2010 CarswellOnt 10712

R. v. **Buckley**

Her Majesty the Queen and Damien **Buckley**

Ontario Court of Justice

Paul M. Taylor J.

Heard: October 13, 2010
Judgment: December 15, 2010
Docket: None given.

Counsel: S. Kim, for Respondent, Crown

A. Gold, for Respondent, Chief Williams Blair, Toronto Police Services

V. Arsenault, F. Sie-Wiskhow, for Respondents, Toronto Police Services

D. Butt, for Respondents, Police Constables Cheechoo, Grant, Douglas-Cooke, Kennedy

S. Mathai, R. Rowe, for Accused / Applicant

Subject: Criminal; Evidence

Criminal law.

Evidence.

Cases considered by *Paul M. Taylor J.*:

Brown v. Durham Regional Police Force (1998), 39 M.V.R. (3d) 133, 131 C.C.C. (3d) 1, 116 O.A.C. 126, *(* sub nom. *Brown v. Durham (Regional Municipality) Police Service Board)* 59 C.R.R. (2d) 5, 43 O.R. (3d) 223, 21 C.R. (5th) 1, 167 D.L.R. (4th) 672, 1998 CarswellOnt 5020 (Ont. C.A.) — followed

R. v. Brown (2003), 2003 CarswellOnt 1312, 36 M.V.R. (4th) 1, 173 C.C.C. (3d) 23, 9 C.R. (6th) 240, 105 C.R.R. (2d) 132, 170 O.A.C. 131, 64 O.R. (3d) 161 (Ont. C.A.) — followed

R. v. Khan (2004), 2004 CarswellOnt 5233, 13 M.V.R. (5th) 244 (Ont. S.C.J.) — followed

R. v. Luu (2010), 264 C.C.C. (3d) 48, 272 O.A.C. 55, 2010 CarswellOnt 8961, 2010 ONCA 807 (Ont. C.A.) — considered

R. v. McNeil (2009), 383 N.R. 1, 301 D.L.R. (4th) 1, 62 C.R. (6th) 1, 238 C.C.C. (3d) 353, [2009] 1 S.C.R. 66, 2009 SCC 3, 2009 CarswellOnt 116, 2009 CarswellOnt 117, 246 O.A.C. 154 (S.C.C.) — followed

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — considered

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — followed

R. v. Stinchcombe (1995), 1995 CarswellAlta 409, 1995 CarswellAlta 27, 178 N.R. 157, 38 C.R. (4th) 42, 96 C.C.C. (3d) 318, 162 A.R. 269, 83 W.A.C. 269, [1995] 1 S.C.R. 754 (S.C.C.) — followed

Toronto Police Services Board v. Ontario (Information & Privacy Commissioner) (2009), 245 O.A.C. 160, 93 O.R. (3d) 563, 53 M.P.L.R. (4th) 1, 2009 ONCA 20, 2009 CarswellOnt 133, 307 D.L.R. (4th) 155, 92 Admin. L.R. (4th) 109 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 9 — considered

***Paul M. Taylor J.*:**

Application to Produce Third Party Records

1 On December 13, 2008, Damien Buckley was standing outside an apartment building on Jane Street, in the City of Toronto. Four members of the Toronto Police Service were in the area doing a patrol as part of Project Isosceles, which was part of the Toronto Anti-Violence Strategy normally referred to by its acronym "T.A. V.I.S.".

2 One of the officers, P.C. Nelson Cheechoo, testified that he smelled burning marihuana and saw Mr. Buckley in front of the building. He decided to investigate and went over to the accused. A second officer, Constable Judy Grant, testified that she smelt the scent of marihuana or freshly burnt marihuana coming from Mr. Buckley. The officers approached the Accused and a violent struggle ensued, Cheechoo and Grant were joined by two other officers, Douglas-Cook and Kennedy, who also became involved in the altercation. The officers believed that Mr. Buckley was trying to disarm Constable Grant by grabbing her sidearm. Mr. Buckley was eventually arrested and charged with a number of criminal offences.

3 The Crown's position is that the police had reasonable grounds to investigate, and subsequently arrest Mr.

Buckley and that during the course of that arrest they were unlawfully assaulted by him. Mr. Buckley, through his Counsel, has alleged serial violations of his *Charter Rights* by the police. He has asserted that there were no grounds for the police to investigate him. His central position is that he has been the victim of racial profiling.

4 Mr. Buckley's trial began before me on January 12, 2010, and following the generally accepted practice, the trial proceeded in a blended fashion. The Crown closed its case on January 13th, and the case was adjourned for defence evidence until February 26, 2010.

