

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

DAMIAN BUCKLEY

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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 13, 2010 at TORONTO, Ontario

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**APPEARANCES:**

S. Kim, Ms.	Counsel for the Crown
A. Gold, Esq.	Counsel for the Toronto Police Service
V. Arsenault, Ms.	Counsel for the Toronto Police Service
F. Sie-Wingkhov, Ms.	Counsel for the Toronto Police Service
D. Butt, Esq.	Counsel for the Toronto Police Service
S. Mathai, Esq.	Counsel for Damian Buckley
R. Rowe, Esq.	Counsel for Damian Buckley

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WEDNESDAY, OCTOBER 13, 2010

THE COURT: Now on the Buckley matter. We are going to wait for Mr. Rowe, or what is his situation?

Your Honour, I thought I would introduce myself, because I am one of the new faces to this matter. Mathai, M-A-T-H-A-I, first initial S. I am assisting Mr. Rowe. Mr. Rowe is just involved in another matter in the Courthouse today. He said he will be about ten minutes more. If we can stand the matter down for about ten minutes, just so that Mr. Rowe could attend, that would be great.

THE COURT: Just before we get to that, Mr. Butt, are you filing any materials?

MR. BUTT: No. I take the same position as and rely on the materials compiled by the Toronto Police Service.

THE COURT: Ms. Khow, any materials?

MS. SIE-WINGKHOW: No.

THE COURT: So Mr. Gold, I have your materials. Mr. Mathai, I have your materials. Is the Crown filing any materials?

MS. KIM: No, Your Honour.

THE COURT: Do you anticipate oral evidence this morning?

MR. MATHAI: Yes we do, Your Honour. Doctor Scot Wortley is here today, and will be called

as a witness on the first stage of the application.

THE COURT: So as soon as we get Mr. Rowe into the Courtroom, then you can call Doctor Wortley and then we can proceed.

MR. MATHAI: Your Honour, just as a matter of housekeeping, I just want to make sure that you received the materials that we sent to the Court Registrar yesterday. It is a bound application record. A White cover.

THE COURT: Looks like I have it. It says Court copy. October 13. 308 Court. One copy only. Application Record. It is dated September the 8<sup>th</sup>. That document?

MR. MATHAI: That is right.

THE COURT: This says it was received October the 12<sup>th</sup>.

MR. MATHAI: And there should also be a reply factum as well. A small white, bound document. That is it. Okay. Thank you.

THE COURT: I can see it. I would have appreciated getting the documents in a little bit more timely fashion.

THE COURT: Apparently Mr. Rowe is on his way down the hallway.

MR. Gold: Your Honour, Ms. Vanessa Arsenault is with me.

MS. ARSENAULT: Good morning, Your Honour.

MR. GOLD: Would it be all right if we pull this over just to make some more space?

THE COURT: Certainly, if you can make yourself comfortable. And at some point, Mr. Buckley would likely have to physically have to come before The Court. Are there other housekeeping matters or any of the records here?

MR. GOLD: Yes. A complete copy has been brought, Your Honour, of the available records. It is sealed.

THE COURT: Do you want to call the trail coordinator to see if he is on his way?

CLERK OF THE COURT: Your Honour, he is on his way in.

THE COURT: Thank you.

MR. ROWE: Good morning, Your Honour. I am sorry I am late. I was in a J.P.T. I apologize to my friends.

THE COURT: Mr. Buckley. Now, the sealed records are here?

MR. GOLD: It is.

THE COURT: They should be deposited with The Court. That is the start of the proceeding, just to insure that there are, in fact, records.

MR. GOLD: Your Honour, this box should be sealed. It is a box of officer notes.

THE COURT: All right. What will be done is the sealed envelope that has on the front, R. v. Damian Buckley. F.I.R.S. oblique stroke, 208, will be Exhibit A on the hearing. And the banker's box, which has been produced by Mr.

Gold, will be Exhibit B. And it should be immediately sealed with tape of some type, and initials over the seal. So all the parties are present. Mr. Mathai, are you in a position to call your witness?

MR. MATHAI: Mr. Rowe?

MR. ROWE: Yes, Your Honour.

THE COURT: Is the witness here?

MR. MATHAI: Yes he is, Your Honour. Court's indulgence for one moment please. Sorry, Your Honour. I understand that the other part of our request regarding the direct is from management to rag a file postdating the December the 10<sup>th</sup> demonstration, have not been provided. That was part of our subpoena as well. Do we want to address that now?

MR. GOLD: Your Honour, our instructions are that there are no such directives. They do not exist. There are no responsive records.

MR. MATHAI: Okay. Thank you.

THE COURT: So you are content with that?

MR. MATHAI: Yes, Your Honour.

THE COURT: Okay.

MR. MATHAI: Okay. Let us go ahead then. Thank you. May I bring in Doctor Wortley?

THE COURT: Well that is what I have been asking.

MR. MATHAI: Thank you.

THE COURT: Yes.

MR. ROWE: While we are waiting, can I just put on the record the specific request so it is clear? F.I.R.S./208 is complied by officers Cheechoo, Grant, Douglas Cook, and Kennedy. That is four officers. For the period of June 1<sup>st</sup>, 2008 to December 31<sup>st</sup>, 2008. Item two: the corresponding officers notes for the six month time period. And three: it says officers' notes for the period December 9<sup>th</sup>, 2008. So item three is subsumed within item two. And item four, which was the directives, they do not exist. So essentially, there is one package and a box. A package for item one and a box for number two. So all of the sought records that exist are before The Court.

THE COURT: And just for greater clarity, the copy of that letter could be entered as Exhibit D on the *voir dire*. If you have a spare copy.

MR. ROWE: I would not.

THE COURT: If you do not, then I will arrange to have one photocopied by the Clerk.

MR. ROWE: I was reading from an email that we used to obtain instructions. I believe it was--

THE COURT: It is part of your application records.

MR. MATHAI: In the application record at tab three, there is the actual subpoena. That includes the items listed.

THE COURT: All right.

MR. MATHAI: So if it assists Your Honour, I could rip it out of mine.

THE COURT: No. That is fine. I recall seeing the actual subpoena in the application record. As long as everyone is content that the subpoena mirrors the document, we will go on. But some point in the proceedings to say well at some point we ask for something different. You are content that the subpoena is the document?

MR. MATHAI: Yes, Your Honour.

THE COURT: All right. Go ahead.

MR. MATHAI: Thank you.

THE COURT: Doctor Wortley?

MR. ROWE: Your Honour, I am going to be referring to Doctor Wortley's curriculum vitae. It may be helpful to The Court to have a copy.

THE COURT: It is part of the application record and it is part of your original application record, so I have two copies of them.

MR. ROWE: Thank you.

CLERK OF THE COURT: Good morning.

MR. WORTLEY: Good morning.

CLERK OF THE COURT: Do you wish to make a non-religious affirmation or swear on a Holy Book?

MR. WORTLEY: Non-religious.

CLERK OF THE COURT: Please raise your right hand. Please state and spell your first and last name for the record.

MR. WORTLEY: Norman Scot Wortley.

CLERK OF THE COURT: Please spell.

MR. WORTLEY: W-O-R-T-L-E-Y.

CLERK OF THE COURT: First name?

MR. WORTLEY: Norman, but I go by Scot, which is my middle name.

CLERK OF THE COURT: Please spell, Sir.

MR. WORTLEY: S-C-O-T.

CLERK OF THE COURT ADMINISTERS OATH

NORMAN SCOT WORTLEY: AFFIRMED

CLERK OF THE COURT: Please have a seat and please keep your voice up at all times.

THE COURT: Mr. Rowe, do you propose to qualify the witness as an expert?

MR. ROWE: Yes, Sir.

THE COURT: In what field?

MR. ROWE: Criminology. We propose to qualify Doctor Wortley as an expert in racial profiling in the Criminal Justice System and in police investigation in Canada.

THE COURT: So criminology.

MR. ROWE: Criminology and Sociology. His Ph.D is in sociology.

THE COURT: And racial profiling?

MR. ROWE: Correct, Your Honour.

THE COURT: Are there any quarrels with the doctor's expertise in whether his evidence



ought to be received as that of an expert in those fields? I will ask you first, Mr. Gold.

MR. GOLD: Mr. Butt is going to speak to this issue.

THE COURT: Okay.

MR. BUTT: On behalf of both the Toronto Police Services and the individual officers, we do not admit his qualifications, but neither do we contest them.

THE COURT: Well then how do I come to an conclusion as to whether I can receive his evidence as that of an expert?

MR. BUTT: My anticipations of my friend will briefly address those qualifications. We will make no submissions and Your Honour will make a finding.

THE COURT: All right. So that is on behalf of the officers and the Toronto Police Service.

THE COURT: Mr. Gold, what is your position?

MR. GOLD: Yes, Your Honour. Same position.

THE COURT: Ms. Kim, is the Crown taking any position?

MS. KIM: No, Your Honour.

THE COURT: Are there questions to qualify Doctor Wortley?

MR. ROWE: Yes, Your Honour. I was going to provide Doctor Wortley with a copy of the C.V. that I am going to be questioning on right now, if that is okay with The Court.

THE COURT: Go ahead.

MR. ROWE: As well as a copy of the affidavit that is in the application.

THE COURT: Go ahead.

THE WITNESS: Thank you.

EXAMINATION IN-CHIEF BY MR. ROWE:

Q. Doctor Wortley, can you tell us your current occupation?

A. I am an associate professor at the Centre of Criminology, University of Toronto.

MR. GOLD: I apologize for interrupting Your Honour, but something was bothering me since I read our email on the record. Correct me if I am wrong, but I think June 1<sup>st</sup> to December 31<sup>st</sup> is a seven-month period, not a six-month period. That may become important later, so I just thought I correct that on the record.

MR. ROWE: Thank you.

MR. GOLD: I apologize.

MR. ROWE: Thank you, Mr. Gold.

Q. I understand that from your curriculum vitae, that you have a Ph.D. in sociology.

A. Yes.

Q. All right. From which institution?

A. The Department of Sociology, University of Toronto.

Q. And that would be in 1996 that you acquired that?

A. Yes.

Q. You also have an M.A. in sociology, and a B.A. in sociology?

A. B.A. in sociology and history.

Q. Okay. And an M.A. in sociology?

A. Yes.

Q. From the same institution?

A. Yes.

Q. Okay. How long have you been an associate professor at U of T?

A. From 07/01 is when I received tenure at U of T.

Q. So that is July of 2001?

A. That is right.

Q. Okay. And what was your position prior to that?

A. A tenure stream position as an assistant professor.

Q. Okay. And what were some of your duties or responsibilities as an associate professor?

A. The same as an assistant professor. Teaching, administrative duties, supervising M.A. and Ph.D. students, conducting research, applying for research grants, writing reports and academic papers.

Q. Okay. Now I understand that you had some involvement in the roots of violence inquiry of 2007. Do you recall having any involvement in that project?

A. Yes. I was hired as a consultant and basically given the title of research director for that in Court.

Q. Okay. And can you just briefly tell us what some of your duties were in that connection?

A. A number of different projects we were involved in. I had to produce a report on the research literature dealing with the causes of youth violence to various theoretical perspectives and how they had been tested with the empirical literature. I had to produce a detailed literature review on crime prevention programs and how they have been evaluated and what those evaluation results indicated. I had to write a report on trends and patterns in youth violence. What types of issues we are facing in Ontario, with respect to violent crime, particularly among young people. And I also conducted an inventory of the programs that have been funded by the Ontario government and how to prevent, for the purposes of youth crime prevention and youth violence prevention and how they have been evaluated.

Q. Okay. I understand that you were also involved in the Toronto District School Board school community safety advisory panel.

A. Yes.

Q. Tell us about your involvement with that project.

A. Again, a number of different capacities. Reviewing the literature on school safety and school safety programs, crime prevention programs. I also conducted surveys of both the staff and the students of two schools in the northwest corridor, Westview Collegiate and C.W. Jefferys.

Q. And what was your title?

A. I put down research coordinator, but there really was not an unofficial title given. I think I was checking with the records and I believe it was chief academic.

Q. Okay. I understand you were also involved in the Metropolis project in 2007. Can you tell us, briefly, your involvement in that?

A. Metropolis is a federally funded organization that is designed to explore the settlement experiences of new immigrants to Canada. I was nominated and appointed as the National priority leader in justice, security, and policing.

Q. Okay. I understand that you also have some involvement with the commission on systemic racism in the Ontario Criminal Justice System.

A. Yes. When I was a Ph.D. student, I was hired as a researcher for that commission.

Q. Okay. And can you tell us, briefly, what your involvement was with that project?

A. I was asked to serve as a general methodological consultant for some of the projects that were being conducted by the commission. I also had a few projects of my own, including compiling prison data by race, to indicate which racial minority groups were over or underrepresented in the Ontario Criminal Justice System at both the corrections and detention levels, and to establish any trends that we could. I also consulted a study of possible racial violence within The Court system and I also conducted, in conjunction with York University's institute for social research, a general population survey of the black, white and

Chinese populations, eighteen and over, residing in Toronto. That will be my major tasks with that commission.

Q. Okay. Thank you. I understand that in your capacity as a social professor, you have been teaching courses at U of T as well. Is that right?

A. Yes.

Q. I believe that your courses taught are set out of the record.

A. Yes.

Q. In particular, introduction to criminology?

A. Yes.

Q. And independent research in criminology?

A. Yes.

Q. Directed research in criminology?

A. Yes.

Q. All right. I understand you have also been involved in the supervision of Ph.D. candidates?

A. Yes.

Q. I believe that there is three listed in your C.V.

A. Their completed thesis.

Q. Okay.

A. I am currently supervising a number of other Ph.D. students at the centre.

Q. Okay. And you are also involved in the supervision of Masters candidates as well?

A. Yes.

Q. I understand that approximately nineteen completed Masters thesis; you were involved in supervising.

A. Technically, we refer to them as research papers at the centre of criminology. We are now a two-year Masters program, but students have the option of doing what we call a major research paper, which requires supervision. Basically, it is a research paper that counts for two full courses.

Q. Okay.

A. It would be incorrect to state that they were Masters thesis.

Q. I see. Okay. I understand that you have also been involved in the organizing of various conferences.

A. Yes.

Q. According to your C.V., there are approximately twenty-six conferences from 1999 to 2009, including several on race, crime and justice. Is that fair to say?

A. Yes.

Q. And in particular, a conference on racial profiling and immigrant youth.

A. Yes.

Q. Is that set out at page thirty of your C.V.?

A. Yes.

Q. Right?

A. Yes.

Q. And also a conference workshop on documenting racial profiling in Canada with a seventh national metropolis conference, Montreal, Quebec.

A. Yes.

Q. You also coordinated a conference on the aftermath of the Toronto Star series on racial biasing and policing.

A. It was not a conference. It was workshop.

Q. Okay.

THE COURT: Where is that in the C.V.?

MR. ROWE: Sorry Your Honour. It is at page thirty of the record, four paragraphs down. It is the fifth paragraph from the top of the page.

THE COURT: You are saying that is on page--

MR. ROWE: Page thirty of the record. I can point out to Your Honour if you wish.

THE COURT: And you say it is how far down?

MR. ROWE: It is the fifth paragraph.

THE COURT: Thank you.

Q. And I understand, Doctor Wortley, you have also received various academic awards. A Social Science and Humanities Research Council of Canada Fellowship in 1995?

A. Yes.

Q. And O.G.S. Doctoral Research Fellowship in 1993?

A. Yes.

Q. What is O.G.S.?

A. Ontario Graduate Scholarship.

Q. Okay. And you have also had various academic memberships and appointments?

A. Yes.

Q. They appear to be set out at page thirty-one of the record. Can you mention just a couple of them?



A. American Sociological Association, the American Society of Criminology, the Canadian Criminology Association.

Q. And some of the appointments that you received?

A. Yes.

Q. Can you just mention a couple of them?

A. I am a member of the School of Graduate Studies at University of Toronto Committee on program matters, board of directors, operational spring board, Toronto Police Services board, advisory panel on community safety, the Toronto Youth Gang Advisory Committee. I was the graduate coordinator at the Centre of Criminology in 2004 up until last year. I stepped down from that position once I took my tenure, so this C.V. needs to be updated. I am a member of the Graduate Executive Committee for the School of Graduates Studies and etcetera.

Q. Okay. Now before I take you through your various academic publications and invited conference presentations, can you tell me, based on your experience, how racial profiling has been studied in Canada?

