ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

DAMIAN BUCKLEY

****

C O U R T P R O C E E D I N G S

BEFORE THE HONOURABLE MR. JUSTICE P. TAYLOR
on October 14, 2010 at TORONTO, Ontario

****

APPEARANCES:

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ONTARIO COURT OF JUSTICE

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MS. KIM: Your Honour, with respect to the Buckley matter, I wonder if Mr. Buckley will be attending.

MR. ROWE: Yes. I expect him to attend. He is just not here yet. I expect him to attend.

THE COURT: Pardon?

MR. ROWE: I expect Mr. Buckley to attend. If he is not here by 10:00, I propose we just proceed and he will join us in progress, because the designation has been filed.

THE COURT: My preference is that he be here. You have not seen him this morning?

MR. ROWE: I have not seen him yet this morning, but I fully expect him to be here.

MS. KIM: And prior to the commencement, Your Honour, I would like to make a couple of comments on the record before we proceed. Mr. Rowe is aware and I will advise other counsels of the situation that I am in at this present time.

THE COURT: When Mr. Buckley gets here, we will deal with it.

MS. KIM: Yes.

MR. ROWE: May I step outside and see if I can locate him, Your Honour?

THE COURT: Certainly.

OTHER MATTERS DEALT WITH AT THIS TIME

THE COURT: Mr. Rowe, any sign of your client?
MR. ROWE: Yes Your Honour. I checked with my office and I was informed that Mr. Buckley contacted my office at 9:30 and advised that he is on the way to The Court and that he is going to be a little bit late. I had no way of speaking with him before now. I did not know.
THE COURT: Do you know how he is traveling here? Is it by public transit?
MR. ROWE: I believe he is coming by public transit.
THE COURT: So he has to come up Jane to Finch and catch the Finch bus.
MR. ROWE: Yes, Your Honour.
THE COURT: We will wait a few minutes in Court. If is not here by ten-after then we will see where we go from there.
MR. ROWE: Thank you, Your Honour.

OTHER MATTERS DEALT WITH AT THIS TIME

THE COURT: Mr. Rowe, would you go out and take one more look for your client?
MR. ROWE: Yes, Your Honour. Thank you.
CLERK OF THE COURT: Should I page, Your Honour?
THE COURT: Again please.
CLERK OF THE COURT: Damian Buckley report to 308. Damian Buckley report to 308.

MR. ROWE: Good morning Your Honour. I located Mr. Buckley. There were two issues. One was a problem with the buses and another is he is in a counselling program. The last day of which is today. And there was some confusion of whether he should be here or there. I think that may help explain why he is late. So I apologize on his behalf.

THE COURT: All right. Ms. Kim?

MS. KIM: Yes Your Honour. I have discovered later yesterday that I have a conflict with this particular case. I spoken to Mr. Rowe and he indicates that he has no issue with me continuing as a Crown for the third-party application only. The resumption of the trial; we will have to get a different Crown assigned to it. So I just wanted to let Your Honour know, just in terms of scheduling issues.

THE COURT: And I gather you have no concerns, Mr. Rowe, because Ms. Kim is taking no active part in the third-party application.

MR. ROWE: Correct Your Honour.

THE COURT: Yes?

MR. GOLD: Yes Your Honour. Before we resume, there are two matters on the agenda. One by me and one by my friend. As a result of communications last evening, I think I need to clarify something. Let me put it this way. You will recall that in cross-examination of Doctor Wortley, one of the factual underpinnings that

he was taking was that all four officers had been TAVIS officers for the period of the six months. And obviously in cross-examination, you questioned the factual underpinnings to see if there is evidence to support. My friend seemed to have been under the impression that I have to show they were not. So I think in the interest of all concerned, what I am going to give Your Honour is the actual transcript references. And then, of course, it will be for Your Honour to decide if that issue is significant to what the facts are. So regarding Officer Grant's evidence, at page six, you will see that he indicates that the evening in question, he was part of Project Isosceles. And on page seven, he confirms that Isosceles was fairly recent and Project Isosceles is a matter of public record, and I gave Your Honour the dates in cross-examination. And on page seven, he is asked more about Project Isosceles and it indicates that this was a smaller or specific component of the TAVIS strategy. There is nothing asked in cross-examination about how long he had been any kind of TAVIS officer. Instead, on page thirty-three, where Mr. Rowe starts the examination, he focuses on December 13, that the officer was in the vicinity of the relevant address as part of a TAVIS initiative. And the officer answers, "TAVIS initiative project. Right. Isosceles." There is nothing

asked of him, that we could find, as to how long he had been. These references, as Your Honour knows, are all in our application record on behalf of the third-party record holder. So I was reading that from tab two, which is that transcript. We go to tab three at page forty-six. And this is in cross-examination. Officer Cheechoo is asked, "And how long have you been doing this TAVIS initiative?" And the officer gives a long answer saying that, "Since the spring of 2007. I am going to say April. I started in the community response unit in April 2007." So there, the question is clearly asked and answered.

MR. ROWE: Sorry Mr. Gold. What page is it?

MR. GOLD: Pages forty-six and forty-seven.

MR. ROWE: Thank you.

MR. GOLD: The bottom of page forty-six, and then it goes over to the top of forty-seven. I will just wait a moment, Your Honour.

THE COURT: Cheechoo.

MR. ROWE: Thank you.

MR. GOLD: Thank you, Your Honour. The bottom of forty-six; top of forty-seven.

MR. ROWE: Yes. Thank you.

MR. GOLD: No problem. And then we go to Officer Douglas Cook, which is page sixty at the same tab. And in-chief, again, the Crown, for obvious reasons, asked him about that evening and he talks of being part of Project

Isosceles. Remember, Your Honour, the Crown has no idea that it would matter how long they are TAVIS officers. This is my friend's application. So that is Officer Douglas Cook. And then Officer Kennedy is page 109. And then again, in-chief, it is very clear that he is working as part of Project Isosceles. And again, there is no reference to how long. So my position simply was to the expert was, "Well you are making this factual assumption. And if it is not true, you would agree with me that impacts" And he stated and the obvious answer, of course. But it is for my friends to show any factual underpinnings and those are the transcript references and it is for Your Honour to see. I do not have to introduce evidence that they were not TAVIS officers, because I am not leading the evidence. My friends are. So in any event, just to clarify any misunderstandings, I am not saying that there was affirmative evidence they were not. That is the evidentiary foundation that was being explored with the expert. And it will be for argument as to what it means, if anything. Thank you, Your Honour.

THE COURT: Yes?

SUBMISSIONS BY MR. MATHAI:

MR. MATHAI: Thank you, Your Honour. And I thank my friend for that clarification. The

reason this came up, Your Honour, is you recall during the cross-examination yesterday, Mr. Gold did put to the witness whether or not--I will take the words from my notes and I will be honest; my notes could be wrong. But the words from the notes were three out of the four officers were not TAVIS members, prior to November. They got brought in as part of Project Isosceles. And when I heard that, I thought I do not remember that being in the transcript. Maybe I am missing something, because all of the officers under my recollection had indicated, under examination, that they were TAVIS officers during the relevant time. And so, I had asked my friend, Ms. Arsenault, whether or not there were some transcript references that reflect this fact. It was possible I just missed something. And what the evidence shows is that, unfortunately, I did miss something. And maybe I should have objected at the time. What the evidence shows and the way the evidence is portrayed, in the transcripts, Your Honour, is Project Isosceles is just a smaller component of TAVIS. All of the officers admit, in December, that they were members of TAVIS. One officer, Officer Cheechoo, admits to being a member in the Community Response Unit, i.e. TAVIS, as early as April 2007. I believe it was April 2007. And the transcript reference for that is page

forty-seven of Mr. Cheechoo's evidence. That is January 13th, 2010. So I think the evidence on the record establishes that these officers were TAVIS members, clearly at the time in question. But there is evidence that at least one of the officers was a TAVIS member for the entire period of time in which we were seeking the records. Meaning from June 1st, 2008 to December 31st, 2008. And I do not mean to suggest that my friend now has to least evidence. I just thought, out of fairness, we should clarify on the record, because it may have been left with the impression that there was actual affirmative evidence that established that these officers were not TAVIS members during the entire time that we requested the documents; meaning from June 1st to December 31st. And my friend has clarified that and I appreciate it.

THE COURT: And that is a matter that I will have to deal with. The matching of the evidentiary record, the transcript, and various assertions in your factum are a variance, which is causing me some concern in determining exactly what the defence position is.

MR. MATHAI: Okay.

THE COURT: But I am sure you will address those issues in the course of your oral argument.

MR. MATHAI: I will, Your Honour. And if, at any point, there is some understanding or clarification required with respect to the factum or any assertion of evidence that we put in the factum, then please ask me to clarify, and I will be happy to take you to the transcript and the relevant provision.

THE COURT: Well as I understand it from your factum, there is a positive assertion that Constable Cheechoo had previously stopped Mr. Buckley and had a 208 card filled out.

MR. MATHAI: And the evidence, and it was done through Mr. Rowe's cross-examination of Mr. Cheechoo, where he puts to Officer Cheechoo that he had done a TAVIS stop on Officer Cheechoo. And if you would like that reference from the transcript, I can provide that to you, Your Honour. The reference is at paragraph fourteen of the factum, although I think you know that. It is Cheechoo's evidence of January 13th, 2002 at page thirty-four. And if you would like, Your Honour, at this point, I can just read it to you. This is the cross-examination of Officer Cheechoo by Mr. Rowe. I am not sure if you have the transcript reference. Do you have the transcripts themselves?

THE COURT: The transcript reference in your factum says pages eight and nine.

MR. MATHAI: That is right. And that is a typographical error. I apologize for that.
THE COURT: And it is?
MR. MATHAI: And the application record. I am just checking to make sure that it is accurate in the application record.
THE COURT: And by the way, the reference in the factum is, in fact, Mr. Buckley's anticipated evidence.
MR. MATHAI: That is right. And that is the way the question was asked.
THE COURT: Is that Constable Cheechoo has, on prior occasions, stopped him to obtain 208 card information.
MR. MATHAI: That is right. And if I could read you from it. It is tab seven, Your Honour, of our application record, which has Mr. Cheechoo's evidence. Page thirty-four of the evidence and page two hundred and two of the application record. And you will see one third way down, a question from Mr. Rowe in cross-examination. "Well I expect that we will hear evidence that this was not the first time that you had encountered Mr. Buckley. Do you agree or disagree?" Answer: "I do not recall. I have been around for ten years. I have bumped into him in the past. I do not remember everybody that I had dealings with." Sorry. "I may have bumped into him." I read that incorrectly. "I may have bumped into him in the past. I do not

remember everybody that I had dealings with." Question: "I expect that we will hear evidence that around July 2008, that you had done one of your TAVIS stops on Mr. Buckley at Jane and Wilson." "That is very possible."

MR. GOLD: Well you have got to read the whole thing, with respect.

THE COURT: Why I am perplexed. First of all, there is no admission in the part of Cheechoo that that happened. It is put to him, "We anticipate that there will be some evidence. What do you say?" He says, "I do not recall." In the factum, it asserts, "Buckley's anticipated evidence is that Cheechoo has, on prior occasions, stopped him to obtain 208 card information." Is that not the defence position?

MR. MATHAI: That is the defence's position. Maybe Mr. Rowe can explain.

THE COURT: As I understand, the time in the application, the defence position is that they had no idea of the existence of 208 cards prior to the trial. The factum, at least superficially, suggests not only an awareness of the 208 cards, but a positive indication that Mr. Buckley had been racially profiled by at least Constable Cheechoo on other occasions.

MR. MATHAI: Maybe my friend can--

MR. ROWE: I can speak to that, Your Honour. First of all, at page 202 of the application record, there is an excerpt of the transcript

of Cheechoo's evidence at subparagraph fifteen or line fifteen, where I put to Officer Cheechoo, "I expect with your evidence that in July of 2008, you had done one of your TAVIS stops on Mr. Buckley." And he answers, "That is very possible." So it is not a denial or disagreement. He says it is very possible.

MR. GOLD: I am sorry. Where is my friend reading from?

MR. ROWE: Sorry. It is page thirty-four of the transcript of Cheechoo's evidence, but it is page 202 of our application record.

MR. GOLD: Yes. I am sorry. I see it now. I was looking at the rest of the relevant passage.

MR. ROWE: Yes. So Your Honour, to answer the concern, I was aware of TAVIS. I was not aware of 208s. I asked my client as early as the time that we did the--

THE COURT: Unless he is getting independent legal advice, communications between you and he perhaps ought not to be repeated in open Court.

MR. ROWE: Fair enough, Your Honour.

THE COURT: But on the surface of it, your assertion in your factum says he is stopped and he is asked for 208 information. And your position to me was, "I have no idea about 208s prior to the trial." That is the reason the timing in the application has occurred in the way it has.

MR. ROWE: And that is right, Your Honour. I see that there is an apparent discrepancy between the factum and what I indicated to you, but I stand by what I indicated to you. I was aware of TAVIS. I was not aware of the 208s. In addition, the *Cunningham Matthews* case, I was not made aware of until around March, which is a few months after the *voir dire* had occurred, where the issue of 208s and the need to have expert evidence was--

THE COURT: I am not going to conduct an imposition. You said you did not know about 208s. I accepted it face value.

MR. ROWE: But I want to be clear that I knew about TAVIS.

MR. MATHAI: Your Honour, while I was not counsel at the time, I think it is important to remember how the events unfolded. The first mention of 208s came on the first day of trial, which Officer Grant, in cross-examination by Mr. Rowe, goes over a note in Officer Grant that says, "Stopped individual 208."

THE COURT: The page where it is, I refer you to page fifty-three. "What are 208 cards?"

MR. MATHAI: That is right. So it came up during that examination. That is when it first came up. And while I was not counsel at that time, I think it is important to put it in context of where the evolution of the evidence came from.

THE COURT: That is fair enough.
MR. MATHAI: Thank you.
THE COURT: What I am trying to do is focus, because if you look at the initial application, there is no mention of racial profiling. It appears to be on the surface of it, a reasonable grounds case. And that is the initial notice of application of constitutional question. And the grounds seem to shift. And I am trying to find out, with some degree of precision, the defence position, which will assist me in determining relevance and other issues. For example, while we are on the issues of concerns that I have, you will see at page one of the initial notice of application.
MR. ROWE: Your Honour, I do not have my notice of application with me. Wait it is here. So we do have it. It is at tab one. Yes, Your Honour. We pulled that up. Are you referring to the notice of application, which is found at tab one of our application record, or are you referring to another notice of application?
THE COURT: Let me check, because I am working from it. I am referring to the very original application.
MR. ROWE: Yes I have it, Your Honour.
THE COURT: Okay. Paragraph two. "The police refused to do this and one of the officers immediately searched the applicant's pocket and pulled out a bag and accused the accused of

possessing marijuana." Page four of your applicant's reply factum.

MR. ROWE: Yes, Your Honour.

THE COURT: "P.C. Grant then put her hands inside Mr. Buckley's coat pocket and pulled out a baggie and accused Mr. Buckley of being in possession of marijuana."

MR. ROWE: And with respect to the original application in paragraph two, the last couple lines refer to that. "He refused to do this and one of the officers immediately searched the applicant's pocket and pulled out the bag of the accused, the applicant possessing marijuana."

THE COURT: Okay. January 13. Examination in-chief of Constable Melwin Gonsalves. Page 165 of the transcript.

MR. ROWE: Right, Your Honour.

THE COURT: "Do you recall him throwing you're a marijuana joint?" Answer: "Throwing a marijuana joint to me?" "Yes." "No, Sir." "Okay." "It would have been in my books." "Sure." "I do not recall." "Okay. You can agree or disagree." There will be evidence that, in fact, Mr. Buckley, during the time of the search took out his marijuana spliff and threw it in the direction of yourself and Cheechoo, saying: is that what you are looking for?

MR. ROWE: In the station, Your Honour. Not at the site of the occurrence. This is what

transpired at the station. You recall that Officer Gonsalves indicated that there were two searches done; one at the sight and one at the station that he was paraded. And I was anticipating to clarify all of that and calling Mr. Buckley upon the resumption of the trial.

THE COURT: All right. Thank you. Go ahead, Mr. Mathai.

MR. MATHAI: Thank you. In terms of housekeeping, there is one other issue that I sought to address with Your Honour. And what it is is a slideshow presentation that I had proposed and referred to in my argument. It was done by Professor Scot Wortley for CERIS. And CERIS is the Centre for Excellence and Immigration Safety. And it was not provided to my friends and I provided it to them this morning. And I understand what they have is a clearly understandable objection to me referring to this in argument because they did not have it before. And to be fair, I did not have it before. It is not listed on Doctor Wortley's resume, but I have confirmed that this is a slideshow presentation that he has provided. But I found it last night, during my own research in preparations for the oral argument. I thought it might be helpful because it is an amalgamation of many of the slides that my friends already have. There are some addition slides that get added to it. It is

like any professor or lawyer, for that matter, who does presentations a lot and we recycle our work. And that is what happened here. But he has added a few slides that deal with the specific critiques that my friend, Mr. Gold, had raised with Mr. Wortley, with respect to the Melcher critique. None of it adds, what I would say is new evidence with respect--

MR. GOLD: It is all--

MR. MATHAI: If I could finish my submission.

THE COURT: Let counsel finish.

MR. MATHAI: It does not add new information. In fact, it really buttresses what Mr. Rowe elicited from Professor Wortley in his re-examination. If I could just hand it up. And I flagged the relevant pages.

THE COURT: I am not going to read it. You made reference to it. I will have to hear from the other side.

MR. MATHAI: That is fair.

THE COURT: But again, go ahead and finish what you wanted to say.

MR. MATHAI: My submission, Your Honour, is that I should be allowed to refer to it during my closing submissions on the argument. And it will go to weight for the fact that Mr. Gold has not been able to cross-examine on these particular slides. Although, I would say, as I said earlier, much of the evidence was already provided in the re-examination. So I am not

sure that it adds a lot, other than putting into a nice presentation for Your Honour, and a little bit easier to follow. That will be my submission on it.

THE COURT: What do you see is the purpose of the rules and the preparations?

MR. MATHAI: I understand Your Honour. That is why I said I perfectly understand my friend's objection. And if Your Honour does not feel it will be of any assistance or that there are other procedural or fairness issues that are at stake that should prohibit the use of this, then that is fine. I can continue and just rely on the evidence as provided by Mr. Wortley in re-examination. I am perfectly content to doing that. I just thought it might be of some assistance to The Court. But if it is not, I will happily withdraw it and continue on with my submissions.

THE COURT: I think giving your concession that you will happily withdraw it; that is perhaps preferable. The fundamental rule of our system is to listen to the other side, who, at this stage, and we will come back to what this stage means. To say I found something else that I would like to rely on is simply going to protract the proceedings. And I say at this stage, the trail is approaching several management problems. This application should have been brought pre-trial. I do not think

anybody would quarrel. It was not. And the reasons for that have been explained. But it is brought after the Crown's case is closed. Assuming for the sake of argument that everything cascades down the way the defence wants it to cascade, the real fundamental problems is about how the trial continues. And that is just leaving aside the fact that I last heard evidence on this nine months ago. And whatever happens, I will have to hear evidence, perhaps for another few months. So let us move it along as quickly as we can.

MR. MATHAI: I understand, Your Honour. Thank you. May I proceed, Your Honour?

THE COURT: Yes.

MR. MATHAI: Thank you. I had begun yesterday, Your Honour, by explaining that Mr. Gold is really trying to elevate the test passed what the likely relevant stage of the analysis in the *O'Connor* application, or the reliance/necessity of the *Mohan* qualifying test. He is trying to raise it to this point where this type of adjusted benchmarking census data analysis has to be perfect. And unless it is perfect, it cannot be likely relevant. And with respect, that is not the test. And you will recall from yesterday, before we ended the day, I was just about to get into the facts that are anchored in this case that gives rise to questions about whether or not racial

① RAISING TEST TOO HIGH

profiling has happened in the instant case and whether or not it has happened in the past. Because I think the key issue that arises in this application, Your Honour, is the issue of whether or not this type of adjusted census benchmarking and the 208 cards being used for that purpose can give this Court likely, relevant information. Keeping in mind that likely relevant means reasonable possibility of providing probative information on an issue at trial. Reasonable possibility. The test is not it has to be conclusive. The test is not it is a hundred percent proof. It is reasonable possibility of being probative to an issue at the trial. It is not the significant hurdle that Mr. Gold makes it out to be.

THE COURT: Is there not a fundamental difference, though, in this particular case? If it were a diary or a journal account by someone, in the second phase, the Judge looks at it and the document stands and falls on its own. In this case the data, on its own, is largely useless. It has to be compared to other data and possible conclusions drawn from the comparisons.

