

Allegations of Profiling: How Much Disclosure of Investigative Records is Appropriate?

By Roger Rowe

In appropriate instances, 208 cards ought to be disclosed as potential circumstantial evidence of racial profiling. Unfortunately, as the trend of Ontario law is to deny access to the 208 cards and acquit the accused, alternative strategies may have to be found. This paper will attempt to address the following issues:

1. Should individuals be able to obtain disclosure of officers' work product going back over a long period of time?
2. Access to 208 cards
3. When should disclosure be ordered?
4. Recent decisions

Background

208 cards are used by police as part of a strategy called the Toronto Anti Violence Intervention Strategy ("TAVIS") to record information about persons the police consider to be of interest. TAVIS specializes in proactive policing in what it regards as high crime neighbourhoods. The cards include information such as name, address, date of birth, and skin colour.

208 cards are approximately 3" x 5", printed on both sides, commencing with the words "Person Investigated." A 208 card is used to record information about a person stopped by the police and includes information such as name, aliases, date of birth, colour, address, contact location, and time. On the back it has a place for "associates," such as "gangs, motorcycle clubs, drug treatment court."¹

Typically police stop a resident in a particular community and start questioning them under the guise of meeting and greeting the community. They do not stop everyone they see, and they do not write up 208 cards on everyone they stop. On a community level and on an individual level, who gets stopped, and who gets written up are matters of wholly police officer discretion. To the extent that TAVIS officers

¹ *R. v. Davidson*, [2010] O.J. No. 989 [*Davidson*] at 27.

focus their intensified police scrutiny on certain individuals in certain communities, they arguably risk creating a self-fulfilling prophecy in respect of crime statistics, in which crime in less targeted communities goes undetected and unaddressed.

The 208 police stops occur in the context of both pedestrian stops and traffic stops. Police claim that the data they obtain by use of these cards are an invaluable tool in fighting crime – for example, in identifying known criminal associates, the whereabouts of known suspects and disproving false alibis. To many community residents, 208 cards are a form of racial profiling done under the guise of TAVIS whereby certain sectors of the community are targeted for more police scrutiny than others and stopped more frequently on the basis of their race.

Though 208 cards have been used by police for several years, renewed controversy over their use came to light in a series of Toronto Star (“the Star”) articles around February 2010. This series was a follow up to a 2002 Star series on race, policing and crime in Toronto. After obtaining a decision from the Ontario Court of Appeal², authorizing public disclosure of the 208 cards for all police officers in the GTA completed between the period 2003 to 2008, the Star reported finding evidence of racial profiling. The cards were released without identifiers - thus the names of the individual officers and subject individuals they stopped were not disclosed. In a series of newspaper articles, the Toronto Star reported that a review of the data from the over 1.3 million 208 cards obtained, disclosed that black people were about three times more likely than white people to be stopped by police as a result of the 208 stops.³ The Star reported that 41 percent of all contact cards filled out by TAVIS officers involved black people. According to Dr. Scot Wortley, 80 percent of those stopped had no criminal record in the 5 years preceding the 208 stop.⁴

² See *Toronto Police*, infra note 15.

³ Jim Rankin, “Race matters: Blacks Documented by Police at High Rates” *The Toronto Star* (6 February 2010), online: The Star < <http://www.thestar.com/specialsections/raceandcrime/article/761343--race-matters-blacks-documented-by-police-at-high-rate>>.

⁴ Dr. Scot Wortley, *R. v. Buckley* trial transcript – October 13, 2010 at pages 36 and 79.

Police Chief William Blair conceded in a Toronto Star interview that part of the disproportionate number of police stops of black individuals is attributable to racial profiling.⁵ The silence of the public in the face of that admission by Chief Blair has been deafening.

Should individuals be able to obtain disclosure of officers' work product going back over a long period of time?

The answer to this question depends on the context:

- a) The specific information being sought
- b) The time period over which the information is sought
- c) The purpose for which the information is being sought

Racial Profiling

An accused's allegation of racial profiling by police is one context in which the disclosure of an officer's "work product", including 208 cards, may be relevant. It is useful to note that not every criminal charge or arrest will merit a racial profiling defence. For example, where a police officer witnesses a murder being committed by a visible minority, it is unlikely that a racial profiling defence necessitating disclosure of 208 cards would arise in this context. Racial profiling has been defined by the Ontario Court of Appeal as:

Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.⁶

The Court of Appeal went on to explain that for the purposes of proving racial profiling:

A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.⁷

⁵ Jim Rankin, "When good people are swept up with the bad" *The Toronto Star* (6 February 2010), online: The Star <<http://www.thestar.com/news/gta/article/761551--when-good-people-are-swept-up-with-the-bad>>.