A. How racial profiling has been studied in Canada? There are basically three general methodologies that have been used to explore the phenomena of racial profiling and what it is, whether it exists or not, the extent that it exists. One of those methodologies should be referred to as qualitative research. Interviews involving in-depth interviews often with members of the black community or racial minority groups, where they document their experiences with the police and their beliefs. Perhaps the most ambitious example of that

would have been the Ontario Human Rights Commissions report on racial profiling, which involved, I believe, eight hundred reports from civilians. Methodological weakness of qualitative work is often, although they provide rich detail on how people are impacted and feel about racial profiling, there are sampling issues. The Ontario Human Rights Committee, for instance, asked people who have had issues with racial profile to call and relay their experiences, so that is not a random sample of the population. And there has been a number of other qualitative research that have been conducted on this issue, including work by people like Norm Berger and Carl James. But the weakness is often sampling issues and the fact there is no comparison between the experiences of minorities and the experiences of white people. The second major strategy for examining racial profiling has to do with survey research. Survey research often has the benefit of involving large random samples of the general population, and therefore can be used for inferential statistical analysis. And in these types of surveys, you can ask people from different racial backgrounds about things like how frequently they have been stopped and questioned and stopped and searched by the police over a particular period of time. And you can statistically control for demographic characteristics besides race, including education, employment level, poverty, an area of the city that they reside in, their self-reported criminal activity and criminal records, their engagement in particular leisure activities. So the benefit is that it allows for comparisons if sampling is done correctly.

Q. Okay. And you mentioned there was a third methodology?

A. And that would be the analysis of police data that have been collected by the police themselves. Something that is widespread in Great Britain and the United States, but in fact, quite rare in the Canadian context. There has only been, as far as my knowledge, one major study in the Canadian Police Force, which was Kingston, in which police officers had to document the race and other characteristics of the people that they stop.

Q. Okay. Have you, yourself, done studies on racial profiling?

A. I have conducted different surveys. In 1994, in 2007, in 2000, on both high school populations and Toronto's general population, where we had questions dealing with citizen contacts with the police. I also was commissioned by the Kingston police service to analyse the data that their officers had collected during a special one-year pilot project.

Q. Okay. Perhaps you can tell us a little but more about the Kingston study that you were involved with.

A. Like many communities across Canada, the Kingston police have been faced with allegations of racially biased policing. The media in Kingston had focussed on the experiences of young men of African-Canadian descent over a two-year period who had been subject to high-risk takedowns. This caused a great deal of media discussion about the possibility of racially biased policing. The chief of the police at that time held a number of community forms where he was faced with allegations of racial bias, and at that time, made a decision that he was going to conduct a study over a

one-year period the see who his officers were stopping, the reasons for those stops, and the dispositions for those stops.

Q. Okay. So what were you engaged to do exactly?

A. At the very beginning of the process, myself and a colleague, Tony Doob, were asked to asked to take a look at their contact sheet and to see how it could be adapted to measure the racial background of individuals who were stopped. We gave our recommendations regarding that. After that, I had no contact. That was the only methodological role that I played in terms of the initial design of the project. After that, the Kingston police and the Kingston police officers collected stop information on the contacts they made from October 2003 to October 2004, a one-year period. Several months after that, I received a dataset with that information and was asked to analyse that dataset for the Kingston police serviced board.

Q. Okay. And what methodology did you employ in this study?

A. The methodologies that we attempted to employ involved what might be called adjusted census benchmarking. We often started from the big picture and we looked at all the stops and we compared those to the census population of the city of Kingston and revealed that the black population was several times more likely to experience a stop than the white population. Then we started looking at some of the potential pitfalls with respect to unadjusted census benchmarking. One of the being that there was a possibility that many of the people who were stopped in Kingston did not reside in Kingston. So therefore, using census benchmarking

would be inappropriate. So an innovative technique that we were able to use in the Kingston case was eliminating all people who have been stopped who did not reside in the Kingston area. Kingston might have a lot of visitors due to tourism, due to the prison population, due to the university population. So we were able to create a new dataset that only had the residents of Kingston in it, and then we re-ran the analysis. Again, found significant differences between the stop rates for black and white populations. Another issue that we then faced was the possibility, particularly because Kingston has a rather small black population. That one or two and the various individuals in the city couple have been stopped a couple times, thus driving the rate for the black population up. Luckily, we were able to identify individuals. We created yet another dataset where individuals were only counted once, so we were able to document the number of specific individuals who have been stopped in Kingston over the study period. And once again, we received data that suggested that the black individual residents of Kingston were about three times more likely to be stopped. We also adjusted for other factors. Another factor that might come out would have been the issue of age that the black population in Kingston is significantly younger than the white population, particularly since Kingston has a significant retirement community in the Kingston area. So we broke down census estimates by age and once again, recalculated, and we found that controlling or taking the age into account, these racial differences still existed, with respect to the stops. We also had a very limited research budget, so we tried to do some observational benchmarking in Kingston, which was reported. We

could only focus in the entertainment district of Kingston, and we found that the racial disparities still existed, but they were reduced. But I would have to say that the amount of observational data that we were able to collect, I think, points to the potential importance of looking at that observational benchmarking. But it was not of particularly high quality, compared to some of the studies that have been conducted in the United States, which had considerable resources.

Q. Okay. It would be helpful for you to explain to us in lay terms, what the term, observational benchmarking, means. What is that?

A. One of the arguments that might explain what the representation of certain groups within stop or contact dataset is presence on the street. So if you only use census benchmarking, it could be argued that although, for instance, the white population eighty percent of the population, they are only sixty percent of the population on the street after eleven o'clock at night, when police activity might pick up. So the argument is that one of the weaknesses of census benchmarking is that it does not take account of people's routine activities and their presence on the street. In a previous survey, for instance, we statistically controlled for that, looking at high school students. Besides race, two factors that might strongly predict whether or not a youth comes into contact with the police would be how often they spend their time in public activities, particularly late-night activities. So we asked detailed questions and distinguished between youth who were often allowed freedom to go to parties, to stay out late, to be on the street late at

night, from youth who had to go home right after school, for instance, and only could participate in activities with their families. We also controlled for drug and alcohol use, self-reported gang activity, and delinquent activity, which is obviously another characteristic that would legitimately attract police activity.

Q. How does that relate to observational benchmarking?

A. I am just demonstrating that within the study, we found that those two variables were strongly related to police contact. The youth who spent their time in public were much more likely to report police contact or multiple police contact than youth who spent their time in private settings. And youth who were engaged in criminal activity were much more likely to report that they have been stopped and searched by the police than those youth who did not report such activity. We statistically controlled for those things. However, we found that the impact of race was not reduced. We found it actually got stronger, because the racial differences were actually greatest among youth with low levels of self-involvement in criminal activity and low levels of engagement in public leisure activities.

Q. I am sorry. Can you just run that passed me again?

A. What we found was controlling for, for instance, criminal activity. We found that crime was very strongly related to being stopped and questioned by the police. To paraphrase, bad youth or deviant youth reported much higher levels of police contact than good youth or youth who were not engaged in criminal activity. This is very much

consistent with the arguments that are coming from the law enforcement community. We also found that youth who were engaged in public activities, particularly late night public activities, were much more likely to report that they have been stopped, questioned and searched by the police, than you who had to spend most of their time at home or with their parents. We statistically controlled for those factors. And what we anticipated--because we have also found that black youth reported much more public activities, white youth and black youth were about similar in their public engagement and leisure activities, whereas Asian and South Asian youth were much more involved in private activities, which protected them from police contact. And we controlled for deviant activity. And what we found was the impact of race doubled. In fact, it became more; not less important. So despite the fact that black youth reported higher levels of gang activity, higher levels of criminal activity, we statistically controlled for it, the odds, I believe, for being stopped, jumped from four times more likely to eight times more likely. We tried to explain that. You know? What is happening here? And what we did was we broke down the likelihood of being stopped by level of deviance, and we found that the racial differences, for instance, between black and white youth, were greatest among the low deviance kids. So among black kids who said they never engaged in any crime, their percentage of youth in that category who were stopped, questioned and searched by the police was extremely high. The percentage of white youth who were stopped and questioned was very low. If you looked at the other extreme among the top ten percent of deviant kids, the differences between white kids and black kids was not



statistically significant. It was negligible. Close to ninety percent of both black and white kids who were highly involved in crime were stopped. The interpretation of that data could be two-fold. It could be that the police are better at identifying criminality among white youth than black youth. That is why white youth who are not engaged in crime are very rarely stopped by the police. It could also have to do with the fact that race is a master status that attracts attention on the street, which is consistent with an over-surveillance of racial profiling argument.

Q. Thank you. So to continue then, I understand that you have been responsible for a number of academic publications. These are at pages thirty-two to thirty-six of the applicant record.

A. Yes.

Q. From 1989, right up until the current year. Again, many of these having to do with race, criminal justice and profiling. For example, if you look at page thirty-two, at the bottom of the page, Wortley and Tanner, "Racial Profiling in Canada. Survey Evidence from Toronto."

A. I should stress that I was looking at the record and the title that the journal of Canadian Review of Policing gave that article. It is the same article, but they gave it a different title from the proofs that I have. But it is addressing those issues.

Q. Okay. And then at the top of page thirty-three. Scot and Tanner again. "Discrimination or Good Policing? The Racial Profiling Debate in Canada."

A. Yes.

Q. At the top of the page.

A. Yes.

Q. And then three paragraphs down or the fourth paragraph down. Scott and Kellough. "Racializing Risk: Police and Crown Discretion and the Overrepresentation of Black People in the Ontario Criminal Justice System."

A. Yes.

Q. And then five or six paragraphs down, Scot and Tanner again. Data, Denials and Confusion: The Racial Profiling Debate in Toronto.

A. Yes.

Q. And then I guess five from the bottom of the page. Kellough and Wortley, "Remand for Plea: The Impact of Race, Pre-trial. Detention and Over-Charging on Plea Bargaining Decisions."

A. Yes.

Q. I understand that you have also--

A. I am sorry. Some more recent publications that have dealt with the racial profiling issue were Wortley and Kellough, 2008. Wortley and Tanner, 2005. That is on page thirty-two. And Wortley, 2009. And a Wortley and Akwasi Owusu-Bempah, 2009.

Q. I see. Okay. And I understand that you have also been involved in a number of presentations to Judges and police groups.

A. Yes.

Q. On racial profiling. Perhaps we will start with presentations to Judges. Just one moment. At page thirty-six, under the subtitle, invited conference presentations.

A. Yes.

Q. The second one from the top, it says Wortley, Scot, 2009. It appears to be written in French, so forgive my pronunciation. Analyse Sociologique.

A. Yes.

Q. Do you recall your involvement in that?

A. That was a conference sponsored by the Quebec.

Q. It was sponsored by?

A. The Bureau de Quebec. The Bar Association.

Q. Okay. What was it about?

A. It was concerning the issue of racial profiling. And does it exist? How can we measure it? What do you address it and reduce it? The consequences as well.

Q. Okay. And then four paragraphs down. Wortley Scot, 2009. Race and Justice. Recent inquiries and research presented at the National Judicial Institute on race, law and judging.

A. Yes.

Q. And what sorts of issues were you discussing in that?

A. Two presentations in that conference. One was dealing primarily with policing issues, with respect to race. I talked about racial differences and perceptions of the police. I talked about racial profiling. I talked about police use of force, some of the research I have conducted in the past. And then the second was more on race with respect to bail and bail conditions.

Q. Okay. I understand. Continuing along the presentations that you made to Judges, at page thirty-nine of the record. If count eight paragraphs down from the top of the

page. Wortley Scot, 2006. Racial profiling and legal implications of social science research, presented at the Ontario Court of Justice university education program.

A. Yes.

Q. And what sorts of issues were you discussing in that context?

A. Very much the same issues documenting how definitions of racial profiling. How it had been documented or researched in the Canadian, American, and UK contexts. And I had a question and answer period about how such data might be interpreted by The Courts or used in The Courts.

Q. Okay. There are other presentations to Judges in your resume. I will just move on right now, to some of the presentations that you made to police.

A. Okay.

Q. Again, at page thirty-six. At the bottom of the page, one paragraph from the bottom. Wortley 2009, plenary address, eliminating bias and the perception of bias from Canadian policing. Do you see where I am referring?

A. Yes.

Q. And that was a conference that you were involved with?

A. Yes.

Q. And who were you presenting to?

A. It was primarily police representatives from Western Canada.

Q. Okay.

A. Calgary, Edmonton.

Q. And at page thirty-eight, six paragraphs from the bottom of the page. Scot Wortley, 2007. Police use of

force against racial minorities in Ontario. Empirical data, explanatory models and policy implications.

A. Yes.

Q. And who were you making that presentation to?

A. That was to the S.I.U., their investigators training conference.

Q. There are a few other presentations you made to police. I will not take you through all of them. I will just take you through one more, which is at page thirty-nine, and it is six paragraphs from the bottom. Wortley Scot, 2006. Keynote address. The social context of police use of force and an analysis of data from Ontario's Special Investigations Unit.

A. Yes.

Q. And who were you presenting to in that instance?

A. Canadian association for the civilian oversight of law enforcement. CACO.

Q. All right. And there are more presentations to police on pages forty and forty-one, which I will not take you through, at this time. Have you been qualified as an expert witness before?

A. Yes.

Q. All right. And I believe at page thirty-one of your C.V., there is an indication at the bottom of the page there, of a number of cases in which you have been qualified as an expert witness. In particular, the case of Nasia v. Peel. Do you recall that case?

A. Yes.

Q. And was it a criminal case? Or what kind of case was that?

A. It was an Ontario Human Rights Tribunal.

THE COURT: It says June, 2006, he was qualified as an expert on systemic racism within the criminal justice system for an Ontario Human Rights tribunal.

Q. So I am just asking Doctor Wortley.

THE COURT: That is fine, but it seemed obvious because the doctor has put it in his C.V. that it was an Ontario Human Rights Tribunal.

Q. Okay. So you were qualified as an expert in racial profiling in the Criminal Justice System and in police investigation in Canada?

A. In which case?

Q. In Nasia.

A. It was an expert on systemic racism within the justice system.

Q. Okay. And the Ali Tahmourpour case. You were qualified as an expert in that case?

A. Yes.

Q. And what was the expertise?

A. Policing and systemic racism in Canada and social research methodology.

Q. Okay. And also the Smith case?

A. Mm hmm.

Q. And how are you qualified in that case? How was your expertise qualified in that case?

A. I would have to say I cannot recall what the exact wording was. It was dealing with racial profiling and systemic racism. But I cannot recall the exact.

Q. Was that racial profiling and systemic racism in the criminal justice system or in Canada? Do you recall?

A. It focussed within the Justice System. Yes.

Q. You also made reference to the Kenneth Allen Inquest?

A. Yes.

Q. And you were qualified as an expert in that case?

A. Yes.

Q. Can you tell us a little bit about what the nature of that case was about and the expertise you brought to there?

A. My primary testimony in that case was regarding minority perceptions of the Justice System and how the developed. The Inquest was interested in hearing how the death of Kenneth Allen and police custody might impact how minority groups perceived the police and the impact on their trust of the police.

Q. Okay. To come back, for a moment, to the Nasia case.

A. Mm hmm.

Q. Can you tell us a little bit about what the case was about and how your expertise was brought to there, in that case?

A. The majority of my testimony in that case was just outlining what racial profiling was and what research had been done in Canada to document whether it exists or not. The strengths and weaknesses of the methodologies that had been used. In that case, I was also asked to comment on the

case itself. The individual scenario that was being played out.

Q. Thank you.

MR. ROWE: Your Honour, at this point, I would like to ask that Doctor Wortley be qualified as an expert witness with expertise in racial profiling in the Criminal Justice System and in police investigation in Canada.

THE COURT: Racial profiling in the police investigation?

MR. ROWE: Yes, Your Honour. Expertise in racial profiling in the Criminal Justice System and in police investigation in Canada.

THE COURT: What has me concerned--I do not see any questions that you have directed to him, concerning his expertise in the field of police investigation. Racial profiling, yes. You are talking about investigative techniques?

MR. ROWE: Your Honour, racial profiling in police investigation. I am not seeking to qualify Doctor Wortley as an expert in police investigation. I am seeking to have him qualified as an expert in police racial profiling in police investigation. If it helps to clarify--

THE COURT: Can we just limit it then to racial profiling?