MR. MATHAI: I would agree that that is what is required by getting the 208 data. But I preface that by saying, Your Honour, that is the nature of statistics and that is the nature of statistical analysis. And what Justice Molloy's

decision in *Khan*, and even Justice Goodman's decision in *Cunningham Matthews* tells us is you can rely on statistics. My friend makes the argument, "Yes, you can rely on statistics, but you should not be using it as a comparator of the 2006 census data; you should be using crime statistics or observational benchmarking." So he does not take issue with statistics generally. He just takes issue with the manner in which the statistics are being analysed in this case. I do not think anybody would argue, and maybe my friends will go this route, but I do not think they will, because the case law is clear that in racial profiling cases, you can rely on statistics in order to establish past prior conduct that may give rise to racial profiling or may give rise to race being a motivating factor. And that is what we are trying to do. I agree with you, Your Honour, it is not the typical case where the requested document, on its face, provides the information. There is an analysis that has to be done. But that is the way pretty much all statistics work. If we had just asked for the 208 cards, my friends would be complaining, what are you comparing it to? And now that we have provided what we are going to compare it to, which is the census data as well as the dataset collected by the Toronto Star--Meaning comparing it to Toronto, generally, 31

Division, TAVIS officers, TAVIS officers within 31 Division, all those comparators that Mr. Wortley enunciated in his testimony. We have taking the step of providing to The Court what the analysis will be of the 208s, because we recognize, on its own, a layperson cannot find anything from the documents. It requires study. The issue between Mr. Gold and I, and Mr. Butt and the parties is whether or not the manner in which we are proposing to study it gives rise to likely relevance. And with respect, we say it does. Mr. Wortley was quite rightfully conceded that there are problems with census benchmarking or even adjusted census benchmarking. But the test is not that you have to provide the perfect statistics in order for The Court to accept it. That is not the test. Mr. Wortley, doing his job to The Court, will analyse the data, evaluate the strengths or weaknesses, and explain what those strengths and weaknesses are. And then my friend, Mr. Gold, would do another excellent cross-examination of Mr. Wortley on the weaknesses of adjusted census benchmarking and tell this Court not to provide any weight. But we are getting ahead of ourselves; because what Mr. Gold is trying to get us to do is at this first stage, elevate it to the point where it has to be perfect. And that is simply not the case.

THE COURT: So you contemplated, at least theoretically, a situation where I would order the production that Doctor Wortley would review them. Doctor Wortley would make his findings, whatever they might be, come to Court, and his findings would be the subject of a second *voir dire* as to whether the findings were relevant.

MR. MATHAI: I am not sure if I would say it would be a part of a second *voir dire*. Although, technically, it would have to be. Yes, you are right, Your Honour.

THE COURT: I will not put sequentially then. I will say another *voir dire*.

MR. MATHAI: I think you are right, Your Honour, to determine whether it is admissible evidence. But I think it would pass that threshold and then Mr. Gold would rightfully cross-examine on what he sees the weaknesses are, and say to you, Your Honour, "while all this data shows X, Y, and Z, here are the frailties of that data." And I am going to bring Mr. Melchers up and Mr. Melchers may tell us a different thing about this data. I am a bit facetious about that, but that is an avenue that the Crown may be entitled to go if they do not like this study or if they think there are frailties. But at the end of the day, it will be up to you, Your Honour, to determine whether or not what weight will be given to it, in light of the frailties. And I think that is how

this would play out, that much of what you saw Mr. Gold do in his cross-examination would happen again, but this time, from a Crown. One of the great ironies of this case, Your Honour is that at the end of the day, everybody admits racial profiling exists. The Courts have admitted it. You indicated yesterday that it is one of the regrettable things of our justice system that we have to admit that racial profiling exists. Chief Blair admits it. He says that part of the discrepancy that you see in the Toronto Star analysis is explained by racial profiling. But to what extent, he is not sure. And he does not know how quantify that. So everybody admits it. But every time an applicant comes to The Court and says: Here is how we are going to prove what everybody admits is happing. We get presented with, well that is not how you prove what everybody knows is happening. That is not how you do it. There is a better way of doing it. It may be impractical. It may not be anything that could actually be done in terms of observational benchmarking. There may always be critiques of the type of study that you are going to do, but you cannot prove it that way even though we all know and we have all admitted it. And thankfully, we have all admitted hat this is something that happens.

THE COURT: But did Doctor Wortley not use a more expansive definition of racial profiling in the sense that the legal definition is probably encapsulated in the Judgement of Justice Rosenberg in *Richards*?

MR. MATHAI: Right.

THE COURT: That it is profiling based on race. Racial colour profiling refers to that phenomenon, whereby certain criminal activities attributed to an identified group on 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 the general criminal propensity of an entire racial group.

MR. MATHAI: And you are obviously referring to the *R. v. Brown* case. I think you said *Richards*.

THE COURT: It is *Richards*. The quote comes from *Richards*.

MR. MATHAI: Sorry. That is right. And it is cited in *R. v. Brown*. That is right.

THE COURT: Whereas Doctor Wortley indicates racial profiling can be malicious. Conscious malicious activity can be stereotyped, it can be systemic, and it can be as a result of directives.

MR. MATHAI: That is right. First what I would say is, taking a step back, at paragraph five of his affidavit, you will see this at tab four

of our application record. At paragraph five, Doctor Wortley says racial profiling refers to police surveillance practices, which is consistent with what his evidence was yesterday. It exists when members of certain racial ethnic groups become subject to higher levels of police surveillance then other groups and when differences in surveillance cannot be explained by individual behaviour. Racial profiling refers to the phenomenon. And then what is quoted is essentially the quote that you read from *Richards*, that is reproduced in *R. v. Brown*. And he cites in that paragraph of his affidavit, *R. v. Brown*, for that position. I am not entirely sure that there is any form of inconsistency in that. Doctor Wortley says that the issue of surveillance is key to the issue of racial profiling. When a group gets overly policed because of the colour of their skin or a combination of factors. That leads to racial profiling. And I propose to get into this analysis a little bit more detailed when I was going to refute the argument that my friend, Mr. Gold, makes about using the comparator of crime statistics, because there is the problem with the comparative crime statistics. Mr. Wortley, in response to Mr. Gold, brought this out. The problem with using crime statistics is that crime statistics in of themselves contains racial profiling. That is

to say that if forty percent of black people--I am throwing out random numbers here, Your Honour. These are not actual statistics. But if sixty percent of the population of people who have been convicted of possession are black and forty percent are white, that does not necessarily mean that black individuals are in possession of marijuana more than their white counterparts. What it can mean is that they are over-policed, which my friend, Mr. Gold, conceded in his argument. I mean you will recall when he did his examination; he said there are a whole bunch of reasons why some of these people may be targeted; because they are poor, because they live in a certain area. And that is at the heart of what racial profiling is, Your Honour, because to use those crime statistics, what you are using is something that inherently shows the fact that there is racial profiling. It becomes somewhat topological and circular, Your Honour. Sixty percent of the males or individuals who are charged with possession are black, and forty percent are white. That does not mean that there are more black people who are in possession of marijuana. And that was the point that Mr. Wortley was making.

THE COURT: And does it not point to the inherent unreliability, generally, of crime statistics?

MR. MATHAI: Well that is why you use the comparator of the census, as opposed to crime statistics, because census data does not have that inherent bias in it. When I say inherent bias, Mr. Gold, in his cross-examination would say, well listen, we are talking about crime. These people are committing crimes and they are being stopped from committing crimes. And that is not the analysis that we are engaging in here, Your Honour. It is not to say that the sixty percent are not legitimate crimes in being policed; it is why the number is sixty percent that becomes problematic. And in using that comparative route, then you use racial profiling, essentially, to try to establish that there is no racial profiling.

THE COURT: Does that not, again, come back to what is the census data to move the paradigms?

MR. MATHAI: That is right.

THE COURT: Most sixty-five year-olds do not smoke marijuana and drink beer in public parks. If they are going to do it, they do it in the privacy of their home. Teenagers often engage in that type of activity.

MR. MATHAI: That is right.

THE COURT: So is the comparative group not the census data, but the people who hang around in the park?

MR. MATHAI: And that is where you get into the issue of observational benchmarking and whether

that is a better method than census benchmarking. But I will say two things to that, Your Honour. And this, again, was stuff that Mr. Wortley gave evidence to yesterday. It is when you can control for things like age, using the census data. You can control for things like time and location, because that is all contained in the 208 data. So you can control for these factors and use that analysis as part of the overall analysis and whether or not there is patterns of racial profiling that is demonstrated by the statistics of the 208 cards. What we are forgetting is what is distinct about this case. It is that 208 cards actually contain a lot of data that help us control for things. Not only do they just have the race, but they have the time, they have the location, and they have the reason for the stop. All these factors can be used in controlling for what my friend says is observational benchmarking. Now, Mr. Wortley conceded that observation benchmarking can be helpful. In fact, he said in the Kingston study, they did observational benchmarking. And opposed to contradicting what his evidence has showed, using the adjusted census data-- Actually, he did not use adjusted census in that data. I think he used census data. As opposed to contradicting, it just supported.

THE COURT: What is the comparator then?

MR. MATHAI: In observation benchmarking or in census?

THE COURT: No. What is the comparator? You assume constable X, you look at a hundred accounts of constable X's 208 cards.

MR. MATHAI: That is right.

THE COURT: They show that sixty percent are black males between the ages of eighteen and twenty-four and that these stops occurred between 8:00 p.m. in the evening and two o'clock in the morning, and they consist of loitering, disorderly, things of that nature. What do you compare those to?

MR. MATHAI: I think you compare them to several things. One: you would compare them to other officers who are doing the same shift in the same area and use that as one comparison. That is one analysis.

THE COURT: Mm hmm.

MR. MATHAI: The second analysis you do is looking at TAVIS officers and generally, within 31 division. But more importantly, what you can also do, and this is something that Mr. Wortley also explained in his evidence, is you can take those officers outside of the 8:00 p.m. to 12:00 a.m. shift and see when they are working the 10:00 a.m. to 3:00 p.m. shift and determine what their stops are in that scenario too.

THE COURT: But that is a different comparator because it is a different time, a different place.

MR. MATHAI: Agreed, Your Honour. But if the earlier shift had showed just as high a disproportionate stops of black males, then you are left with the argument that black males are everywhere committing crimes at all periods of time. And that just cannot be the analysis. What is interesting about The Star data and we have gone back and forth about the legitimacy of The Star data. But one of the interesting things about The Star data is when they looked outside of areas that had high populations of black males, the disproportionate effect of the stops on black males were through the roof. I believe it was eight to one, as compared to four to one, in areas that have a higher population of black males. That was not in the evidence.

THE COURT: I do not know that that is before me.

MR. MATHAI: No.

THE COURT: I know that I can get a hold of it, because I live in the Greater Toronto area and I read the newspaper, as you would anticipate. But I do not know whether I have the--

MR. MATHAI: You definitely did not get that evidence from Doctor Wortley. That is a hundred percent correct. Shortly, what I could do is

check the articles that we put in the application record, as to whether or not they indicate that. They may, in fact, and I am not sure over the top of my head. But I can do that at the break. Maybe I can ask my friend, Mr. Rowe, to take a look as we are talking.

THE COURT: Given the way that Mr. Butt and Mr. Gold were reacting, I would say the answer is no.

MR. MATHAI: I am not sure. My friend will take a look. There are a series of articles.

THE COURT: E and--

MR. MATHAI: And F as well.

MR. GOLD: You will recall, Your Honour, one of my points with the doctor was that he could have presented some kind of evidence to Your Honour, based upon the data, how it would be useful, what he takes out of it that he can then use. None of that scientific framework, based upon The Star data, and that was an issue that I discussed with him in cross-examination, Your Honour.

THE COURT: Thank you. Go ahead.

MR. MATHAI: All that is to say that there are comparative groups that can be used in adjusted census benchmarking, that will assist this Court in determining whether or not there is prior circumstantial evidence of racial profiling. Essentially, it is not the standard that Mr. Gold says it, where it is useless

evidence. With great respect, it is not useless evidence. Adjusted census benchmarking has not only been used by Mr. Wortley in the Kingston study, which as he indicated, was then peer reviewed in a book that him and Ms. McKhala did in 2008, I believe. But the other issue is that it is used all of the time. And this is the evidence in re-examination. It is used all of the time in the U.S. and in England, in that they used adjusted census benchmarking. If you look as far back as the Ontario commission on systemic racism, they used adjusted benchmarking when determining whether or not there was overpopulation of black males of Aboriginal males or Hispanic males in the Canadian prison system. Adjusted benchmarking is not the garbage science that my friend makes it out to be.

THE COURT: But it is not so much the numbers, it is the conclusions that you draw from.

MR. MATHAI: And that is fair. And that is what Mr. Wortley's point was, where you have to look at the magnitude of the difference. If the magnitude of the difference is so large and it becomes harder to explain in a way by simply observational issues, like who is out at X park at 8:00 p.m., it becomes less easy to explain that. And that is why he stressed to this Court. And in response to Mr. Gold's question, he stressed the fact that you have to look at

magnitudes. That is an important part of this equation. And if the magnitudes are not significant, then there may not be evidence of racial profiling in the 208 cards for these officers. And he was quite candid that he does not know what he is going to get from these 208 cards from the officers. Maybe my friend might not concede this, but no study or statistic will show a hundred percent proof of racial profiling. It is not, but that is not the test. If it was, there just would not be any study of this phenomenon. There would not be any admissions of this phenomenon. Racial profiling can be proven by statistics. The Courts have already recognized that, Your Honour. And if the requested documentation is permitted to be used by the defence and analysed by Mr. Wortley, he will provide his conclusions, as to what, if any, patterns or conclusions can be made. And then it will be up to Your Honour to take that and either put no weight into it or some weight into it and determine whether or not that is circumstantial evidence that can be used to show that in this case, the officers racially profiled Mr. Buckley.

THE COURT: In the sense that Justice Rosenberg refers to racial profiling in *Richards*.

MR. MATHAI: That race was a factor that led them to detain him and then to search him, which is consistent, both with Mr. Wortley's

evidence on what racial profiling is, as well as Justice Rosenberg's decision.

THE COURT: But the doctor expanded on that. He said it could be systemic, which is one of a better term, targeted policing in certain communities. And the same factors that may play into race may also affect other factors; poverty, lack of opportunity, things of that nature. And so, the doctor would equate the two and simply, systemic factors, which are about poverty and things of that nature, he equates with racial profiling. Because he looks at it from the filter of this affects this racial group differently than other racial groups.

MR. MATHAI: In fairness, while his definition may have been viewed as an expansive of racial profiling or what The Courts has recognized as the definition of racial profiling, that is not what his analysis will be, based on the data. His analysis will be based on the data and the statistical analysis and comparisons that are done of the 208 cards. So that removes from the equation, his definitions of racial profiling. All it does is he presents patterns. In this case, with Officer Cheechoo, it was 2.5 times the norm, in terms of stopping black males. He will use the odds ratio that made my eyes glaze over during the examination. He will use all of those things. But it does not take into account, his subjective view of what racial

profiling is. It is based on data. The data collected by the Toronto police Service and used for the purposes of establishing circumstantial evidence of racial profiling. Whether it be systemic or whether individuals just saw a black male standing in a corner and decided to question him. Either way, the issue that we are address is whether the evidence that is contained in the 208 cards reflect in the past issues of racial profiling. Before I move on from this topic and go into the facts a little bit and try to show you where the case is anchored and some of the facts that have been elicited to date, I do think, at this point, I need to make a couples of comments about the observational benchmarking, jest because we have been discussing it already. Doctor Wortley did not testify that observational benchmarking is not effective. He did not say that it was useless. He said that there were problems with it. He said that, practically speaking, it is very hard and expensive to do that type of work. And Mr. Gold put to him, while just because it is expensive and hard, it does not mean that you use bad science. And that presupposed that, obviously, the use of adjusted benchmarking is bad science, which it is not. Is there possibility that there is a better way? Maybe. I am not willing to concede that, because Doctor Wortley

was not willing to concede that and my friends have not led any evidence to suggest that observational is better than adjusted benchmarking. I recognize that it is our burden this application, but we have provided evidence that says that adjusted benchmarking can give you statistically relevant information. My friends have not called an expert to rebut that. So right now, you are left with the expert's opinion, saying that you can get information that is statistically relevant and significant from this data and doing this type of study. Mr. Gold has put the opposite through questions, but he has not provided any evidence or any expert to suggest that it is useless and that observational benchmarking is, in fact, better. He has not done it. Could it be? Possibly. Doctor Wortley does not believe so. But just because there may be a better way or the more optimal way, it does not mean that this way does not meet the likely relevance test. He does not provide this Honourable Court with a reasonable possibility of probative information on the issue at trial, which is the credibility of the officers, versus the credibility of my client. And that is a nice little segue into the facts of this case.

THE COURT: Just on that, why the four officers?

MR. MATHAI: Because if we did not do the four officers, we will hear from my friend saying, well you are not actually doing four officers. You are just picking random officers and they may be different.

THE COURT: No. I am talking about in the context of this case, because you are moving into the context of this case. The point of contacts is Cheechoo and Grant.

MR. MATHAI: That is right, although Douglas Cook does not fall far behind. It is Kennedy who lags a little bit and that she stays in the vehicle to make a radio call. But Grant and Cheechoo are the first ones up and Douglas Cook is not far behind.

THE COURT: But it is Cheechoo who makes the initial approach. He evidence is, "I smell a burning marijuana.' And then he goes in and then Grant. The other two appear to be use of an anchor along for the ride. The point of contact is Cheechoo and Grant. They are the ones the allegedly make the observations. Why Kennedy and why Douglas Cook?

MR. MATHAI: Well because they are all involved in this situation. And while Kennedy may lag behind, the three of them, being Cheechoo, Douglas Cook, and Grant are all part of the detention. And that they are all three out there at one point, detaining Mr. Buckley. So I would say that is one of the reasons. But the

other reason is it provides you with an internal comparison between the four of them. And they were all TAVIS officers that night, engaged in TAVIS activities, which is to go up to people and question them.

THE COURT: But according to them, this is not a TAVIS case.

MR. MATHAI: Well--

THE COURT: They are TAVIS officers, but this is not a TAVIS stop, according to the officers.

MR. MATHAI: According to the officers, I would agree that that us their evidence. Now it would be something differently, obviously, from my client. And Mr. Rowe, has in his cross-examination--He has done his job in *Brown* and *Dunn*. He has put forward exactly what the evidence will be from Mr. Buckley that goes the exact opposite way, which is these officers just approached him for no reason. And they began asking him questions about where he lives and then reached into his pocket and grabbed--Sorry. I am mixing the evidence. Reached into his pocket and then grabbed it. And I apologize for that. Where I get asking where he lives is from Cheechoo's evidence. But I will get into that when I go through some of the inconsistencies. But I apologize for that confusion. A brief indulgence Your Honour.

THE COURT: Certainly. So the reason for the four is that they are all in it together?

MR. MATHAI: They are all involved in the detention. And in some ways, one of the reasons too, Your Honour, is that it is not just the credibility of Cheechoo and Grant that is being questioned. It is the credibility of all of the officers insofar as they back the evidence of Cheechoo and Grant. Remember it is Cheechoo who says, "I smell the burning marijuana." And no one else apparently smells it in the van. Grant then smells it apparently when she exits the vehicle, although none of the other officers smell it when they exit the vehicle. But it is Cheechoo who says, "I smell burning marijuana." Then you have Cook who says, "Well I also saw him smoking a cigarette." And Kennedy says, "Well I saw him smoking something too. It could have been marijuana." So all of their credibility is being called into question in this case insofar as they support the initial reason for the stop, which is being challenged. Because our evidence is that--

THE COURT: You are changing the paradigm. Racial profiling is targeting. If targeting is done, if anybody, it is done by Cheechoo and Grant. To say that the others then joint in, they are not targeting.

MR. MATHAI: With respect, I think they are. When they support their fellow officers in what is a racial profiling stop, then I think they are involved. I think they are all involved.

And one of the issues will be their credibility insofar as this Honourable Court may say Cook confirms the story, Kennedy confirms the story, and it backs of Cheechoo's story. Therefore I believe Cheechoo over Buckley. And one of the reasons we are using this information is to challenge the credibility of all of the officers. Now I understand the concern is you are challenging Cheechoo's credibility because he made the decision to go up and talk to him whether it was a burning cigarette or whether it was just because a black male. But there is no evidence that the officers did not agree with the decision of making a stop or did not follow along. Right? What we had is Officer Cheechoo said, "I smell burning marijuana." And other officers saying, "I see that smoke. It looks like a joint." I think it would be foolish to suggest, Your Honour, that the other officers, who had said they saw a joint would just say, "I am driving away. I am going now. I am going home." They are all part of this racial profiling of this individual.

THE COURT: But again, why I say changing the paradigm? Using what the doctor said about racial profiling: malicious, conscious malitional activity. I am going to get you because you are an X stereotype. I think all Xs do this. Systemic. In essence, what you are saying is this has to go beyond any benign

interpretation than malicious actions on the part of the officers, because what they are saying simply cannot be true. And I am talking about Kennedy and Douglas Cook, because they just jump on the bandwagon and support Cheechoo and Grant.

MR. MATHAI: Yes. I agree that the analysis is there, jumping on the bandwagon and supporting Cheechoo and Grant. There is no other way of seeing it, given the evidence that we anticipate to call during our case. That being said, you have Cheechoo who makes an unconscious or subconscious decision to stop Mr. Buckley and then the other officers join in on it. So they all make the decision that this is an individual we are going to approach for whatever reason. Our reason that we proper to The Court is because he is black. The Crown's case is because he is smoking a Joint. This case is not unlike other cases of racial profiling in that you have two very stark contrasted versions of what happened the night of December 13th, 2008. The way we anticipate the facts to come out in the defence's case is set out in paragraph five of our factum. I will briefly read it to you there. The cites are also provided in paragraph five. The TAVIS officers surrounded Mr. Buckley. Upon seeing the officers surround him, Mr.--

THE COURT: Hold on.

MR. MATHAI: Sorry.