⁶ *R. v. Brown*, [2003] O.J. No. 1251 [*Brown*] at 7.

⁷ *Brown*, supra note 6 at 44.

Courts have acknowledged for several years that racial profiling exists and that a detention motivated by racial profiling is a violation of Section 9 of the *Canadian Charter of Rights and Freedoms* (“the Charter”)^{8,9} Racial bias in police decision-making can influence not only the initial actions of the police in making a stop of a person, but also subsequent police actions, including the use of force.

The extent that a police officer has singled out black individuals in the past for the recording of the subject’s race or skin colour on 208 cards can be relevant circumstantial evidence to help prove whether an accused was a victim of racial profiling in an instant case. In *R. v. Khan* (“*Khan*”)¹⁰, Madame Justice Malloy explained:

Evidence that the police officer involved had a history or pattern of only stopping black people at the checkpoint is evidence of prior acts to support an inference of racial motivation...Evidence that the number of people of colour stopped was a grossly disproportionate percentage of the number of people who went through the checkpoint, or grossly disproportionate to the number of white people stopped, could also be capable of supporting an inference of discrimination.¹¹

To the extent 208 cards are considered officers’ work product, in an appropriate instance, they may constitute circumstantial evidence of racial profiling. In order to have a sufficient sample of 208 cards for statistical analysis, the 208 cards to be analyzed would have to cover a time period large enough to enable the drawing of statistically meaningful generalizations about the officers’ past 208 carding practices.

Access to 208 cards: when should they be disclosed?

Access to “208 cards” is governed by the procedures for obtaining third party records. The Supreme Court of Canada has set out the procedure for obtaining third party records in the cases of *R. v. O’Connor*¹² and *R. v. McNeil*¹³. Collectively, the procedure is referred to as the *O’Connor* test. Under the two part *O’Connor* test, the defence is required to establish the following:

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

⁹ See *Brown*, supra note 6; See *Khan*, infra note 10 at 41.

¹⁰ *R. v. Khan*, 2004 CarswellOnt 5233 [*Khan*].

¹¹ *Khan*, supra note 10 at 46.

¹² *R. v. O’Connor*, [1995] 4 S.C.R. 411 [*O’Connor*].

- a) First, that the material sought is likely relevant, in that there is a “reasonable possibility that the information is logically probative to an issue at trial” or to the credibility of witnesses;
- b) Second, that a balancing of the accused’s right to make full answer and defence and any privacy interest in the records sought favours production.

In the context of a racial profiling defence where past 208 cards are sought, the *O’Connor* test requires the defence to establish under the first head of the test, that the requested records are likely relevant to reveal a pattern that the TAVIS officers disproportionately stop members of a particular racial group, that this is logically probative to whether there had been racial profiling in the instant case, and that the requested records assist in challenging the credibility of TAVIS officers as to whether an accused was racially profiled. This is not a heavy onus, but it is a higher test than is imposed in the context of disclosure.¹⁴

In respect of the second head of the *O’Connor* test, defence counsel would have to establish that a balancing of the accused’s right to make full answer and defence (ie make out the racial profiling defence), with the privacy interests related to the 208 cards sought, favours production. Privacy interests might include the right to privacy of those individuals who were the subjects of the stops in the requested 208 cards, as it relates to their identity, address information and the circumstances under which they were carded. There are arguably no privacy interests that militate in favour of refusing the requested data as 208 cards can be edited to remove a person’s name and the database can be coded to remove any other identifying information. The Ontario Court of Appeal in *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*¹⁵ held that the data contained in 208 cards could be coded so as to remove privacy concerns.¹⁶

¹³ *R. v. McNeil*, [2009] 1 S.C.R. 66 [*McNeil*].

¹⁴ *O’Conner*, supra note 12 at 24; *McNeil*, supra note 13 at 29; *Cunningham*, infra note 22 at 25.

¹⁵ *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20 Can Lii [*Toronto Police*].

¹⁶ *Toronto Police*, supra at 12, 13, 23, 34, 35, 45-47.