MR. ROWE: Well the context of the racial profiling is police investigation. That is why I mentioned that in my request for his being



qualified as an expert. And a lot of the racial profiling studies that he has done and conferences and so on that he has organized and participated in, can relate directly to that issue of racial profiling in police investigation. And worked with the commission on systemic racism and so on. In fact, he has been qualified as an expert, with that particular expertise, in other cases.

THE COURT: Racial profiling in the context of police investigations. That is what you are trying to get him qualified as?

MR. ROWE: Correct, Your Honour. Thank you.

THE COURT: Just proceeding down the order of counsel. Any questions by any counsel?

MR. GOLD: Not on the issue of expertise, Your Honour.

MR. BUTT: Nor from myself, given the way that you have listed it. The expertise has been narrowed.

THE COURT: Okay. Ms. Khow?

MS. WINGKHOW: No.

THE COURT: And you are calling the witness, at this time, on the application?

MR. ROWE: Yes, Your Honour, to demonstrate--

THE COURT: As part of any larger process. I have to go to *Mohan*. I have to look at what the issue is and then apply the expertise to the issue. Now being called at large is being

called, I am presuming on the threshold issue of relevance.

MR. ROWE: Yes, Your Honour...

OTHER MATTERS DEALT WITH AT THIS TIME

R E C E S S

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

EXAMINATION IN-CHIEF CONTINUED BY MR. ROWE:

Q. Doctor Wortley, what do you know about the Toronto antiviolence intervention strategy?

A. It was a special unit that was put together following the rush of gun-violent incidents in Toronto. I believe it was established in 2005, shortly after. It targets what have been commonly known as high crime, high violence areas. I understand that the police, using their own datasets, established those neighbourhoods that were most at risk of gang violence. I understand that there is different aspects of the TAVIS unit. There is the rapid response unit, there is regular patrol units, there is a community unit that helps community-building activities. It is my understanding that the main function of TAVIS is to reduce gun violence in these targeted communities. And one of the strategies that they used to do that is to engage community members actively. Approaching individuals within these communities, striking our conversations with them. Conversations that often lead to a request for I.D., and sometimes the search of personal items, looking for drugs and guns, primarily.

Q. And what are 208 cards?

A. 208 cards are cards that the police fill out for intelligence purposes. They have long existed; they are not a new phenomenon. There has been a case where an officer has stopped a civilian, and for whatever reason, wants to take note of this individual. Where they were, what they were doing, their address, their name, their description, to be entered in a database that is used for investigative purposes. It might be used to identify possible suspects or possible witnesses within a particular location. Most of the 208 cards are not connected with a particular criminal transgression. I believe that, for instance, eighty percent of the 208 cards that were collected from 2003 to 2008, by the Toronto Star, the individuals had not been involved in a crime.

Q. Sorry. What percentage?

A. Pardon?

Q. What percentage?

A. Above eighty percent had not been involved in a crime for the past five years. But there are basically a police intelligence strategy for noting individuals who are of interest.

Q. And what sort of information is contained on the cards?

A. Various pieces of information. The timing and location of where they encounter took place, the gender, age, skin colour, physical description of the individual in question, their name and home address, another contact information, the reason or circumstances of the stop, there are officers' notes where they might note special information of something that they think is of relevance.

Q. Are you are talking about officers' notes, in terms of what is noted on the actual 208 card or are you talking about notes that are separate and apart from the 208 cards.

A. I am talking about the contact card itself. There is a place for officers to put notes.

Q. All right. Okay. And what is your understanding of what is racial profiling?

A. Racial profiling is a term that has been used in many different contexts, and I do believe that it has become somewhat confusing. But my view of racial profiling has to do with surveillance. Does a particular racial group come under higher levels of scrutiny or surveillance by the Justice System than other racial groups? There is a debate within the racial profiling literature where some individuals would argue that race has to be the only factor determining a surveillance tactic, but most of us argue that race would have to be one of the factors. It could be race combined with age, combined with neighbourhood, combined with a number of other factors that would be indicative of racial profiling. But it is a surveillance. It is not a difference in rest decisions or differences in sentencing or police use of force. It comes down to the level of surveillance. It is typically related to things like the frequency of police stop activities and also what happens after the stop. Searching, investigation, following the stop.

Q. And is it something that is done cautiously or sub-cautiously or both or what?

A. It is one of the emotional aspects of racial profiling that the media discourse often attributes

racial profiling to what I would call racial malus. When you look at the literature, there have been four major explanations for racial profiling or why it might manifest itself. One is that us. That officers hold animosity towards the members of a particular racial group and use their power as officers to make life difficult to stop and search them and focus their attention on them. That is probably, in my opinion, an extremely rare phenomenon in our society, although it cannot be totally discounted. The second is stereotypes in that racial profiling results from the fact that most people or all people in our society have stereotypes and that there may be a stereotype that people of a certain age, gender, racial background are more involved in particular types of criminal activity, and therefore, deserve more attention or more scrutiny by the justice system. The third major form of racial profiling is systemic. It has nothing to do with the individual or will or stereotypes of the officers involved. Scholars have argued that systemic racism might result from the positioning of special units in high-minority areas. So officers who work those areas are given a mandate to, for instance, patrol these areas. But if areas of high minority concentration receive more patrols or more aggressive patrols than high-white areas, you can argue that this is systemic racism. It is police decisions. And systemic racism is often very difficult to understand. I mean when I am teaching my class and I am trying to explain it, I often use it with respect to how employment status used to be used in bail Court. Many studies have found that black defendants are much more likely to be held without bail in remand. This is in the United States and in Canada. And one of the reasons,

traditionally, that they were held they were more likely to be unemployed. Unemployment status was often seen as indicative of flight risk. So you could argue that black people were being detained pre-trial, because of employment status, not race, but because systematically, the black community had a much higher level of unemployment, they were systematically more impacted by that practice, which has led to the establishment of special bail Courts and etcetera, to try to reduce the impact of systemic bias. And finally, another form of racial profiling could be specific police directives, where police managers, themselves, say this is the profile of who we want you to stop and this is who we want you to conduct, which again, has nothing to do with the individual propensities of officers on the street.

Q. Okay. And does the particular race of the officer in question affect the analysis in any way?

A. I would not say so. I mean it is a variable. In the analysis that you could examine--

Q. Does the fact that it is a black police officer mean that there cannot be racial profiling?

A. Not at all. Not at all.

Q. All right. In this case, we are asking The Court for certain data of The Court or the production of data, 208 cards, and the officer's corresponding notes for four arresting officers for a period of time from June to December of 2008. In respect of inquiring into whether those particular officers, during that time period, engaged in racial profiling, what sort of methodology would you use?

A. I think ideally, if given the opportunity, you would have to put the actions of these individuals into

the larger context of what is happening within Toronto as a whole. So I would want to examine the 208 cards for specific divisions. The divisions that include a high black population, as well as those that contain a small black population. I would also want to examine the individual officer's behaviours or 208 records with respect to the officers in the particular divisions that they work in; other TAVIS officers within particular divisions. One of the reasons to do this is to try to account for the lack of observational benchmarking that we have in this case. Police Enforcement Research Foundation, for instance, in their writing about racial profiling, argues that one way to determine whether specific officers are systematically engaging in racial profiling is to compare their actions to the officers within their same unit, within their same division, who are actually working the same streets, to determine the extent to which their actions are similar or significantly different. Then the actions of the other officers who are policing the same streets, the same area, the same locations.

THE COURT: If I understand you correctly, you do not just need the four officers involved in this incident. You need TAVIS officers assigned to 31 Division.

A. Mm hmm.

THE COURT: TAVIS officers assigned to TAVIS units, at large, in the city?

A. Mm hmm.

THE COURT: And then, presumably, 208 cards for regular patrol officers in 31 Division?

A. We should clarify. We already have that data. The data that was collected by the Toronto Star includes that breakdown, and therefore it is already within the public domain. Not only myself, but anybody interested in analysing that data. It is now available.

Q. Okay.

THE COURT: Just a moment.

MR. ROWE: If it helps Your Honour, the proposed methodology is set out in Doctor Wortley's affidavit at paragraphs eight to twelve and fifteen to sixteen, tab four, page seventeen.

THE COURT: Go ahead.

MR. ROWE: Thank you, Your Honour.

Q. All right. Before I continue, you made reference to certain Toronto Star data. Can you clarify? Is it reliable in view of the fact of the Toronto Star's involvement in its acquisition, as opposed to whether it was done by a more scientific institution?

A. I think it would be probably incorrect to refer to it as the Toronto Star data. The Toronto Star through a freedom of information request was able to acquire the data. It is actually T.P.S. data on contact cards.

Q. So T.P.S.?

A. From police service.

Q. So this is police data?

A. Yes.

Q. That was compiled by the police?

A. Yes. It is basically, from my understanding, is the record of all 208 cards that had been



are concerned with are TAVIS officers, how do you address or how do you control for the fact that non-TAVIS officers may have a whole different approach or result in terms of their numbers of stops? How do address that issue?

A. Basically, what we want to do or what would be interesting is to highlight the actions of TAVIS itself. It would be highlighting, to an extent, TAVIS's activities are different than other Toronto police officers. Are they more likely, for instance, to target a particular population and are their reasons for conduction stops different then officers from other units? I think it would be exploring the issue of possible systemic bias, as opposed to bias on part of individual officers.

Q. Okay. In terms of the 2006 census data that you would be relying on, does the fact that the occurrence that brings us here today occur in 2008, two years after the census was done, impact the reliability of the 2006 census data for the purposes of your methodological approach?

A. I think a concern would be to what extent the population in a particular area might have changed over a two-year period. An argument could be made that a particular group has increased in its presence. You know that the demographics of a particular area might be different two years after the fact. I have been in contact with Stats Canada and they do do projections of how particular racial groups will grow within particular communities, based on previous experience. So what I would attempt to do is try to produce the estimated populations, based on projections. Some of that is done by comparing the 2006 with the 2001 census to see to what extent particular groups increased or decreased in

population. It is a relatively short period of time, I believe, to demonstrate dramatic turnover in a particular population, but it might slightly affect the numbers. Another thing that we can do, in which we did in the Kingston study, is calculate possible error rates in the population. If we are looking at population estimates for a particular group, we can both underestimate and overestimate the populations, but the analysis that we conduct would only calculate on overrepresentation, which would be conservative if we could put a fifty percent error rate on the population and see if there is still an overrepresentation, based on that possible sampling error. It is a method of analysis, just to explain. For instance, in Kingston, we had issues of sampling error. The census population would have had to have a three hundred percent error rate to explain the overrepresentation of minorities and stuff.

Q. Mm hmm.

A. Okay?

Q. And in the case of Bar, we have been told that the total number of cards completed by the officers in question was about six hundred.

A. Mm hmm.

Q. Over this period of time from June to December of 2008. So my question is: is that a sufficient number to allow for statistically significant findings?

A. I definitely think--I mean particularly if we look at it as the total population of stops that were done in the six-month period, we are limited to that. We are talking about a total population. We are not talking a sample of cases. We are talking about their entire 208 records, so to

filled out from 2003 to 2008, inclusively from all of the divisions and all units. So it is basically the complete record of 208 cards. And I believe they have important for this case, that covers the 2008 period.

Q. Okay. And you reference, at the outset, census benchmarking. In terms of your methodology, how are you going to do your analysis, in terms of determining numbers of a particular group in a particular area and so on? What is the yardstick or the measure that you are using?

A. Any plan of analysis, I would start with the general picture and move into the specific picture. Census benchmarking has its strengths and it has its weaknesses. Adjusted census benchmarking is what I would eventually use for part of my analysis. I would not exclusively rely on it. The census would give us an idea of the proportion of the population and various racial categories.

Q. Sorry. When you say the census, what are you referring to?

A. 2006 Canadian census. It would give us a breakdown of the racial composition of not only the city of Toronto as a whole, but specific residential areas, and give us a picture into the ethnic diversity of specific locations. One of the weaknesses with census benchmarking is that the population who resides at a particular area does not necessarily reflect the population that would be using a particular area at a particular time of day. I believe, for instance, in the Jane and Finch area, we did surveys of staff and teachers at Northwest high schools and we found that the vast majority of the teachers were white and the vast majority lived more than thirty kilometres away from the Jane and Finch

quarter, but they would be present here in the community on an almost-daily basis as they came to work. And we would not capture that group in census benchmarking. So they would be present here on the streets of Jane and Finch, but they would not be captured in the census.

Q. Okay.

A. One way that we can correct for that, as I mentioned with the Kingston study, is create a new dataset that only includes the stops of people with residences in a particular area. So for instance, the entertainment district downtown, if we were concerned that the black residents of the entertainment district were being stopped and searched more frequently, it would be a mistake, probably, to look at everybody who was stopped and searched there, because it is such a high public use area. But with the 208 data, we would be able to identify only those individuals who were stopped, who actually resided in the neighbourhood in question. That is adjusted census benchmarking. We can also adjust for other factors, including the age of the population and age differences that might exist between different racial groups within particular communities.

Q. Okay. Relating to that last point that you were referencing, is there anything in a particular geographic area that could change the profile of the persons in the area or the demographics of the persons in the area at a particular time? You referenced the entertainment district as an example.

A. Mm hmm.

Q. So for example, on a Saturday night, a number of residents versus non-residents, or the portion, it may be different than a Monday night.

A. Definitely.

Q. And so the question is how do you control for that and are there any other sorts of variables that might change the demographic of persons in an area at a particular time that you would be able to address through your adjusted census benchmarking?

A. Unfortunately, one of the weaknesses with adjusted census benchmarking is you cannot totally control for street populations. For instance, you might argue that the residents of a particular neighbourhood after nine o'clock at night changed dramatically. It could be argued that--I have heard the argument before that after nine or ten o'clock at night, black males, for instance, come out and the rest of the community, including non-black residents go inside and lock the doors, so to speak. Therefore, the presence on the street of a particular group could change at different times of the day. And unfortunately, observational benchmarking is much more difficult and we do not have data for that, which is one of the reasons why we would want to compare the actions of the individual officers in this case, with their peers who have worked the similar communities at the similar day. Because by default, all officers who are working these particular locations, for instance, all of the TAVIS officers or all other officers that patrol in the evenings in this neighbourhood will effect your controlling for the population on the street, because they should all be facing the same demographic variables in this case.

Q. Okay. Perhaps you can clarify, I guess, for me. When you talk about TAVIS officers in a particular division, and then cross-comparing their statistics of stops

with another division, how does that take account of that phenomenon that you have just described of different groups coming out at different times, on different days?

A. I want to stress that we would also be comparing to other officers within the same division, as well as other divisions. One of the things to overcome a lack of observational benchmarking would be to demonstrate whether the phenomena of one group appearing in the 208 much more frequently than others, would be to document how widespread the practice is. Typically, what is often argued is often argued is that while black may be show up in 208 cards much more frequently than people from other racial groups because they happen to reside or live or play in particularly high crime rate areas. So their presence on the street in these areas dictates their overrepresentation in the 208 cards has nothing to do with their race. It is just they reside in these types of area or are present in these types of areas. However, I think if we look across all the different communities within Toronto and we still see evidence of that overrepresentation, it makes it more difficult to explain away that overrepresentation. You cannot easily argue that the eight percent of the population that is black, in Toronto, has spread itself throughout the entire community. It is difficult to be two places at one time. And I think that it can, at least partially, address the issues of presence in the street.

Q. And your reference to doing comparisons with the entire T.P.S. or comparisons of the TAVIS officers in the instant case with the data for the entire T.P.S. And my question is: as the entire T.P.S. includes both TAVIS officers and non-TAVIS officers, and as the instant officers that we

speaking. So that it is what it is. If we try to extrapolate and say that this was what they had been doing throughout their entire career, that would be problematic. But if we limit our analysis to the six-month period--

Q. It can be told as an issue of whether it is six months or seven months. We are talking about June to December, if it affects your evidence in any way.

A. Yes. I mean, as a social scientist, you always are of the opinion that the more data, the better. So would it be great to potentially get all of the stops that have ever been conducted via the officers in question, clearly, that would be more data and you would have more things to analyze, but that might be a great burden in terms of producing it. It is also relevant to what was happening in the, I guess, immediate period surrounding the event in question. A problem with choosing a smaller period of time, if we chose two weeks or three weeks, the argument could be made that there was something special happening on the street during this two or three-week period that might substantially impact the nature of data that we are examining. So a six-month period should be sufficient, although it is not the entire record.