THE COURT: This is in the reply factum?

MR. MATHAI: This is in the reply factum, which is in the thin, white--That is right. And it is page three, paragraph five. And where this comes from, the information, Your Honour, that is here in paragraph five, is through Mr. Rowe's examination of the various officers. At paragraph five, you see the TAVIS officers surround Mr. Buckley. Upon seeing the officers surround him, Mr. Buckley asks what is going on. P.C. Grant then demanded that Mr. Buckley take his hands out of his coat pocket and Mr. Buckley complied. Mr. Buckley then said to P.C. Grant, you have to ask me my name. Ask me my name. Run my name. You will see I have no priors. And again, this is through cross-examination. Mr. Rowe is putting this to the officers. E: one of the TAVIS officers responded by saying we are not asking you anything. F: P.C. Grant then put his hands inside Mr. Buckley's coat pocket and pulled our a baggie and accused Mr. Buckley of being in possession of marijuana. G: P.C. Cheechoo then grabbed Mr. Buckley and then forced him to the ground. And the cites are provided there, in terms of the cross-examination that elicited this evidence and the recitation in the factum. The officers have a very different story and that version of events begins with the officers

doing a sweep of the adjoining apartment. I should not say adjoining, because they are not connected. The apartment across from the apartment that Mr. Buckley is eventually standing in front of. They do a sweep, they come out, they get into their van, and Officer Cheechoo says I am hot because I am running up and down these stairs because it gets very hot, and I roll down my window. And when I rolled down my window, I smelled burnt marijuana. None of the other officers say they smell it in the car including P.C. Kennedy, who is sitting in the passenger side of the vehicle. Though be it her window is down, but not very far from P.C. Cheechoo. She does not say that she smells marijuana. Officer Grant, who is sitting in the seat behind P.C. Cheechoo and the lower window, she does not small it at that point, and neither does Douglas Cook. When they exit the vehicle, Grant says, well now I am smelling burnt marijuana. No one else testifies to that, that they continue to smell burnt marijuana as they exit the vehicle. Then the disparity becomes a little bit larger, in that Grant says that Cheechoo's first question to Mr. Buckley are, get your hands out of your pocket. And he says it several times and Mr. Buckley ignores it. This can be found at page 111 of Grants testimony. And because he does not remove his hands, eventually Officer Cheechoo says, well

you are under arrest for the possession of marijuana. Cheechoo's evidence is a little bit different. Cheechoo says that he approaches and the first thing that he does is ask him for his name and address. This can be found at page eight and seven of the transcripts. Which is consistent with what happens in these TAVIS stops? And what we anticipate the evidence will be from Mr. Buckley, that in July of 2008, Officer Cheechoo did the same type of thing with Mr. Buckley. He asked him questions to get contact information--208 card information. And the same thing was happening here. Under Cheechoo's own evidence, even though it is different from Officer Grant's, in Cheechoo's evidence, the first thing he is asking is name and address. He is not asking about marijuana or whether he is smoking marijuana. He is not asking about issues of safety or concern. Get your hands out of your pocket. He is not advising him that you are under an investigative detention. Here is why: I saw you smoking marijuana. He is not asking any of that. What he is asking is your name and address. And Officer Cheechoo says he does not answer that question. He starts walking around and I am scared he is going to flee, and so, I put him under arrest for possession. And that is when P.C. Grant is alleged to try to get

into the jacket pocket and Mr. Buckley swats his hands away.

THE COURT: Her.

MR. MATHAI: Her hand away. Thank you, Your Honour.

THE COURT: The only male officer is Cheechoo.

MR. MATHAI: Thank you, Your Honour. That is a significant difference in their testimony. And with respect, Cheechoo's evidence, the person who is alleged to have made the comments, is that he is asking for name and address, which is consistent with the theory that this is a TAVIS stop. In that what they have done is try to get information from this individual because he is a black male standing outside of a building and they are suspicious of him and that there was no other reason for that stop. And that will be the anticipated evidence of Mr. Buckley that he was not smoking a joint outside that day. That he was just standing there and these officers approached him, and then one began aggressively searched him, and then a male occurred. What is also consistent with the notion of TAVIS stops, 208 stops, and racial profiling is the suggestion that Mr. Buckley was acting suspicious. Because one of the things that you heard in Cheechoo's evidence, Your Honour, was when he smells the burning marijuana, he sees Mr. Buckley smoking. He hypothesises that Mr. Buckley sees this

marked police van, takes his marijuana joint, throws it out, and starts walking around suspiciously. One of the officers, Kennedy, indicates that they were not in a marked van. And I am not sure how far that takes you. That is just another inconsistency in what they are explaining.

THE COURT: But is it no the essence. In fairness, I appreciate your skill as an advocate. Is it not the essence of advocacy?

MR. MATHAI: Yes.

THE COURT: If he is acting furtively, that leads us in one direction. If the police says he was acting normally, while he had nothing. I appreciate the point, but it has to be put into context of it.

MR. MATHAI: Thank you. And I was looking for the word, furtively, and again, I could not remember it, so I appreciate you helping me out in that regard. In cross-examination, Mr. Rowe put to officers Grant, Cheechoo, and Douglas Cook, whether this was an instance of racial profiling. Whether they stopped Mr. Buckley whether he was a black male. Whether they detained him because he was a black male. And the answers from all of the officers was no. Mr. Rowe went a step further and asked each of the officers, well do you know how many black males that you normally stop, and all of then said, I do not recall. But Officer Grant, In

particular, had an interesting exchange with Mr. Rowe. And I think it is necessary to review. And the easiest way to do it, rather than turn to the transcripts themselves, if you take a look at paragraph twenty-four of our factum, Your Honour, if I can direct your attention to that. That is at paragraph twelve and the exchange is reflected at paragraph thirteen.

THE COURT: Okay. Just give me a moment.

MR. MATHAI: Sure.

THE COURT: And you are talking about your reply factum or your other factum?

MR. MATHAI: I apologize. I should be more specific. The reply factum, Your Honour.

THE COURT: So it is the reply factum.

MR. MATHAI: At paragraph twenty-four. And the actual quote that I am looking to read to you, Your Honour, is from page thirteen.

THE COURT: Yes.

MR. MATHAI: Now this is Officer Grant. This is the first officer that came up and Mr. Rowe is cross-examining her. Mr. Rowe says, "All right. In terms of the persons you engage in your TAVIS work and the way you just described, what proportion, would you say, are young black males?" The answer, "Oh 31 Division, where I work and where I have done this TAVIS, it is comprised of a lot of young black males. A lot of young black females. There is a lot. A huge

population in 31 Division." Mr. Rowe rightfully says, "That was not my question, Madam. My question was of the persons that you engaged in the way described, what proportion are young black males?" "I do not have an exact number or proportion. It would be young black males I engage. Like I said, I engage a lot of people; not just young black males." And then he asks, "Did you write the race of the person on the 208 cards? There is a pace." It is a typo for that. "Yeah. I do not know if that says race or colour. I do not have a 208 card on me, but yeah, there is a space." All right. The reason I say that is interesting is because when Mr. Rowe asks an open-ended question in cross-examination, the first response is not I do not remember. It is "there a lot of black people in 31 Division. A lot of black people." Almost an explanation. A consciousness of guilt to reflect the fact that, yes, most of my stops are black males or black females. That is her first answer. When Mr. Rowe rightfully asks for a more exact answer to the question being asked, then she says, "I do not know the exact proportion." With great respect, I believe that that is very telling, Your Honour. The other officers, when asked, they just flatly said, "I do not remember." But not Officer Grant. To be honest, it is her first response. It is probably the more accurate, where she seems to

be suggesting that most of her stops will be of black males and black youths, because 31 Division has a lot of black males and black youths. Consistent with the theory that is being expressed by the defence that what happened that day was Mr. Buckley was standing in front of that building and they thought there is a black male. Maybe is looking suspicious. I do not know, but we are going to go approach him. And he was not smoking a marijuana joint. I notice that it is now 11:37.
THE COURT: We stated late, but we will take a break. We will come back in at five to 12:00.

R E C E S S

U P O N R E S U M I N G

MR. MATHAI: You would recall, Your Honour, that prior to the break, I had said that there may have been a reference in the Toronto Star articles that have been attached to Doctor Wortley's affidavit with respect to the higher disproportionate rate of carding for blacks in areas that are predominately white. And while it does not give the exact stats, at tab 4E of the application record, and this is Exhibit 5 of the affidavit of Scot Wortley; it is a Toronto Star article titled, "When good people are swept up with the bad." The second to last

paragraph. "Blacks are documented more than whites in almost every part of Toronto, with the highest disproportionate rate of carding for blacks in areas that are predominately white, like pockets of North Toronto. A criminologist calls this the out of place factor - people being questioned because they do not fit in." I just wanted to make sure that you had that reference, Your Honour. Closing off the argument, Your Honour, with respect to the facts and how there is on the facts as they presently stand, enough evidence to suggest that there are inconsistencies and potentially, that there is a case made out here for racial profiling that existed in the case at hand. What I would like to do is draw your attention, Your Honour, to the evidence of 208 cards and what 208 cards are. And that came, at first, from Officer Grant. At paragraph seventeen of our factum, rather than take you through the entire transcript, Your Honour, and that is the reply factum at page eight. At this point, Officer Grant is being cross-examined by Mr. Rowe and Mr. Rowe says: All right. Can you turn to page fifty-three of your notes? Do you see at the top there, where it says group of four males investigated in the lobby, 208s submitted? The answer is yes. Yes? What are 208s? Mr. Rowe inquiring as to what the 208s are, because all that is reflected in the notes

is the fact that it is a 208 and without any indication of what the actual 208 is or reflective of. Answer: These are contact cards that the service has. And what is that, Mr. Rowe asks. The answer: It is just a card. If you speak to people, you make contact with them. You can put their name, their address, their phone numbers, their date of birth, the time that you had contact with them, and where it was that you spoke to the individuals and the reasons why you spoke to the person. Sometimes it can be community contact. Sometimes it can be in terms trespass or whatever. Even if you go to a radio call, you had contact with that person. It is just a contact card. Also in the factum, at paragraphs eighteen and nineteen, you will see other descriptions of the 208 cards that have been provided by the Ontario Court in *R. v. Reeves* and *R. v. Davidson,* as well as *R. v. Cunningham and Matthews,* as well as *Ferdinand* as well. Just various descriptions of what the 208 card case, by way of information and what it is used for. And the primary purpose, which was acknowledged by P.C. Grant. And it is reflected in the decisions, in particular *Cunningham and Matthews,* in that the primary purpose for this is an investigative tool. And that it is not just used when people are committing crimes. Often times, it is just used for individuals

who are not doing anything. Your Honour, at this point, I would like to turn to the test - the first stage of the *O'Connor* application, which is likely relevant. And it is at this point when I will merge some of the issues of likely relevance, along with the *Mohan* test with respect to necessity and relevance of the expert's witness. Now, with respect to likely relevance, I am not going to into great detail about the law on this. Your Honour already knows this. The *McNeil* case tells us that the relevance threshold is not a high threshold and it cannot be, for the principled reason because the defendant does not know what the data is, that they are always in a catch twenty-two when it comes to that. And for that reason, while it is more of a significant burden than that of a typical disclosure, it is not an onerous one. At paragraph thirty-three of the *McNeil* decision, The Court says that in order to be likely relevant, it has to be a reasonable possibility that the information is logically probative to an issue at trial - of the competence of a witness or the credibility of a witness. In this case, Your Honour, what we say that it would be probative of is the issues of credibility of the officers' versions of events, which is the central issue that happens in this trial, because you have two versions of events that are quite different. And at the end

of the day, you will be called upon, Your Honour, respectfully, to make a decision and to weigh the evidence and to decide who is credible and who is not. And it is our position that this evidence will assist in answering that question, by providing circumstantial evidence that the four officers have been involved in racial profiling and stops based on racial profiling in the past. In relying on that circumstantial evidence, you can find that in the case at hand that there was racial profiling. In the parlance of the *O'Connor* decision, the test, in this case, is whether there is a reasonable possibility that the 208 cards and the associated notes of all of the officers, with respect to those stops, is logically probative to whether there was racial profiling in the case at hand. And it is our respectful submission that it is indeed probative of the issue of the officers' credibility and whether or not there was a burning marijuana joint that night, or whether or not Mr. Buckley was just stopped because he was a black male in a bad neighbourhood. So where this comes down to then, is the essential question becomes how do you prove racial profiling? And in that regard, Justice Molloy's decision in *Khan*, which can be found at tab four of the respondent's book of authorities, is very helpful on this issue. It tells us a

few things - Justice Molloy's decision in *Khan*. It tells us that there is rarely every going to be any direct evidence of racial profiling, and that is the case at hand. Mr. Rowe asked officers Cheechoo, Grant, and Douglas Cook whether or not they engaged in racial profiling in this case. They all said no. He asked them whether or not they had what percentage that they had stopped in the past, and they said they do not know. In this case, there is no direct evidence, as is often the case. As Justice Molloy, quite rightfully recognizes that rarely, is there going to be that direct evidence. But she also recognizes that you can prove it through circumstantial evidence. In particular, circumstantial evidence that is based on past conduct or prior conduct that gives rise to racial profiling, or as Justice Molloy puts it, as far as racism. She points out that in proving racial profiling, you are not limited to the circumstances of the particular stop and that prior similar conduct can be used in establishing, circumstantially, what happened in the case at hand. And that is the pivotal issue on this application, because that is where we fit in. The defence, Mr. Buckley, seeks to use this 208 evidence and the analysis that comes out of it to suggest that the officers, have in the past, engaged in racial profiling and that is circumstantial

evidence that they engaged in racial profiling on the night of December 13th, 2008. And that circumstantial evidence will be bolster by some of the inconsistencies that I have already mentioned in the facts. Like the fact that Officer Cheechoo approaches Mr. Buckley and his first question is not where is the marijuana joint you just threw out or I am smelling marijuana. It is not what is in your pocket. It is not remove your hands from your pocket, as Officer Grant suggests. Officer Cheechoo's first concern is, where do you live? What is your name? And with great respect, that is consistent with him approaching for the sole purpose of getting a 208 card from a black male, who is doing nothing wrong. The circumstances that happened in this case fit in what you normally see in the profile of these types of TAVIS stops. And an example of one of these TAVIS stops, Your Honour, can be found in the *Reeves* decision. I understand that there are different cases.

THE COURT: I have been in this Courthouse for eight and a half years. I have had cases that involve TAVIS stops and I appreciate your argument. Based on Mr. Buckley's version of events, this is a TAVIS stop.

MR. MATHAI: That is right. My respectful submission is that there are some inconsistencies that are reflected in the

officers' notes that also suggests that it is a TAVIS stop. One of those inconsistencies is Grants version of what happened when they first approach Mr. Buckley and Officer Cheechoo's version of what happens when he first approached Mr. Buckley. And that Officer Cheechoo's version, his own version, is consistent with the idea of a TAVIS stop, and not with an investigation into whether or not Mr. Buckley was in possession of marijuana. Now, obviously, in the *Khan* decision, Justice Molloy decides not to grant the defence's request. And if I could direct your attention, Your Honour, to tab four of the respondent's book of authorities, it is the decision of Justice Molloy in *R. v. Khan* and the *O'Connor* application.

THE COURT: Just a moment. You said it is at tab four?

MR. MATHAI: It is at tab four of my friend's materials. It is the large green binder reading book of authorities on behalf of the third party record.

THE COURT: I apologize. I misheard. I was looking at your materials. Yes?

MR. MATHAI: If you turn to page sixteen, Your Honour.

THE COURT: Yes?

MR. MATHAI: It is really paragraph fifty-four all the way to fifty-six. I do not plan on

reading you the entire thing, Your Honour. I am sure you are well versed with the decision in Justice Molloy's decision. The important thing is to note is at the end of paragraph fifty-four. "If evidence exists, showing that the officer is engaged in racial profiling in the past or otherwise displayed racial bias, it will be relevant circumstantial evidence as to whether the defence allegation of racial profiling in this case can he established." Turning to paragraph fifty-five, she notes what the key question is. "Having determined the evidence of the type sought by the defence could be relevant on the section 9 application. The final step is to consider whether the defence has established a basis for believing that the records sought are likely to yield such evidence." I find the contrary. And she finds the contrary based on a number of reasons and most of the reasons are reflected in paragraph fifty-six of her decision. "In the course of argument, the defence indicated that the evidence sought would not be used for statistical purposes, but rather, only to show prior similar conduct by this officer. I will deal only briefly with the relevance of the documents for statistical purposes." Now that is the first distinguishing feature between this case and Justice Molloy's decision for why not to grant the *O'Connor* application. In this

case, we are specifically looking for statistical analysis. And Mr. Wortley has been kind enough to indicate that he can do that and provide a report to this Court and to my friends with respect to what that data will show. "There may well be cases where statistical evidence could be used to support a finding of racial profiling." This is paragraph fifty-six. "Such evidence is sometimes used to support inferences of discrimination in human rights cases, for example. However, there is no foundation to support drawing statistical inferences from the records sought. The police in Toronto do not keep records of routine stops made by officers." In this case, they do. It is called 208 card data. "Records are only kept when an arrest is made." That is incorrect. Now we know that there is 208 data where records are kept when there is not just an arrest made - when there is any contact made. And that is what is so useful about the 208 data cards, Your Honour. It is because the reasons will reflect why there was a stop, which can be supplemented with the notes. And what is very important about that is that you can then control for cases where all they are doing is finding someone and trying to get contact information. They are just doing an investigative stop, but not for any particular purpose, and that data can be analysed -

another thing that Mr. Wortley indicated in his examination yesterday, that you can control for the reason of the stop. Justice Molloy goes on to say, "Therefore, there is no way of knowing whether Officer Asselin has a habit of stopping young black males with more frequency then individuals of other racial backgrounds and no evidence to indicate that he does. There is no statistics available as to the number of black drivers in the area covered by Officer Asselin precinct. There is no mechanism for comparing Officer Asselin's numbers of arrests to those of other officers or to the averages for that particular division. Even if they can be broken down by race, which is by no means clear, number of arrests alone will have no probative value. No expert evidence was presented as to the statistical reliability of the available records. Nor the existence of valid statistical comparators. According, I conclude that there is no basis for believe that the record sought could provide useful statistical information relevant to the accused' case." In this case, we have addressed the concerns of Justice Molloy with great respect. We have statistics available for the number of individuals who lived in this area, the 2006 census track data. And we can control for the issue of other individuals who live outside the area, coming into the area, which is the big issue in terms

of using census benchmarking when it comes to traffic stops, because often times you say someone is driving into the area and they do not necessarily reside. But we can control for that with the 208 cards because we have people's residences and addresses. But not only that, in this particular case, we are not dealing with the situation where it is an individual who is driving and coming in from out of town or outside of the area or outside of the census area. It is an individual who resides in the census area.

THE COURT: Does that not in and of itself create one of the problems as to what the benchmark is. Assuming for the sake of argument that people come into an area because it is an area in which to buy drugs. There are transients throughout. So you will exclude transients because you only want to rely on the census data of actually who lives there. You are excluding a population that has to be considered in the calculus. Are you not?

MR. MATHAI: Well you can exclude them, but the exclusion will probably be in favour of the officers in question, because you will be excluding a group of people where there is no address. That would only be, I would think, of assistance to the officers in the case at hand, when you are lowing the numbers to just the individuals who are known to live the area.

Meaning the officers fill our a contact card that has their address, presumably because they checked with the individual and asked for identification to which they can then compare the address and put down in their contact cards. Because to suggest otherwise really means that these contact cards are just being filled out in the air, which I do not believe.

THE COURT: But if the officer's position is, "I talk to people in high crime areas. Some of whom may be residents, some of whom may be transients." Does excluding the transients not skew the process?

MR. MATHAI: I do not believe it does. And what was what Mr. Wortley's evidence was on the adjusted benchmarking data. And that he says that the best way to do this analysis is to remove people from outside the area because they are not reflected in the census, and that you are trying to create a truly equal scenario.

THE COURT: That is what I am saying. In an effort to create an accurate benchmark, you create an inaccurate one.

MR. MATHAI: That is fair, and I think that the way you can address with that, Your Honour, and I see your point now, is that you can do both an analysis that includes them as residents and then includes them as non-residents and then compare the results. I do not think you would

have to do an either/or. There is the ability to do both. They are not mutually exclusive. So you can control for those issues and that is what adjusted benchmarking means. It is that we are controlling for issues regarding residents.

THE COURT: But that is the priority. I mean assuming for sake of argument there was an area that was notorious for street prostitution, and you said, "Well to get an adjusted benchmark, we are going to take out all of the transients." Would that give you a picture of the people who were in the area utilizing the services of the street prostitutes? The answer would have to be no.

MR. MATHAI: With respect to that example, I think it is problematic, because if you are going to a high area of prostitution, the reason you are going there is to investigate prostitutions. So the reasons for your stops are probably going to be reactive policing. And this is what Mr. Wortley was referring to. You see something happening and therefore you go and investigate. And that will be reflective in the 208 cards. They will reflect when the police officers were doing reactive policing. But the issue is not reactive policing. The issue is proactive policing, when there is nothing that draws the eye of criminality and the officers are still going up to people and asking them for their contact information and

providing no reason for doing it. Because they are not reacting to something, they are being proactive. And that is reflected in these 208 cards, because we have the reasons for the stop. And that is why, with great respect, I do not think the analogy is something that you can rely on, because at the end of the day, we can control for the reasons for the stop, using the 208 data. And we can see, if we want, only those cases where the officers were not engaged in some form of reactive police, where they were only engaged in proactive policing.

