COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Spiers, 2012 ONCA 798
DATE: 20121121
DOCKET: C48160

Goudge, LaForme and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Clare Alexander Spiers

Appellant

Anthony Moustacalis and J. Orkin for the appellant

Michal Fairburn, Scott Latimer, Gillian Roberts and Deborah Calderwood, for the respondent

Jonathan Rudin and Christna Big Canoe, for the interveners, Rhoda & Berenson King (Bushie Family) and Elizabeth & Marlen Pierre (Pierre Family)

Kent Roach and Cheryl Milne, for the intervener David Asper Centre for Constitutional Rights

Julian N. Falconer and Sunil S. Mathai, for the intervener Nishnawbe Aski Nation

Heard: April 30, May 2, 3 and 4, 2012

On appeal from the convictions entered on December 3, 2007 by Justice James Robert MacKinnon of the Superior Court of Justice, sitting with a jury.

Rouleau J.A.:

[1] After a four-month trial, the appellant was found guilty by a jury of first degree murder and two counts of kidnapping. The offences occurred in May 2004, and involved the kidnapping of M.K. and her infant grandchild from M.K.'s home, and the strangling and stabbing death of M.K.

[2] The appellant appeals his convictions and seeks a new trial. He submits that the trial judge erred by failing to exclude evidence that was either highly prejudicial, inaudible, or obtained in a manner that infringed his *Charter* rights. The appellant also argues that the police and Crown carried out extensive and improper pre-screening of prospective jurors, also referred to as jury vetting, and that the egregious nature of this conduct entitles the appellant to a new trial, as well as an order for costs of both the new trial and this appeal.

[3] Finally, the appellant also appeals on the basis that the jury roll and the jury panels from which the jury was selected were not representative as a result of the procedures used and the inadequacy of efforts made to include on-reserve Aboriginal people on the jury roll for Simcoe County. This issue was argued together with the same issue in *R. v. Kokopenace,* Court File No. C49961.

[4] For the reasons that follow I conclude that, in the circumstances of this case, the extent of the jury vetting carried out by the police and Crown and the use to which the collected information was put disrupted the balance in the jury selection process to such an extent as to constitute a miscarriage of justice. I would therefore allow the conviction appeal and order a new trial.

FACTS

[5] Given my conclusion that the appeal should be allowed on the jury vetting ground and a new trial ordered, I need only set out a brief summary of the facts

giving rise to the convictions. I will then summarize the fresh evidence tendered on appeal with respect to the jury vetting issue.

(a) Background

[6] On Friday, May 21, 2004, M.K. was at her home in Barrie with her 11-month-old granddaughter. The circumstances of the crime became known when M.K. answered a call on her cell phone from a stereo installer regarding a scheduled meeting that afternoon. M.K. told him that someone was trying to get into the car with her granddaughter and asked him to call her husband. After she spoke these words there was a rustling sound and the phone went dead. The stereo installer immediately called M.K.'s husband and the two of them hurriedly drove to the home, only to find M.K. and her granddaughter missing. M.K.'s car, an Audi, was also missing from the garage.

[7] M.K.'s granddaughter was found in the Audi hours later in a parking lot in another part of Barrie. She was upset but unharmed. M.K.'s body was discovered in a wooded area in the nearby township of Oro-Medonte. She had been stabbed and strangled to death.

[8] The investigation that followed led the police to the appellant who had been selling roof and window repairs door-to-door in the neighbourhood that day. The appellant was interviewed by investigators and quickly became a suspect. The police also discovered that he had called a cab from a location mere steps

away from where M.K.'s granddaughter and the Audi were discovered. The call was placed just after the Audi had first been noticed in the parking lot.

[9] A circumstantial first degree murder case was presented at trial. The logical movements of M.K., her granddaughter and the Audi were tracked and timed. Evidence was presented that tied the appellant, both geographically and temporally, to where the abduction began and ended. An eyewitness testified that she saw the appellant driving a car with a child inside during the time that M.K.'s granddaughter was missing. A forensic examination of M.K.'s clothing revealed that male DNA had been deposited on her shirt, in an area where force would be applied in a manner consistent with strangulation. Y-STR DNA testing revealed that while 99 percent of the male population could be excluded as the donor of that DNA, the appellant could not.