Q. Okay. By the way, the 208 cards used by TAVIS, how do they compare to the contact cards used in the Kingston police study you were involved with?

A. Well they were similar in many ways. There were slight design features. But they have captured a lot of the same information. The biggest difference, I would say, about the two was the Kingston study was designed to measure all stops that the police had conducted. So every time they

conducted an investigative stop of a pedestrian or a vehicle, a contact card had to be filled out.

Q. You are saying it was mandatory in the Kingston example?

A. Yes.

Q. It was mandatory for the officers to fill those cards?

A. Yes. In many ways, it could be argued from an analysis of investigation of racial profiling that the 208 cards are far superior in many ways, to the contact cards that have been collected in Kingston, for two reasons.

Q. Are the 208s mandatory?

A. The 208s that were in the Toronto police; no they are not.

Q. They are not mandatory?

A. They are based on the discretion of the officers on whether they think an individual should be noted in their intelligence dataset. So there are many stops that take place that a 208 card is not filled out.

Q. And does it matter if the filling out of the card is mandatory or not?

A. I think it shows, on a discretionary basis, who officers feel should be noted in the intelligence dataset. In other words, it is even a higher order of surveillance. It is basically saying this is somebody we want to make a record of. Regardless of the nature of the stop and what was happening, this is somebody we want to take note of. Where the Kingston was any stop they had to record. I think the other value of the 208 dataset, as opposed to the Kingston dataset, was that the Kingston study was brought into existence under



great media pressure, great hype. The police officers knew that this was a study that was taking place from a particular to a particular day. And it could be argued, as it has been done in the United States, that this knowledge that you are being scrutinized for a particular year may have dramatically changed the activities of officers on the street. And we found some evidence of that in the Kingston study. It has been acknowledged in the United States as well. It is known as the Hawthorne effect.

Q. Sorry. The Hawthorne effect?

A. The Hawthorne effect.

Q. Okay.

A. That when individuals know they are being investigated or studied, their behaviour changes. It was done in the Hawthorne--It was named after an experiment in which experimenting on lighting in factories and how it affected productivity. And they found that regardless of the lighting capacities in different factories, productivity went up during the study period. Until they figured it out that it was people in lab coats walking around that were impacting how workers were responding and not the change in lighting.

Q. So the discretionary 208 cards--are you saying that they give a more representative view of the motivations of the officer doing the stop than mandatory?

A. I do not know about motivation. I think they capture the attitudes. I think the benefit of the 208 dataset is that when it was collected, the officers in question did not know that it would be used for purposes of examining the racial differences in context. Officers were not aware, where in Kingston, for instance, they were very aware

that racial differences and their stopping procedures was going to be examined after the study period was over.

Q. Now in respect of the particular 208 card and the category where race or skin colour is supposed to be filled out, suppose some officers left that category blank. Suppose you get a whole bunch of cards, but some of them are not filled out completely.

A. Mm hmm.

Q. Specifically, are not filled out completely on the issue of the race of the person stopped. Does that impact the analysis in any way?

A. It is my understanding that very few of the contact cards in question did not have colour filled out. The vast majority of them did have a colour designation. In those cases, if you wanted to make a conservative estimate therefore, on who the race of these unknown individuals were, one thing that I would do is label them all white. That way, it would increase the number of white contact cards that would have been filled out. It is erroneous to do so, but in conservative estimation--

Q. I see.

A. If we want to stay on the conservative side of observing the magnitude of racial differences, that is one thing that you could do and just assume that all--It would have an impact, but it is my understanding that the numbers are low enough out of the 1.7 million contact cards that had been filled out or are present in the dataset, I believe, I may be mistaken--I have to check the numbers--but less than one hundred thousand were missing the race data.

Q. Okay. And I believe you indicated in your affidavit that regarding officer's notes--and I do not mean the notation that the officer doing the stop and filling out the 208 card puts on the actual card--I mean the separate officer's notes in an officer's notebook. You appear to indicate that they are helpful, but not necessary to the racial profiling analysis. Can you clarify a bit about that?

A. I think you have to backtrack a bit. When we are looking at the contact cards, you not only will be conducting an analysis of the racial differences and the number of contact cards or proportion of contact cards that are attributed to citizens of different racial backgrounds. They also allow you to examine the nature or reason for the encounter, why the stop was generated. And previous researchers in many of the racial profiling manuals document that this is a very important part of the analysis. For instance, if we were focussing on behaviour and we found that there was an overrepresentation in black people and traffic stops and the reason was always speeding over twenty kilometres per hour, we might say that a possible explanation for that is the fact that black people speed more. And this was totally explaining the overrepresentation in the stop cards. It does not necessary discount all racial profiling possibilities, but it could be consistent, definitely, with that argument. However, when we look at other reasons for being stopped, such as random stop or general investigation, those types of discretionary stops, which are proactive police activity, they are not reacting to something in the community, it might be more indicative of racial profiling. So we will be breaking down, basically, analysis of the reasons for the

encounter and why the contact card was filled out and in what context. My view is that the officer's notes might provide additional information on that, if in fact, they might not have notes in most cases. I do not know. But it would just be additional qualitative information on the nature of the encounters with civilians.

Q. Okay. And regarding the actual 208 card and the designation or the space for the indication of skin colour, does it matter if the skin colour part is filled out by way of self identification of the person stopped or whether it is filled out based on the officer's perception of the person's race?

A. My understandings of the 208 cards is that in most cases, I would feel it would be the officer's description of the suspect. I cannot imagine, for instance, if I was an officer interviewing you, asking you what your race was. And if you replied white, would I put down white because you told me you were white? I would probably, because it is for intelligence purposes, want to put down what I thought was an accurate description. The other thing that leads me to that conclusion is the nature of a lot of the coloured categories that are identified. There is black, there is white, but there is also brown. I do not know too many people, if have asked about their racial background, would report that they are brown. In previous versions of the contact cards used by the Toronto police, the skin colour designation was not something that was written in; it was actually checked off. And the racial designations on the T.P.S. contact cards, which I had access to with the commission on systemic racism, were black, brown, yellow, red and white.

Q. Mm hmm.

A. And because of that, they seemed to be more the officer's skin coloured description for descriptive purposes, rather than a self-reported indication of race.

Q. Okay. You have referenced the Toronto Star article and the data that the Toronto Star was able to acquire through its freedom of information act application. Just to clarify, what, if anything, was your involvement with that process?

A. Very minimal. I had a conversation with one of the lead reporters, Jim Rankin, at the time of the Kingston study. He came to me and he asked were there contact cards collected by the Toronto police service. I indicated to him that it was my understanding that there were contact cards that were collected, but they were not mandatory. They were not for every single search. They were more for intelligence purposes. So I was aware of them and that was our conversation and how it ended. The Toronto Star's interest in the contact cards and their decision to seek information on the contact cards, through a freedom of information request, was their work and their work alone. The only other involvement I had was after they had produced their data, they asked me to review it and to comment on some of the data that they had produced, but it was their analysis.

Q. Okay. Does the nature of the reason that an officer might write on the card as the reason for the stop affect your analysis of the quantitative data?

A. I think you can provide a quantitative data for different reasons. So we can break the data further to examine, for instance, is a particular group overrepresented

in the stops and are they particularly overrepresented in particular reasons for being stopped? And as I said, I think there is a consensus in the profiling literature that you must distinguish between what would be seen as reactive police activity--Reactive activity being a call for service, witnessing a crime, witnessing a traffic violation, where the police have very little discretion in terms of whether they should stop somebody or not. The activity of the civilian basically demands that you make a stop. And proactive or discretionary stops where the police are engaged in active investigations based on their own views or the views of the police department. So I think, as I mentioned before, it would be not only interesting to look at the contact cards overall, but the contact cards by the types of explanation for the contact.

Q. Right. Does the fact that some of the stops may have resulted in criminal charges being laid, whereas other stops might not have, impact the overall analysis in any way?

A. Well I do think that in the vast majority of 208 cases, based on the information I have received and it could be verified with further analysis, is that 208 cards generally do not involve arrest. I think there might be cases where a contact card and an arrest incident sheet is filled out, but I think in most cases, contact cards are filled out in cases where the officers are not making an arrest or laying a charge. In cases where an arrest or charge is being made, the information that the police require would be contained in the arrested information or charge information. I think that was identified in The Star's analysis, where they indicated

that eighty percent of the contact cards that were filled out were filled out on individuals who had not been charged with a crime in the previous five years.

Q. Okay. And in doing your study, your inquiry, your analysis, are there any steps that you are aware of that can be taken to ensure the privacy of the individuals who may have been subjected to 208 stops?

A. If properly coated, there is no reason that the names of the officers or the names of individual citizens have to be identified. They would need a unique identifying number, for instance, so that we can distinguish officer A from officer B or a distinct civilian number. But there is no reason that their names would have to be there.

Q. In respect of the police data acquired by the Toronto Star, do you know if the identities of the individuals stopped was disclosed as well or how that was dealt with?

A. I do think that the Toronto police service worked diligently to give all civilians or as many civilians as possible, a unique identifier. I do not think that it was perfect. I would need to investigate the data more fully. But there was an attempt to allow the data to be able to identify unique individuals, therefore identify individuals who had been stopped multiple times, without disclosing their name. For instance, the Toronto Star was able to highlight those people in 2008 who had received the most contact cards, and that was done through the data that was provided.

Q. Okay. So perhaps you can clarify. In respect to the particular data that we are asking The Court to have the police produce to us, that is the 208 cards for these

four officers for this period of time, June to December of 2008, what is the scientific process you are going to apply to that data in order to reach any sort of conclusion?

A. I would start with an analysis of the general picture. What is conducted by the Toronto police over all, what is conducted within particular divisions, what is the 208 record for TAVIS officers and TAVIS officers overall and within particular divisions. And then would compare the behavioural record over the last six months for the four officers in question. With each of those broader levels of analysis, I could provide that analysis in a table. The different types of measures that we would use, there are three measures of disparity that I would like to use with respect to the analysis. One would be a stop rate for particular groups. There would be the percentage of--A table would start with the percentage of the census population within the particular location that belong to particular racial backgrounds, based on an adjusted census estimate the percentage of all stops that were conducted with people from racial backgrounds. The next measure of disparity we would look at would be the stop rate per thousand for each racial group. We would then produced what is known in the literature is the disparity index. The disparity index is the proportion of all stops involving a particular group, divided by the representation in the population. What you would--a figure of one, based on that calculation means that the group is no more represented in stops, then they are evenly represented in both stops and population. A figure of greater than one indicates that there is an overrepresentation. And a figure of less than one



indicates that group is underrepresented in the stop data or in the contact data.

Q. So an overrepresentation means that there is profiling happening?

A. Pardon me?

Q. An overrepresentation--a figure greater than one suggests that there is profiling happening?

A. I think you would also have to examine the magnitude.

Q. What? Sorry?

A. The magnitude of that overrepresentation. I mean there is no magic bar. There is no magic bar that if it is over 1.5 times--Some previous researchers have set the bar as 1.5 or 2 times greater is indicative of racial profiling. I think what you would argue in these cases is that the greater the disparity, the more likely some of that disparity is explained by racial profiling. So if a group is ten times more likely to be stopped than another group, that is obviously tougher to explain by behavioural measures than if a group is 1.5 times more likely to be stopped. So I think you would look at the magnitude. I will definitely acknowledge the other benchmarking challenges, based on those findings in analysis. The last measure of disparity is called the ratio of disparity. And you would take a reference group, which in my analysis, would be the white group, what their index of disparity is, divide that by the index for black individuals for people from other racial groups, and what that produces is an estimate of how more likely a group is to be stopped than whites or less likely than whites. It can also indicate how much less likely. So for instance, we might find that the

language of a disparity index would be, according to the data, blacks in this location are 3.1 times more likely to be documented by the 208 dataset than whites living in the same area. That is the type of analysis that we would conduct.

Q. Okay. The ultimate decision as to whether there was profiling by these officers in the instant case, that is the particular individual case that brings us here, is that of a Judge. The Judge makes the final determination about what the facts are in the case and, consequently, whether there was profiling or not. So my question to you is how does your analysis of the activities of the four arresting officers predating the stop that brings us here today, assist The Court and the decision it has to make about whether there was profiling in the instant case?

A. The information that would be provided is in many ways, circumstantial evidence. It is documenting the past activities, not only of the Toronto police service and the TAVIS units and the TAVIS units within particular divisions, but how the officers in questions activities are consistent with or deviate from that record. So for instance, in the PERF manuals which document--

Q. That what? Sorry?

A. The PERF. One of the police enforcement research foundations has done a lot of work on how to analyse racial profiling data and make sense of racial profiling data. Professor Laurie Ferdelle has written on how to analyse individual stop data, or in other words, to benchmark within a police unit. So you are benchmarking the activities of particular officers to the activities of other officers. You are not relaying, in this case, on census benchmarking. It is

a different type of benchmarking analysis. The argument is that by tackling such analyses, you can determine whether individual officer's activities are more indicative of racial profiling than their peers working in the same neighbourhoods, at the same time, in the same units. So what we will have to do is develop a profile of the stops that these officers engaged in over that six-month period with the stops engaged in by other TAVIS officers within the same division. We would be able to determine then, for instance, whether their stop records deviates. It could be less indicative of an overrepresentation of particular racial groups. They could be less likely to stop, for instance, a record stops with black civilians than their peers, they could be more likely. And I think an indication of that, I would want to look at the mean levels of stopping particular groups and see to which extent the officers in questions records deviates from that norm. We might look, for instance, at one standard deviation higher than the norm. In my opinion would indicate that the actions that we all--

Q. Before you continue, you used a word there. Standard deviation. What do you mean by that?

A. We are looking at the records of all the officers in a particular unit within a particular division. And each of those officers would produce a measure of, let us say, a proportion of their stops that involve back individuals. I am sorry. I keep using the word stop. But the proportion of the contact cards that involve black males. We can put together a distribution of those stops for all the officers. We could also, overall, produce a mean. So on average, a TAVIS officer, forty percent of their stops involve

black individuals, and I think that is approximately what the overall TAVIS numbers are, using The Star data. So forty percent. So we might say all TAVIS officers, on average, stop forty percent of officers--If, for instance, we would also calculate the standard deviation. Standard deviation is an indication of spread. One standard deviation above and below the average should capture about sixty-eight percent of all cases.

Q. Okay.

A. Two standard deviations above the mean would capture ninety-five percent of all cases. Three standard deviations would capture almost 97.5 percent of all cases. So what we are arguing is that people who are within one standard deviation of the norm are relatively similar to their peers.

Q. Okay.

A. If they fall one standard deviation above or below that mean, they are deviating from the activities of the other individuals. And it is quiet possible in this case, for instance, if an individual officer had a stop record that was one standard deviation lower than the norm with respect to filling out contact cards on black citizens, we would argue that they are less likely than their peers to engage in this activity. So it is possible at this time, to determine what those figures would be. To simplify things, it would highlight the level of difference. How different are these officers from their fellow officers? Once again, to reiterate, by comparing them to officers who work within the same units in the same divisions, you eliminate a lot of the other benchmarking issues that come out, because, theoretically, these officers are dealing on to a day-to-day basis with the same population.

THE COURT: Does the standard deviation have to be calculated for each dataset?

A. No. We would only calculate that when we are analysing the data dealing with the individual officers in question.

THE COURT: I have been inarticulate. But does it have to be for the analysis of 31 division TAVIS officers, you have to come up with a standard deviation for that group.

A. Mm hmm.

THE COURT: As opposed to the TAVIS officers from 21 division?

A. Ideally, I would like to look at the TAVIS officers, overall, to see if this division is operating any differently. But I think the most crucial analysis would be of the TAVIS officers in 31 division, because they would be the immediate peers of the officers in question.

THE COURT: And what ultimately, does that show? Assuming, for the sake of argument, the officer comes within the standard for 31 TAVIS.

A. Mm hmm.

THE COURT: What does that tell you?

A. I think the argument in that case would be that these officers are acting similar to their colleagues in the same unit.

THE COURT: What does that tell me?

A. It would be indicative that--It would not discount the possibility that profiling existed within the TAVIS unit overall, but it would discount any argument that

these officers were more likely to engage in profiling than their peers in that particular unit.