THE COURT: Using my analogy, the police will only engage in reactive policing in the prostitution situation.

MR. MATHAI: Well then there is a problem if they are going to an area that is known for prostitution and just randomly going up to people and asking their contact information, irrespective of whether or not there is any issue of potential criminality, and I think that is problematic, Your Honour. I think that is very problematic. And that is why this type of analysis can help us drill down, because all of the various comparators that Mr. Wortley has indicated will be done. It will help us drill down, in order to determine and to find the most accurate comparators and to detail the strength and weaknesses of each comparative group that is being analysed. You will see that

the second to last sentence at paragraph fifty-six, Justice Molloy laments the fact that "no expert evidence has been presented as to the statistical reliability of the available records, nor the existence of valid statistical comparators." In this case, we have provided that expert evidence. We have filled in the gap that Justice Molloy has indicated, in that we presented Doctor Wortley as an expert who did testify as to the reliability of the 208 records and how he can do a statistical analysis of them and provide a very detailed information to this Court of what comparative groups they can provide. It is our respectful submission, Your Honour, that relying on Justice Molloy's decision in the case at hand, I think, re-established the likely relevance test. But with respect to the *Mohan* issues of necessity and relevance, I point to Justice Molloy's decision in *Khan* as well as noting that there was a need for expert evidence in order to determine what statistical analysis could be used and what comparative groups could be used. And that is one of the reasons why it is not only necessary to have Doctor Wortley testify and provide his expert evidence and why it should be admissible, but also why it is relevant, because this is not a statically analysis that can be done by an ordinary

individual or by this Honourable Court, with respect.

THE COURT: Does it not reduce to this? In essence, what he says is, "I am going to analyse the data to determine whether these officers stop young black men and the disproportionate to their grouping in the population." If I find that, I am going to ask you to draw the inference that that is as a result of racial profiling, as opposed to any other reason. The real neat point is that he has to be able to construct an accurate comparator, because otherwise, all he is going to be left is with this number and this number and no way to draw any inference from that.

MR. MATHAI: That is right. And it is our respectful submission and Mr. Wortley's evidence that an adjusted census benchmarking will provide that proper comparator. Now Mr. Gold obviously disagrees and obviously takes issue with that and suggests that there are better comparators. We disagree. Mr. Wortley disagrees. Mr. Wortley says those are not better comparators. But not only that, this is the type of comparative analysis that has been used by the Ontario Commission on systemic racism, as well as himself in the Kingston study, as well as in England and in the U.S. This is used all over the world. This is not new evidence or new studies.

THE COURT: But in essence, the ultimate issue is to whether he can do that. It may not be capable of being determined until I grant your request and see what he produces. Because he made decide this is the adjusted census data, which I have used; and I look at it and say this is nonsense or it is of no assistance. You picked the wrong comparator.

MR. MATHAI: Yes. That would be open for you after receiving his report and his analysis of the data. It would be open for you after viewing the entire report to say, "I do not put much weight in this, because you used the wrong comparator group." But at this point in the stage, we have an expert who is testifying that this is an accurate comparator group and that the fact that this is a 2006 census data, as opposed to 2008, would not reflect much of a change in the population. And in any event, he can rely on statistic Canada to assist him with providing with projections of the growth of the population in that area for the two years. And also that we can adjust for issues of people who are being stopped from outside. The very example that you gave, Justice of--People coming outside of the community for criminal reasons can be excluded from this case. That can be excluded?

THE COURT: Why?

MR. MATHAI: Because we can remove anybody with an address that is outside of the areas that we are looking at.

THE COURT: Again, coming back to my point. Why should they be excluded?

MR. MATHAI: Well if they are not living in the area, then they are not reflective of the census data. And the argument would be in and that is the argument that you see in Justice Goodman's decision in *Cunningham and Matthews*. Her decision is largely based on the fact that we have these individuals who are not from the Malvern area, who drive into Malvern and there is no way of saying that there is a proper comparator when the case at hand involves someone driving from outside of the relevant area into the relevant area. And that is where her analysis suggests that that is why it is not a good comparator group. But in the case at hand, you have an individual who resides in the area that is going to be looked at. Resides in the area of 31 Division. By everybody's own admission, he resides there. And the census information will be used from that area. And as Mr. Wortley suggested that you do not just have to use census track data. You can actually drill down further that there are smaller tracks that could be used to analyse this. And that is the benefit of this adjusted census benchmarking that he refers to. That we can

exclude for what Justice Goodman rightfully sees as a problem - individuals coming from outside into an area and skewing the census. I would say on the facts of this case, it is not an issue, because the individual resides in the actual census area, but we can also control for that in terms of comparing it to the people who lives in the area. And that is why adjusted benchmarking, as Doctor Wortley suggested, is a valid method of analysing the pattern in this case. Or not in this case. Sorry. The patterns of the officers.

THE COURT: That is particularly what I am concerned about and I will put an entirely neutral cast on it. There is in the community, hypothetically, a religious institution. And around the religious institution have grown up various stores and markets and things of that nature. Because of the religious institution, people flop to it. So at any given day, they now represent forty percent of the people in the community. But they leave because they are drawn to it. The actual community only makes up ten percent of the population. But when you are looking at a pool, assuming for the sake of argument, that the police are looking at that pool by excluding the transients. They have excluded a large portion of people who are actually there at a given time. That is all I am saying. And the effort to ultimately come up

with a comparator can only be judged when we see the comparator that he uses.

MR. MATHAI: You are right insofar as if there is a removal of large portions of people as a result of the adjusted benchmarking. Then that could affect the data. I would have to concede that, Your Honour. But with respect, we are getting ahead of ourselves in that it is getting very, very--What is the word I am looking for?

MR. ROWE: Premature.

MR. MATHAI: It is premature. Thank you Mr. Rowe. It is premature to determine whether or not this will actually exclude a large portion of the people that are reflected in the contact cards. It could very well be that these contact cards mostly reflect the individuals of this community, which is likely the case, given the TAVIS initiative and the Project Isosceles initiative that has been described in The Court, as dealing with people from this area and engaging them. I understand your point, but I think it is speculative at this point, Your Honour, because at the end of the day, we do not know whether that data or large portions of it will be excluded. And there may be a day where Mr. Wortley says, "You know. What we have to date tells us that there is about six hundred cards." That is what be had been advised by my friends - that there is about six

hundred cards. And it may be the case that Professor Wortley does his data analysis, four hundred get excluded, because they are people from outside. And then that may not be statistically relevant. And he would provide that in his opinion and then maybe it does not become useful. But we are getting ahead of ourselves to suggest that a vast majority of these stops are from people from outside of the Jane and Finch area. It is somewhat speculative, what great respect.

THE COURT: My point--

MR. MATHAI: And I think that point is taken.

THE COURT: And I have done it inelegantly obviously.

MR. MATHAI: No. I think the point is well taken.

THE COURT: It is that the key is the comparator and there may be very real practical difficulties getting a comparator that works. And one of the examples was that popped out immediately was, well we can exclude for this. And in the process of attempting to get the correct comparator, we skew the process by excluding the group that should be the comparator. We will only know that when the doctor comes to Court and says, "This is the comparator that I have used."

MR. MATHAI: I agree with that, Your Honour. I agree with that.

THE COURT: Thank you. Go ahead.

MR. MATHAI: The second case that I propose to take you to justice, Your Honour, is *Cunningham and Matthews*, which could be found at tab seven of my friend's book of authorities. Now, *Cunningham Matthews*, a decision my friend, Mr. Butt, is very familiar with, dealt with a case where the individuals were not residents of the census track area. They were coming into the Malvern area and were stopped by police. In that case, the defendant claimed racial profiling as the reason for the stop. And a request was made, in that case, for the 208 data for the five shifts preceding the event in question. There, at page twenty-eight, Your Honour, the decision. It is half way down that part. You will see, again, another Judge lamenting the fact that there is no expert evidence. "There was no expert evidence before me, however, to satisfy me that five shifts is a represented number for shifts for statistical analysis purposes." And you recall that Mr. Wortley was examined in-chief on this issue of whether or not six hundred cards would be sufficient. And Doctor Wortley's response to that was that six hundred cards reflects the entire period. So if we are analysing whether or not there is a pattern within the seven months, then yes, it is enough. He went further and said, "If we had more data, the more the

better. It is always better to have more data than less data." But he clearly said that six hundred would be enough for establishing the profile within those seven months. Again, explaining the need, the necessity, and the relevance of Doctor Wortley's testimony and why his evidence should be accepted as admissible in this proceeding. But it also goes to the likely relevant issue. As it is our submission, Your Honour, that the amount of cards that have been produced - six hundred is what we have been advised - will allow Doctor Wortley to provide a statistically relevant analysis. In that case, again, Justice Goodman decided against granting the disclosure request. So she decided against granting the request for 208 cards for the officers in the five shifts before, as well as the request by the defendants for the officer's notes for any traffic stops. They made a distinction and said, "We only want notes for traffic stops; not for all the 208 cards." In our case, obviously, it is different. We are asking for the notes of the officers with respect to any 208 that they filled, whether it before a traffic stop or any other reason. I think the mean reason why Justice Goodman decided not to grant the application can be found in two areas of her decision. The first is at page twenty-

eight, which I believe you are already at, Your Honour.

THE COURT: Yes.

MR. MATHAI: And you will see there, after the sentence I just read to you, it says, "Further, even assuming that all of the shifts for which documents are being sought are general patrol shifts in the same zone or area, and even assuming that the statistics Canada census data taken in 2006 accurately or closely enough reflects the percentage of black persons in the population of March 2008, and even assuming that the defence could satisfy me that certain census track information accurately or closely reflects a relevant area, be it zone three or 42 Division, a combination of zones in 42 Division, depending on the areas that the officers patrolled during the five shifts, or the area known as Malvern..." And this is the key part. "The evidence does not satisfy me that comparing the number of black persons stopped as against the black population of those areas or in a particular area is probative in this case." And she notes why. "I note, just as one example, that neither of the defendants in this case is a resident of Malvern or as I understand it, any of the census tracks found in zone three or four." This is why she is saying that the census benchmarking suggested in that case, without

the use of an expert, would not be significant. In this case, we are in star contrast, because we have an individual who is not subject of a traffic stop or not driving in from outside of the area. He is a resident of the area. So it is a proper comparator group insofar as what we are looking at in terms of data is data from the area that Mr. Buckley resides in. She goes on to say, "I found Mr. Butt's analogy of the traffic and the entertainment district to be a fascinating and illustrative one. I am not satisfied on the evidence before me that the comparators for which the defence seems to intend to rely on are valid ones, particularly given or do not know what it is likely to prove racial profiling of these particular officers." Now, we have not had the benefit of hearing Mr. Butt's analogy of the entertainment district yet. But I imagine that it is similar to the analysis that you suggested in your hypothetical--The religious analysis of people coming into the area that do not reside. And again, the response to that is what Mr. Wortley's evidence was, was adjusted benchmarking. That we could control for these factors and we could remove people who are not from the area. And I take your point, Your Honour, that that may, in the end, reflect an improper comparator group, and that is something to decide when we actually get the

report and it is being presented and the weight that is to be given to it is being analysed. But with respect, the likely relevance test is not where we engage in that form of analysis, because as The Courts tell us, the defence is not a catch twenty-two. They do not have to say exactly what it is going to be used for, because they do not know. In this case, we can go a step further and say if it establishes racial profiling or it establishes a pattern of racial profiling, then we will use it as circumstantial evidence to challenge the credibility of the officers with respect to their version of the events. But the likely relevance test cannot be raised to a situation where we are supposed to give The Court the answer to what the analysis was or is going to be without having the information in hand. The question, at this stage, has to be whether or not there is a reasonable possibility - that is the key words in this test. The reasonable possibility that the documents sought will be probative to an issue. Now, Doctor Wortley has already told us that this is a type of analysis that is used often. Other jurisdictions. It has been used in Ontario in the past. He has used it himself, and that it is a valid statistical analysis for this information. With respect in light of that information and no expert evidence to the contrary, I think that it is

our respectful submission that there is no question that this evidence should be seen at this point as a reasonable possibility of assisting in a probative information on an issue in this trial. At page thirty-five, the entertainment district analogy is flushed out a little bit more in the analysis. "Mr. Butt raised the spectra of the problem of the correlation between residents and drivers in the area." And again, that is not an issue in this case. "He gave, again, the highly illustrative example - the change in the characteristics of the Toronto Entertainment District on Saturday night, as opposed to Monday afternoon. He asked quite rightly what the time of day or the particular day has any impact on the driver profile in the area. Is there anything in the area that would change the profiled persons in that area in particular times?" Again, Your Honour, our response to that and the response that you heard from Doctor Wortley was that we can control for factors like time and like location. So we can not only compare these officers to other officers during that same time, but we can also compare them to shifts that they do earlier in the day, where the argument that the untoward people that are out at night is now removed from the situation. And see where there is consistency between the two. We can compare

those magnitudes and that will be of assistance in determining whether or not all of the observational benchmarking issues my friends raised are truly relevant. Page thirty-six, again, Justice Goodman reiterates, what I believe, her major concern in this case is. "I have concerns about the suggestion at all that what to take from the records to be produced is a matter of weight only. I am not persuaded on the evidence that comparing stops of black persons to the residential census is probative of racial profiling on the part of the officers." And here is why, she goes on. "Again. In this particular case, the two defendants themselves did not reside in the Malvern area when they were stopped. I therefore can reasonably assume that neither lived in zone three or 42 Division if what is going to be the population base used for the suggested statistical analysis." That is her reason for finding that there is no probative value.

THE COURT: And she accepts adjusted data.

MR. MATHAI: But her problem is the link to the case at hand. She said let us assume all of these things. What my real problem is these two individuals did not live in the area when they were stopped. So using the census data in this particular case is not very helpful because these individuals did not live in the area. And

that is why she says, "I therefore, can reasonably assume that neither lived in zone three or 42 Division if that is going to be the population base used for the suggested statistical analysis." Her concern is that these two individuals cannot be compared to the residents of Malvern, because they are not residents of Malvern. And that is not the concern at the case at hand. We have the individual who resides in the area to which we are going to compare this 2006 census data to.

THE COURT: So what is the comparator that Doctor Wortley is going to use?

MR. MATHAI: Well Doctor Wortley said that there was many comparators. Doctor Wortley explained that he can use a census track data for 31 Division and that it is available through Statistics Canada, what the population is within the 31 Division. But he said you can also go micro. You can go lower than that. And he said that he will work with Statistics Canada to nail down and drill down to the smallest area so as to get a very good comparator group. And if he can do that using this data, I do not know how we can suggest that it is not reasonably possible to probatively help on an issue in this matter. A brief indulgence.

THE COURT: Go ahead.

MR. MATHAI: The final analysis I propose to do, Your Honour, is go through some of Mr. Gold's particular critiques of adjusted benchmarking and I suggest to you, Your Honour that a) they are not valid concerns; but b) these concerns will only really bear fruit or not bear fruit once we have the report in our hand and once the data is actually analysed. And at this point, the concern is speculative, and nothing more. What appears to be Mr. Gold's main argument is that we are using the wrong comparator group and that the comparator group that should be used is that of crime statistics. Because if sixty percent of the black youths or black males are committing crimes and sixty percent of the black youths are reflected in contact cards, well then there is no racial profiling. And I have already addressed this earlier on when we were discussing some of the issues with respect to comparator groups. But the problem with that analysis is that race crime statistics include the issue of racial profiling. So it is not neutral. It then becomes a circular argument. Sixty percent of black males commit crimes. Why is that? Because they are maybe policed more for all of the reasons that Mr. Gold said in his cross-examination. Maybe they are policed more. But it does not reflect the fact that black males commit more crimes than white

males. The contention is that that statistic, in and of itself, contains elements of racial profile. So to use that as a comparator is problematic. And that is why census benchmarking is more advantageous--Or adjusted census benchmarking. Because you do not have the issue of the comparator group being affected by racial profiling. The only way you can use crime statistics as a comparator group is if you say that it does not in any way reflect racial profiling. And I think, quite frankly, that is a hard submission to make.

MR. GOLD: Your Honour, I hate to interrupt, but this is such an incorrect statement of my argument. Perhaps my friend should wait for my argument and then in reply, deal with what I am actually going to argue. But I can assure Your Honour that this bears no resemblance to the argument that I am going to be making.

THE COURT: It may expedite matters to do it that way.

MR. MATHAI: I am happy to wait and deal with it in reply. And I may be wrong. My notes may be incorrect, but one of the questions that was put to Mr. Wortley was, "Would it not be better to use the comparator group of crime statistics as opposed to census population?" But I could be wrong about that. My notes could be wrong so what I will do is just leave it at the arguments I have already provided on this issue

and then return to it in reply once Mr. Gold clarify what the argument actually is. The second issue, Your Honour, is that Mr. Gold suggests that there is problems with--We should be using observational benchmarking and that that is a more accurate way of determining whether or not there is any racial profiling. And a few responses to that. The first is that it assumes that observational benchmarking may lead to a different result. I think that the evidence that you heard from Doctor Wortley was during his study in the Kingston study, when he did observational benchmarking, it actually reflected the same evidence as the census benchmarking did. That is they went on the street and they did their analysis. They counted the number of people who are in the entertainment zone in Kingston such that it is. And the evidence suggested the same thing that race was an element in the stops.

THE COURT: But is the point not that the adjusted benchmarking is just that. It is an artificial construct, whereas observational benchmarking is actual. It may be that they turn out to be the same thing. It may be that the adjusted benchmarking accurately reflects. But it is at least an arguable point. Is it not?

MR. MATHAI: I think that is clear is that it is a different method. What is clear is that it

can be used to establish he same thing that there is patterns of racial profiling. But what is not clear, in my respectful submission, is that it is better or the only approach to ascertaining whether or not there is patterns of racial profiling.

THE COURT: But at the end of the day, does that not depend on the accuracy of the adjusted benchmarking?

MR. MATHAI: Yes it does.

THE COURT: And so the more accurate the adjusted benchmarking, the closer it is going to be to the observational benchmarking.

MR. MATHAI: Yes. Although I would say this: The problem with observational benchmarking-- Forget about all of the practical realities that Mr. Wortley spoke about in his examination in terms of cost, energy and all that. The problem you get with the observational is that what you will hear the is, "On December 13th, 2008, there was a parade that day. That skewed what the observational benchmarking would have been on that day." And so, you went on December 23rd. And December 23rd is close to Christmas and there is different people out on the street because it is Christmas, and because people are out shopping and whatnot and they are in the malls and there is more people around late at night because they are shopping late of Christmas gifts. So it sets up this impossible

means of proving racial profiling. And that is what I think is the trouble in this case. That my friend says observational is better, although he does not lead any evidence to suggest that observational is better. But he suggests to you that observational is better. But there is no reason or no basis for believing that yet in this case. Now there may be an argument to be made that it is a frailty that there is no observational benchmarking that is being done in this case. Sure. And that is an argument for cross-examination, as to the weight that it can be given. But to argue that it renders it useless, or not even useless. That it renders it not statistically valid, I think it is a leap. With great respect, I believe it is a leap. It is troubling to hear that this statistical analysis that is being used time and time again in sociological studies and criminological studies is incorrect. It is just not of relevance whatsoever because it is not good science. What we do not hear from my friends is some kind of analysis of the 208 data or some kind of observational benchmarking that they have done or the police have done. And trust me, if the police had done it, we would have heard about it in this hearing. That reflects something other than what is reflected in these adjusted census benchmark data. I guess if you boil it

down to it's heart, Your Honour, you do not have to determine, in this application, that adjusted census benchmarking is not as good as observational. You do not have to decide that in this proceeding. All you have to decide is whether or not, on this first stage of the *O'Connor* analysis, adjusted census benchmarking reasonably provides probative value to an issue in the trial. That there is a reasonable probability that it will be probative to an issue in the trial. And that is not a high threshold. It is conclusive of an issue at the trial. It is the best evidence that you can possibly get in an ideal world. That is not the standard. That is not the test in the *O'Connor* application. In fact, it is quite the opposite that what the test in the Supreme Court has suggested is that we should be given the benefit of the doubt because we do not have access to the records. That the threshold is not that high. The last thing I will mention with respect to street observations or observational benchmarking is that while we are not suggesting that it is being done in this case, for obvious reasons, there are ways to control within the adjusted benchmarking so that you can come close to observational benchmarking, as I have already indicated through controlling for elements like time and location. So there are ways, using the adjusted

census benchmarking data, to control for those elements and alleviate some of the concerns that my friends have with respect to this type of statistical analysis. As Doctor Scot Wortley also testified is another way to alleviate some of the concerns my friend has is by comparing other officers and by comparing other districts and across the T.P.S. generally. That allowing for these comparators and doing the analysis of these different comparisons, you are able to start reducing the outside factors that could possibility contribute to the disparity that is reflected in the data. Finally, with respect to the issue that the fact that the 208 cards are discretionary, I think that Mr. Wortley's evidence is that that can actually be beneficial. And he gave two examples for how it can be beneficial. One was by analogy of the Kingston study and how in the Kingston study, the officers were mandated for one year to do the contact cards. And you are referred to what is called the Hawthorn effect. You will recall, Your Honour. Where he said because the officers knew why this data was being compiled, it may have affected the manner in which they gave them out or affected their conduct. In this case, because it is discretionary and because there was no sense when they were first being used and that they were going to be used in this manner, it is our respectful submission

that the discretionary nature of this is what makes it highly valuable, because it shows what the officers or who the officers are picking of their own reasons, whether it be reactive or proactive reasons. They are making the decisions. It is not being mandated; it is something that they can do on their own. And we can get the reasons for the stop because we have them in the 208 data themselves. And in my respectful submission, that is more valuable information than something that is mandatory and forced upon them. Again, without any evidence on this point, Mr. Gold suggests that these officers are noting down the race and the reasons as a protective measure, because they worry that this will be used in the human rights context to suggest that they were racially profiling. So there is some skewing in the data. To be honest, I think a) that is speculative; b) there is no evidence on that point. And the officers, clearly, when they were examined on this issue on 208 cards, they never said that when they were doing it, they were doing that to protect themselves from potentials of human rights claims down the road. This is data that was collected, really for the purpose of information gathering and intelligence gathering. And you will see that reflected in the *Cunningham* Goodman decision where an officer testifies what the purpose is.