Recent Decisions: *R. v. Buckley*

The issue of 208 cards and racial profiling came up again recently in the case of *R. v. Buckley* (“*Buckley*”)¹⁷. In *Buckley*, a 22 year old black male was approached at about 10:00 p.m on December 13, 2008, by four TAVIS officers from 31 Police Division in the midst of a TAVIS sweep. Mr. Buckley had been standing outside of his mother’s apartment building in the Jane Street and Sheppard Avenue West area waiting to be picked up by a friend to go out for dinner. The officers testified that the area where the encounter occurred was a known drug and high crime area. As the officers in the TAVIS van drove towards Mr. Buckley, one of them claimed they smelled burned marijuana emanating from Mr. Buckley. Two of the officers exited the police van and approached him. During their investigative stop and search, a violent altercation ensued between the four police and Mr. Buckley, as a result of which he was charged with possession of marijuana under, assault resist arrest and disarm police officer. Though the police claimed the grounds for the stop was the smell of burning marijuana, Mr. Buckley was adamant that he had not been smoking any marijuana at the time of the police stop.

Defence counsel filed an application alleging that the stop was without reasonable and probable grounds and that Mr. Buckley’s rights under sections 7 (security of the person), 8 (unreasonable search and seizure), 9 (arbitrary detention), 10(a) (right to be informed promptly of the reason for arrest), and 12 (cruel and unusual treatment) of the *Charter* had been violated. Defence counsel asked that the evidence of marijuana be excluded under section 24(2) of the *Charter*.

During the blended voir dire, three of the four arresting officers disclosed under cross examination that they routinely used 208 cards during the course of their TAVIS duties in the Jane Finch community. They were unable to state what percentage of those stopped were black, or articulate the basis on which they exercised their discretion to make a 208 stop. One of the arresting officers acknowledged that he may have subjected Mr. Buckley to previous stops.

¹⁷ *R. v. Buckley*, 2010 CarswellOnt 10712 [*Buckley*].

Third Party Records Application/Expert Evidence

Defence counsel then made a mid-trial third party records application for disclosure of the 208 cards (about 600 cards in total) of the arresting officers for the period June to December 2008 and the corresponding officers' notes for the same time period. This time period was chosen as one large enough to draw statistically meaningful generalizations about the officers' past 208 carding practices. Defence counsel adduced expert evidence from Dr. Scot Wortley, a criminologist and expert in police racial profiling in police investigations, on the likely relevance of the 208 cards for the time period sought, to the issue of whether there was racial profiling in the instant case, and with regard to what methodology he would employ in the event the court released the officer's 208 cards for his review and analysis. Neither the Crown nor counsel for the police called any expert evidence.

Methods of Analysis

One methodology for analyzing data for evidence of racial profiling is adjusted census benchmarking. In respect of 208 card data, this would entail collating of the data, including address and skin colour, from the 208 cards, and comparing the racial distributions revealed in the cards to a benchmark using official 2006 census data. The benchmark would be adjusted to control for non-resident stops and traffic stops and focus on police stops of pedestrian residents of the community, as Mr. Buckley's police stop occurred in the context of a TAVIS pedestrian stop and Mr. Buckley was a resident of the community where the stop occurred. Adjusted census benchmarking has been used extensively in the United States and the U.K. as a method of analyzing data to establish whether or not there has been racial profiling in several studies that have been subjected to extensive peer review.

Another methodology for the analysis of racial profiling is observational benchmarking. This entails observing and documenting all of the actual police stops at a specific time and place. It provides an exact documentation of who was stopped and the circumstances of the stop at a particular time and place. There are strengths and weaknesses associated with both of the above approaches. On the one hand, one challenge of adjusted census benchmarking is to identify an accurate statistical comparator. On the other

hand, observational benchmarking tends to be very expensive and impractical and it is difficult to find a reliable benchmark.

In respect of both methodologies, there is always a danger of confounding factors such as the fact that the apparent overrepresentation in a racial distribution may be caused by factors unknown or unforeseen, other than racial profiling. There is also the danger when conducting a statistical analysis that correlations will be mistaken for causation.

In the *Buckley* case, Dr. Wortley proposed the methodology of adjusted census benchmarking to analyze the 208 card data. In his affidavit, sworn April 29, 2010, Dr. Wortley provided the following explanation:

“The purpose of the analysis will be to compare the racial distribution of contact cards completed by the officers in question to: 1) the racial distribution of contact cards collected by the entire Toronto Police Service between 2003 and 2008; 2) the racial distribution of contact cards collected by the TPS in specific patrol areas; 3) the racial distribution of contact cards completed by TAVIS officers; and 4) the racial distribution of contact cards completed by TAVIS officers in specific patrol areas. As part of the contemplated comparative analysis, if this Honourable Court granted the relief requested on this motion, it would be my intention to compare the data from the individual officers involved in this case against the contact card dataset which is accessible and has already been the subject of disclosure to the Toronto Star.