THE COURT: Simply, as I understand, what you are saying to me is they are performing in accordance with their peer group, which makes the question: what about the peer group?

A. Mm hmm.

THE COURT: What is the peer group?

A. I mean we would provide that analysis also. I think the argument would be demonstrating to what extent the officers are operating differently to their peer group or similar to their peer group. If a conclusion is drawn--I am not drawing that conclusion at the moment--that this unit, for whatever reason engages in profiling, and that these individual officers match the profile of their peers, then that overall conclusion would apply to them. If they were less likely to engage, in that argument, in those activities, it would be evidence that they were not acting in accordance with their peers. And if they were more likely to be focussing on that particular population, it would be stronger circumstantial evidence of profiling.

THE COURT: Go ahead, Mr. Rowe.

MR. ROWE: I am almost done, Your Honour.

THE COURT: Take your time. We have got three days.

Q. Assuming that The Court grants our request for the data they produced, how much time would you need to complete your analysis and submit a written report?

A. That is very difficult to determine. I would have to see what state the data was provided in. If the

data is in good shape, I would say a minimum of two weeks. If the data requires some interpretation and questions back and forth in terms of what various variables mean and etcetera, it might take longer. I think it would also determine, from my schedule, be predicative on when the data arrived. If it arrived in the middle of exam season when I was very much involved with students, it might be more difficult to address. If it came during the Christmas break, there would be more free time to conduct that analysis.

Q. Is there any preferred format in which you would like to receive the requested data?

A. Well as social scientists, we often use social science datasets. So one of the major social science datasets within data analysis programs includes SPSS or SAS or Strata. We could also use Excel, because Excel could be easily converted to an SPSS dataset. It is not that data in another format cannot be used, it can be used, but it would just take probably a longer time to get used to the data and might not be in the form needed to conduct some of the statistical analysis that we want to conduct.

Q. Do you know what form the Toronto Star acquired data was in?

A. I have acquired the data, but I have not had the time to call it out yet, so I am not exactly sure what form it is in right now.

Q. And assuming The Court grants our request and you get this data, what do you expect to see in this case or do you have any hunches?

A. I have no hunches right now. I am aware of the data that was presented in the Toronto Star series. I

think my first step would be to verify that those are the results that I am getting with the dataset, but there would be a period of exploration. And I have no preconceived notions on what the data involves and would be very transparent in any analysis that I conducted in terms of the programming used to produce the analysis.

Q. My last question is regarding the census data. Can that be broken down? I am talking about the 2006 census data that going to provide the basis of your framework for analysing and so on.

A. Mm hmm.

Q. Can that data be broken down into the little communities within a police division, as well as a division as a whole?

A. As my understanding, yes. That even below the census track level, there is smaller units of analysis that we can produce. You can also--Stats Canada has become very in depth at providing data for particular units like divisions, for instance, when needed for a particular use. In fact, that is what the Toronto Star did through a special request, got the census profile for particular divisions.

MR. ROWE: Thank you Doctor Wortley.

END OF EXAMINATION IN-CHIEF BY MR. ROWE

THE COURT: We will resume at 2:15 on this matter.

R E C E S S

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



CROSS-EXAMINATION BY MR. GOLD:

THE COURT: Okay. Go ahead Mr. Gold.

MR. GOLD: Thank you.

Q. Doctor Wortley, as I understand your definition of racial profiling, it is where police action cannot be explained by individual behaviour on behalf of the suspect or the person attended to. Correct?

A. Correct. That race is one of the factors involved in the surveillance decision.

Q. Well you mean if the police sees someone committing a crime and that person happens to be black, you would still query whether there was racial profiling involved?

A. I think racial profiling can exist. For instance, suppose we have a stretch of highway and an officer-

Q. Could you please answer my question? If the police see a crime being committed and the person happens to be black, would you still, as an expert, be concerned that racial profiling had taken place?

A. It depends on the context.

Q. In other words, Sir, even if the police saw a black person shoot another person and arrested that black person, you would come to Court here and give exactly the same evidence and want to see their 208 cards?

A. Not at all. Not in the case where an individual witnessed a shooting, an officer witnessed a shooting. Not at all.

Q. What if they just witnessed the black person standing over a body with a gun in their hand, would you come to Court and ask for their 208s?

A. No.

Q. What if a witness reported to the police that a black person had shot somebody else, would you come to Court and ask for their 208s?

A. It would depend on the context.

Q. In this case, what do you know about the facts?

A. I have read the statement of facts from both the defence and Crown.

Q. So you know in this case, His Honour has evidence, in which you will ultimately, of course, assess.

A. Mm hmm.

Q. That it was conduct by the accused that led to the detention and arrest. You are aware of that?

A. I am aware that that is the--

MR. ROWE: Objection. That has not been established as a fact.

THE COURT: I do not know that it needs to be. It is part of the calculus, however. The position of the Crown, in the Crown's case, is complete.

MR. GOLD: Yes.

THE COURT: If the officer saw and smelled your client smoking a marihuana cigarette and that is what led to the interaction. Whether I ultimately find that; remains to be seen.

MR. ROWE: I think it is important because the case is not over yet. There is still evidence.

MR. GOLD: Your Honour will note my question was in this case, there is evidence that--I did

not, in any way presume what Your Honour is finding.

THE COURT: I think Mr. Gold back loaded it. Contention on the finding then.

MR. ROWE: Fair enough. Thank you.

MR. GOLD: Your Honour will ultimately hear me argue how that factors into the likely relevance test, of course.

Q. So you are aware, Doctor, that in this case, there was evidence placed before The Court that contains an explanation for the detention and the arrest that is completely race-neutral. That is the evidence.

A. The Crown's statement of fact is that. Yes.

Q. And in fact, I put it this way. Listening to your evidence, I do not see anything in your evidence that is linked to the specific facts or evidence in our case, other than that the accused is black. Am I missing something in your evidence?

A. I think that I have been asked to provide to The Court is the context in which the stopping and question of young black males takes place, and whether there is an overall pattern of profiling. That is what I have been--I am not supposed to comment on the individual circumstances surrounding this particular case.

Q. Correct. There is nothing in the particular circumstances of this case or the evidence before The Court that, in any way, provides any sort of a foundation for your evidence to obtain the 208s. Correct?

MR. ROWE: If I can object before that question is finished. My problem with the question is

that Mr. Wortley has already said that all he knows, in terms of the actual particulars of the case, is what he read in the Crown's synopsis. He has not read transcripts; he has not read the evidence that was led; he has not read the cross-examinations and for my friend to put this questions to him about whether there is evidence or not, I think it is a little bit unfair to Mr. Wortley, given that he does not know what the evidence is for the trial. All he has is these synopsis that he is reviewing.

MR. GOLD: Your Honour, I apologize, but my question was about his opinion. I was not asking about the trial. I was asking if there was anything in his opinion--In the foundation for his opinion that was specific to our case.

THE COURT: And that is my understanding of the question and that is my understanding of the thrust of the examination in-chief. The doctor is talking about racial profiling generally. He link to this particular case is another thing that has to be explored. The fact that racial profiling exists is not indisputable, but it is the extent that his evidence may assist me linking it to the facts of this case.

MR. ROWE: That is right. Which may become an issue of argument. The way I understood my friend's question is that he was looking for Mr. Wortley to provide whether or not there was

any facts that link to his evidence. And my only issue with that is that it presupposes that he knows all of the facts of the case to this point, which he does not, and that is why I took issue with it, and solely for that reason.

THE COURT: I think it is a fair question.

MR. ROWE: Fair enough. Thank you.

Q. Doctor Wortley, let me see if I can put it this way. The evidence I heard from you today and the affidavit could be given by you in any case, in which a black person is arrested by Toronto police officers on a street. Is that not fair, Sir?

A. Not necessarily. I mean I understand in this case that there is a different story coming from the defendant in that the investigation was not based on a criminal act, that there is a disputed fact over that issue and that the information in this case that I am providing, with respect to racial profiling or whether it exists or not, might provide circumstantial evidence that would indicate the probability of a non-criminal stop taking place.

Q. In other words, what you are trying to do is both do the credibility of the accused in his claim that the police are lying about what took place. Is that fair?

A. I am not really trying to bolster the credibility. I have been asked to perform a very specific task, which is provide my opinion on whether racial profiling exists and whether there is data related to TAVIS, this division, and the officers in question, that would suggest

that patter. I have not been asked to provide opinion about this specific--

Q. And you appreciate that guilty people would lie to try to escape criminal activity?

A. Sure. It is quite common.

Q. And you do appreciate that someone who is, in fact, lawfully arrested by the police may lie about the circumstances, in order to try to claim that the police were acting unlawfully. Correct?

A. I am sure it happens.

Q. And you are of course, are not in a position to decide credibility and you would not attempt to. Correct?

A. Correct.

Q. Well we can put it this way. That you would agree with me that unless His Honour rejects the evidence of the police officers and finds that there was no conduct by the accused that justified the detention and arrest, then your evidence about racial profiling, in general, is completely irrelevant. Correct?

A. I suppose if there was no disagreement about the causes of the stop.

Q. Or if His Honour was not prepared to reject the police evidence. Correct?

A. Correct.

Q. Than you would agree that we do not come within the definition of racial profiling.

A. I suppose the only issue of circumstantial evidence that might provide context to this particular case is with TAVIS officers, would the individual have been stopped

and questions anyway, if he had just been standing in front of the building and doing nothing. What is the likelihood that the mandate of TAVIS is not only focussed on people engaging in criminal activity, but on general investigations that are conducted on the street, even when there is not a blatant crime being taken place.

Q. And you would, of course, agree with me, it is impossible for you, as well as anybody else to answer that question. Correct? Assuming the accused version, you are not able to say whether a white person would have been treated the same. Are you Sir? Are you claiming to be able to do that?

A. In that particular night, on that particular occasion, no.

Q. I mean you are not suggesting that somehow being black provides an immunity from criminal liability. Are you?

A. Not at all.

Q. You are not suggesting for one minute that the black community wants its lawless members to have some kind of immunity from proper police conduct. Are you Sir?

A. No.

Q. Now regarding the police notes that have been requested, as I read your affidavit, at tab four in paragraph eight on page twenty, you simply say that the officer's notes in relation to 208 cards, while not absolutely necessary, could further amplify and conceptualize the information in the 208 card. You have not provided there, any example of cases where that has happened in your experience. Have you?

A. No.

Q. You have provided no evidence to substantiate that could be, that may be. Have you Sir?

A. No. It would just be additional information.

Q. It might be. You have no way of knowing.

A. Absolutely. Absolutely. That would be the purpose of the analysis.

Q. So that is just to speculate of possibility on your part. Is it not?

A. It is a possibility.

Q. Now, as I understand your evidence, what you are talking about is a statistical analysis of certain data. Correct?

A. Yes.

Q. Okay. And that involved putting the data into a form where it can be mathematically manipulated and sorted?

A. Mathematically analysed.

Q. Analysed.

A. Yes. I would not use the term manipulated.

Q. Pardon me. I did not mean anything sinister by manipulation. And I am not going to remind you about that there are lies, damned lies, in statistics, because that would be--By the way, there is a kernel of truth in that. Is it not there, Sir? That famous aphorism: there are lies, damned lies, and statistics.

A. I think that statistics, like any type of information, can be used and interpreted in particular ways. I think that responsibility, as social scientists, is to be



completely transparent, with respect how that data is collected and analysed.

Q. Because, in fact, it can be quite an intellectual exercise to analyse statistics correctly. It is easy to make mistakes with statistics. Is it not Sir?

A. Yes.

Q. That is why you mentioned transparency a couple of times. Transparency is very important. Is it not?

A. Yes.

Q. So that others can assess your and your reasoning. Right?

A. Yes.

Q. And in fact, as part of the expert evidence algorithm, we talk about something called peer review.

A. Yes.

Q. And peer review is a really important function in the scientific community, where other people, your peers, review what you have done to catch your mistakes. Correct?

A. Yes.

Q. Because everybody is human and even the most eminent expert can make reasoning mistakes, especially with something like statistics. Right Sir?

A. Yes.

Q. It is easy to mistake correlations for causation. Correct Sir?

A. Easy?

Q. Easy.

A. You need to distinguish between the two.

Q. But is that not a common failing in the statistical literature that the two things seem be related and therefore the mistake is made of causation being attributed?

A. I think that people interpret correlation for causation often. I think that trained social scientists and the discussion of that data will mention that.

Q. And so, peer review is really important to make sure that mistakes are not slipping by. Correct?

A. Yes.

Q. And peer review is an example of what you call transparency. Correct?

A. Yes.

Q. First of all, regarding these 208s, as you already told us, you have no idea of what you are going to find, do you?

A. No.

Q. You have no idea of whether you are going to find any statistical discrepancies. Correct?

A. Correct.

Q. No matter what benchmark you use. Correct?

A. Correct. I mean I have seen the overall data discussed by The Star.

Q. The Star. Yes. I am going to come to that in a minute, but in terms of the records being sought in this case, no matter what benchmark you use, you have no idea of whether you are going to find any statistical discrepancy, much less a significant statistical discrepancy. Correct?

A. Very true.

Q. You may, for all you know, find absolutely nothing of any use to the defence in this case, for all you know.

A. I would agree.

Q. Now, The Star data is referenced in your paragraph nine. Okay? And what strikes me from reading that is you already have what the defence wants in this case. Do you follow my point, doctor? I mean the records that are being sought would appear to me to be part of the cards gotten by The Star. Am I wrong?

A. You are right in that they would have been included as part of the dataset, but you would not be able to identify the officers involved and extract their data from this dataset, because the names of officers and their numbers are not provided.

Q. Well you have examined The Star data Correct?

A. I have not looked at The Star data yet, but it is my understanding that that is how the data is handed over. That there was privacy concerns.

Q. So my question is, from paragraph nine, why, in your affidavit, would you not provide evidence of the type of studies you are going to be doing from The Star data to show The Court that there is meaningful research, even within the terms that you want to do it?

A. Sorry. I do not follow your point.

Q. Sorry. The Star data must allow you to pull--You might not be able to know which officers are which, but it must link to all the--First of all, to be clear, The Star data is the same 208s that we are talking about. Correct?

A. Correct.

Q. And The Star data appears to go up to 2008. Correct?

A. Yes.

Q. So it would include the 208s that we have provided to The Court in a sealed envelope. Correct?

A. Yes.

Q. Right? These are from 2008, our 208s.

A. I am unfamiliar with what has been handed over to The Court.

Q. Okay. All right. Well His Honour knows. Ours are 2008. Correct? So therefore, these would have been within The Star data. Sorry anyone can correct me if I am wrong. Are we not in two thousand--Yes.

THE COURT: The subpoena indicated June first to December 2008.

Q. To December 2008. Yes.

MR. ROWE: That is right.

Q. Okay. So looking at your understanding of The Star data, which has all the contact cards between 2003 and 2008, our cards are in there.

A. They are in there, but I think what is being specified in my testimony and in the affidavit is we would like to identify the specific 208 record of the four officers involved in this case. And you cannot do that with The Star data, because it does not identify individual officers.

Q. I understand that, but you are missing my point. It must identify all the cards of each particular

officer, in order to draw conclusions. Or is it just bulk across the division?

A. The designed analysis that we are proposing would propose to review the record--I will say stops--the contact card record of the four officers, with their immediate peers from TAVIS, in this particular division.

Q. Therefore, even though you cannot pick out these particular four officers, you must have been able, up until now, to pull out all the 31 division officers and show us the distributions to provide evidence to The Court, as to what kind of benchmarks you are going to have. You did not do anything like that. Did you?

A. I have not yet, no. It was my understanding that this particular hearing was about a request for data, and I was not supposed to design an analysis or whatever it is.

Q. Doctor Wortley, I am not blaming you, because you, of course, are only a witness, a resource for the defence. But the defence had certain legal obligations in terms of an evidentiary showing. The point I am making is that this: that on this issue, to show His Honour what might be done if you got the particular 208s of these officers, you could have produced the values for all of the Toronto police officers for 31 division to see what the range is. Correct?

A. Yes. I could have.

Q. And if we looked at the range, for all we know, they might have shown The Court that there is no point, because the range is fairly consistent. We do not know because you have not done that. Have you?

A. No.

Q. And you were not asked to.

A. I am aware of the stop or the contact card distributions for TAVIS, overall, because that data was reported in the Toronto Star. And the data that was reported in the Toronto Star indicates that forty-one percent of all contact cards filled out by TAVIS, over the study period, involved individuals who were described as black.