[10] The Crown submitted to the jury that the evidence could only lead them to infer that it was the appellant who abducted M.K. and her granddaughter and who stole the Audi. In the Crown's submission, the appellant brutally killed M.K. and then ditched the Audi along with the infant granddaughter in a public space and fled. The Crown submitted to the jury that the available evidence demonstrated beyond a reasonable doubt that the appellant was guilty of two counts of kidnapping and murder.

(b) Fresh Evidence of Jury Vetting

[11] Subsequent to filing his notice of appeal, the appellant became aware of possible improprieties in the jury selection process used in Barrie. He inquired of the Crown whether background checks had been carried out with respect to the potential jurors prior to the selection of the jury in his trial.

[12] The appellant received disclosure of a number of background checks that had been made in relation to one of the three jury panels used in the jury selection for the trial. On consent, the appellant then amended his notice of appeal to add the jury vetting ground. He subsequently filed extensive fresh evidence concerning the jury vetting issue.

[13] Included in the fresh evidence is Practice Memorandum #17, issued by the Ministry of the Attorney General in March 2006, over a year before the trial in this case. It provides "guidance to Crown counsel on practice and procedure relating to the background of prospective jurors." The Memorandum advises Crown counsel not to request the police to undertake an investigation into the list of jurors other than to carry out criminal record checks. The Memorandum further advises that if criminal record checks are done, "any concrete information provided by police to the Crown suggesting that an individual may not be impartial, should be disclosed to the defence."

[14] In this case, which undoubtedly carried a high profile in the community, this policy was not followed. On August 17, 2007, the Crown Attorney for Simcoe, who was one of the prosecutors in this case, released copies of jury panel lists to seven police detachments with a covering memo that reads in part:

> Please check the attached jury panel lists, for the persons listed in your locality, and advise if any have criminal records. We are not able to provide birthdates.
>
> It would be helpful if comments and details could be made concerning any disreputable person we would not want as a juror. All we can ask is that you do your best considering the lack of information available to us. ... [Emphasis in original.]

[15] This memo was copied to the other prosecutor in this case, a senior Assistant Crown Attorney.

[16] The vetting process was carried out by several police officers, and involved not only CPIC criminal record checks, but also searches of databases for all police contact with the potential jurors, including *Highway Traffic Act* violations (also referred to as M.T.O. records), and other police occurrence reports of encounters the police had with citizens, whether or not investigative. The information obtained filled several binders and was provided to the Crown together with annotated jury lists.

[17] Although three jury panels were used in the selection of the jury, the original background checks for two of these, panels 33 and 35, could not be located. The original background checks into jury panel 34 were produced and

consisted of 500 to 600 pages of information obtained from various police databases. There are a number of handwritten comments on some of the pages, comments such as “Flag, Hates police”, “No”, and “No...MTO.”

[18] Also produced were the jury panel lists. These also contained handwritten comments regarding jurors’ suitability, comments such as “ok”, “If born in 1952 – has mental issues”, “Complainant”, “No” and “Complaint in domestic assault 2005.”

[19] Because the material assembled as part of the original background checks into jury panels 33 and 35 could not be located, the appellant obtained an order in this court that:

> [t]he Crown recreate the background checks for the following categories of jurors:
>
> (1) all jurors from panels 33 and 35 that made it past the challenge for cause and peremptorily challenged by either defence or Crown;
>
> (2) all jurors from panels 33 and 35 that were selected to be on the jury.

[20] The appellant also received written responses to specific questions from the two prosecutors. When asked about the purpose of the background checks, the Crown Attorney advised that:

> The background checks were reviewed very summarily, certainly on my part. The M.T.O. records which form the bulk of the material are not particularly useful but I

> would look for a conviction for “drive while suspended” as being somewhat indicative of a negative attitude to law enforcement. Beyond that, the record checks do occasionally reveal a criminal conviction, even for an indictable offence, and while a summary conviction does not disqualify a person as a juror, I would tend to see any such conviction as negative.

[21] The Assistant Crown Attorney, now a judge of the Superior Court of Justice, advised through counsel that:

> [She] reviewed the background checks and from them identified individuals who had existing criminal records (and who would therefore be ineligible[*]).
>
> She also identified individuals with significant MTO/HTA offence records or anything that indicated the possibility of mental health issues.
>
> Finally, she noted the approximate age of the prospective juror. It was anticipated that the trial would be a lengthy and difficult one and so it was felt that prospective jurors would require a degree of stamina as well as some life experience.