I will use data from the 2006 Census to compare the representation of young black males in the contact card data with their representation in the population. Census estimates will be drawn from the City of Toronto as well as specific patrol areas and postal codes. The potential methodological strengths and weaknesses of this “adjusted census benchmarking” strategy will be discussed. I will also discuss the methodological strengths and limitations of other “observational benchmarking” techniques that might be used to further test for the possibility of racial profiling.

In addition to examining the representation of various racial groups in the contact card data, analytical scrutiny would be directed to the reasons given for stopping a civilian and filling out a contact card and what, if any, patterns are discernible in these reasons as they relate to the racial backgrounds of the subjects. This information could provide further insight into the phenomena of racial profiling.

Any conclusions drawn about the issue of racial profiling will be based on an analysis of: 1) the magnitude of the difference between black representation in the contact card data and black representation in the community; 2) racial differences in the reasons for stopping civilians and filling out contact cards; and 3) methodological challenges that may limit one’s ability to draw conclusions about racial profiling from the available

data. I will also put the findings from the contact card analysis into the context of other research findings pertaining to racial bias in policing.¹⁸

This was the sort of analysis suggested by previous case law.¹⁹ The Crown, counsel for Chief William Blair and counsel for the four arresting officers vigorously opposed Mr. Buckley's application alleging the following grounds:

- a) the application was nothing more than a fishing expedition;
- b) there was no likely relevance between the 208 records sought and the issue of whether Mr. Buckley was a victim of racial profiling in the instant case;
- c) adjusted census benchmarking as a methodology, was too unreliable to be scientifically valid;
- d) no valid statistical comparator was identified.

In dismissing the third party records application, the court in *Buckley* ruled that there was no likely relevance between the 208 cards and the issue of whether there was racial profiling by the arresting officers in the instant case. The court held:

It is clear that racial profiling exists. If it occurs in a particular case, it can lead to Charter remedies. While it is accepted that racial profiling occurs, it will rarely be shown by direct evidence, the defence must normally rely on circumstantial evidence to support its claim. Statistical information could in some cases tend to show racial profiling had occurred. On this application, I have not been persuaded that the Applicant has met the "likely relevance" test because I have not been given any real information as to how the data could be used in a meaningful way to assist with the Defense position that racial profiling has existed in this case....

While I have found that the Applicant has not met the "likely relevance threshold" generally, given the specific allegation with respect to stops by Constable Cheechoo, I am prepared to find that the test has been met for those specific allegations. Evidence that the Officer had stopped Mr. Buckley on other occasions, depending on the circumstances of those stops, could lend support to an agreement [sic] that Mr. Buckley had been "racially profiled". I have reviewed the 208 cards for June and July 2008. My review of the 208 cards prepared by Police Constable Cheechoo does not show any stops or recording of data from Mr. Buckley. Moving to the second or balancing phase, it would be inappropriate to release the 208 cards. The fact that no 208 card exists does not mean Mr. Buckley was not stopped, as Constable Cheechoo testified cards are not always filled out.²⁰

¹⁸ Dr. Scot Wortley, Affidavit sworn April 29, 2010 at paragraphs 9-12.

¹⁹ See *Khan*, supra note 10 at 56; See *Cunningham*, infra note 22 at 28-30 and 32-36.

²⁰ *Buckley*, supra note 17 at 35 and 36.

Post- script on *Buckley*

The court in *Buckley* ultimately acquitted the accused on all charges based on the finding that there were serious inconsistencies in the police officers' testimony. Further, the court found Mr. Buckley's section 10(a) *Charter* right had been infringed as there was a failure to promptly inform him of the reasons for his arrest. The court found that citizens are not obliged to submit to an arrest if they do not know the reasons for detention. The court further found that the right to be promptly informed of the reason for detention under section 10(a) of the *Charter* included persons detained for investigative purposes. The court held that as Mr. Buckley was not advised of the reason for his arrest, he was entitled to resist the actions of the police. The court, citing *R. v. Pelletier*²¹ said it was not satisfied that Mr. Buckley was ever arrested by the officers, who thus could not be said to have been acting in the course of their duties.