Q. Did you, yourself, examine The Star data for that conclusion?

A. No I have not.

Q. You are relying on something that was published in a newspaper?

A. Yes.

Q. If you come to Court and you tell a Court that TAVIS officers had a forty-one percent rate, you are not going to rely on an article in The Star; you are going to crunch the data yourself. Are you not?

A. If I was starting the analysis, the first thing I would do would be to test the numbers provided by The Star were the same.

Q. But the point is, Sir, today, as we are in Court in this application, you have had access to this data, which is supposedly going to provide, I am not sure if it is entirely or part benchmarked, but you were not asked by the defence to do any analysis of the data that The Star obtained, in order to assist The Court, whether it would be useful to proceed to the next step.

A. I was not asked to do any analysis and preparation for this hearing. No.

Q. If you calling about TAVIS officers, do you believe that all four accused in this case are equally situated as TAVIS officers?

A. I have no--

Q. I am sorry. Each of the Crown witnesses in this case are similarly situated as TAVIS officers.

A. I have no idea.

Q. You would agree with me that the TAVIS comparison that you keep making, you would have trouble from a scientific point of view, upholding the applicability of that if you found out that only one officer was a TAVIS officer from 2007 and the other three essentially became TAVIS officers as part of something called Project Isosceles, which only existed from November 10<sup>th</sup> to December 14<sup>th</sup> 2008, a period of approximately five weeks. And that prior to that, they were simply ordinary police officers. That would seriously impair any analysis. Would it not?

A. It would provide you with a smaller sample of TAVIS stops. It would allow you to compare, however, the pattern of stops that the officers were engaged in before they became in TAVIS and the pattern of stops they were engaged in after taking on TAVIS responsibilities.

Q. But Officer Project Isosceles specifically targeted an area with a high incidence of shootings.

A. Mm hmm.

Q. And in fact, caused a number of shootings to drop, because of that. I mean you cannot compare things that are not similar in all other respects, other than the fact you are examining. Can you Sir?

A. You can provide an analysis of what type of activities a particular unit was involved in. What types of stops, what types of searches they were involved in, how the unit operates. Because it was tackling a particular type of crime, it says nothing of the actions on the streets and the activities they were engaged in.

Q. Let us go through it step by step.

A. Mm hmm.

Q. You would agree that even if you got statistically significant differences, even between the four officers, that may or may not mean anything, much or less circumstantial evidence of racial profiling. Do you agree with that proposition in general?

A. If you could repeat it.

Q. Even if you got statistically significant differences, even between the four officers involved in this case, that in and of itself, may or may not mean anything, much or less represent circumstantial evidence of racial profiling.

A. It would depend on what I would find. I cannot make that conclusion right now without first having analysed the data.

Q. Do you agree that in order for even statistically significant differences, in relation to blacks, having any meaning, the officers have to be similarly situated for the entire seven months in terms of hours of work, location of work, time of work. Do you agree or disagree with that?

A. I would disagree. I would have to see what the data revealed. How many cases, for instance, they were



involved in, with respect to their TAVIS responsibilities and how that compared. I simply do not have enough information to answer your question properly at this time.

Q. So again, we are back to the fact that you have no idea of what these 208s are going to show you. You just want to look to see if they show you anything. Is that fair Sir?

A. That is what I have been asked to do by the defence. Yes.

Q. By the way, what the defence is trying to do in this case, to have you look at the 208s, am I correct that it is novel in the sense that there is no prior situation where that was done?

A. In the Canadian context?

Q. Yes.

A. The only other case that I am aware of where the 208s were requested would have been the Cunningham--

Q. No. But in terms of doing what you propose to do. It is novel. Is it not?

A. I do believe so. I am not aware of other work done in Canada. Similar analysis has been proposed in the United States.

Q. Now you know that the first series of Star articles were what? About 2002?

A. Yes.

Q. So this issue of racial profiling involving the black community and the Toronto police service, it is been in everybody's attention for the decade. Has it not, Sir?

A. It has. And I would argue that it has been an issue for much longer than that.

Q. I was not meaning to suggest the negative. I was just focussing on the 2000s.

A. Yes.

Q. Okay. Well, Sir, do you not see that because of that, the fact that the 208s are not mandatory, could inject an unfair bias into the statistics?

A. As an analysis of 208 cards, I cannot see it.

Q. Well what if a police officer was more likely to fill out a 208 with a black person, because of the sensitivity of stopping black people, because they want to make sure they are on record, why they stopped them. Whereas when they stop a white person, they are not going to be hauled in front of the Human Rights Commission for it. Do you not think that you are more likely, therefore to get 208s, in relation to black people than white people?

A. I have never actually never heard that argument before.

Q. I am asking you. Does that not seem plausible?

A. I think it would be--Is it plausible? I suppose to. Is it likely? From my understanding of what the 208 cards are filled out for, they are more for investigative purposes, rather than trying to cover or explain your actions.

Q. Has anybody researched the loss factor in 208s? The percentage of 208s that are not filled out in relation to different populations?

A. Sorry. I do not know.

Q. Has anyone researched that the cases where 208s could be, but are not filled out, in relation to white

people, versus not filled out in relation to black people.  
Does anyone have that figure?

A. No.

Q. You said in your affidavit, you are familiar with the international literature on racial profiling research. You are familiar with the home officer research series 131, called profiling populations available for stops and searches? Are you familiar with that?

A. I believe a few years ago, I did review that document.

Q. Do you agree with the following? There is a section of answers to key questions I am going to read you something and ask for your comment upon this. "How useful are residential population figures, as a measure of the population available to be stopped or searched?" That is the key question that they are answering.

A. Mm hmm.

Q. The research presented here shows quite clearly, that "measures of resident population give a poor indication of the populations actually available to be stopped or searched. The available population in the five sites that were quite different from the resident population of the areas, as measured by the latest census. Most significantly, within pockets of high stop and search activity, young men and people from minority ethnic backgrounds, tended to be overrepresented in the available population." Are you familiar with this research, where they went to five places in England and actually counted who was on the street at the time and measured. Do you agree or disagree with what I have just read?

A. I agree with it partially. Basically, you are referring to the issue of what we discussed before, about observational benchmarking and its utility in further analysing the issue of racial profiling. Similar studies have been done in the United States, with respect to traffic populations.

Q. You do not have any observational benchmarks for the Jane and Finch area. Do you Sir?

A. No.

Q. I suggest to you: young black men on the street in the late evening, in the Jane and Finch area, there is no relationship to the census data. Do you agree, disagree, or do not know?

A. I do not know.

Q. Without knowing it, how can you possibly judge the conduct of someone stopping a black male, as opposed to a white male, when you do not even know whether in fact nine out of the ten people at the time were black? You cannot do that. Can you Sir?

A. You can analyse the data for different days of the week, different times of the day, to see if the same patterns emerge. You can also compare, as we discussed, the actions of the officers in question, with the other officers who are working at the same communities, during the same times of the day, which to an extent, provides some sense of benchmarking.

Q. Doctor, how are you going to find out if the officers who filled out the cards were working the same hours or always in the same location? How are you possibly going to get that data? Are you just going to assume it?

A. No. I mean the 208 dataset itself, has information on the time of the stop and the location of the stop.

Q. Yes.

A. So if we wanted to, for instance, restrict the analysis to stops that were made after 8:00 p.m. by the officers in question and limit the analysis to that, that would provide de facto population benchmarking.

Q. How do you know if the comparison officers were working the same hours or doing the same duties? That is my question.

A. Because we could look at the comparison group and restrict the analysis to stops that took place during those periods as well.

Q. But again, how do you know what the officer's duties were, on each occasion, for that shift? You are just assuming that if officer A stopped somebody at 9:00 p.m. and officer B stopped somebody at 9:00 p.m. on a different day, that they are doing the same job?

A. I think that is where the analysis for the reasons of the stop come into play. If they are doing a different job or they are on a different detail or that have different responsibilities, I do believe that that would be reflected in the reason for the stop and in accompanying notes.

Q. Where is your evidence that would be reflected in the reasons for the stops in the accompanying notes? I understand you are making that conjecture, as some scientists say. Where is your evidence of that?

A. Well I have not analysed the data yet, so I do not have that evidence.

Q. So again, that is just a speculative possibility.

A. It is a speculative possibility or as researchers might say, it is a research question.

Q. You appreciate His Honour is not here to help you answer research questions.

A. I appreciate that.

Q. And speaking of that, you know Ron Melchers from the department of criminology at the University of Ottawa?

A. I am aware of him. Yes.

Q. He has had some critical things to say about you and your work. Has he not?

A. Yes he has.

Q. Referring to an article. You are familiar with his article, Do Toronto Police Engage in Racial Profiling? It was published in the Canadian Journal of Criminology and Criminal Justice in July 2003.

A. Mm hmm.

Q. One page 350, I just want to follow up the home office research. He is referring to these Toronto Star's initial set of articles in 2002.

A. Right.

Q. And Professor Melchers had this to say at page 350. "Contrary to the use of population data in studies of racial profiling. Contrary to the assurances of The Star, this method is not well supported in the literature--quite the contrary in fact. For example, McMahon et al. concluded from

their review of racial profiling research that studies of racial bias in traffic stops "too often base their conclusions on comparing preliminary data on traffic stops to aggregate city demographics without establishing credible benchmarks for comparison purposes. These superficial evaluations are dangerous, in that they may foster incorrect conclusions and general inappropriate corrective measures." And the quotation is taken from McMahon, Garner, Davis, and Kraus, How to Correctly Collect and Analyze Racial Profiling Data. Your Representation Depends on it. Final Report for Racial Profiling Data Collection and Analysis, Washington D.C. government, 2002. You are familiar with that reference as well?

A. Yes I am.

Q. Okay. Now first of all, do you agree with the criticism quoted from McMahon at all?

A. They are referring to studies that had used, first of all, traffic stops, which might be very different than pedestrian stops.

Q. Sorry. Which may be different.

A. Yes. Well they are very different than pedestrian stops in terms of why police officers are engaging in traffic stops. They were also referring to stretches of highway that, as we discussed before, might have no resemblance to the residential population, because they are through ways where people who live in various locations would be passing through. It was also referring to cases where there is not adjusted census benchmarking. I believe, for instance, we were discussing earlier, the ability to eliminate non-residents when making a census benchmark. The studies that

Melchers is referring to there, we are not doing that. Do I think that census benchmarking, to answer your question is perfect, no. I think that adjusted census benchmarking is better. But does it have it's weaknesses, absolutely.

Q. Do you agree that The Star--the source of all of this interesting--The Star claims that census data was an appropriate benchmark in its series of articles. And they are completely wrong in that. Are they not?

A. As I said, they have their strengths and their weaknesses. A lot of the initial Star series was more focussed on post-arrest treatment and also examining issues of the overrepresentation in certain types of offences. It was more sophisticated than Melchers' quotes suggests.

Q. But Melchers, who is a professor, did criticize you.

A. Yes he did.

Q. Can we at least agree on this that statistical disparity, much less, significant statistical disparity, requires that all other features are equal, so that all other possibilities are eliminated, other than the factor that you are testing for. Is that correct?

A. Under the ideal circumstances, yes.

Q. Because otherwise, there is a danger of what is called confounding factors. That you are seeing something, but it may be due to something that you have not thought of, rather than what you are suspecting. Is that not fair, Sir?

A. Yes. I think that theoretically, if you are establishing a finding like whether or not a finding, for instance, that shows that black males are overrepresented in a



population of stops, you have to ask why. What are the possible explanations for that? One of them might be profiling. It could be involvement in criminal activity, it could be presence in the street, it could be a number of other factors, and you should address those issues.

Q. And you would agree with me that the first and obvious explanation is their conduct or behaviour, which attracts the interest of the police.

A. Yes.

Q. That is the first thing you are looking for. Right? Because that is what the police are looking for. It is evidence of criminality. Right?

A. Well part of what my previous research has uncovered is that given criminal behaviours or illegal behaviour, that some groups come under greater surveillance, and therefore, are more likely to be caught. So for instance, if we are looking at issues of drug possession, the public health research, the surveys that are conducted throughout North America, suggest that the vast majority of individuals who consume illegal drugs, including marihuana and other illicit drugs, are white. That rates of use are much higher in rural areas than they are in urban areas. However, when we look at statistics on who gets caught and arrested, and must suffer the consequences of a criminal record, there are hugely disproportionate racial minorities. Now circumstantially, you can look at that and say why then, is one group overrepresented in the statistics for this type of crime. And putting together different forms of data, you can make an argument that this may reflect surveillance activities. In

other words, black people who use drugs are more likely to get caught.

Q. Are you suggesting that the police should only arrest guilty people in proportion to the census data?

A. Not at all.

Q. Then did it ever occur to you that for a variety of socio-economic factors, certain groups may be easier to catch than other groups? Did that ever occur to you?

A. Yes. That occurs to me.

Q. And is that somehow the police's fault? Are they being discriminatory because they are catching first, they are just catching the easier fish. Is there something wrong with that?

A. No. Unless there are systematic factors that make you focus in certain pawns and not others.

Q. So a really important factor in any intelligent discussion of racial profiling has to be the crime rate in the group. Correct?

A. I think if you review some of the publications that are put out and some of the reports I have written, I would agree, for instance, if you were trying to make the argument that the rate of crime, in particular, some violent crimes, is higher within the black community than it is in other racial groups--largely sometimes explained by the socio-demographic factors that you are referring to. I would agree. I wrote a report for the roots of youth violence and found that approximately fifty percent of homicide victims in the city of Toronto were young black males--Hugely disproportionate to the representation in the population. The question is does those findings justify profiling a particular

group for criminal activity? That type of profiling can actually increase the surveillance and the number of innocent people who are brought into criminal justice surveillance, and likely leads to an overrepresentation for relatively minor crimes as well.

Q. I see. Ultimately, is that not--I mean what is wrong with real profiling? You said it is wrong too much of the time. You are focussing on a factor that really does not help you catch criminals. That is the knock against racial profiling. Correct?

A. Yes.

Q. So if you really want to detect racial profiling, do you not look at the success rates? Are the police arresting too many wrong blacks? But if the conviction rate is remaining high, how are the police to be faulted? They are catching criminals. They just happen to be black criminals. Is there something wrong with that?

A. I suppose from criminal justice point of view, as long as you are arresting people, that could be viewed as legitimate police. As a sociologist and as a criminologist, we want to look at the overall social impact of that. And the impacts are twofold. Are people from particular racial groups more likely to come under surveillance, more likely to be caught, more likely to suffer the consequences that can enhance the inequalities in society.

Q. Even though they are perfectly guilty people?

A. Even though they are perfectly guilty. What you are finding in that case is that if you are white and do the same thing, you are more likely to escape detection, get

away with the crime, and go on with your life. Perhaps as young man, grow out of it and go on with a productive life.

Q. So should the police be catching criminals in direct proportion to the census data? In other words, they will have a quota. So many oriental criminals per year. So many white criminals per year. Is that what you are saying?

A. Not at all.

Q. So what are the police supposed to do if they are catching criminal and it just happens to be easier to catch black criminal for socio-economic reasons, because they are out on the street, they are less wealthy, all of the unfairness of life. No one denies that life is very unfair. Some people have more. Some people have less. What are the police supposed to do? Turn a blind eye?

A. I am not suggesting that at all. I am suggesting that if profiling exists, if either for individual or systemic reasons, that as certain population comes under higher levels of scrutiny, they are going to be revealed in crime statistics and you are going to resolve the self-fulfilling prophesy. I also think one of the interesting things with the 208 cards, is they are a type of information that we rarely get a chance to view, which is citizen encounters, surveillance activities on the behalf of the police, that do not result in arrests. One of the consequences of profiling, I think The Court often uses the term, the legitimacy of the law, is that it can undermine that legitimacy by having people feel that they are being targeted for investigation that are not warranted.

Q. What do you think, under my legitimacy of the law more, are the police properly doing their job catching

criminals or the Toronto Star using population census data to scream headlines that blacks are being victimized by the Toronto police service. Which does more to undermine the legitimacy of the law?

MR. MATHAI: Is there any relevance in this at all?

THE COURT: Maybe that is beyond the Doctor's field of expertise.

MR. GOLD: I will move on.

Q. Doctor then, just on the issue of drawing conclusions from statistical disparities, you are familiar with the Melchers report that was commissioned and published by the RCMP?