5 On February 26, Mr. Rowe, the Accused' Counsel, brought an Application to have certain records in the custody of the Toronto Police Service released to the Defence those records are:

> (1) Toronto Police Service 208 Field Investigative Report Cards and associated Manix 208 file that is completed for each 208 card for the period of June 1, 2008 to December 31, 2008,
>
> (2) The officer's notes corresponding to each 208 Field Investigative Report Card and
>
> (3) A copy of any directives issued by the Toronto Police Administration to rank and file officers regarding the December 10, 2008 demonstration against racial profiling by Jane Finch residents at 31 Division.

6 During oral argument, the Applicant accepted the Third Party Record Holder's position that the records listed as item 3 do not exist.

7 The Application was heard on October 13, 2010. Counsel for the Chief of the Toronto Police Service and the four officers have resisted the Application. The Applicant called Dr. Scott Wortley, a Professor of Criminology at the University of Toronto, in support of the Application. Following submissions, I adjourned the matter until today for decision.

Analysis- Racial Profiling

8 In order to contextualise the records application and to understand Dr. Wortley's evidence, it is appropriate to contrast the legal definition of racial profiling with Dr. Wortley's definition. The legal definition is set out in the decision of the Ontario Court of Appeal in *R. v. Brown*, [2003] O.J. No. 1251 (Ont. C.A.) at paragraph 7:

> There is no dispute about what racial profiling means. In its factum, the appellant defined it compendiously: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group" and then quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case, *R. v. Richards* (1999), 26 C.R. (5th) 286 (Ont. C.A.), as set forth in the reasons of Rosenberg J.A. at p. 295:
>
> > Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

9 Dr. Wortley testified that racial profiling is a term that has been used in many contexts and in his view has become somewhat confusing. He defined racial profiling as over surveillance of a particular group by the Justice System than other racial groups. Within the academic community there is a debate whether race has to be the only factor, most academics he said would argue that race had to be a factor but could be combined with others

such as age or neighbourhood. He described four possible explanations for why racial profiling may occur:

> (1) malus, an individual holds an animus to a particular group, he felt this was rare;
>
> (2) stereotyping, where individuals believe that a particular group of a certain age, race, or background are more likely to be involved in crime,
>
> (3) systemic, which has nothing to do with the individual officer or stereotypes held by the individual officer. He testified that some scholars have argued that systemic racism might result from positioning special units in high minority communities. Officers working in those areas are given a mandate to patrol those areas, in a more concentrated or aggressive fashion that other areas of the community. Systemic racial profiling in his view is often difficult to understand. It has nothing to do with the individual propensities of the officers on the street,
>
> (4) as a result of police directives where police managers direct "this is who we want stopped". As in the case of systemic racism as defined by Dr. Wortley, this would have nothing to do with the propensities of the individual officer.

10 There can be no serious dispute that racial profiling exists as defined by both the Court of Appeal and Dr. Wortley. The extent to which it exists, the reasons why it exists and whether it exists in a particular case are matters which may be disputed. The extent and causes are a matter for public discussion and academic research. Unfortunately as Dr. Wortley testified, there is virtually no peer reviewed academic research on the subject of racial profiling in Canada. Whether racial profiling has occurred in an individual case has to be assessed on the unique facts of that case. Since racial profiling is unlikely to be admitted the real challenge from the point of view of the individual alleging it is, how to undermine the credit of the officer(s) involved in the arrest or detention (see *R. v. Khan*, [2004] O.J. No. 3811 (Ont. S.C.J.) at para. 42/43).

11 A detention motivated, consciously or unconsciously, by racial profiling is a violation of Section 9 of the *Charter of Rights and Freedoms* (see *R. v. Khan*, [2004] O.J. No. 3811 (Ont. S.C.J.) at para. 41; *R. v. Brown*, [2003] O.J. No. 1251 (Ont. C.A.) at para. 10/11, *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) at para.1).

12 It would be rare for direct evidence of racial profiling to occur; normally racial profiling would be established through circumstantial evidence. It may be proved where the evidence shows circumstances relating to a detention corresponding to the phenomenon of racial profiling and provide a basis for the Court to infer that a officer(s) is lying about why they singled out the accused for attention (see *R. v. Khan*, supra at paras. 41/42, and *R. v. Brown*, supra at para. 45)

13 In *R. v. Khan*, *supra*, Justice Molloy of the Superior Court made reference to the use of statistical information to support a claim of racial profiling. Since both the Applicant and the Respondent have referred to her decision, I will quote what she said at paragraphs 45-46:

> "I do not take either *R. v. Brown* or *Brown v. Durham Regional Police Force* as suggesting that these are the only ways of proving racial profiling. In both cases, the examples given were based on the particular facts before the Court. In particular, I find no suggestion in either case that in order to prove racial profiling; an accused is limited to the circumstances of the particular stop involved in his or her own situation.