The Implications of *Buckley* for future access to 208 cards

If the *Buckley* decision is any indication, the future of access to 208 cards as circumstantial evidence of racial profiling is bleak. The police practice of 208 carding is likely to continue unabated with impunity. The threshold for the likely relevance part of the *O'Connor* test in respect of 208 cards has now been raised so high that it will be virtually impossible to establish likely relevance. The court imposed as a prerequisite for finding likely relevance that the accused applicant demonstrate that the same arresting officer(s) in the instant case, previously subjected the accused to a 208 stop(s). This is a requirement never before seen in Canadian law. As the 208 cards are discretionary and the person stopped is never given a copy, an accused will likely never be able to meet this prerequisite unless the arresting officer admits to previous carding of the individual. The court's reasoning creates the conundrum that an accused seeking access to 208 cards as circumstantial evidence to support a current allegation of racial profiling, must first prove that he has been previously carded by the same offending officer, a feat unlikely to be accomplished, unless the said officer admits to previous carding of the same accused.

²¹ *R. v. Pelletier*, 1999 O.J. 3738 at 3.

The *Buckley* decision is troubling on another level. The court, in reaffirming that an accused may resist an unlawful stop or arrest, puts individuals or communities who are targeted by TAVIS 208 stops in potential life threatening confrontations with armed police officers. Mr. Buckley sustained serious injuries as a result of his encounter with TAVIS officers, who subsequently denied him medical attention. He was detained for 12 days until he could get bail. As the majority of those subjected to TAVIS stops are law-abiding citizens who are not subjected to any arrest, and occur in communities regarded by TAVIS as alleged crime hot spots, this risk of life threatening confrontation is disproportionately borne by those innocent law abiding residents of TAVIS targeted areas who are being carded. This may inevitably fatally undermine respect for law enforcement and the administration of justice.

The *Buckley* decision is troubling on yet another level for those of us who seek to end the police practice of racial profiling. The court's indication that the occurrence of racial profiling in a particular case can lead to *Charter* remedies is of no assistance to the majority of persons subjected to 208 stops, who have no criminal record and are not subjected to an arrest as a result of the 208 stop. For these cases, the *Charter* offers no remedy that can be actioned through the courts.

The case of *R. v. Cunningham and Matthews* ("*Cunningham*")²² which was cited to the court in *Buckley* as authority for calling expert evidence in support of a third party records application for 208 cards, was apparently ignored by the court. In *Cunningham*, the applicants were two individuals who were stopped in the "Malvern" area while they were driving. They sought the 208 cards of the arresting officers for the five shifts preceding the arrest of the accused. Neither applicant was a resident of the "Malvern area" or from census tracts relating to the area of the stop. As a result, the court in *Cunningham* expressed concern about whether comparisons to 2006 Census data for the "Malvern area" would be probative. The court lamented the fact that no expert was adduced to assist the court in determining what the appropriate comparators would be and whether five shifts was a representative number of shifts for statistical analysis purposes. The court appeared to endorse adjusted census benchmarking as a way of addressing this

²² *R. v. Cunningham and Matthews* (4 March 2009), Toronto, Court File # C-50414 (Ontario Superior Court of Justice) [*Cunningham*].

concern as long as an appropriate statistical comparator could be found with the assistance of expert evidence. The controlling of the statistical sample of 208 cards for non-residents of the community, seen as desirable in *Cunningham*, was criticized in *Buckley* as unreliable and creating an artificial and inaccurate benchmark.²³ This confusion in the law may need to be resolved by a higher court. Ultimately, the court in *Cunningham*, as in *Buckley*, denied the accuseds access to the 208 cards but acquitted them on all of the charges.

In *Khan*, the applicant was arrested for possession of cocaine for the purposes of trafficking. At the time of his arrest, the applicant was driving a Mercedes Benz in which drugs were found. The applicant alleged that the police did not have grounds to stop his vehicle and that he was targeted by the police officer involved because he was a young black man driving an expensive car. In an attempt to prove racial profiling, the defence sought records relating to the involved officer's highway traffic arrests and citations. After holding that prior conduct can be used to establish racial profiling, Justice Malloy refused the applicant's request because the records sought would not support drawing a statistical inference. The court though dismissing the application, ultimately acquitted the accused.

In 2004, in the case of *R. v. Ferdinand*²⁴, Justice LaForme (then a Superior Court Justice), described the manner in which officers of the Community Response Unit (a program similar to TAVIS) perform 208 stops and expressed grave reservations about the potential that 208 stops can be used as a tool for racial profiling. Justice LaForme explained:

Although I do not dispute that 208 cards might well be a useful and proper investigative tool for the police; in my view the manner in which the police currently use them makes them somewhat menacing. These cards are currently used by the police to track the movements - in some cases on a daily basis - of persons who must include innocent law-abiding residents.