A. Very familiar with it.

Q. And in that report is written the following. Notwithstanding then, its growing acceptance in The Courts, among the media with the public, the evidentiary basis for allegations of racial profiling is weak. Often fabricated, if not entirely absent. The only two Canadian experiences in racial profiling data collection are the one conducted by the Toronto Star and the one conducted more recently by Scot Wortley for the Kingston police service. None of this work has been accepted for peer review publication, yet it continues to circulate as great literature. These studies suffered from such serious methodological problems that the consensus view in the research community is that they are junk sciences. Do you agree or disagree?

A. Totally disagree.

Q. But that is a view that is held within your profession. Correct?

A. No it is not. It is a view held by Ron Melchers, who was commissioned by the RCMP, to write a report. So incidentally never conducted a study dealing with these issues.

Q. So do you think that there is something sinister that he was commissioned by the RCMP as opposed to you being commissioned by the accused in this case?

A. Put it this way. If you would like to go through a page by page analysis of the Melchers' report, I do think that his report is less than balanced. If you would like for me to highlight a few points to illustrate that, I would like the opportunity to do so. First of all, he is incorrect. He makes a blanket statement. I do not know. It is the consensus in the research community. He also states that there has only been two efforts to document this, which is totally ignoring my peer review studies which have dealt with survey research.

Q. No. He says data collection.

A. Data collection?

Q. He says racial profiling data collection.

MR. MATHAI: It strikes me that it may be a useful task to have a copy of the papers presented to Mr. Wortley so that he can review it.

MR. GOLD: This is from Mr, Wortley. He sent me this.

MR. MATHAI: No. I am talking about the Melcher report and that he be provided a copy of the Melcher article and the Melcher report so that he can review it. So that when questions re

being asked with respect to the Melcher report, maybe he can be provided with the context of some of the comments that are being put to him. I just think it might be more useful than just taking things out of the context and giving it to him without him being able to analyse it.

MR. GOLD: Your Honour, this was sent to me by the defence.

MR. MATHAI: I am not talking about that, Mr. Gold.

MR. GOLD: That is what I am talking about.

MR. MATHAI: I am just referring to the Melcher report. I think it should be provided to Mr. Wortley and given the opportunity to examine it and then review it.

MR. GOLD: I do not have the Melcher report.

MR. MATHAI: I am not sure where he is finished. Maybe Mr. Gold can tell me.

THE COURT: There is no useful purpose for this, is there by this? This is not a school yard. This is a Courtroom. Mr. Gold is much more experienced to not to have interrupt. Continue please.

MR. MATHAI: Thank you. And I apologize for that. I thank Your Honour. I think it might be a little bit better to have the document in front of Mr. Wortley so that he can review the document and then questions that are put to him that deals with questions of Mr. Wortley's work can be evaluated within the context of Mr.

Melchers entire report, rather than taking things out of context and put to the witness. I just think it might be more fair that way.

THE COURT: I will come back to Mr. Gold in a minute. But the concept of peer review and experts is bound together. It is a fairly textbook cross-examination. You said you read this and this and this article. How many of them are peer review? You have indicated a couple of times you do not have a copy of the Melchers report.

MR. GOLD: I do not have it. I am just giving what the witness sent to me through counsel. I am not taking anything out of context. I am quoting exactly what the witness put I his slides.

THE COURT: So this is material, as I understand it, maybe you just want to show the doctor to make sure that it was his.

MR. GOLD: We have the cover letter from defence counsel.

MR. MATHAI: There is no doubt that those slide we have provided as part of the presentations that Mr. Wortley had in his C.V. My friends has asked me for those documents so I provided it for him. But when you just take random quotes from a larger report and put it to a witness and say do you agree or disagree, I think it is unfair to the witness. My friends could have, if they wanted to, I am sure, they could have



easily gotten a copy of Mr. Melcher's and then cross-examine Mr. Wortley on that. They decided not to. I think that the manner in which they are doing it is unfair.

THE COURT: I do not see anything wrong with the way it is received. It is fairly standard. You are an expert. Here is another expert. They disagree with you. Would you like to comment on that? Continue on Mr. Gold please.

Q. I just want to be clear, was the Kingston police service study ever written up in a peer review journal?

A. I think a book chapter or two of them that have emerged since.

Q. Is it published?

A. Yes.

Q. When was it published?

A. Wortley and McKhala, 2008.

Q. The reason I asked is you recall you were kind enough to meet with us on May 25<sup>th</sup>, 2010.

A. Yes.

Q. And our notes indicate that regarding the Kingston study, which we discussed, you were to send us the references to the Kingston study. We never received anything from you.

A. It is my understanding that you received the Wortley and McKhala 2008 article. It was one of the articles that you requested. There was a section of that article that deals with the Kingston study.

Q. I am sorry. Did that section include all the data? Was it totally transparent so that another expert could assess it?

A. It was peer reviewed.

Q. Was that study you sent me, was it totally transparent so another expert could have read that and assessed it?

A. Yes. Another expert did read it. I mean it was a peer reviewed book chapter, so it was peer reviewed before it was published.

Q. I read what you say you sent. Did it have all the original data?

A. The entire original--

Q. Yes.

A. No it did not. It provided a summary of the data, the major findings, the strengths and weaknesses of the results, and the need for further research.

Q. And just tell me again what that reference was, because I admit it escaped.

A. Let me grab it here.

Q. And by the way, that was in a book. Not a journal?

A. A peer reviewed book. Yes. It was actually reviewed by one of Ron Melcher's colleagues at the University of Ottawa, who has now moved to Oxford. Wortley and McKhala 2008. Racial discrimination in the Ontario criminal justice system. 1994 to 2007. page 187 to 207. And Julian Roberts and Michelle Grossman adds criminal justice in Canada, a reader, third edition. Page thirty-two of the vitae and it is the one, two three, four, five, sixth, seventh citation down.

Q. We will take a look at that. So the situation is that you say certain things, professor Melcher criticized. In fact, what I read you was the two slides that you, yourself prepared, containing professor Melcher's criticism. Correct?

A. Mm hmm.

Q. And then you published something, which you think is scientifically valid. Correct?

A. I think so. Since we have met, there has been another publication that is coming out using similar data.

Q. Okay. But in any event, you agree there is a dispute between you and professor Melcher about the proper statistical analysis, as you call it.

A. Yes. I would like to remind The Court, also that professor Melcher's document, was not in any way peer reviewed. It is an RCMP publication.

Q. So aside from the issues among the good professor's, can we then ultimately agree that if you are going to assess an officer's street conduct at a particular time and place, that the best benchmark would be reliable observational data gathered at a similar time and place? That would be the best benchmark.

A. The best benchmark. It is one of the challenges with observational benchmarking is how can you do it and is it, in fact, possible at a high quality level at all. Perhaps if you were looking at a specific activity like speeding, you can imagine the methodological issues to try to benchmark the speeding population. When it comes down to searches in neighbourhood stops and searches in

neighbourhoods, particularly involving pedestrians, it becomes more onerous. Give you an example, the New York City conducts stop and frisk studies every year. Every individual who has been stopped and frisked by the police in New York City has to be documented. Eighty percent of those who were stopped and frisked on the streets of New York were black or Hispanic. Furthermore, the number one reason for stopping and searching pedestrians is something called furtiveness. How you would benchmark furtiveness, which I assume means looking suspicious in some way, I find a difficult prospect to look at. As you state, with respect to observational benchmarking, if hypothetically speaking, we had the resources to go out and observationally benchmarking the neighbourhoods in question, for this study, the argument could also always be that the street population and the behaviours of the people on the street have changed dramatically between 2008 and 2010. So it is very difficult to engage in those activities.

Q. It is difficult and it is expensive. But all you are really saying is that in the real world, we may not be able to get a reliable benchmark. Is that not a fact?

A. I think that one of the strategies that social scientist use is try to use different methodologies. It may be easier and it has been acknowledged by other experts to some kind of benchmarking with survey research, such as the 2005 publication, where we control for available on the street and criminal activity, and drug and alcohol use.

Q. Sir, with all due respect. First of all, you agree with me that good science is difficult, it does not mean that you do bad science because that is the best you can do. Right? You are not going to accept that principle.

A. No I am not.

Q. You know Google has cars that drive around taking picture of the entire world. When you have a place like Jane and Finch, where obviously there is a police interest, would it be that hard to do video surveys just video cameraing the passers by and doing some counts of the actual street population? Has that ever been done?

A. It can be done. Yes. It is very expensive and I have not seen it done in Canada yet. It has not been funded.

Q. In other words, Sir, observational benchmarks--What you want to do is you want to know who is actually out on the street at a given time and place. Right? Night after night. Fair enough? That is what you really want to know. You want to know people who are out hanging around as opposed to people who are walking, with a purpose to a job or something like that. You want to know what the unemployment rate is, because people who are unemployed can hang out on the street. Does that not all factor into what is actually going on out there on the street?

A. It might.

Q. Do you know if the unemployment rate among the black population in the Jane and Finch area is higher than the normal?

A. I believe it is.

Q. At the end of the day, Sir, if I understand your evidence, you really have no idea of whether or not you will find any statistical disparities, much less significant ones, within the 208s. Correct?

A. Correct.

Q. There are real issues about what benchmarks you are going to use for comparisons. Correct?

A. Correct.

Q. And it is obvious to state that your conclusions in this regard, will not, in fact, be peer reviewed, because you are just going to come to Court and give them. Correct?

A. Correct.

Q. Unless, of course, we require an independent examination of all your data by another expert. Correct?

A. Correct.

Q. Who may or may not agree with whatever conclusions you may or may not come up with.

A. Correct.

Q. And since you approve of the Kingston study--You do approve of the Kingston study?

A. I think the Kingston study had great weaknesses involved and I have always been transparent about the weaknesses with that study.

Q. Okay. And Melcher certainly disapproved of it. Clearly, there could well be opposing opinions to what ever you come up with. So called battle of the experts if I can use that term.

A. It is a possible scenario.

MR. GOLD: Those are all my questions, Your Honour.

END OF CROSS-EXAMINATION BY MR. GOLD

THE COURT: We will come back in at twenty-five to four. We will go until approximately 4:30 or 5:00.

R E C E S S

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

MR. GOLD: Your Honour, just before I complete, as Your Honour puts it, completely routined cross-examination--

THE COURT: Only referenced to some questions.

MR. GOLD: I just want to update you on the material regarding the Kingston study. We have figured out what happened. This in no way reflects anybody, but I do not want Your Honour to think I do not read what I am sent. We were sent an earlier version of the chapter, which did not contain the Kingston study. And then we were sent a letter that, apparently, there is an updated version, but some student had walked off with Doctor Wortley's copy and he could not give us one and we should get it from the Centre of Criminology Library. I sent someone. We could not get a copy, so I actually never was able to put my hands on that chapter, and that was the source of the confusion between the witness and I. I just wanted to explain what happened on the record.

THE COURT: That is fair enough.

THE WITNESS: I apologize. I was on sabbatical this past summer, so I was not downtown all the time to assist in searching for that.

THE COURT: No harm done. Do you want to get a copy of the chapter?

MR. GOLD: Given the history, I am not going to hold up this thing one minute, Your Honour.

THE COURT: Thank you. Mr. Butt?

MR. BUTT: Nothing. Thank you.

THE COURT: Ms. Kim?

MS. KIM: No, Your Honour.

THE COURT: Thank you. Re-examination?

MR. ROWE: Very briefly.

RE-EXAMINATION BY MR. ROWE:

Q. Doctor Wortley, Mr. Gold asked you if you appreciated that some accused, they lie about the circumstances of their arrest. Do you remember him asking you about that?

A. Yes.

Q. And you agree with him that sometimes that happens?

A. I would agree it is possible. Yes.

Q. Would you agree that sometimes police lie about the circumstances of the arrest?

A. There has been evidence that that has taken place in previous cases, so I would assume that. How frequently that takes place; I cannot say.

Q. I take that as a yes.



THE COURT: Just to close the loop, I think I can take judicial notice that from time to time, people are untruthful.

MR. GOLD: That is what mainly keeps Your Honour in business, as I understand it.

THE COURT: If that assists anybody.

Q. Mr. Gold asked you if you could have pulled out all of the data for the 31 Division officers, and some sort of analysis to establish some sort of range that could be used as, I guess, a statistical comparator. Do you remember being asked that?

A. I remember being asked whether I had done or could have done an analysis of the 31 Division data before this hearing and I replied that I had not.

Q. Okay. At any time prior to today, had either Mr. Gold, Mr. Butt, or Ms. Khoo ask you for that?

A. No they did not.

Q. On the question of peer review, in your experience as a sociologist, is there always universal unanimity as to the acceptance of all academic treatises?

A. No. It depends on the text being reviewed. It depends on the journal being submitted to. But it is often, for instance, that an article being submitted for publication will receive two positive reviews and a negative review, and it up to the editor, in those times, to decide whether it is published or not. And you will often find that journal articles that are submitted to one journal; the exact same article is rejected and is submitted to another journal and is accepted.

Q. But does the fact that there is one negative peer review of an article vitiate the reliability or the value of the article? Being negatively peer-reviewed by that one person?

A. From an academic point of view, it creates academic debate. I mean I think that is what grows the social science. A study is published. It has its strengths and weaknesses. Those strengths and weaknesses are highlighted. A need for further research is highlighted. And hopefully the discipline or the topic in focus; that debate results in better quality research as we move along. I mean I think a point where I greatly disagree with Ron Melchers' article was that in that piece, he calls for researchers to never explore this issue. That it should be a taboo topic that a researcher should never explore in any context, because it damages the reputation of the police. And I guess I would argue that the research that has been done has its value. It is far from perfect, and that in order to learn more about the phenomenon, we need to conduct more studies and have access to the type of data that might provide insight.

Q. You just made a comment about Professor Melchers saying that the research in the area might damage the reputation of the police. In your review of Melchers' work, does Professor Melchers indicate what he means by "damage the reputation of the police"?

A. I think he is meaning in terms of the studies themselves. Often when you research a sensitive topic, there is a point of the topic itself that is so sensitive and that findings; people may read it and then think badly of the police, because they take those findings to be truthful and

reflect reality. I have also researched, for instance, perceptions of injustice and documented the fact that high school students, for instance, in Toronto, who are African-Canadian, have a high level of distrust of the police, compared to other groups. People have looked at that and said that it is because of these other studies that are out there that are causing distress. That is an example of what he was stating. There is very little empirical data that would suggest that research into racial profiling causes opinions to change. In fact, in Great Britain, where such data has been regularly collected, public perceptions and minority perceptions of the police have actually improved, following the mandated collection and release of that data. Experts there suggest that the greater transparency that has been provided by regularly collecting and releasing such data has increased confidence among minorities that the issue is being dealt with, and not hidden. So I guess in concluding, I would argue that, as a research question, there is just as much to think that a lack of study and a lack of research could actually reinforce negative perceptions.

Q. Right. In respect of the international literature, Mr. Gold questioned you about the couple of studies done in the Canadian context.

A. Yes.

Q. One being the Kinston study, and I think there was another one. And then put to you Professor Melchers' critique of both. Right? The Toronto Star and Kingston, yes. You had mentioned that in the international realm, that there had been many studies using census benchmarking as a methodology in the analysis of whether there is profiling.

A. Mm hmm.

Q. Perhaps you can tell us what is the reliability of those studies done outside Canada, where census benchmarking was the methodology employed and racial profiling was found to have occurred.

A. I think that methodological strengths and weaknesses, that were already reviewed here, apply to the situation in the United States. I mean pure census benchmarking without adjustments and without a deeper analysis have distinct weaknesses, and I think we have discussed those. And many of the discussions about the weaknesses with census benchmarking have been brought up, first, in the American context.

Q. I think you had also mentioned the U.K.?

A. In the U.K. as well. Yes.

Q. Okay. And does the fact that there may be strengths versus weaknesses of a particular methodological approach completely vitiate the reliability of the conclusions that come from that approach?

A. No. I mean there is either data that is going to support a position or not. I think, as was noted earlier, you need to take into account, other explanations. So if we were looking at a correlation between black and being stopped, I think that you would have to consider other explanations besides racial profiling if you are conducting a thorough test of that hypothesis. I do think that you can also combine different types of data. If you have only focussed, for instance, on police data and trying to make an argument, you are going to be missing out on the qualitative experiences of people getting investigated on survey data, which can do a

more advanced form of benchmarking. That is not to say that there has ever been a perfect study of racial profiling or there ever will be. I think that, in many cases, I heard it argued once, that you can never prove racial profiling because you can never read somebody's mind in terms of what they were thinking at a particular point in time on the street. And if that is the standard that you are going to hold, with respect to proving racial profiling, unless you are a mind reader and can prove that you can accurately read minds methodologically, it will never be proven.