And he says the purpose is information gathering. It is not to protect yourself. I think the officer's name was Officer Jones, in that case. This is reproduced in our factum as well, that particular paragraph in the decision. In light of that, I would think that it is a hard sell to make that officers are using this as a protective measure, and therefore, it affects the credibility of the data that is in there. The officers are choosing people whom to stop based on whatever criteria. That criteria is reflected in the 208 cards and that criteria will be relevant data that will be analysed through a statistical analysis. Your Honour, to finalize my submissions here and to wrap it up, what I have done to the analysis is to try to, in some way, suggest to you that the likely relevance in this case have been met and also that the four-part *Mohan* test has been met as well. That this is a qualified expert, that there is necessity to Doctor Wortley's testimony as can only provide the statistical analysis that we are working or that we want, and that Justice Goodman and Justice Molloy both lamented the fact that there was no expert evidence that had been provided in earlier cases that could assist The Court. And here, we have provided that, so that satisfies the necessity element. And in terms of relevance, Your Honour, again,

as you know the relevance stage is not a high one, with respect to the *Mohan* test. But it has to be relevant information. And this information that is sought to be obtained and the evidence that he has provided today was of assistance and, obviously, relevant to this matter, as it has now become the subject of the entire *O'Connor* application in that he has told us how he is going to do a particular analysis. And that is relevant to the issue of whether or not that analysis can be used in an effective way for the purposed of an *O'Connor* application. So in our respectful submission, each element of the *Mohan* test has been satisfied and in addition to that, for largely overlapping reasons, the likely relevance has been established in this case. Subject to any questions that you have, the rest of my submissions I will save for my reply.

END OF SUBMISSIONS BY MR. MATHAI

THE COURT: I think at this time, rather than starting up now, we will come back at a quarter after.

MR. MATHAI: Thank you.

R E C E S S

U P O N R E S U M I N G

THE COURT: Who is preceding first? Mr. Gold?

SUBMISSIONS BY MR. GOLD:

MR. GOLD: Yes, Your Honour. Your Honour has our written submissions and you are aware of our quotation from the case law that there is an onus to show that, quote, "The records are likely relevant to the issue of racial profiling to an issue in the case." And Your Honour has our quotation from *McNeil* about how scarce judicial resourced are not to be squandered on fishing expeditions. In my respectful submission to deal, first, with a couple of points made by my friend in his submissions, the fact that, in this case, there is something called expert evidence, which was missing in two other cases, that negative argument does not mean that he succeeds. It simply raises the issues of whether other problems exist in this case. You cannot reason from the fact that this case does not lack the negative feature of another case that therefore, my friend wins in this case. And when he quotes from an officer's evidence in another case, in my submission again, that is impermissible. The issue is what is the evidentiary basis in our particular case? I am going to proceed first, by assuming that Doctor Wortley's evidence is all admissible on this application. And the first thing to note is

that this application is a step in the way to a certain kind of proposed expert evidence. And the next thing to note is that there has to be likely relevance to an issue in the case. In order to decide that, Your Honour has to look at the evidence in the case. So the first issue is: is there any real issue of racial profiling on the evidence in this case? Your Honour, the fact that everyone agrees, or as my friend submits, everyone agrees that this phenomena exists, although I think Your Honour was, with respect, extremely perceptive to realize that the expert's version of racial profiling is not the law's version of racial profiling. And with the greatest respect to Doctor Wortley, although he gave me a negative answer, it almost appears that his view of racial profiling does provide colour as an immunity for criminal activity, that in fact, the person is performing. But in any event, is racial profiling a real issue? Your Honour, if you accent the legal version of racial profiling, unless you are prepared to find, on a balance of probabilities that the officer's evidence has no credibility, then in my submission, there is no evidence of racial profiling as an issue in our case, because as long as the officer's evidence exists in the case and is not rejected, they have a perfectly good reason for interacting with this individual. The

detention and subsequent arrest is justified. And Doctor Wortley's extended view of racial profiling that even if you are catching a criminal who happens to be black, he is still prepared to crunch the numbers and develop an argument there was racial profiling should be rejected. It does not accord with the case law. So in my submission, Your Honour has to assess the viability of the issue of racial profiling on the evidence in this particular case; not just some theoretical existence. For example, everybody knows self defence happens. That does not mean that self-defence is considered in every case. There has to be an area of reality to it. Everyone knows that automatism happens. In fact, everyone knows that wrongful identifications happen. And yet, notoriously, The Courts have said you do not give general evidence about wrongful identification. It is inadmissible, according to *Macintosh*. So evidence, merely, that there is racial profiling, however defined, and it exists in and of itself, is not enough, I submit, to bring it into a particular case. Otherwise, this was put to professor Wortley, every case involving a black accused will now have super added to it, days and days of Court inquiry into the kind of statistical analysis that are sought to be put forward. So that is the first issue.

THE COURT: Now, is there not though, at least internally, of direct evidence in this case? It was not developed particularly in any particular depth in cross-examination, but it was put to Constable Cheechoo, "You stopped Mr. Buckley in July, basically, for no reason."

MR. GOLD: But Your Honour, first of all, TAVIS stops, as I understand it, can be for no reason. But secondly, that was not agreed to by the officer. His evidence was quite fair. If you look at all of the evidence, he says, "I do not remember that." He does not accept that. He says, "I make lots of stops. I do not recall."

THE COURT: Do you ultimately agree that it is possible?

MR. GOLD: Well it is possible on a theoretical level. That is all. And that is fair. I mean if he had said, "No. It is impossible," you would ask the question: He cannot remember it. How could he possibly deny affirmatively? His evidence, as a whole, in my submission, does not amount to any evidence that took place. Of course, this is a matter of final argument for the Crown, but I point out that if there was such a prior stop, it cuts both ways for the following reason Your Honour: to the extent that my friend makes so much of the fact that his client will eventually give evidence that the events followed at TAVIS-like stops. It is open to the Crown to argue that he is simply

modeling his bogus story on the prior stop. That is why it sounds so credible. And that he is simply hiding the fact that in this case, it was not a TAVIS stop. It was a stop as the officers have described. So if the client does have a prior TAVIS stop experience, that cuts both ways. It can provide a reason why he is able to give a convincing TAVIS stop story. That is not for this point. I am simply pointing out that like most things in life, it cuts both ways. Now the next issue that then, Your Honour, is even if racial profiling is a sufficiently live issue, that it forms the linchpin for evidence allegedly likely relevant to it, the first thing to point out is the evidence sought is merely a step in the creation of supposed expert opinion evidence. So the issue of likely relevance is not to be decided just upon the pieces of paper that had been filed with The Court, but upon the end product. Because these pieces of paper, in and of themselves, clearly do not meet the test. For example, unlike cases like this, Your Honour is not going to be able to review the records and decide whether they should be produced. Your Honour is not going to flip through the pages and form a determination whether they have significance or not because you are not able to do that. These are just alleged raw material for a final work product

by Doctor Wortley. So likely relevance has to be assessed against what Doctor Wortley proposes to produce. And in my submission, likely relevance must consider all of the features of expert opinion evidence. And that, of course, involves the four features that Your Honour adverted to yesterday. So let us look at the evidentiary basis. First of all, essentially, what Doctor Wortley proposes to do is to do some counting of documents and then perform a statistical analysis involving a comparison with some external frames of reference. Dealing with those documents themselves, if he is ultimately allowed to testify, a trier of fact will have to consider the fact that these documents are not mandatory. Does counting them really show anything? And to the extent that one counts between the four officers. And again, so much of my friend's submission was as if this was the end of the case and we have to introduce evidence. It is his application. And even between the four officers on the issues of what where their duties. Your Honour, I just ask you to consider, in addition to the references I gave you this morning, I would ask you to consider officer Grant's evidence at pages six and seven, talking about criminal response units and Project Isosceles. And I can tell Your Honour that whether my friends like it or

not, they have a serious misapprehension of the relationships of these various things. And ultimately, there would have to be evidence on the relationship between community response units, which are not part of TAVIS. They exist in every division in the Toronto police force. And I suspect this is on the force--the website. And Project Isosceles, they will learn that TAVIS officers, as well as community response officers, were combined in Project Isosceles. I do not want to give evidence. What I am trying to make at this point is that Your Honour does not have, and what my friends have failed to introduce, is a clear evidentiary record of the police duties of the four officers involved, even for the seven month period, they are seeking production for. That is the point I am making. It is their evidentiary burden. You do not have a clear evidentiary record of the police officers even involved in this case, as to what they were doing in August '08 or September of '08. My friends did not question them about it. The Crown could hardly be expected to foresee this issue. So that is the first thing. The next point regarding the statistical analysis would be the statistical framework - the so-called benchmarks. Now the first thing I want to point out, Your Honour, is doing the benchmark in no way depends on the production of the 208s. Why

did Doctor Wortley not produce an evidentiary record showing his proposed benchmarks? My friends have it backwards. They say, "We will get the 208s first, then Doctor Wortley will do his benchmarks, and then on the merits, we can argue about whether it is good." That has got it backwards to show likely relevance, are we not allowed to assess the benchmarks as part of Your Honour's gate keeping functions? Because if we showed the benchmarks were worthless, there would be no point in ordering production. The benchmarks did not require production. He had not even really examined The Star data. And as Your Honour knows, in science, you set your standards first so that you are not influenced by what you expect to see. If we produce the 208s first, he does his number crunching, then produces his benchmarks, as my friends are fond of saying, "regarding racial profiling," subconsciously, his benchmark analysis may be influenced by the numbers he crunched in the 208s. Why cannot he produce his benchmarks in advance? We can have them assessed by expert evidence. We can call expert evidence. This point is this is part of the evidentiary record, that we submit, is required on the likely relevant gate-keeping hearing before Your Honour. Because, as I say, he produces benchmarks and we showed Your Honour they were completely suspect, you are not going to order

production because there would be no point. So that is another point of the evidentiary record that we submit is absent on the hearing. Then, Your Honour, regarding likely relevance of his expert evidence, one of the most important facts under *Mohan* that Your Honour should consider, in my respectful submission, is what the Supreme Court of Canada would call "legal relevance." What the Supreme Court of Canada called "legal relevance," they described as, "an addition consideration to logical relevance. A cost-benefit analysis, whether its value is worth what it costs." Now as Your Honour has already noted, first of all, there is absolutely no evidence there is going to be any finding helpful to the defence. Even the expert admits it. He says, "I have no idea what I am going to find." Some counsel would submit to Your Honour, respectfully, that is really the end of it. If I stood before Your Honour in a six records applications and I said, "I have no idea what is in there. I have no idea it is going to help me. I just want it." Your Honour would, in my submission, provide short shrift in telling me the application was dismissed. So that is the first thing. There is not a piece of evidence suggesting there would be anything in the records helpful to the defence. The next point, as Your Honour noted, is what the very expensive pathway this expert evidence will

require prior to any possibility of admission. As I say, Your Honour cannot look at the records and decide whether they help or not. That is part of the overhead costs. In other words, you will be in a position where you will have to turn over records in, essentially, a blind hope that the defence may find something of use to them. And if they are turned over and Doctor Wortley does his work and produces a report, the next step will be an expert evidence *voir dire* in the trial. And we, Mr. Butt and I, on our side, we did not wish to turn this application into that kind of a *voir dire*, so we simply tried to introduce enough so Your Honour appreciated there were highly contentious issues regarding this. And that is all we wanted to you take away. Okay? It is obvious whatever report Doctor Wortley produces, if it is in any way favourable to the defence, it is going to be hotly contested. So there will have to be a *Mohan voir dire* with every prospect of contrary defence or Crown expert evidence on that *voir dire*. Does Your Honour doubt how many days that will consume? And if Your Honour were somehow persuaded to admit the evidence at the trial, even if most of the evidence is adopted, and nothing says it is going to be, it will have to be adduced again. And then what about reply evidence by the Crown? Again, another battle of the

experts. Will the police officers have a chance to come back and say, "We do not care what Doctor Wortley's adding machine tells him. We are not racist and we did not racially profile." How many days will that take? So in my respectful submission, Your Honour, this is what *Mohan* says. You have to balance all this, so I would submit to Your Honour, in a case where there was strong evidence of racial misconduct by a police officer, perhaps it might be worth it to admit this evidence. But I submit in a case like this, where there is, I say, no evidence of racial profiling, Your Honour disagrees and thinks there is some there at the bottom of that big barrel of evidence. In my submission, this evidence is not likely relevant because there is no way it would ever be admitted under *Mohan*. The cost-benefit analysis simply states this evidence would come in so high a price that if this is not a fishing expedition, it is the next best thing to a fishing expedition and it is what the Supreme Court of Canada in *McNeil* cautioned against. So in my respectful submission on the assumption that Doctor Wortley's--This is why so much of my friend's submission is as if we are finishing the case. I do not want to get into an argument of the merits of the benchmark. And if the evidence is ever admitted, Your Honour, I am sure, will hear

many fascinating hours of expert evidence on benchmarks. The purpose of all of that was not to persuade Your Honour one way or the other. It was to show you what this evidence was going to cost if you ordered production of the 208s. And we are entitled to show that, because as I say, it is very important to bear in mind that the likely relevance test is to be applied to Doctor Wortley's ultimate statistical analysis. Because if his ultimate statistical analysis is not "likely relevant," then there is no point in producing the records. I will change that a little bit. If my friends have not established that his statistical analysis is ultimately likely relevant, because as I say, in my respectful submission, one of the big gaps in their meeting their burden of proof is, where is your benchmarks? Let us see your benchmarks. Let us have an intelligent discussion and examination of your benchmarks now. What right do you have to demand we produce the 208s first, and then Wortley is going to work out his benchmarks? What percentage is he looking for now? So that we can have out experts look at it and say, "Look. If this is Doctor Wortley's target, this is going to be worthless for the following reasons, because that is relevant to whether production should be ordered." Did we get that? No. He has not even looked at The Star data. He reads the paper and

The Star tells him this, and therefore he assumes that he is going to be able to produce benchmarks. So that is on the assumption that his evidence before you was admissible. I am sure that Your Honour can extrapolate from what I have said to the following submission that on the application of likely relevance, to the extent that he gave descriptive evidence of statisticians do, that is admissible. On reviewing his evidence, I really had a heard time picking out what opinions he was offering on the application. I think it digests to this: "That I think if I get the 208s, I can do a statistical analysis, which may or may not show something." And to the extent that that is the expert opinion on the application, technically, I say it is inadmissible because it really is not helpful to Your Honour. And to the extent that his evidence says, "Well racial profiling exists from my research," again, Your Honour does not need to hear that. As I said, this idea that as a theoretical concept it exists in some times and some places, my friends are fond of saying that no one debates that. Your Honour does not need any expert to tell you that, just like you do not need an expert to tell you that some identifications are wrong. So technically, I submit that his expert evidence is not even admissible on the application. But for the reasons I have given, I submit that my friends

have failed to establish that the records sought are "likely relevant to a real issue in this case." Thank you.

END OF SUBMISSIONS BY MR. GOLD

THE COURT: Mr. Butt?

SUBMISSIONS BY MR. BUTT:

MR. BUTT: Thank you, Your Honour. I take the same position, ultimately, as Mr. Gold. I do arrive at that position by a path, that has some common ground and some other aspects to it. So what I thought I would do is I will provide you the architecture of my analysis and I will obviously identify points where we overlay and will not repeat anything, and then I will just supplement where necessary within my architecture to make points that have not yet been made. So what I am going to do by way of submissions, Your Honour, is obviously starting with the basics that the burden is on the applicant to call case-specific evidence; not mere assertions. Mere assertions are not enough. So case-specific evidence that makes out the likely relevance standard.

THE COURT: Just as I have asked Mr. Gold, I will ask you. What about the question to Constable Cheechoo: "You stopped Mr. Buckley in July," in cross-examination.

MR. BUTT: Yes. We looked at it when my friend was on his feet this morning. And if you do read the whole passage, he does say it is possible, but he also says, "I stop thousands of people. I cannot say." So if we put the two together, what he is doing is providing no evidence one way or another. And all that he is doing is acknowledging the obvious that if he cannot remember, he cannot deny. So that is all it amounts to. "I cannot deny it, because I just do not remember." It gets the applicant nowhere. In fairness, he would be illogical, at best, deceitful at worst, if he said, "I cannot remember, but it definitely did not happen." So if he cannot remember and he does thousands, so that makes perfect sense that he cannot remember, then saying it is possible is really the only honest and consistent way to deal with that particular question. So looked at fairly, in its entirety, his answer is nothing more than that. And in my submission, it cannot be put any higher than that. So just to return then, the evidence that we have is the evidence of Doctor Wortley. And I will talk about why it does not get over the hurdle of likely relevance. I will give you what I say are eight different problems with the evidence. Four of them are scientific or analytical problems. And four of them are problems when viewed from a legal perspective. And there is a ninth one

that sort of ties the two together, but basically there are eight. After I outline what I say are the eight flaws, I will return to the legal principles that are stated in a general way in the Supreme Court of Canada decisions. And after that, I will tie it to the more specific cases that deal with exactly these kinds of issues--The *Cunningham* case, the *Khan* case, and the *Fitch* case. So that is sort of the roadmap of my submissions. So I want to talk then, about the problems with Doctor Wortley's evidence and why it does not get over the likely relevance threshold. And if I can give you a theme to keep in mind, just expressed in colloquial terms, what we are essentially dealing with here is the difference between fishing and fetching. And the simple idea that is driving the third party's records analysis is you cannot fish, you have to fetch. Fetch implies you know what you are getting. Fishing implies you do not. You put the line in and what bites, bites. Fetching, you are going to get something. This is what I am getting at and this is where I am likely to find it. So with that basic idea that I say drives third party records, let us turn to the problems with Doctor Wortley's evidence. So the first of the eight is radically contingent. In other words, it depends. It is the best he can say about what might be there. And it is radically

contingent in two important ways. First of all, as Mr. Gold has said, he has no idea of what the analysis might reveal. But the second point is radically contingent at a deeper level. He does not even have any idea of whether the data will be a fruitful foundation for analysis. If I can use an ore analogy, he does not know what he is going to make that ore into--a ring, an earring, or a bracelet. He does not even know if it is going to have any precious metal in it at the second level. But he wants you to go to this very long and involved process to mine that ore for him on spec. Just with respect to the second sort of radically contingent aspect: no idea that the data will be suitable for analysis. Why do I say that? We have a number of issues that were explored in the cross-examination that give us reason to pause. First of all, as Mr. Gold mentioned, filling these out is discretionary. We do not know the extent to which it is or is not representative of what actually happened. Second, he mentioned in his cross-examination that a certain percentage did not even have the colour filled out. Thirdly, he mentioned how car stops are unhelpful because, very often, they are not related to colour because you cannot see the driver. Fourthly, he talked about proactive versus reactive stops and his principle focus, as I took it from his cross-examination, is on the

proactive stops, because the reactive stops are essentially self-justified. He spoke in terms of, during the discussions about creating reliable comparators, controlling for time of day and controlling for age. If we pause there and ask ourselves, "What net impact could all of these factors have on the data?" it is potentially huge and it is completely unknown. For example, if each one of those six points that I have given, eliminate only ten percent of the aggregate data--ten percent are car stops; you want to throw out. Ten percent are reactive, where they had to arrest; so you get rid of those. Ten percent are at the wrong time of day; you get rid of those. You can quickly eliminate the bulk of your dataset. And what assurance has he given us that that will not happen? Because these are all valid reasons to remove data from the data pool that he acknowledged in cross-examination. But is he able to say, "I will end up with a reliable pool of data in the end." No. All he says in his affidavit is, "Give me six months. Six months experience teaches." Fine. That is nice. That is a good starting point, but what can you say about the accumulative effect of eliminating data from the analysis pool on the basis of all of these factors accumulatively? The answer is: nothing. He cannot say anything about what will be left. So we not only have no

idea what he will find, but no idea whether the data will even be capable of yielding intelligible results. So it is as contingent as it can possibly be. On both levels you look at it, there is nothing to suggest likely relevance. That is the first problem. The second problem: What he proposes to do with the data--His proposed analysis is, in my phrase, methodologically unstable. And I want to contrast it with something that is methodologically stable. If we get a DNA expert to come into Court and testify, we have got a body of experience with DNA experts. We know what the standards of analysis are. We had to learn some hard lessons through cases that were prosecuted, and without these standards sometimes. Places like the centre of forensic science have learned over time and we now have a reliable, pre-existing, widely accepted methodological process. The methodology for DNA is stable. And you can present an expert and we can explore that with reference to scientifically community wide stable baselines for analysis. Did you do this? Did you do that? Did you do the third thing? If you did: great. If you did not: problems. Let us compare that with this situation. There is no methodological stability. And I want to develop that by pointing out a number of things that came from his cross-examination. The first point--By the

way, I have got about ten or twelve of these, so there is a lot of methodological instability here. The first point: the data analysis in the police context in Canada is rare. No issue about that. He acknowledged that in cross-examination. He is about the only one who is doing it, it seems, so we do not have a scientific community that has stabilized on methodological conventions. We simply do not have it. It is not anybody's fault. This is where we are in our learning. But an earnest desire to address this issue cannot compensate for the lack of stability that comes from a community working out the bugs in methodology. The second point: no observational benchmarking techniques. And that has been discussed at length already and I do not need to dwell on that, other than to say on Doctor Wortley's own evidence, that is potentially a problem. He says in paragraph ten of his affidavit. "The methodological strengths and weaknesses of adjusted census benchmarking will be discussed and observational benchmarking will be discussed." In other words, we are so much in our infancy in this process that as a precursor to doing an analysis, he has to talk about the strengths and weaknesses of what he chooses. And it is so weak that he cannot even say, either in his evidence or in his affidavit that this is what I will do. This is the right way

and I am committed to this, because that is what the scientific community says or that is what is irrefutably valid to do. In the way that a DNA scientist would say. You know what? If I am going to do the analysis, here is how I am going to do it and here is why I am going to do it this way. You cannot do that.