I do not agree with the Crown's submission that evidence of prior similar conduct by a police officer is inadmissible or irrelevant in a case in which racial profiling is alleged. On the contrary, where such evidence exists, it may be a pivotal part of the defence case. I find support for that proposition in the checkpoint example posited by the Court of Appeal in *Brown v. Durham Regional Police Force*. The Court stated that if only people of colour were stopped at a checkpoint, an inference could be drawn that the stop of a particular accused was discriminatory. Evidence that the police officer involved had a history or pattern of only stopping black people at the checkpoint is evidence of prior acts to support an inference of racial motivation. Suppose, for example, that a checkpoint is set up purporting to address highway safety issues and, over its eight-hour existence, every person of colour passing through the checkpoint was stopped, only persons of colour were stopped, and no white people were stopped. That would be virtually conclusive evidence of an unlawful discriminatory purpose. I would go one step further and suggest that it would not be necessary to prove that the only people stopped were visible minorities. Evidence that the number of people of colour stopped was a grossly disproportionate percentage of the number of people who went through the checkpoint, or grossly disproportionate to the number of white people stopped, could also be capable of supporting an inference of discrimination. Similarly, if there had been a similar checkpoint the day before, operated by the same officer, with similar results, that too would be compelling evidence of a racial bias at work.

The checkpoint example is a good one because it illustrates easily the potential force of the evidence of prior conduct. Needless to say, in real life, such extreme examples of racial profiling will not be forthcoming. Not all evidence of prior conduct will be as forceful as the extreme examples I have posited. The degree to which the prior conduct will be compelling will depend on the circumstances. Some such evidence may be so inconclusive that no weight can be given to it. My point, however, is that this is a matter of degree. Prior conduct of a similar nature by the police officer in question can, depending on the circumstances, be admissible as a piece of circumstantial evidence relevant to his or her motivation in the particular case before the court".

and "I therefore will deal only briefly with the relevance of the documents for statistical purposes. There may well be cases where statistical evidence could be used to support a finding of racial profiling. Such evidence is sometimes used to support inferences of discrimination in human rights cases, for example. However, here there is no foundation to support the drawing of statistical inferences from the records sought. The police in Toronto do not keep records of routine stops made by officers. Records are only kept when an arrest is made. Therefore, there is no way of knowing whether Officer Asselin has a habit of stopping young black males with more frequency than individuals of other racial backgrounds, and no evidence to indicate that he does. There are no statistics available as to the number of black drivers in the area covered by Officer Asselin's precinct. There is no mechanism for comparing officer Asselin's numbers of arrest to those of other officers or to the averages for that particular police division. Even if they can be broken down by race, which is by no means clear, numbers of arrests alone will have no probative value. No expert evidence has been presented as to the statistical reliability of the available records, nor of the existence of valid statistical comparators. Accordingly, I conclude that there is no basis for believing that the records sought could provide useful statistical information relevant to the accused's case."

The Test for Production — The "O'Connor Test"

14 The procedure and tests to be applied with respect to third party records applications were settled following the decision of the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) at paragraph 19et seq and 140,142. The following principles may be gleaned from the judgment;

(1) the onus is on the applicant to satisfy the Court that the information is likely relevant;

(2) the onus is not an evidential burden, and a *voir dire* need not be held in every case;

(3) likely relevance is a significant burden, but it should not be considered onerous,

(4) admissibility is not a concern,

(5) the relevance threshold is simply a requirement to prevent the Defence from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time consuming requests for production",

(6) if the "likely relevance threshold is met then the Justice hearing the application should look at the records and proceed to the second or balancing stage of the inquiry.

15 The rationale for the "likely relevance" test was reiterated by the Supreme Court in *R. v. McNeil*, [2009] 1 S.C.R. 66 (S.C.C.) in the following terms at Paragraph 29:

> It is important to repeat here, as this Court emphasized in *O'Connor*, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production" (*O'Connor*, at para. 24, quoting from *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32). The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after *O'Connor*. On the other hand, the relevance threshold should not, and indeed *cannot*, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, "to demonstrate the specific use to which they might put information which they have not even seen" (*O'Connor*, at para. 25, quoting from *R. v. Durette*, [1994] 1 S.C.R. 469, at p. 499).