One reasonable - although very unfortunate - impression that one could draw from the information sought on these 208 cards - along with the current manner in which they are being used - is that they could be a tool utilized for racial profiling.

While I am not at all deciding that this is the case - and it is not necessary for me to do so - I make my observations only to express a profound note of caution. If the manner in

²³ *Buckley*, supra note 17 at 27.

²⁴ *R. v. Ferdinand*, [2004] O.J. No. 3209 [*Ferdinand*] at 11-16.

which these 208 cards are currently being used continues, there will be serious consequences ahead. **They are but another means whereby subjective assessments based upon race - or some other irrelevant factor can be used to mask discriminatory conduct. If this is someday made out - this court for one will not tolerate it.**²⁵ [Emphasis added]

Justice LaForme's words are as troubling today as is the continued practice of racial profiling by police in Ontario.

On December 13, 2008, several residents of the Jane Finch community attended a demonstration at 31 Police Division protesting racial profiling by police under the guise of TAVIS. They presented a petition addressed to the Superintendent of the Division. The following is an excerpt of that petition:

We are committed to working with Toronto Police in order to create a safe Jane Finch community, however the actions of the police over the past few months have created deep wounds and built a culture of fear amongst our residents.

The attitude and actions of officers including TAVIS towards our community have strained the relationship. Mothers are now scared to let their children out of the house for fear of violence and harassment.

Our youth are currently more scared of the police violence than they are of 'street' related issues. The over policing of this community has led to increased levels of targeting, harassment, racial profiling and created a fear of persecution amongst residents. The 'serve and protect' credo of the police is not felt in our community.

Alarming is the brazen approach of individual officers. Witnesses have accounted for what they felt was questionable conduct and or tactics.

Citizens have described seeing or hearing abusive language, threatening behaviour, the excessive use of physical force, unfounded allegations, coercion and torture.

We believe that the policies and practices of the police over the past few years have led people to feel captive in their places of residence. In order for the police and the community to work together, we need to resolve this ongoing issue in a fair and expeditious manner.

The community expresses a strong desire to work with the police, however, the police being in a position of power to the community, must take the lead. We advocate for a police service, not a police force.²⁶

²⁵ *Ferdinand*, supra note 24 at 18-20.

²⁶ "Jane and Finch Residents Allege Police Brutality in 31 Division" *City News (Toronto)* (10 December 2008), online: Citytv <<http://www.citytv.com/toronto/citynews/news/local/article/7166--jane-and-finch-residents-allege-police-brutality-in-31-division>>.

In a landmark report entitled *Paying the Price: the Human Cost of Racial Profiling* (“the OHRC Report”)²⁷, the Ontario Human Rights Commission discussed several reports and task forces in Ontario dating back to the 1970’s that have documented the existence of racial profiling by police²⁸ and why racial profiling does not work.²⁹ The OHRC report outlines how racial profiling creates mistrust of our institutions and alienation and a diminished sense of citizenship amongst those subjected to racial profiling.

Conclusion

Given the reluctance of courts to disclose the 208 cards, defence counsel may have to resort to other strategies. The following are some Ontario cases where the court acquitted accuseds because of unlawful arrests or conduct by TAVIS officers: *R. v. Osbourne*³⁰, *R. v. Davidson*³¹ and *R. v. Reeves*³².

Regrettably, if the current state of the law is any indication, innocent law-abiding citizens who find themselves subjected to 208 stops in which they are not subject to arrest, may have to adopt self-defense remedies against the police. That is probably not the kind of society that most reasonable people want to have.

The best way to end the controversy is to simply end the use of 208 cards altogether, effective immediately, to the extent that they constitute a form of racial profiling. If police do not have reasonable and probable grounds for an investigative stop, detention or arrest, they should leave the citizen alone.

²⁷ The Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (21 October 2003), online: OHRC < http://www.ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN > [OHRC Report].

²⁸ OHRC Report, supra note 27 at pages 9-10.

²⁹ OHRC Report, supra note 27 at pages 15-16.

³⁰ *R. v. Osbourne*, 2008 CarswellOnt 1618 at 19.

³¹ *Davidson*, supra note 1.

³² *R. v. Reeves*, 2009 CarswellOnt 1363.