Q. Right. Mr. Gold suggested to you that observational benchmarking might be a more ideal, or certainly, better or more reliable way of analysing whether there is racial profiling, than census benchmarking.

A. Mm hmm.

Q. Right. And Mr. Gold put to you that you do not give up on the god science, because it is hard to do, and rely on bad science. Or words to that effect.

A. Mm hmm.

Q. All right. Does the fact that you use census benchmarking as your methodological approach and that that may not be as ideal a methodology as observational benchmarking, does that mean that census benchmarking can constitute bad science?

A. Not in my opinion. And I would stress that I would like to use adjusted census benchmarking. But the point that was made earlier-- For instance, if we had all of the stops that were done in a particular jurisdiction or a particular patrol division and we found a huge overrepresentation of blacks in that population, the next step

would be to eliminate non-residents if you were doing census benchmarking, because the non-residents should not be benchmarked on a population that is measured based on residential location. I think the point can be taken though, that I would personally look at the volume of the discrepancy. If it is a small discrepancy between the stop rates and the census representation, I think you could make an argument that it might be totally explained by availability on the street. However, if it is a huge difference in the level of stops, that type of explanation becomes more difficult. I also think it is one of the reasons why I have stressed that we need to look at other divisions as well. There has also been the argument made that black men are more available to be stopped than other groups, and this might explain why, in Jane and Finch, for instance, they are more likely to appear in 208 dataset. But would that explain, for instance, why there are even greater overrepresentation in areas with low black populations? And I find it very difficult to believe that black people of a small proportion of a population in some areas are overly represented in the population available to be stopped on the street in all jurisdictions. For a very small portion of the population to account for such a large proportion of the people available on the street, I think is physically impossible. But that is something that could be discussed with additional benchmarking data and additional analysis of the data available.

Q. All right. Mr. Gold put to you, in quoting Professor Melchers, at page 350 of some report, that use of population data, contrary to assurances of the Toronto Star

analysis, is not supported in the literature regarding traffic stops.

A. Mm hmm.

Q. Right? And in responding to that, you said that the use of traffic stops versus pedestrian stops poses certain issues.

A. Mm hmm.

Q. Can you clarify in respect of the use of census benchmarking and traffic stops, what some of the issues are, that may affect the reliability of the profiling analysis in that kind of a context?

A. A couple of issues that could emerge in terms of traffic stops are often people who are in cars and travelling are passing through an area and do not necessarily reside there, so the accuracy of using census benchmark to test drivers has its weaknesses, because you have a higher proportion who do not reside in the area that you are using the census benchmarking. Although I said before, you can correct that by eliminating non-residents from the stop dataset. So there is a way, using adjusted census benchmarking to correct for that. Another issue that often emerges with respect to police response to traffic stops is that they are unable to view the race of the drivers that they pull over. If somebody is speeding at night, officers often argue that you cannot see the race of the individuals pulled over. There is some debate about that in the literature. But is very difficult to make the same argument about pedestrian stops. If somebody is walking, hanging out, or is standing still and you approach them. It is very difficult for officers, and in those cases, I really did not understand. One of the hypothesis we

had in the Kingston data, because one of the values of the Kingston data, although it has weaknesses, is that it did collect data on both pedestrian stops and vehicle stops combined. About forty percent of all of the contact cards that would have been handed out by the Kingston police during the pilot project were, in fact, pedestrian stops. And what we found that was that the overrepresentation was much greater in pedestrian stops than traffic stops. Overrepresented in both groups. But the hypothesis would be if race was more evident in pedestrian stops, that would be reflected in the data.

Q. All right. So here is the thing. So you were talking about doing an analysis of all of the data that was acquired by the Toronto Star in setting up a statistical comparator. And my question to you is of all of those stops you look at, how do you differentiate the pedestrian stops from the traffic stops, as the instant case concerns a pedestrian stop of a young, black resident within the Jane and Finch community.

A. It is my understanding that the differentiation is made in the 208 dataset. They will highlight whether it was an HTA stop, for instance, or the circumstances surrounding the stop. So I do believe that we will be able to make that distinction.

Q. All right. One moment. Mr. Gold had put to you that the subject of racial profiling has been out there for study for several years. And yet, there have only been a couple studies in Canada.

A. Mm hmm.

Q. And in your evidence, you had mentioned that there have been several studies in other jurisdictions.



In the United States, in the United Kingdom, and so on. Do you have any idea why the number of studies in Canada have been so few?

A. I think there is an informal ban on the release statistics, not only based on race and police activity, but race and crime statistics are not released in Canada either. The United States and Great Britain are much more willing to release that data for analysis, which impedes a lot of investigation in Canada into issues of race and crime and issues of race in the criminal justice system. To date, there has not been a political will, I think, to release those data and conduct the types of study that have been conducted in the United States in the Canadian context.

Q. Mr. Gold questioned you on the issue of peer review and the significance and importance of it. The articles that you have written, studies, these reports you have done, the ones highlighted in your C.V.; were any of those peer reviewed?

A. Most of them, yes. The ones listed under academic publications. Some of the government reports, for instance, that you may have produced would not have necessarily peer reviewed, no.

Q. And the last area I wanted to ask you about relates to Mr. Gold's question to you about the need for officers being studied to be similarly situated in order for the conclusions from the data to be reliable. Do you remember being asked about that?

A. Yes.

Q. All right. Can you clarify what it means for officers to be similarly situated for the purposes of statistical analysis?

A. I am basically referring to the value of comparing similarly situated officers with the officers who were working the same division, working the same shifts, working the same basic population. So basically by focussing on those officers, in isolation, you are controlling for the benchmarking issue that we were discussing before. And I believe that the issue that was brought up by Mr. Gold was the fact that the officers in question, and this was my understanding of what Mr. Gold said, that they were not, for all the six-month period, necessarily assigned to the same division, which is going to reduce the amount of data we have to analyse. How many stops were conducted during the period when they were assigned to TAVIS, I do not know yet, because I obviously have not seen the data.

Q. And this issue of being similarly situated, do you know if that would have come up in the studies that were done in the U.S. and the U.K.?

A. If they were looking at comparing the stopping actions of individual officers, yes.

Q. All right. And is there a way that you take that into account when you do your analysis?

A. If given the opportunity to do the analysis, I would attempt to take a highlight of those findings and when those officers would not have been similarly situated. So yes.

Q. Does the fact that a few of the officers may have been in a unit that was called Isosceles and may not

have been previously in TAVIS, but were still doing the stops and activities, does that preclude you from being able to do a study or analysis employing census benchmarking methodology?

A. I think it would change the analysis. I think you would have to look at the contact card record before and after involvement in TAVIS or Isosceles. And the value of that analysis is going to be based on both sides of the equation. I believe the statement was that it was five weeks or something, may have been involved in that particularly.

Q. What I am getting at is are you precluded from doing a racial profiling analysis by that fact?

A. I do not believe so.

MR. ROWE: Thank you. Those are my questions.

END OF RE-EXAMINATION BY MR. ROWE

THE COURT: Doctor, much of the focus of the examination in-chief and the cross-examination talked about stops. Should I take it to mean random stops? How would a stop allegedly based on reasonable grounds factor into the analysis of racial profiling?

THE WITNESS: I think what the literature would highlight is the difference between reactive and proactive police stops. A reactive stop, being that you are reacting to a citizen called for service or to the actions of a particular civilian. I think in a traffic stop context, the reactive stop would be seeing somebody speeding by, clocking them, and pulling them over because they were speeding. A proactive

stop would be why that person driving a nice in this neighbourhood? I want to check them out. So an general investigation: I just want to find out who this person is, what they are doing here, ask for some I.D., find out what they are doing. Not based on their behaviour, but perhaps their presence in the neighbourhood would be a more proactive policing activity, as opposed to reacting to the behaviour of an individual.

THE COURT: So how does reactive policing and racial profiling--

THE WITNESS: Racial profiling is about discretion and the police ability to make decisions when dealing with civilians. I think that the level of police discretion is reduced when we are dealing with civilian actions. And the more serious a civilian's action, the lesser the discretion the officers have. So Mr. Gold raised the issue of a police witnessing a shooting. I do not think a police officer has any discretion in that case to, you know, turn the other cheek and walk away. Do I think the police exercise discretion in minor cases of drug possession? Yes I do. I mean I work outside Queens Park. My officer overlooks Queens Park and every year, there is the marihuana march, where hundreds and thousands of people smoke marihuana and the police are around and do not make arrests. So the argument

could be do the police stop and search everybody who they see smoking marihuana? There is more discretion for those types of cases than there is for major cases of violence or gun carrying, where there is very little discretion. There might be more cases of discretion in a shoplifting case, where the officer may give a warning and let a person go, as opposed to a bank robbery case, where they would have no discretion in terms of letting someone go. So the seriousness of the behaviour engaged in, reduces the discretion the police officers have.

THE COURT: But is it not their discretion, would you say, if they exercise it one way or another way, as a result of racial targeting or profiling?

THE WITNESS: This is where you have to look at the larger pattern of data. And this is one of the reasons we want to look at the reasons for the stops. If the police were more likely to engage in general investigations that involve a high volume of black males when there were other white people available for such investigations, that would be indicative of racial profiling. And again, I want to stress that does not mean racial malus. It just means that the profile they are looking for, wanting to target people that look a particular way.

And sometimes that discretionary stops also based on race and gender as well.

THE COURT: How would you deal with that statistically, to set the officer up with a black, a brown, a white, another, and then observe how they exercise their discretion?

THE WITNESS: To me, there would be more evidence of racial profiling if we were looking at the overall data profile, and we found that overall, blacks were overrepresented in the 208 dataset. And then we would break it down by reason for contact and we found that they were less overrepresented in traffic violations, but more overrepresented in random stops or general investigations. That would demonstrate that race was becoming more of a factor in discretionary police activities, rather than reactive police activities.

THE COURT: Any questions arising out of mine?

MR. GOLD: Yes. Overrepresented compared to what? You are not overrepresented unless you have some standard that you consider to be the right amount of representation. Right? So overrepresentation buries the issue. Overrepresentation compared to what?

THE WITNESS: It would depend on what we were looking at.

MR. GOLD: My only point is this: when you say to the Judge if blacks were overrepresented,

that word, "overrepresented," is really the crucial issue.

THE WITNESS: What I am saying is that if we were analysing reasons for stops, there is a variety of reasons that officers can provide for the initial stop that generated the 208. What I am saying is if profiling existed, we would see, by argument, we would see a greater overrepresentation for general investigation than for stops that were generated by the actions of the civilian.

MR. GOLD: How do you recognize a case of overrepresentation? It does not come labelled.

THE WITNESS: Using adjusted census benchmarking in this case.

MR. GOLD: Exactly. That is the whole point. And it may well be that if you are not using an accurate and reliable benchmark; you will have a false case of apparent overrepresentation. Correct?

THE WITNESS: It is possible. To me, it would depend on the magnitude of the disparity.

MR. GOLD: Thank you.

THE COURT: Thank you. You are free to go, doctor. The next witness?

MR. ROWE: No further witnesses, Your Honour.

THE COURT: Any witnesses in reply?

MR. GOLD: No, Your Honour.

THE COURT: Start your argument please.

MR. MATHAI: Your Honour, before I go into argument with respect to the issues that we discussed earlier, *Mohan* and the first stage of the *O'Connor* analysis, the time right now is at 4:10. I am mindful of what you said earlier that we go until 4:30, so what I propose to do is--

THE COURT: We normally go to between 4:30 and 5:00. So if there is a convenient break at the half-hour mark, you let me know and I will stop.

MR. MATHAI: Okay. Thank you. Your Honour, the major theme that comes out of Mr. Gold's examination and the respondent's position, as I see it, is twofold. It is one, that 208s must conclusively show racial profiling to be likely to be relevant; or two, that the only way you can get any statistics that are likely relevant are to recreate, exactly, the circumstances of December 13<sup>th</sup>, 2008. With great respect to my friend, I think he elevates the test, not only for the *Mohan* issues of relevancy and necessity, but he elevates the *O'Connor* test far higher than what the Supreme Court has recognized in *O'Connor v. McNeil*, and even what the Superior Court has recognized in cases like *Khan*, for one, and later as I go through it, *Cunningham*, as well. Are there problems with adjusted census benchmarking? Doctor Wortley candidly admitted to Your Honour that there are



some negatives to adjusted benchmarking, as there is with any form of statistical study and statistical analysis. Does that render it useless? No. Doctor Wortley clearly stated that it does not render it useless. And does it render it to the point where it cannot satisfy the likely relevance at stage or the relevance stage with the *Mohan* test? It is our respectful submission that the answer to that is no as well. That at the end of the day, the arguments that my friend makes, Mr. Gold and the respondents make, go to weight. And will eventually go to weight to whatever expert report Mr. Wortley presents after dealing with the data and analysing the data. At that point, Mr. Gold can rightfully argue all of the different issues that he has with adjusted census benchmarking, potentially call another expert witness to rebut or provide even more analysis with why there are problems with it, and then it will be up to Your Honour to decide whether or not the data provides enough to give you circumstantial evidence as to whether or not racial profiling occurred in the case at hand. But likely, relevance has not been elevated, as far as I know from the review of case law, to the point of what Mr. Gold suggests, that if there is any issue with the statistics whatsoever. And let us be honest; there is always going to be an explanation for

statistics. But Mr. Gold's argument amounts to if there was any explanation outside of racial profiling in these statistics, then they are no use whatsoever to The Court. And with great respect, that cannot be the state of the law, and it is fact, not the state of the law, as Justice Malloy's decision in *Khan* suggests, that statistical analysis can be used as circumstantial evidence of racial profiling. Because if Mr. Gold's argument is taken to its logical extreme, with great respect, then there is no statistical analysis that will ever be good enough to be allowed into this Court to prove, circumstantially, racial profiling. That cannot be the test. What Mr. Gold seeks to do is turn this into the ultimate trial of the issue and not to focus the issue on the test, as set out in *O'Connor v. McNeil* and as applied in decisions like *Khan*. When looking at the issue of likely relevance, Your Honour, it is obvious that, in this case, what we are talking about is two very divergent-- [MISSING SECTION OF COURT RECORDING] --light of December 13<sup>th</sup>, 2008-- [MISSING SECTION OF COURT RECORDING] -- that you have received from that has many inconsistencies. And I do not plan on taking you through each one of those, although they are in the factum and can be reviewed within the reply factum in particular. But some of the glaring inconsistencies deal with the actual

approach of Mr. Buckley. The first inconsistency I draw your attention is the evidence of Officer Cheechoo. And Officer Cheechoo says, "I smelled marijuana from my vehicle. I rolled down the window of my vehicle despite it being December-- [MISSING SECTION OF COURT RECORDING] --doing TAVIS stops." That was his evidence. That is why he rolled down his window. [MISSING SECTION OF COURT RECORDING] --looked around and I saw an individual smoking outside of the apartment. And then he looked evasive. And I cannot remember the word that Mr. Wortley used. It began with an F., so I am not even going to try to--

THE COURT: Furtive.

MR. MATHAI: Furtive. If you look at Officer Cheechoo's evidence, it is ripe for that type of analysis--

CLERK OF THE COURT: Your Honour, there is a problem with the tapes. I believe the Reporter needs a break.

THE COURT: When did it start? Just now? Okay. I do not know how long it is going to take to get that sorted out, given that it is a quarter after 4:00. Will it do violence to your argument if we recommence at ten o'clock?

MR. MATHAI: Your Honour, it would not do violence. I would be happy to reconvene at ten o'clock if it assists The Court.

THE COURT: I think it seems to be chewing things up. We do not know the nature of the mechanical problem and I am going to keep Memorex brief, because we are no longer recorded record, but I will treat that as a licence to doing it. It would not go on the record, but we will see everybody back at ten--

THIS IS TO CERTIFY THAT  
the foregoing is a true and  
accurate transcription from  
recordings made herein **by E. Pasqualino**, to the  
best of my skill and ability.

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January 31, 2011

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Signature of Authorized Person