16 It is unlikely that the Field Service Report Cards commonly referred to as "208 Cards" and in and of themselves would meet the "likely relevance" test. They are simply cards on which information including the person's name, sex, birthplace, skin colour and other personal identifiers are recorded. The information contained on the cards must be analyzed, and compared to other information to support if possible the assertion that racial profiling has occurred. They may, however, meet the "likely relevance" test if there is a submission that an individual Applicant has been carded in the past, by a particular officer.

The Positions of the Parties

17 The Applicant's position is set out at paragraph 29 of their factum; "The Applicant asserts that the 208 cards and the officers' notes relating to each 208 card will assist in challenging the credibility of the T.A. V.I.S. officers with respect to whether the detention of Mr. Buckley was racially motivated (i.e. Mr. Buckley was racially profiled).

18 Counsel for the Chief of the Toronto Police Service and the four officers have asserted that the Applicant has not met the "likely relevance" test.

19 In the context of this case, the assertion of racial profiling is linked indelibly to the credit of the officers

who have testified and been cross examined on the trial.

Background and Overview

20 Each of the four Police Constables Cheechoo, Grant, Douglas - Cooke and Kennedy have testified on the blended trial/*voir dire* and have been cross-examined by the Applicant's counsel. Mr. Buckley has yet to testify on either the trial or the *voir dire*. His position is set out in an affidavit, on information and belief, of Leyda Franco, Mr. Buckley's Counsel's legal assistant. Ms. Franco's affidavit simply recites the defense position as relayed to her by the Applicant's Counsel. Some of the assertions are drawn from the transcripts of the trial others are pure hearsay. At this stage, they are relatively bald assertions. The Applicant relies on the cross-examination of Constable Cheechoo to support an allegation that Cheechoo had stopped Buckley in the past. The Defense position is set out in the following terms:" Far from being speculative, the claims of racial profiling are directly relevant ...in light of Mr. Buckley's assertion through Counsel's cross examination of Constable Cheechoo that he has been the subject of stops in the past by P.C.Cheechoo.

21 The assertion may be somewhat overstated, the actual testimony was; that Constable Cheechoo did not recall having stopped Mr. Buckley prior to December 13, 2008, but that it was possible that he had stopped him on other occasions given that he had stopped hundreds, if not thousands, of people over his ten-year career. No request for Constable Cheechoo's notes for the relevant time (June, July 2008) was made by the Defense (to which the normal "*Stinchombe*" see *R. v. Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.) rules would apply), prior to the commencement of the trial or this Application, the Officer's position that it is possible, is essentially equivocal.

Application of the Principles to this Application

22 The core of the Applicants argument is that if the 208 cards are released that Dr. Scott Wortley, an expert in the field of racial profiling, will be able to analyze the data and then assist the Court through an analysis to determine at least circumstantially whether racial profiling has occurred. In turn this will assist in undermining the credit of the four officers.

23 The methodology that Dr. Wortley will employ involves collation the data on the officers 208 cards and comparing that data to a benchmark, with a view to determining whether any of the officers have deviated from the norm. The greater the deviation from the norm the more likely it is that racial profiling has occurred. The following exchange sets out the Dr.'s Wortley's position:

> Q: An overrepresentation... a figure greater than one suggests that there is racial profiling happening?
>
> A: I think you would have to examine the magnitude... the magnitude of that overrepresentation. I mean there is no magic bar that if it is over 1.5 times ... some previous researchers have set the bar at 1.5 or 2 times greater as indicative of racial profiling. I think that you would argue in these cases that it is the greater the disparity, the more likely some of that disparity is explained by racial profiling."

24 The fact that an overrepresentation may exist leads inexorably to the question, why? The fact of an overrepresentation per se may not assist in any meaningful fashion. As Dr. Wortley conceded correlation does not necessarily equate to causation.

25 Two questions immediately arise; what is the benchmark and why the overrepresentation occurs if it oc-

curs at all? As Dr. Wortley testified; "... for instance, (a finding) that shows 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. One 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."

26 The relevance of the 208 cards and the officers notes are inextricably bound up with Dr. Wortley's analysis of them. Dr. Wortley was asked by Mr. Rowe how he proposed to analyze the data he said; "I would start with the general picture and move into the specific picture. Census benchmarking has its strengths and its weaknesses. Adjusted census benchmarking is what I would eventually use for part of my analysis. I would not exclusively rely on it... one of the weaknesses of adjusted census benchmarking is that is does not necessarily reflect the population that would be using a particular area a particular time of day". Although he expressed confidence that he could create an adjusted census benchmark he did not say what it would be.