THE COURT: I mean to continue your DNA analogy, when the technology was first introduced into the Courtroom setting, it was not universally accepted. There were a great number of battle of experts and then things seemed to have setting down in the intervening half a dozen or a dozen years. So you have got to start somewhere.

MR. BUTT: Yes. And Your Honour has anticipated the point in *Mohan*. I will just flip ahead to give you the paragraph number. I believe it is paragraph twenty-eight. Paragraphs nineteen and twenty-eight. Both refer to the point of threshold reliability, in terms of expertise. So you are quite right. We cannot allow the fact that new scientific knowledge takes a while to develop. That reality cannot cause The Courts to say, "We will never do anything new." However, of The Courts say that, "You know what? Any theory that is untested and unstable, we will take." The Courts strike a balance and the balance is threshold reliability. So it has to have gained a certain level of reliability

in the community of experts who actually practiced that science. Once it has threshold reliability, yes, we will deal with it. And we will have the battle of the experts to work out the fine points. My point is we are nowhere near that threshold reliability stage. We might be later, but with one guy in Canada doing it, with one study in Kingston that is written up as a blurb in one chapter of a book, no self-respecting scientist would say, "We are at the point where technique and methodology have reached a stage of threshold reliability." Not even Doctor Wortley can say that, because he is not committing to any particular kind of analysis here. I mean he, himself, is not even saying that. Give me the data, and then, as Mr. Gold said, I will figure out how I analyse it. The reason is, this, if you can call it s science at all, is not developed to the point where we can say there is threshold reliability. And obviously, you can see where I am going with this and I am going to object to on *Mohan* grounds to admissibility, along with likely relevance. So that is my point on observational benchmark techniques. Census benchmark techniques: again, the colloquy that you had with my friend this morning in submissions, what about the people who flock there? That might actually be important, as opposed to unimportant, to which my friend

says, "Yeah. Okay. Well we could adjust for that." That is not the right answer. The right answer is: think to the DNA scientists. Here is what the community says about that. Here is what the research literature says about that. Here is what the reliable scientific opinion says about that. Not the unanimous opinion, but the reliable opinion, instead of us on our feet, trying to figure out how that may or may not be important. We are at out infancy. We are guessing. We do not have settled scientific norms that can give us the answer that Your Honour quite reasonable asks. The forth methodological instability. A point my friend, Mr. Gold, made so I do not need to dwell on it. That the comparative data has not even been analysed. The Star says it is what it is, so that is good enough for Doctor Wortley in the witness box yesterday. Sorry. Not good enough to establish the kind of methodological stability that makes expert opinion evidence admissible. The fifth point: the comparative police data from The Star is all internal. So at one point, the question came up and I wanted to return to that in my submissions. And your Honour asked it. "Compared to what?" So if these officers are above or below their peers, the significance is—Question mark, no answer. Doctor Wortley could not give an answer to that. Just as an example of the problems with

having a lack of settled methodology, if you look at paragraph ten in the affidavit, it is just a convenient place. It is consistent with his evidence. Look at the last sentence. "I will also discuss the methodological strengths and limitations of other observational benchmarking techniques..." And let us focus on the last phrase. "...That might be used to further test for the possibility of racial profiling." Might be used? He admits, "I do not know what testers I am going to use - what criteria I am going apply. I will discuss all this stuff. Maybe I will use it. Maybe I will not." Which leaves us wondering, "Okay. You are a scientist. You want to be able to apply objective criteria to test the hypothesis? What are your objective criteria?" And if he says, "I am not going to tell you. I might use this and I might use that. Wait until I get the data." I am going to say, "You are not a scientist." You heard Doctor Wortley, in Mr. Gold's cross-examination, dancing with the parameters that he might impose on this data. So he assumed that these were TAVIS officers. Then in cross-examination, it is not TAVIS. The evidence when my friend, Mr. Gold, just took you to when he was on his feet, about "they are community response unit officers who happen to be engaged in Project Isosceles for five weeks." And Doctor Wortley says, "No problem. I

will adjust for that." Well you compare that, for example, with his explanation in paragraph eight of his affidavit for why he need six months of data. Because what he says is about the fifth line up from the bottom of paragraph eight on page four of the affidavit. "A review of the 208s completed over the six-month time period should provide a sample large enough to draw statistically meaningful generalizations." The next sentence, "Using a shorter time period would dramatically reduce the sample size, and thus, bringing the validity of the analysis into question." Okay. Two questions. How come all of a sudden it is not a problem that we only have a five-week Isosceles Project? "Oh I can adjust for that." And again, if a shorter time period would dramatically reduce, I go back to my first point. What about all of these eliminations that might come from looking at the data? Would that not also dramatically reduce? He does not explain anything other than, "I can adjust for that." He next problem: we have him making assumptions about why 208s are filled out - that it is intelligence gathering. My friend put an alternative hypothesis that in an area of heightened scrutiny around racial issues, they are being filled out to justify their conduct involving people of other races.

THE COURT: I remembering the officers were asked. They said why they fill them out.
MR. BUTT: Yes. And we have though, if you look at the discussion of the evidence in the reasons for Judgement in the *Cunningham* case, we have the Judge in that case. And it is tab seven at about page fifteen. That supervisors direct, to some extent, the filling out.
THE COURT: Only the answers in the officers vary, including Cheechoo. I paraphrase. "Basically, this is a nuisance for me. I take them back to the station. They go somewhere. I do not know where they go to somewhere for some answers." And one officer is not asked at all.
MR. BUTT: Right. So the point being that Doctor Wortley makes assumptions about the 208s and why they are filled out. That may or may not accord with either the evidence or the actual practice. And again, a point made in cross-examination, not filling them out. We have a gap there that is unexplained as well. The next methodological instability is talking about deviations from norms. "Let us say you can get some comparative data and let us say that you can compare the data of the 208s. What constitutes as significant deviation?" He could not give an answer. In fact, if I caught the phrase he used, "There is no silver bullet," or "No magic bullet number." Again, you cannot tell us how you are going to do the analysis

and if you get some results, you cannot tell us what your measure of significant difference is going to be? And then the next point is one that Your Honour has already made a couple of times, in terms of the four types of racial profiling: malicious, stereotypical, systemic, and pursuant to directives. What we do not have is any considered view of how the conclusions reached are going to integrate the four types that he actually identified. They are his constructs, but what he did not tell us is how it is going to affect the result. For example, is it significant or insignificant that racial profiling, if there is any, was pursuant to a directive? He never says. How is he going to find out to integrate it into his analysis that it is directive-based, systemic, stereotypical or malicious? He does not say. So he is identifying things in his mind that are relevant. And yet, he is the one who is failing to tell us how it fits together. So even in his mind, the methodological construct is unstable. Then the last point I want to make on methodological instability was the exchange between Mr. Gold and Doctor Wortley on crime statistics. As I understood what Doctor Wortley was saying, even though there was appropriate evidence-based apprehension for criminal misconduct, there still could be racial profiling. If that is his view of the world,

then I could only say in my submission, that differs radically from a view The Court should take. It may be true from a broader sociological perspective. As my friend said, "Life is not fair and people in certain socio-economic situations may be apprehended more readily." But at the end of the day, as far as a Court is concerned, if you have evidence based, charged being laid, then something is going right; not wrong. What his construct really is is an attack on picking low-hanging fruit. What is wrong with picking low-hanging fruit? I agree it is also good to pick higher fruit, but that does not mean that there is something wrong with picking low-hanging fruit. The third scientific problem with his evidence is that the process that he is proposing here lacks peer validation. Doctor Wortley spoke to how the scientific community evolves through peer evaluation, publication, criticism, redesigned studies, and then the whole thing starts around again. It is a continuous cycle of renewal and it is driven by peer validation or invalidation. That does not exist here. So at the end of the day, if I can sort of summarize those, the standards of analysis that he proposes to apply to the extent that he commits to any of them are so soft that they offer no guidance in the way that scientific standards are expected to offer guidance. They

do not govern behaviour. So what he is doing is fundamentally not science. Rather, it is argument. Argument is a much more open-textured exchange where you marshal whatever you think might persuade, unconstrained by the scriptures of scientific method. So if I want to argue by analogy, I will use analogy. If analogy is not going to work, I will use experience. If experience is not going to work, I will use authority. And if none of those work, I will pound the table. What he is offering is so devoid of objectively, verified, methodologically sound standards as to a shaded into argument. And you know what? Mr. Buckley already has some very good people at arguing on his side. We do not need Doctor Wortley chining into that conversation. So now, here are the legal problems. After all those methodological problems, what he is proposing has already been immensely costly. Think of the narrow focus of this trial--one stop, a bag or marijuana, and a marijuana cigarette but, and think of The Court and party time that has been invested. It has already been immensely costly and there is no end in sight, because, again, as Mr. Gold explained, if we go down this road, it will have to be litigated up one side and down the other. On Your Honour's earlier point, I am okay if we have a tightly defined battle of the experts and we have to refine the scientific

foundation a little bit or if the foundation is laid and the casing in the upper story windows are not quite in yet. That is okay. The Courts do not need to wait until the edolphus is pristine and complete. It never will be, but you will surely have to wait until there is a reliable foundation. And without it, what is going to happen? The debate will inevitably be expanded because much of the debate will be about "what are we debating?" So without that scientific foundation that we can transplant into the Courtroom and pose some structure on what is going on, we are going to have to litigate observational benchmarks. We are going to have to litigate census benchmarks. We are going to have to litigate all of those methodological instabilities and then we are going to have to litigate whatever it is the data might say. That is the cost factor that *Mohan* says has to be factored in. Another legal problem with this is that if you listen to his testimony, it is "one size fits all." Take any case where an accused person says simply this, through his lawyers, "I was racially profiled." No more. If you have just that, you can take Doctor Wortley's evidence from yesterday and drop it into that case and he can say the same thing to the same effect. It is one size fits all. It works everywhere. And as a researcher, I mean I do not blame him. He is always looking

for data sources. And in an area like this, where the methodological parameters are still not set, data sources and research projects are vehicles to work out those issues. But with the greatest of respect, that is the kind the work that needs to be funded in the academy. It is not the kind of work that The Court needs to tolerate while the scientists get their head around how they might shed some light on an issue. The next point, and this is the last point, in terms of the weaknesses. There is little or no potential for discernable impact in this case, because this case is essentially all about credibility. If Mr. Buckley's testimony, when he testifies, and we will expect that he will say he was stopped for no other reason than his race and mistreated. If that evidence raises a reasonable doubt in Your Honour's mind, there can be nothing but an acquittal. And the question that one asks is if all it does--If it is disbelief pursuant to W.D., but raised a reasonable doubt, what does Doctor Wortley add to all this. And if it is disbelieved and is disbelieved so thoroughly that it does not even raise a reasonable doubt in the context of all the evidence, which again is W.D., what does Doctor Wortley add? Some broader patterns of behaviours in these officers that apparently were not operative that night. It does not make any significant

contribution to this case. And that is, again, part of the cost-benefit analysis. What is the potential to contribute and what is the cost in the sapping of systemic resources. If you look at that, the cost-benefit analysis just does not work. Part of the problem here in terms of discernable impact on the cast too, is again the colloquy that you had earlier in the day, Your Honour, about the four officers. What do the two who were in the car who came later-- What does the analysis of their data really add. The defence seem to suggest that it would add something because the defence theory is that this was a malicious conspiracy to racial profile, in which they were all haters and the betters. Gosh. If that is the defence theory, then we need to revisit everything Doctor Wortley says because systemic racism suddenly becomes irrelevant. Directive-based racism becomes irrelevant. What we are looking for is something entirely differently now, which is the first category only, or malicious. And where is the evidence of that on this application that would lead you into those records to look for it? There is not any. It is the defence bobbing and weaving in response to the problems in the case. And when you bob and you weave too much, sometimes you step in a pothole that kind of hurts you. So if they are stuck with alleging malicious conspiracy, where

is the evidence to get you past the likely relevance threshold? It is not there. If it is not malicious conspiracy, what is the relevance of the officers who did not instigate this? So I would like to close on the problems with Doctor Wortley's evidence and I can tell you that I will finish by 3:30 if people want to think in terms of the break. I will close on the problems with Doctor Wortley's evidence by trying the characterize it. And I want to characterize it in the most charitable fashion I can. What he is outlined, he used this euphemism research question. That means, "I do not have the faintest idea what the answer might be. Would it not be cool to look at it?" That is the euphemism he used. And that is fundamentally what he is about, as he presented yesterday. "I have no idea, but would it not be great to inquire?" And that is the mindset that does the world a ton of good in an academic environment. We need academics with tenor, who do not have to worry with applying themselves to real-world problems to brainstorm, to blue-sky, and to say, "Would it not be cool to research that? I will have no idea what I will get." That is what serendipitous discovery is all about. In an academic setting, the advancement of knowledge flows from that. And your methodology may be flawed because you are making it up as you are going along. Your

results may be flawed, because you are making it up as you go along. But in an academic world, all that happens is you publish a paper and other academics comment on it. There is no real world consequence hanging on it. And through that process of debate on the published paper about both the methodology and the results, you advance knowledge - other people published papers. That is great for an academic setting and that is fundamentally what he is proposing. It does not fit in a litigation setting. What we need when we turn to experts, and this is *Mohan*, is somebody who will come into out Courtroom with threshold reliability, which means reasonably well-established benchmarks for analysis that they can articulate in advance and they will say, "Here is where I will go and here are the likely outcomes of where I will arrive and here is why." That is where the world of the academy and the world of the Courtroom overlap. Not at the blue-sky stage that Doctor Wortley presented yesterday. So for those reasons, I say, it is not admissible, pursuant to *Mohan*. If you look at paragraph eighteen, it is the cost-benefit analysis problem and it is also the threshold reliability problem. So two sub-aspects. Just to make one point about paragraph eighteen in *Mohan* and the cost-benefit analysis, the cost-benefit analysis is what it

says. You look at both costs and benefits. What we heard this morning, very interesting to listen to, when my friend says, "We do not know, but let him do it anyway." In other words, if we put my friend's proposal in a cost-benefit analysis, what it comes out as is. "Let us do the analysis and worry about the cost later. We do not know where it will take us. We do not know what other kinds of problems. It will go to weight and we can fight about that later." My friend is fundamentally asking you to take the cost-benefit analysis out of this situation in case where Your Honour knows far better than I, because I am just a tourist in this case, what kind of costs have already been incurred by virtue of this procedure. My friends are asking you, "Just keep on ignoring it." You cannot ignore, in my submission, that paragraph in *Mohan*. The passages in *McNeil* obviously set the likely relevance standard and I just want to point to a couple of things in *McNeil* that, I think, can add to the debate. First of all, there are two quotes at are worth leaving with The Court. And *McNeil* is in the book of authorities filed by Mr. Gold on behalf of the Toronto Police Service. And it is at tab three. And the two passages, one of which Mr. Gold has referred to, and I want to tie another one into it, is paragraphs twenty-eight and forty-five. And

twenty-eight and twenty-nine both make the point about consuming scarce judicial resources. And they come back to that theme and expand on it a little bit in paragraph forty-five when The Court says, "Disclosure is intended..." and I am reading from the last line in paragraph forty-five, "...to assist an accused in making full answer and defence or in prosecuting an appeal, but not turn criminal trials into a conglomeration of satellite hearings on collateral matters." And I would just like to pause on the satellite hearings and collateral matters. Why, one can ask rhetorically, do we need to have competing expert evidence on the virtues of adjusted census benchmarking or observational benchmarking techniques? In my submission, that is the kind of thing that The Court in *O'Connor* is encouraging us to avoid. Once the scientific community has its act together and those debates are focused and narrowed--not eliminated, but focused and narrowed, then we can come back. But when you have got one guy with one book chapter on one study, we are not there yet. If I can just see if there is a couple others. I do not want to repeat anything. Just the other line is at the end of paragraph forty-six in *O'Connor*, that the hearing should remain focused on the criminal proceeding at hand. And so, this digression

into methods of statistical analysis, trying to, in one case, fix this methodological instability problem, is not something that this Court should undertake. We have to remain focused on the criminal proceeding at hand and we have to recognize that there is an actually place for that and that is to continual to publish and criticize, and publish and criticize forum of the academy. That will take care of those methodological arguments in the scientific community. Let them do the work they are good at. And when they have got, again, their act together, then they can come back and lend a hand to us and we can stay focused on the criminal proceedings. We cannot do it now though. One point in *McNeil* at paragraph forty-two that I think has to do with stage two of the analysis. So I say you do not get passed stage one, but I do want to talk about stage two, because it certainly highlights the problems. My friend, Mr. Gold, made the point, which is essential to any consideration of the impact of this kind of proceeding in stage two that that can Your Honour do with this material if you get passed stage one and Your Honour looks at it? You cannot engage in any meaningful assessment and what goes and what does not go, because you do not know the proposed analyser's terms of analysis. It is a little bit like saying, like my friend has said

in the counselling records, "Well I am not sure what I am looking for." The counselling records is an easy example because you can say, "I am looking for statements about the allegations. And you know what? Your relationship with your siblings is not my business and I do not want to know, but I do want to know what you said about the allegations." That gives The Court, reviewing at stage two, something to work with. You have nothing to work with here. You just have to give it all and let him decide what is helpful, pursuant to criteria that he makes up after you give it to him. So if we turn with that idea in mind, to paragraph forty-two, where The Court is talking about stage two. And if you just flip two pages earlier, at the very bottom of the page, they have stage two. At page eighteen, paragraph forty-two, when they are talking about actual relevance of material, it may be useful to pose the question in this way: "If the third party record had found it's way into the Crown persecutor's file, would there be any basis under first party *Stinchcombe* disclosure regime for not disclosing it to the accused?" The answer is, "No. There is no principle reason to arrive at a different outcome on a third party's records application." So the double negative there--I do not know why they use it. It is just confusing. But the bottom line is if it is in

the Crown brief, hypothetically, would you give to the defence? Let us ask the question. If I am prosecuting this case, this one stop, and I had all of the officers' notes for the last six months, it somehow ended up in my brief, would I give them to the--No. If I had all the 208s for the last six months, would I give them? No. We do not have anything that we can grasp onto to say, "Yes we should and here is why." So I want to conclude by just touching briefly on the cases that are as close as it gets to on point.

THE COURT: Just to come back to your other point about *Stinchcombe*. Surely, that is facts driven.

MR. BUTT: Sure.

THE COURT: Hypothetically, the situation is my client was racially profiled and I want the notes of officers from 31 Division for the 1st of July, when he was stopped, the 15th of July, when he was stopped, the 28th of July, the 3rd of August, the 4th of August, and so on and so on and so on. Presuming those were the types of things that would be handed over into the *Stinchcombe*. Now, if it is academic, because in this case, as I understand it, there was no request made for what the defence asserts are the several occasions on which Mr. Buckley was stopped by Constable Cheechoo. And the only cross-examination was on that he stopped him

once in July. Again, this is like some of the things that we do in the law. It is facts driven.

MR. BUTT: Yes. Absolutely. And I and I have said what I can say about the foundation that has been laid. A factual foundation. It is possible the one stop--I am indebted to Mr. Gold for bringing to my attention a point that I think is important that we both want to make sure to address. It may have been implicitly, but I just want t make it explicit. With respect to the notes, you have a problem of a different order of magnitude for two reasons. One, these are, even on what I have said as radically contingent or methodologically unstable request, the notes, even on that version, are a nice-to-have. Could possibly shed addition light on. So even he is saying, in the context of my request, the notes are an add-on. The second problem is that the notes are potentially far more intrusive from a privacy perspective because there will be lots of investigative detail that may be problematic. There will be lots of third-party interests that may or may not have made it into a brief. Because I understand that once notes makes it into a brief, there is a diminished privacy expectation; not eliminated. Because *McNeil* is clear on that. The contents of a Crown brief do remain private, but there may be

lots of other things that an officer, in the course of his or her duties over six months will engage in, in terms of citizens, and will be collecting private information. So there is, on the analysis, the notes stand on a far weaker foundation than even what I say is the weak foundation for the 208s, because they are a simply nice to have add-on that might shed light. I think, "Could possibly" is the phrase that is used in the affidavit. And they are potentially much more intrusive into other privacy rights.

