposals to enhance access to justice have garnered increased policy and popular attention over the last few years as reformers, including several Canadian Chief Justices, have declared in no uncertain terms that Canada's legal system is in crisis. Prescriptions for change often focus on the need for better public education about legal options and processes, different or more efficient proceedings and improved access to lawyers or surrogate advisors. The legal narratives of Arab and Muslim human rights claimants analyzed in this paper suggest that a broader set of barriers to accessing justice need to be considered when examining the barriers faced by Arabs and Muslims who seek redress and vindication from perceived discrimination through human rights law. Collectively, these cases challenge access to justice theories and strategies that emphasize that cost, complexity or delay constitute the main barriers to accessing justice and reinforce the findings of access to justice scholars who argue that institutional trustworthiness may be the main barrier facing racialized communities in Canada. The cases also highlight the need for more research about the incentives and disincentives, including institutional trustworthiness, that might shape individual decisions to use the human rights system, and more research about the system's ability to respond to individual and community harms.

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<sup>229</sup> *Ibid* at para 171 [emphasis added].