27 There are a number of very real concerns with the use of adjusted census benchmarking. The principal one being they are an artificial construct. They attempt to some-how replicate observational benchmarking. Observational benchmarking attempts to capture who is actually present at a given location at a given time. It is expensive and time-consuming. The check stop example used by Justice Molloy in *Khan*, *supra*, and the Court of Appeal in *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.), is an example of observational benchmarking. There would be a record of exactly who passed through the check-stop. The significance and difference between census data, adjusted census data and observational benchmarking may be illustrated by reference to the Entertainment District of Toronto. The actual population in the evening hours, on the street and in the clubs and bars may bear no relationship to the actual census data due to the high transient population. Adjusted census benchmarking recognizes that census data per se does not represent an accurate picture and attempts to mimic the actual population on the street. Dr. Wortley gave an example of a study which he conducted in Kingston, Ontario. In that study, which the Doctor described as innovative and which was only peer reviewed as part of a chapter in a larger work, an analysis of stops by the Kingston Police was undertaken. In that study, there was a concern that the results might be affected by a high number of transients. Non-residents were removed from consideration and a new data set was created. This was, in my view, an artificial and potentially inaccurate benchmark as the non-residents may have been physically present and would have to be included in the analysis.

28 What Dr. Wortley proposes to do is to analyze city wide data contained in 208 cards released to the Toronto Star newspaper following a Freedom of Information request (see *Toronto Police Services Board v. Ontario (Information & Privacy Commissioner)*, 2009 ONCA 20 (Ont. C.A.)), he will the look at the cards for all T.A. V.I.S. officers city wide, then T.A. V.I.S. officers in 31 Division and then these four officers. The practical problems that arise are that T.A. V.I.S. officers may operate city wide rather than in a particular Division, Dr. Wortley has not looked at or analyzed the Toronto Star material, and lastly the Doctor has not designed nor was he asked to design a method for analyzing the data. He conceded that there was virtually no research into racial profiling which has been done in Canada. What he was suggesting was novel and that he was not aware of any other work of this nature in Canada.

29 The Toronto Star articles which detail their use of the 208 data where appended to Dr. Wortley's affidavit. Their analysis shows that black men are 3 times more likely to be stopped by the police than whites and that black men between the ages of 15-24 are 2.5 times more likely to be stopped than white males of the same age (see Dr. Wortley's affidavit - Applicant's Application Record Tab D).

30 At the end of the day, the essence of his testimony was "I will look at the data", "I will compare it to other data which I haven't looked at or analyzed", "I will create an adjusted census benchmark and report back with what may or may not assist." Dr. Wortley agreed that he had no idea what he might find. He has not provided what Justice Molloy referred to as the statistical comparator, or as has been used in this case the benchmark.

31 As presently constituted the Application is entirely speculative and essentially a "fishing expedition" as it applies to the 208 data for all officers. To release the entirely of the data to allow Dr. Wortley's analysis would inevitably lead to a second *voir dire* to determine the admissibility of any findings based on the principles set out in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.) which governs the admissibility of expert testimony. I am mindful of the fact that "O'Connor" says that admissibility is not a concern at this stage. In this case, however, the evidence sought is requested with a view to its admissibility. This is not a situation where for example, inadmissible hearsay in a diary or counseling record might lead to further evidence which would assist the Defense.

32 Courts have a duty to adequately and critically examine proposed expert evidence. There has been a fundamental shift from the authoritative experience model to an evidence based model. Expert evidence should be evidence based, subject to peer review and conform with generally accepted standards within the academy. (see *R. v. Luu*, [2010] O.J. No. 5120 (Ont. C.A.) at para. 22/23)

33 On this Application, I have not been presented with any model for the analysis of the data let alone one which meets the standards of the academy.

34 With respect to the production of the officer's notes the threshold has not been met. Dr. Wortley was asked:

> Q: ... (the notes) while not absolutely necessary, could further amplify and conceptualize the information in the 208 cards. 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 but 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".

Summary and Conclusion

35 It is clear that racial profiling exists. If it occurs in a particular case, it can lead to *Charter* remedies. While it is accepted that racial profiling occurs, it will rarely be shown by direct evidence, the defense must normally rely on circumstantial evidence to support its claim. Statistical information could in some cases tend to

show racial profiling had occurred. On this Application, I have not been persuaded that the Applicant has met the "likely relevance" test because I have not been given any real information as to how the data could be used in a meaningful way to assist with the Defense position that racial profiling has existed in this case. My ruling is confined to this Application, I do not wish to be seen as suggesting that a statistical analysis would never meet the "likely relevance" test. It has simply not occurred here, it may be that a valid comparator or benchmark could be fashioned. The Applicant is at complete liberty to continue his Charter Applications based on other evidence.

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

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