[22] The information obtained in the course of the background checks was not disclosed to the appellant until requested during the appeal process, well after the trial, which was held in the fall of 2007.

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[*] It was not actually all people with criminal records who were ineligible to be jurors. At the time of the jury selection in this matter, prior to its amendment in 2010, according to subsection 4(b) of the *Juries Act*, R.S.O. 1990, c. J.3, it was only people who had been convicted of an indictable offence, who had not received a pardon, who were ineligible to be jurors.

[23] The Crown and appellant each had 22 peremptory challenges. At the end of jury selection the Crown had two challenges remaining and the appellant had one.

ANALYSIS

[24] This court has dealt with the jury vetting issue in various ways: *R. v. Yumnu*, 2010 ONCA 637; *R. v. Emms*, 2010 ONCA 817; and *R. v. Davey*, 2010 ONCA 818.

[25] Before turning to the issues in this case, I will summarize the court's reasons in these three cases. Leave to appeal in the Supreme Court of Canada was granted in these cases, the appeals were heard in March 2012, and the decisions are under reserve. The issue was also considered by the Nova Scotia Court of Appeal in *R. v. Hobbs*, 2010 NSCA 62, but leave to appeal to the Supreme Court of Canada was refused: 33879 (January 20, 2011).

[26] In *Yumnu* background checks on potential jurors were conducted using the CPIC data base as well as internal police records systems. Although the Crown in that case, also from Barrie, requested that the police make "comments […] concerning any disreputable persons we would not want as a juror", this court found that "the purpose of the police inquiries was to determine whether a potential juror had a criminal record" (at para. 94), and therefore fell within the scope of information-gathering permitted under s. 638(1)(c) of the *Criminal Code*.

The police also made cryptic notations on the jury panel lists, such as “Okay”, “0”, “10-60”, and “possible record”. Crown counsel did not disclose either the fact that police were conducting background checks or the information obtained from these checks until about seven weeks after jury selection had been completed. In Watt J.A.’s reasons, emphasis is placed on the fact that the appellants’ trial counsel were aware that background checks had been carried out, and that counsel did nothing to bring the Crown’s failure to disclose to the attention of the presiding judge, and did nothing until four and half years later during the appeal process. This court then analyzed the impact of non-disclosure as a component of the right to make full answer and defence, and concluded that the appellants failed to demonstrate a reasonable possibility that the Crown’s non-disclosure affected either the outcome or overall fairness of the trial. Also of significance was the fact that neither the defence nor the Crown exhausted all of their challenges: this was held to preclude “an inference … that the selection process had the appearance of unfairness.” (para. 127)

[27] In *Emms*, an identical letter to that in *Yumnu* was sent by the Barrie Crown office to local police offices requesting “comments” on “disreputable persons.” The information provided was similar in scope to that in *Yumnu*. For example, several names were noted with “possible”, which was understood to indicate a possible criminal record. It was acknowledged by trial Crown counsel that the police notations influenced her decision as to how she exercised her peremptory

challenges. The police undertook the background checks using CPIC and other databases available only to police. The annotated list was not disclosed to defence counsel. At jury selection, four people were called forward about whom Crown counsel had information indicating a possible criminal history: of those four, the Crown challenged two of them, and defence counsel challenged the other two. On appeal, it was submitted that, had defence counsel been privy to the information provided to the Crown, he would not have used two of his peremptory challenges for them. In his reasons, Rosenberg J.A. observed that given defence counsel's remaining two challenges at the end of jury selection, "the fact that he may have 'wasted' two challenges did not impact on the kind of jury he wanted to try the case" (para. 50), and thus the non-disclosure did not affect the overall fairness of the trial process. The possibility was also raised that, had it been necessary for the Crown to use two of its challenges on the two jurors challenged by defence counsel, the last of the challenges made by the Crown could not have been made as the Crown would have exhausted all of its challenges. This last potential juror could have become a juror and may have been favourable to the defence. Rosenberg J.A. dismissed this argument as mere speculation. While Rosenberg J.A. found the wording of the Crown's letter "most troubling" (para. 60), he reasoned that, taken in context, it did not amount to a miscarriage of justice, since "the information actually supplied was of limited utility and related to criminal record information" (para. 60). Ultimately,

Rosenberg J.A. found that the conduct of the police and Crown was not so egregious so as to bring the administration of justice into disrepute or to lead reasonable people to believe that the appearance of justice had been undermined.