THE COURT: I am going to take a break now, because you said you were going to break at 3:30.

MR. BUTT: Yes.

THE COURT: But I do not want to pre-empt you. If it does violence to your argument, we can continue on. Based on what you are saying, there has not been a lot discussion about the notes. And I leave with you the thought that the applicant asserts that he was stopped on multiple occasions by Cheechoo. We have Cheechoo's evidence on that point. Would it be appropriate for me to review Cheechoo's notes to determine whether there are references to stops with Mr. Buckley, under what might be referred to as the normal *Stinchcombe* rules? But I will leave that with you to decide. Another thing on our point of the privacy of

the individuals who are referred to in the notes, my understanding, and Mr. Gold, you can correct me if I am wrong, but the notes were sanitized in the sense that the identifiers were taken out.

MR. GOLD: They have not been, Your Honour, and I apologize. I should have dealt with this in my argument. My position on the notes is as Mr. Butt said, that on Doctor Wortley's affidavit, there is no basis to order them. But what I was going to say, and I apologize for this, two things. On the vetting issue, given Doctor Wortley's concession, which Mr. Butt reminded me about vehicle stops and reactive stops being irrelevant, is Your Honour going to have to go through the 208s and pick out the vehicle stops and the reactive stops and return them to us, so you only order street stops. And on the notes, on the basis that Doctor Wortley wanted them, are you going to have to go through all the notes? This aside from the question that Your Honour just asked. Are you going to have to go through all of the notes to see if you can assimilate notes with 208s cards and only order those particular notes turned over, because as I understand Doctor Wortley's affidavit, the notes could provide more context to a 208 stop. So does he only get the notes that pertain to a 208 stop? Will Your Honour have to go through it and do all that vetting?

And I should have mentioned that earlier, but I mention that now. That is completely aside from Your Honour's question about Officer Cheechoo, which we will contemplate over the break, Your Honour.

MR. MATHAI: Just a clarification question is really all I was going to ask. The subpoena asked for the notes that relate to the 208s. To understand that, it is not in relation to the 208s. It is just all the notes from June 1st to--

MR. GOLD: It is all of the notes, because we cannot, Your Honour--

MR. MATHAI: Okay. I just wanted that clarification, Your Honour.

MR. GOLD: It is going to be very difficult to assimilate notes with 208s.

MR. MATHAI: No. That is fair.

MR. GOLD: So we just brought all of the--

THE COURT: Somebody has to actually review them, I am assuming, to get to that stage. That somebody, I am presuming, is me. It has come up during the course of argument. The *Stinchcombe* request could have been made for the notes of the contact with Mr. Buckley. We will come back in at let us say five to four. And we will continue on today. We have got tomorrow also.

R E C E S S

U P O N R E S U M I N G

THE COURT: Mr. Butt?

MR. BUTT: Thank you. Just to address Your Honour's question about the notes of officer Cheechoo, if the defence makes a request of to Crown, the Crown should deal with that disclosure request in the usual courses. It is how it seems to me that would best be handled. I do not wish to impose any additional burdens on you. And unless the Crown declines to grant the disclosure request and it has to be litigated. It seemed to me that would be the most efficient way to handle that request, if I assume it now will, if it comes.

THE COURT: Thank you,

MR. BUTT: Just in terms of timing, I have been able to look over these cases over the break and that actually helped me. I will be finished in five minutes. I just have a few--

THE COURT: That is fine. We have got all day tomorrow.

MR. BUTT: Yeah. But the point that I was going to get to, having discussing it with all of my friends here at the table, we are content to sit a little bit later today, not later than 5:00, and finish today. And we all think that is realistic.

THE COURT: I will trust the sincerity of that having dealt with lawyers over the last several

decades. Estimations of time tend to be not as accurate as some of out clocks. But as I said, I accept the sincerity of what you say, so let us go.

MR. BUTT: Okay. So I am going to talk now. Moving away from the general principles in the Supreme Court of Canada case law to what I will call the cases on point. That may be a more or less loose use of that phrase. But I say they are more on point than anything else in the sense that it is all particular situations where the defence, as part of an allegation of misconduct or one kind or an other, usually racial profiling, has asked for records of past officer conduct. So in that sense, they are germane to our issue here. And the fist point I make with reference to all three of them, it is *Khan* at tab four, *Fitch* at tab five, and *Cunningham* at tab seven. The first point I will make is that in all of them, The Courts have declined to order production. And so, I rely on the fact that for this kind of request, there is a body of jurisprudence, which surely is at least on the cusp of being obvious that this just is not a fruitful avenue to go down. Then if we turn to the individual aspects of the cases, we will see, where in my submission, the reasoning takes us to the same result in this case. First of all, the *Khan* case, I will refer you to just one page. Page seventeen, the last

page of the decision. And it is a partial paragraph at the top, which is paragraph fifty-six. And we have Madam Justice Molloy's reasons for rejecting the application summarized at the bottom of paragraph fifty-six and at the top of paragraph fifty-seven. So the second last sentence at the bottom pf paragraph fifty six: "No expert evidence has been presented as to the statistical reliability of the available records." And I will just pause there. In this case, we have expert evidence, however what has he said about the statistical reliability of the records? I covered that in my assessment of the methodological instability of what he had to say. He does not know. He does not even know what dataset he will end with once he subtracts out what needs to be subtracted out. So what The Court is saying," Give us a reason to think we will get something reliable and you will get a better chance of getting it." It has not been done here. "Or the existence of valid statistical comparators." Again, those are debated and all that he says in his affidavit, which is consistent with his evidence in-chief is that "I will discuss the pros and cons of these." That is the *Khan* case. The *Fitch* case, a statute on Court of Appeal, essentially follows *Khan*. And again, it was a traffic stop situation and they asked for previous traffic stops. And the only passage that I wish to take

The Court to is paragraph twenty-four, which is the second-last page of the Judgement. And if we look at what The Court is saying, we have the reasons for rejecting and we have similar problems here. The quality of comparative data issues. There is none there, but here, we have quality issues, which I have already outlined. Second, we have the legitimacy issue, which they referenced in paragraph twenty-four. "Legitimate stops have to be eliminated." Third, the disconnect between the stats and the reality of this case. We have to remember that statistical evidence is, at best, even if it reliable, propensity evidence, so you have to be cautious of that disconnect. And Coupled with that potential for disconnect is, as The Court says at the bottom of the paragraph, "The respondent provided no evidence, at all, to support the suggestion that the officer in question was, in fact, engaged in the prohibited conduct." He candidly admitted to this Court that he did not know whether such evidence would emerge from the information sought. So again, you would have The Court reasoning that there has to be some basis to look for confirmation of a hypothesis. And there is no basis other than a mere ascertain. So that is *Fitch*. And then *Cunningham*, page twenty-nine. It is a transcript, so there is no paragraph numbers. But page twenty-nine and a

couple pages afterwards is all I need to take The Court to. First of all, page twenty-nine is the discussion of census data as a comparison. And essentially, what happens on page twenty-nine, is that The Court, Madam Justice Goodman, rejects census data. Based on the problems that we have already just discussed, the difference between census data and actual observational benchmarks. And it is true that Doctor Wortley said, "Well I can control for this and I can control for that and we can make up for some of those shortcomings." My point is not a statistical one. It is a legal one. The Court has already said, "You know what? This is a problem, relying on census data." So it is the authority of The Court's reasoning, rather than the statistical point that becomes important here. If we skip to paragraph thirty-three--

MR. MATHAI: Page thirty-three?

MR. BUTT: I am sorry. Page thirty-three. We see, again, a discussion of the census data at the top of the page, essentially reiterating the point I have already made. But at the bottom, this is something that we have toughed on here and I just want to let The Court know that it is tied into previous authority on point. It is that "on the defence's request..." and I am looking at the bottom of the page, "for the documents--records of arrest--would have required extensive judicial resources and

time to consider and potentially redact." So there is a Judge in this kind of situation saying, "the request you are making, in effect, does not meet the *Mohan* and *McNeil* cost-benefit analysis." If you could make out a strong case for having to go there, the cost falls away. But when it is already weak, the cost-benefit analysis say it is not worth it. At page thirty-five, we have again, the observational benchmark issue discussed. And what is important--the discussion carries over to page thirty-six. At the bottom of page thirty-six, "There is simply no evidence before me that would suggest that people found in a particular area, on a particular day or a particular time are necessarily representative of the make up of the residential population in the area." So again, that is the disconnect between census data and observational data, which we have addressed here already. The only thing I wish to add that is new to the analysis is that, here, The Court is saying, "You have got to provide that." In other words, you cannot just say, as Doctor Wortley did, "Well I can adjust for that." You actually have to provide it. Here is The Court saying, "Give me some evidence that this works." And when you think about it, it is not a radical proposition. If an expert is going to come to you and say, "I want to analyse some data," at the very least,

you should expect the expert to say two things. "One, here is how I propose to analyse it; and two, here is why my analysis is sound and is worth our time." We did not get either of those. And Justice Goodman did not get it either. And that is one of the reasons why she dismissed the motion. And then the last point that I want to make is thirty-nine and forty of the reasons. There is actually two points. But at thirty-nine, another part of her reasons for dismissing is at line fifteen and following. "There is no evidence at all that either of the police officers was ever involved in a case where there were concerns about his action, from a racial profiling perspective." So again, what we see from both *Fitch* and *Cunningham* is that if you can point to something other than the mere allegation that the officers, on this occasion engaged in it, it might help you get over the hurdle. But the absence is problematic and that is what we have here too. It is the absence. And then I want to leave you with the conclusion, which is page forty. Dismissing the application, Justice Goodman says, "There is certainly nothing in the evidence before me that distinguishes this case from any other case where individuals deny the allegedly justifiable factual basis for the stop and claim racial profiling as the basis." And then she gets into the policy implications. "To make

an order to produce the material requested in this case would, in my view, mean that such materials are obviously and automatically relevant and producible in any case where a claim of racial profiling is made." And that is really where we end up with this kind of application. What is it? I spoke earlier, when I was assessing Doctor Wortley's evidence, about his one size fits all evidence. If you get it in this case, you can plop it in the box in every case and you get it. It is as simple as that. And the contours of litigating this kind of case will be altered significantly, and that is not what third party record litigation is all about. And the only little epilogue to those cases that I will leave you is that in *Khan*, without the materials, the accused person was acquitted because it was litigated the way it should have been litigated, on credibility. And in *Cunningham and Matthews*, the accused we acquitted without the records, because it was litigated the way it should have been litigated, on credibility.

THE COURT: That is a fairly big tent.

MR. BUTT: What is that?

THE COURT: It is a fairly big tent. Credibility is a fairly big tent. And I am often told, "Well your Honour, this is a contested credibility," leaving aside the relief from home.

MR. BUTT: Yes.

THE COURT: But I cannot just pluck credibility out of the air. It is evidence-based.

MR. BUTT: Exactly. It is evidence-based upon the description of the allegations in question. In other words, the absence of those records did not prevent the defence from making out their position, at least to the extent of raising a reasonable doubt. So my point is that all we put in front of you are the third party records applications and that is all you have. But in terms of assessing the impact on full answer and defence, it is about the credibility of the assertion. And I spoke about it earlier, in terms of the fact that this records application can have no discernable impact on the outcome. Because if you disbelieve, this material is so amorphous, it is not going to change. And if you believe or have a reasonable doubt that it might be true, this is not going to be necessary to contribute to the result. Those are my submissions. Thanks.

THE COURT: Thank you.

END OF SUBMISSIONS BY MR. BUTT

REPLY SUBMISSIONS BY MR. MATHAI:

THE COURT: Reply?

MR. MATHAI: Thank you, Your Honour. I am going to start in somewhat of a reverse order and address some of Mr. Butt's arguments first,

before I go into a more general reply with respect to both of their positions. Mr. Butt tells us that this is at its infancy and that because it is at its infancy, this type of statistical analysis and racial profiling data, this Court should be wary about using it. And with great respect, Doctor Wortley did provide some evidence about this. He talked about some of the reasons why we are in its infancy right now, in this type of data, and why re lag behind the United States and why we lag behind Britain. And the reason was is because government officials are not really not willing to give this kind of data out. That was his testimony from yesterday. Quite frankly, Your Honour, I think it is unfair for my friends to say, "this is in its infancy, therefore you cannot rely upon it." Every new novel type of scientific analysis starts at an infancy and grows. And Your Honour made the point, when dealing with the analogy with DNA. At first there was great debates. It was before my time in practice, but there were great debates about whether or not it should be used and how it should be used. What happened in that case, in my understanding, is you have both sides who wanted to use this kind of data for different reasons. Sometimes defence wanted to use it because it exonerated. Sometimes the Crown wanted to use it because it led to guilt. And

so, you had two sides who both wanted to use it in different cases that eventually came to agreement about how the data was going to be used. The problem is there will never be a case that the Toronto Police Service or any other government official ever says, "We are going to give you the data and here is how we should use it." Because it never assists the Crown in their case.

THE COURT: I do not think that is the point. The point, as I understand it, is at a certain point in time, it is generally accepted with the community that this is how you analyse the situation. For example, to change the paradigm. White powder was found in the pocket. Generally accepted, the white powder is taken, it is put in for thin layer chromatography, the periodic table is checked, and that is what it is. Now, someone comes in and says the way I tested it is I stick my tongue on it. And the gist of the defence of the police possession is, as I understand it, Doctor Wortley was not able to articulate any generally accepted way of having the data. "I get this data and these are the steps, exactly, that I will follow. And this is the result."

MR. MATHAI: And my simple point to make, Your Honour, is that infancy does not equal not acceptable science. That is simply the point I am making. Doctor Wortley testified yesterday

and provided exactly what his methodology will be in terms of analysing this data. He said exactly what the comparator group will be. He then went and said who he is going to compare these officers to. He said other TAVIS officers, 31 Division, the Toronto police, in general, in attempt to drill down the numbers. He went through all that yesterday to provide his methodology for doing this research. In response, my friend said, "Well Melchers said that this is not effective. One person says that it is not effective." And Mr. Wortley has his response to Mr. Melchers and says, "Well yes, it is accepted. The United States uses it, Britain uses it, and Ontario has used it in the past. The Systemic Racism Commission, they used it." Just because it is novel and because the police side and the academic side cannot agree to a methodology, it does not mean that it is worthless science. To the contrary, what it shows is, as Mr. Wortley testified, a reluctance to have this data out in the open, debated, and freely come to some form of acceptable analysis. And the reason I say that we will never get to that point is because this type of data never assists the Crown or the police officers. And so, there will always be a fight about the methodology. We will never agree on a methodology; police and academics.

It just would not happen. And so, to wait for that day--

THE COURT: The Toronto Star gets the data in 2002 on a freedom of information Act. They get it again, after--

MR. MATHAI: That is right. After fighting about it in the Court of Appeal, they get the data.

THE COURT: It is out there.

MR. MATHAI: That is right.

THE COURT: And people are free to analyse it to their heart's content.

MR. MATHAI: That is right. And there will always be, on the other side, a police interest that says, "That methodology that you are using is not acceptable." And there will always be that contradictory point, Your Honour, because the police will never accept any form of methodology as being proper. And when you are faced with an argument--

THE COURT: It is not whether they accept it. It is whether the scientific community, the peers accept it, and then ultimately, whether The Court accepts it.

MR. MATHAI: That is right. And in this case, it is my respectful submission that Doctor Scot Wortley's evidence was clear that this has been accepted. It has been used in other countries. It has been used in Ontario. And when he reproduced it in the book that him and McKhala

did in 2008, it was peer reviewed and accepted within the book. So pointing to one individual, one academic, who is commissioned by the RCMP, to do a retort does not all of a sudden mean that there is no understandable methodology or agreeable methodology. And taken at its highest is that there is one person out there--one academic out there who does not agree with it. That does not make this a science that there is no agreeable methodology to. It just means that there is one person, who is commissioned by the police, who disagrees. Now, with respect to the issue of whether or not the allegations of racial profiling are reflected in the evidence, my friends will try to downgrade Officer Cheechoo's evidence, where he says, "It is very possible." That was his exact words. Very possible that he did a TAVIS stop on Mr. Buckley. He then goes on to explain, in fairness to the evidence, that he does a lot of them. But his initial response was, "very possible." And that is the anticipated evidence that we will hear from Mr. Buckley and also as part of the *Stinchcombe* request. Obviously, now we will be writing for requesting notes.

THE COURT: We are now nine months on. As I understand the defence position, Mr. Buckley says, "I was stopped on several occasions by Cheechoo," and we are getting a *Stinchcombe* request today, on the second day of argument.

MR. MATHAI: I understand Your Honour. Originally, I thought the ideal was that it would be part of the *O'Connor* application through the request for the notes. And it is clear that we can do it as a separate, through *Stinchcombe.* And Your Honour made that suggestion and it is a wise one.

THE COURT: I made no suggestions.

MR. MATHAI: Sorry. You raised the idea.

THE COURT: I ask questions through the course of argument, which is my test.

MR. MATHAI: Fair enough.

THE COURT: One of the issues is an evidentiary basis. An evidentiary basis is simply, "Constable Cheechoo, is it possible you stopped--Yeah. I stop lots of people."

MR. MATHAI: His answer is very possibly. But that is not the only piece of evidence that I would hang my hat on with respect to the evidentiary record, Your Honour. With great respect, I think that the inconsistency between Officer Grant and Officer Cheechoo with respect to what happened at the initial response to Mr. Buckley is also very telling. Because while Officer Grant suggest that there is some safety concern and there is a request to have the hands taken out of the pockets, that is not what Officer Cheechoo says. Officer Cheechoo's version of events is far more consistent with a 208 stop, because his first questions are not

about marijuana use. It is not, "Where did you throw that joint?" It is not looking around on the floor for marijuana. It is, "What is your name and what is your address?" And in my respectful submission, that is also evidence that you can hang your hat on with respect to whether or not there is an evidentiary basis for a finding that there is potentially racial profiling and that it could occur here.

THE COURT: You agree it is thin?

MR. MATHAI: Sorry?

THE COURT: Do you agree it is thin?

MR. MATHAI: I would agree that it is not as strong as we would like. I would agree with that, but I think that the evidence that has come out and because the two officers have inconsistencies with respect to that evidence, Your Honour, suggests that there is definitely something to that. The last piece is obviously with respect to Officer Grant and the negative findings against her in earlier decisions, which have been made in the factum and I will not go any further in depth with that.

THE COURT: What use can I make of that?

MR. MATHAI: Well it deals with a similar situation in terms that you are dealing with an officer who does a 208 stop of black individual, black male, and then it escalates into something more. And in that decision, The

Court, as you know, ruled against the credibility.

THE COURT: Justice Brewer said that she had difficulty accepting Constable Grant's evidence that the purpose was for to stop him from jaywalking into the highway traffic. What use do I make of that?

MR. MATHAI: Well I think one of the uses you can make of that, Your Honour, is that Justice Brewer's decision, I think, at least implicitly suggests that the highway traffic jaywalking stop was of a pretext to what was actually occurring, which is similar in this case in that there is a pretext used to what is actually occurring. The smoking of the marijuana as a pretext to actually going over and talking to him and trying to get contact information.

THE COURT: So I take another factual finding from another Judge and say, "Well this officer is a liar and--"

MR. MATHAI: I think it becomes part of the many factors that get relied upon when determining credibility in this case.

THE COURT: We litigated that during the course of the trial.

MR. MATHAI: That is right and this is for the purposes of--

THE COURT: I thought that I made a ruling. You are asking me to reverse my ruling.

MR. MATHAI: No. What I am saying is with respect to the application, determining whether or not there is past conduct that suggest that the documents requested are likely relevant can be done. Without it being used in the main case proper.

THE COURT: Can you assist me as to what standard Justice Brewer used in coming to her conclusion that she did not accept Contestable Grant's evidence?

MR. MATHAI: I cannot help you with the standard, Your Honour. I would imagine it is based on a balance of probabilities, but it may not be. It could be based on a reasonable doubt she did not believe the reasons for the stops. Justice Brewer does not provide the reasons for it in her decisions. She only explains why she does not believe. And you are right. I am using this not as a major factor, Your Honour, but it is something to consider in determining whether or not there is any evidence here that shows that these records are likely relevant.

MR. GOLD: Your Honour, there is a Court of Appeal decision I wanted to bring to your attention. I argue that it is *Ghorvei*. It is the one where the Judge--

THE COURT: That is why I was talking counsel. And as I said, this was litigated at the trial. Mr. Gold was present. They raised the same issues.

MR. GOLD: It is 1999 Court of Appeal.
THE COURT: Let me see if I could find the argument in the transcript.
MR. MATHAI: I do not believe it is in the transcript, Your Honour.
MR. ROWE: The argument was taken out of the transcript.
MR. MATHAI: It was taken out.
THE COURT: But *Ghorvei* is the case?
MR. MATHAI: Yes.
MR. GOLD: Yes.
THE COURT: That seems to deal with it relatively definitively.
MR. GOLD: I lost that case.
MR. MATHAI: One of the rare ones for Mr. Gold, I am sure. I would say though, in *Ghorvei*, without having it before me right now, my recollection of it is it is not a type of a case where the evidence is sought to be used within an application. The credibility was being tested within the main case. What I say distinguishes in this case is that *Osbourne* is being used in this case, with respect to the application, to suggest that there is some evidence of prior conduct on the part of at least Officer Grant that might suggest that these documents were likely relevant. But I will leave you with that submission, your Honour. I agree that it is not the strongest analysis, but it part of one of the factors

that I believe that you are rightfully entitled to consider when determining whether or not there is an evidentiary basis for establishing likely relevance. With respect to Mr. Gold and Mr. Butt's argument about the cost-benefit analysis, they raised the sector of having experts competing and how this will take more time. And I will address that to two ways. The first I say is that this is not done in the air. The cost-benefit analysis that is done under *Mohan* is a weighing test. And you weigh it against the expert's evidence and what it can give to the proceeding, and then determine on a cost-benefit analysis of whether or not it is something that is admissible. But at this stage, to inject that *Mohan* analysis into the first stage of likely relevance puts us in a complete disadvantage because we do not have the data. And it somewhat mixes the issues of Doctor Wortley and Doctor Wortley saying, "Well I am not sure what the data is going to say." But from Doctor Wortley's perspective, if he gets up here and says, "I think the data is going to show racial profiling for X, Y and Z reasons," then it is, "Well you have prejudged this issue, Mr. Wortley. How can you prejudge this issue?" Mr. Wortley is being fair. The truth is he does not know what is in that data. He is telling us how he can analyse it and how it can be relevant to this Court in showing

patterns of racial profiling or possibly not showing patterns of racial profiling. But I think, as you suggested when we were debating this issue earlier in the day, Your Honour, it is only until you get that final report in your hand, will you be able to determine or do the cost-benefit analysis. Because it is only after looking at it and see what conclusions are being drawn and how they are being drawn that you are then going to be able to say, "This is a magnitude of twelve to one." Well that seems pretty significant to me, for a variety of reasons, as a hypothetical. And I get that there is going to costs associated. Now we have to have Mr. Gold or the Crown call a new expert to rebut this and it takes time and it takes money. But we are talking about the right to full answer defence here, Your Honour. We are not talking about a civil trial where we are talking about just money being exchanged by two parties. We are talking about the applicant's right to a full answer defence and what evidence will assist him in establishing his defence. And this is part of the evidence that will assist him in establishing his defence in questioning the credibility of the officers. So with great respect to my friends, while I agree that the cost-benefit analysis is part of the *Mohan* test, I think we are doing this prematurely. What has to happen is we get

through the likely relevant stage, we take that information, and then we determine whether or not in the main trial it would be admissible because of the cost-benefit analysis, whether or not it goes in our favour or in the other way. But to reject it at the *O'Connor* stag, I think is premature. It is not something that *O'Connor* talks about. In fact, it seems to elevate the likely relevance test. It seems to elevate it to a higher position than it is supposed to be, because at the first stage, you are not supposed to do a cost-benefit analysis under *O'Connor.* It is supposed to be the second stage in *O'Connor* and *McNeil* where you do the cost-benefit analysis. Although it is not coin to cost-benefit analysis, arguably, you can say that that is where it should occur, if anywhere, within an *O'Connor* application. And that is why I say at this stage, it is premature and that a cost-benefit analysis is not made in a vacuum, Your Honour. They are made with having a report, being able to analyse what the data is, why the conclusions have been made, and then determining whether there is enough probative value to outweigh the costs that are associated to this. Another issue that my friends take is that Doctor Wortley did not analyse the Toronto Star data. And Mr. Gold really hammered this point home by saying, "Well he did not provide us with any

evidence of him evaluating the comparator group." And I think that is where there is a fundamental misunderstanding of what an adjusted benchmark study is. Remember the key term in the adjusted benchmark study is census. That is the comparator. That is the benchmark. There is no analysis that gets done on the census until you get the 208 cards so that you can determine what needs to be adjusted. When I say, "What needs to be adjusted," I mean the earlier discussion we had with respect to residents. It is not about analysing the Toronto Star data ahead of time, because that is not the comparator group.

THE COURT: Well in the context arose, Doctor Wortley was outlining what he would do. He says, "I will look at TAVIS, generally. I will look at other TAVIS 31. I will look at other police generally. I will look at police 31." And I interjected saying, "Well then what you need are all of the 208 cards for every member of the Toronto Police Service." At which point he interjects, "No. No. I do not need that. I have already got that. The Toronto Star got that."

MR. MATHAI: That is right.

THE COURT: And it is then that Mr. Gold follows on in his cross-examination and says, "So you have analysed the Toronto Star, have

you?" He says, "No I have not." Be it he has read the newspaper.

MR. MATHAI: And that is a very accurate restitution of how the evidence came out yesterday. But the argument my friend now makes in his closing submissions is that he has not analysed anything with respect to the benchmark itself, and that is why it is problematic. And what I am trying to explain, and maybe clumsily doing it, is that the benchmark is not the Toronto Star data. A benchmark in adjusted census benchmarking is the census study itself. That is the benchmark.

THE COURT: But the Doctor's evidence as I understand it is, "I am going to at least, in part, rely on the Toronto Star data to come to my conclusions, but I have not looked at the Toronto Star data."

MR. MATHAI: One hundred percent. That is exactly what Doctor Wortley said, but that is not what his benchmark is. The benchmark is the 2006 census data. What he will do, as well, is provide comparative analysis to the Toronto Star data, so as to provide more reliability to the study that he is conducting. But the benchmark is the 2006 census data. And there is no need to study that, because it is what it is. All that is left for Doctor Wortley to do is now adjust the census to exclude the individuals who are not part of the census area

that we are looking at. And that leads into, I think, Mr. Butt's second argument, which was we are starting to exclude so many people because Mr. Wortley says we can control for things like time, like location. But I need to be clear about this. When Mr. Wortley says we can control for these things, it does not mean we exclude them from the analysis. It means that you are using it as a level in the analysis as a comparison. So what you would do is you look at these TAVIS officers in question in this matter. The officers in question, you look at their stops between 8:00 p.m. and 3:00 a.m. You may look at their stops in earlier shifts when they are doing 10:00 a.m. to 3:00 p.m. and then compare the two. You are not excluding cards, so to speak, from the deck. You are keeping them in, but what you are doing is drilling down on the level of analysis. It is not exclusion. The only thing he proposes to exclude is people who are residing outside of the area. And that is to address the very concern that we see in Justice Goodman's decision. It is actually mostly Justice Goodman's decision. And in *Fitch* as well, it also becomes part of the analysis as well. And that is what Doctor Wortley is saying. He is not saying willy nilly he is starting to remove cards. It is not his evidence. And it was a misunderstanding by my friend and hopefully I

am clearing it up right now. It is not an exclusion of those 208 cards. What it is is a drill down so that you can start comparing it at more minute levels to get better data. That is what it is. My friend, Mr. Butt, refers to collateral matters and he says that, "These are collateral issues." And with great respect to my friend, this is not at all a collateral issue. This goes directly to the heart of the case - the central issue on this case, which is the credibility of the officers versus the credibility of Mr. Buckley. If you accept Justice Molloy's decision and Justice Goodman's decision in *Cunningham and Matthews*, then it is not collateral, this issue. In fact, it is central. Challenging the credibility of the officers through statistics can be done. And in a case where it is alleged that there is racial profiling, it is central to the case. It is central to the criminal trial. Mr. Butt then argued that on some of the 208 cards, the information was not filled out. And he is accurate. Doctor Wortley did advise The Court that there were some cases in which some information was missing. And my notes have Doctor Wortley reflecting that out of the 1.2 million cards the Toronto Star received, only around a hundred or thousand or so had missing data, which he suggested was not a significant amount.

THE COURT: It is about?

MR. MATHAI: Ten percent or a little bit under ten percent. Which he said is not a significant amount.

THE COURT: I thought he said it was 1.7 and a hundred thousand.

MR. MATHAI: Oh. Well that is even better for me.

THE COURT: And 1.2. But even 1.7 is approximately five percent.

MR. MATHAI: And I hear you. And I will say two things. First of all, that is not a reflection of what data is missing. It is just a reflection that some data is missing. But the second thing I would suggest to that is--And when I say that, it could not have the date =, it could not have to time. It does not necessarily mean that those hundred thousand did not have race, for instance. But the other thing I would suggest is that Doctor Wortley, who has done this type of benchmark studying in the past, in the Kingston study, has suggested that it is not a significant issue for him to overcome. Now could it be if these six hundred cards are missing vast sums of data? Then yes, it obviously could be an issue. But to be fair, I think that is where we start going into the fishing expedition, when we start hypothesising about what this 208 data card is missing, when all the evidence that we have is to the

contrary, that these are filled out. In *Cunningham and Matthews*, the evidence was if it is not filled out, officers are punished, and that is reflected in Justice Goodman's decision. So all of the evidence we have is to the contrary that this evidence is filled out. With respect to peer evaluation, Your Honour, my friends suggest, and this was put to Doctor Wortley in his cross-examination, "Well if you do your study and you do your analysis of this data, it will not be peer reviewed." And my first response to that, Your Honour, is I do not know how many cases expert evidence or expert reports gets peer reviewed before they come to The Court. I mostly deal in civil matters, Your Honour, but I can tell you I have never dealt with an expert where I tell the expert, "Can you please have your expert report reviewed by your peers before we go into Court?"

THE COURT: Is that not something in a different area? Is that not one of the central recommendations of the commission? Get your experts together. Get them to try and agree. Get some degree of unanimity, which is by any another name, peer reviewed.

MR. MATHAI: Yes. To be fair, I am not familiar with that exact recommendation, not to say that it is not there.

THE COURT: I have used the short form. But the Commission of Inquiry led by Justice Gouge into the activities of the Doctor Charles Smith in the provincial corner and pathology office. So the idea that you would try to get experts to agree, it is just part of the overall calculus. Okay. What is the method? Can we agree on the method? Can we come to some kind of an agreement? It is just one factor to be taken into account.

MR. MATHAI: That is right. And it is not a conclusive factor, such that if there is no agreement between the both sides as to what is the methodology, all of the sudden you do not accept the expert evidence. And in a case like this, frankly, you are just never going to get the police interest side and a defence side to agree on the methodology.

THE COURT: How can you say that?

MR. MATHAI: You are right. It is not paced in evidence. It is an argument, Your Honour.

THE COURT: It is sort of, "They are on the other side. They are never going to agree with me." Well potentially they may.

MR. MATHAI: Well the evidence that you have is from Doctor Wortley, who has said that part of the problem in studying this area is that there has been a reluctance to release this data. And I do not think that--

THE COURT: But that is another issue. Assuming for the sake of argument, there is a reluctance to release the data.

MR. MATHAI: Mm hmm.

THE COURT: The question is, "Okay. Now that it has been released, how do you deal with it?"

MR. MATHAI: Your Honour, we would be happy if the evidence gets released to work together with our expert with an expert from the Crown or from my friend to sit down and create a methodology that works. I have a feeling that that would not happen, but that is obviously something that could be looked at, at this stage. But we are getting ahead of ourselves, because right now, all we need to determine is whether or not this is likely relevant, not whether or not it is, in the end, going something that you put a lot of weight with at the end of the day. Finally, if I could return to the *Fitch* decision, Your Honour, which was in my friend's book of authorities. And it is at tab five.

THE COURT: Yes.

MR. MATHAI: It is really paragraph twenty-four. The first part of the paragraph. "First of all, without comparative data and possibly expert evidence, the bare numbers of stop searches, uses of consent forms, or arrests could not establish any pattern at all." In my respectful submission, that is the key problem

that the Saskatchewan Court of Appeal, with Justice Smith, had with the proposal that was being suggested in this case. In that case, there was no census data that could be used because we were talking about a highway and we were talking about out of province individuals who were coming into the area through that highway. And so, there was no comparator or benchmarking analysis that could be done. And that is what The Court laments in that case, or finds flaw with, frankly, it is that there is nothing to benchmark. And here there is something to benchmark, which is the 2006 data, adjusted, as we have already discussed now, on numerous occasions. The other issue here is that they say without possibly any expert evidence to explain what we are seeing. And what we are trying to do, in this case, is to provide expert evidence to this Court as to how you analyse the patterns that may or may not be reflected in the data. And to the contrary suggesting that it is a weakness that Doctor Wortley has not said what he believes is going to be the end result of his analysis, with great respect, I think it is in line with what his role is as an expert. Not to prejudge issues coming into a matter, to collect the data, do a hard study of the analysis, and then provide his results in a transparent way for this Court and others to analyse and determine

whether or not there is weight to be put to it. The fact that he does not come in with preconceived notions of what he will find, I think, does not detract from the strength of his evidence and what he provided. Finally, with respect to the last portion of Justice Goodman's decision in *Cunningham and Matthews*, at page thirty-six, where Justice Goodman says, "There is simply no evidence before me that would suggest that people found in a particular area on a particular day or at particular times are necessarily representative and make up the residential population in that area." As I have already said in the original argument, Your Honour, one of the things that we can do with this data is control for things like time, location, and as well as residency, to ensure that the concerns that Justice Goodman have are protected and are analysed. Finally, the last issue, Your Honour, I want to address is the issue of floodgates, or as Mr. Butt puts it, one size fits all. That the simple mere allegation of racial profiling means Scot Wortley gets up here every time and testifies. With great respect to my fiends, the sky is falling argument is entirely speculative. In 2004 is the first time I can find any reported decision dealing with 208 cards. And that is Justice LaForme's decision that is reproduced in our materials. From 2004 until now, there is

one case in Ontario that we all have - *Cunningham and Matthews* that deal with the production of 208 cards. This is not something that people have, to be honest, the time, the energy, the expenses that are available to constantly argue this issue. As you can see, it is highly contested. It is not easy to win. It is not easy to argue. And to suggest that all of a sudden, this is going to open the floodgates to a number of people just saying, "Racial profiling. Now let us put Scot up on the stand and do an *O'Connor* application." This is simply untenable. The situation in Ontario and the case law that has developed in Ontario suggests to the contrary that for at least six years now, all we have is one case where a defendant has tried to obtain 208 cards without the use of an expert and was rejected. This is not the making of a floodgate. This is not the makings of a one size fits all. In this case, there are evidentiary basis to ground a belief that there may have been racial profiling in this case. I have already addressed it as Cheechoo's evidence that it is very possible that he had 208 or TAVIS stopped Mr. Buckley in July of 2008. In addition to that, there is the Cheechoo/Grant inconsistency and how Cheechoo's evidence actually supports the theory that what happened here was a 208 stop. And while a minor factor, the *Osbourne* decision, with respect to

Grant, suggests that there may be a pattern with respect to how Grant operates. And again, it is a minor part of the analysis, but I think on the evidentiary record, there is enough to suggest that something is afoot, and that something is racial profiling. And the anticipated evidence of Mr. Buckley is going to be the exact opposite of what you heard from the officers. And at the end of the day, Your Honour, you will be left with having to decide who to believe. And the credibility analysis or W.D. analysis - whatever you are left with. But my client is entitled, as a matter of his right to a full answered defence, to challenge the credibility of the officers in a manner that is consistent with that right.

THE COURT: I think anybody would not dispute that.

MR. MATHAI: That is right, Your Honour. And it comes down to a question of whether or not this evidence is likely relevant and that it is reasonably possible of giving probative evidence on an issue at trial. And this is clearly the central issue on the trial, whether or not there was racial profiling. One more issue and I apologize. I know I said I only had one issue left, but I think we will be able to finish by 5:00. It is the issue of the TAVIS officers versus Project Isosceles. My friends have suggested that Project Isosceles has only

been around since November. I believe that is what he suggested in closing argument by Mr. Butt. Again, I am not sure exactly where that evidence comes from. I am not sure it is reflected in the transcripts.

MR. GOLD: I read you the portion of the transcript, although the date was not given. The one officer testified. You recall, "It was fairly recent," was her language.

MR. MATHAI: That is right. And somehow that has moved to November. But in any event--

MR. GOLD: It is on the website. It was part of the public advertising for police. In any event, it was said it fairly recent.

MR. MATHAI: That is fine. And if it is taken from the website, then it is obviously something in the public domain that Your Honour can potentially take judicial notice of. But either way, I say it is a red herring issue, Your Honour. All the officers have explained that Isosceles was just a smaller component or part of TAVIS. With the exception of Cheechoo, all of the other officers said that this was a smaller component of TAVIS. They were all TAVIS officers. What is unclear is how long they were TAVIS officers for. But there is no evidence to suggest that they only became TAVIS officers when Project Isosceles came into being. In fact, as best we know with Officer Cheechoo, one of the main officers involved here, he was

a TAVIS member, at least, since April 2007. So with great respect, I think it is a red herring, not just because of the evidence that is on the record so far, but also because it does not affect the analysis in any significant way. Whether or not they are TAVIS officers versus just community response unit officers, versus officers that are also involved in Isosceles. The analysis can still be done using their 208 cards, compared to the adjusted census. In addition to that, an analysis of 31 Division officers compared to them can still be done. And an analysis of TAVIS officers can still be compared to them. Or if there can be some agreement as to when these officers became TAVIS officers or what their exact positions were, then that relevant comparative analysis can be done by Doctor Wortley.

THE COURT: Well I think the practical problem is Doctor Wortley sets out the cascade.

MR. MATHAI: That is right.

THE COURT: You know? TAVIS officers, 31 Division TAVIS officers, police officers generally. Well if he is assuming that they are TAVIS officers and they are not, that is a problem.

MR. MATHAI: I do not know if it is necessarily a problem for the census benchmarking, to be honest, Your Honour.

THE COURT: Well then why bother comparing them to anything other than the census data?
MR. MATHAI: Well I think that the reason that you do is to drill down on whether or not there was outside factors that are influencing why the rates are so disproportionate. And that is what Doctor Wortley testified to. It is that the reason that we are doing this comparison is to try to see if we can address some of the issues that are raised by my friends and their observational benchmarking. That is to say that if you compare these officer with other groups, whether it be TAVIS officers or 31 Division officers or officers in the T.P.S., if there is something unusual that is occurring within these officers, in comparison to the other groups, it will assist us in determining that those things are. Or to suggest that the numbers are just simply out of whack, so something else must be going on there. But it does not assist in any other way than that. And that is what Doctor Wortley's analysis was. We are using this comparator analysis to other groups within the T.P.S. so as to try to eliminate some of the outside explanations for why there may be a disproportionately high response rate for black males. And that was the evidence he provided yesterday. So in that respect, I say it is somewhat a red herring that it does not affect the statistical

analysis, frankly. And in addition to that, the evidence just does not bear out what my friends suggest it does. Subject to any questions that Your Honour may have.

THE COURT: What about the notes?

MR. MATHAI: With respect to the notes, we are still requesting the notes, Your Honour. Although we will make the *Stinchcombe* request for Officer Cheechoo's notes with respect to the previous stops of Mr. Buckley. We would still like and are seeking the notes for each 208. I have talked to my friend, Mr. Rowe, and we have both agreed that if Your Honour were to decide that it is likely relevant and that it assists Doctor Wortley in doing his analysis of the 208 data cards, in that it provides more context for the stops, it may provide more reasons fore the stops, and it can be something that can be analysed in any meaningful way, which is what Doctor Wortley suggested. "While it is not necessary, it is more data that can help me analyse this." And if Your Honour were to decide that it is likely relevant and ordered production to yourself and opened it up, we would be fine with having the Crown, with the assistance of officers, weed down those notes so that it only reflects the 208 cards. We will be happy with that approach, if that is something that the Crown or the officers agree to.

THE COURT: I am the only one that can do it now. There are lots of things that could have been done differently about the case, but it cannot be done that way now. The documents are here, they are in the custody of The Court.

MR. MATHAI: In fairness, the subpoena that was requested from my friend only asked for the information relating to the 208 stops. That is what the subpoena said. Now my friends probably tried to save time, and for whatever reason, decided that they were going to give all of the notes. But the subpoena, and you can find it in our application record, Mr. Rowe clearly states that what he is looking for is just the notes that relates to the 208 cards. So this could have been something that was done by my friends earlier and maybe we could have written and said, "Just as a reminder, this is what we asking in the subpoena. Please comply with the subpoena." But to be honest, I am not sure it is necessary to do that. I am not suggesting anything furious in what my friends have done. Not at all. It is just that was the way it is played out unfortunately. Subject to any questions, those are my submissions.

THE COURT: I am going to suggest the 15th of December. I hope to have a ruling by then. It may simply be, "This is what is happening. The reasons to follow." But I need a while to digest the material. And as you know, I am not

asking you to have anything put before me. I have a regular schedule where I have to actually sit in Court. So the 15th of December in 310 Court.

MR. GOLD: Will that be at 10:00 a.m. Your Honour?

THE COURT: It will be at 10:00.

MR. MATHAI: Thank you, Your Honour.

THE COURT: Everybody is free to go. It will take me a while to pack up.

THIS IS TO CERTIFY THAT
the foregoing is a true and
accurate transcription from
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best of my skill and ability.

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FORM 2

Certificate of Transcript

Evidence Act, subsection 5(2)

I, E. Pasqualino, certify that this document is a true and accurate transcript of the recording of R. v. Buckley in the Ontario Court of Justice held at 1000 Finch Avenue West taken from Recording No. 482/10-308, 483/10-308, 484/10-308 and 475/10-308.

February 10, 2011

Signature of Authorized Person