[28] In *Davey* the appellant alleged improper vetting of a jury panel in Cobourg. In that case, however, the police did not actually access databases such as CPIC, but instead provided “comments based on the officers’ knowledge of potential jurors in the community”. Police officers provided short one-word notations to the Crown on potential jurors such as “good”, “yes”, “ok”, or “no”. Limited use was made of the information and Crown counsel in one instance selected one of the potential jurors with negative comments. In his reasons, Rosenberg J.A. held that the appellant failed to demonstrate either a violation of the *Juries Act* or that any alleged violation of that legislation undermined the fairness of his trial. Rosenberg J.A. also held that the police-provided “community information” did not fall within the prosecution’s disclosure obligation. Rosenberg J.A. rejected the appellant’s argument that the jury vetting amounted to an apparent miscarriage of justice. He found that the suggestion that the defence might have exercised their peremptory challenges differently had disclosure been made to be pure speculation. Rosenberg J.A. conducted an analysis taking into account all of the circumstances of the trial, including the apparently limited use made of the police information, the Crown’s disclosure of instances where a real

potential for bias existed, and the challenge for cause in which potential jurors were questioned about their connection to the police force and concluded: “A reasonable and right-minded person viewing what occurred realistically and practically would not come to the conclusion that the jury appeared biased” (para. 33).

[29] From this trilogy of cases it appears there is more than one approach available and several factors are relevant to the analysis of alleged improper jury vetting. In *Yumnu* the approach was focused on non-disclosure and what effect it had on either the outcome or overall trial fairness. In *Emms* the analysis focused on the effect of non-disclosure on the jury selection process as well as the overall fairness of the trial process, and also on whether there was an appearance of a miscarriage of justice. In *Davey*, given the nature of the information, disclosure was found not to be an issue, but the overall fairness of the process and the appearance of bias were still analyzed. In all the cases the nature and quantity of information the Crown possessed was a factor. In *Yumnu*, the inaction of trial counsel was a predominant factor. In *Davey* and *Emms*, the inability to demonstrate an actual effect on the composition of the jury was a factor.

[30] In the present case, a breach of the Crown’s disclosure obligations was conceded. However, despite the submission of the appellant to the contrary, I see nothing in the jury vetting background checks that would have benefited the Crown or prejudiced the appellant in the conduct of the trial proper. In that sense,

therefore, the non-disclosure does not appear to have impaired the appellant's right to make full answer and defence. Moreover, the record in this case does not demonstrate that any of the 12 jurors selected was ineligible because of bias. The appellant also argues that, when analysed, the facts and circumstances surrounding the jury vetting issue demonstrate that there was a miscarriage of justice. An allegation of a miscarriage of justice can rest on the appearance of injustice; and neither impairment of the right to make full answer and defence nor bias need be proven: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 72-73. See also: *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89; *R. v. Moosomin*, 2008 SKCA 168, 239 CCC (3d) 326, at para. 25; *R. v. Sue*, 2011 BCCA 91, 302 B.C.A.C. 30, at paras. 43-44; and *R. v. Hertrich*, 137 D.L.R. (3d) 400, 67 C.C.C. (2d) 510 (Ont. C.A.) at para. 99.

[31] To determine whether the jury vetting in this case amounted to a miscarriage of justice, it is necessary to evaluate the extent of any improprieties associated with the jury vetting that took place and the potential effect those improprieties had on the composition of the jury. As I will explain, what emerges from this analysis is a considerably more troubling picture than what emerged from *Yumnu, Emms* or *Davey*. This picture is one of unfairness in the jury selection process, and disruption of the balance created by Parliament between the Crown and the accused in that process to such an extent as to constitute a miscarriage of justice.

(a) Miscarriage of Justice

[32] *Criminal Code*, s. 686(1)(a)(iii) allows this court to set aside a conviction where we are of the opinion that “on any ground there was a miscarriage of justice”. In *R. v. Khan*, LeBel J., at paras. 69-87 (in dissent, but not on this point) provided an extensive overview of the concept of a “miscarriage of justice”. He noted that there is no strict formula for determining whether a miscarriage of justice has taken place and that irregularities may take many unpredictable forms. The gravity of the irregularities and the impact of these on trial fairness and the appearance of fairness are to be evaluated on a case-by-case basis. An appearance of a miscarriage of justice requiring a new trial exists “if the irregularity would be such as to taint the administration of justice” in the eyes of a reasonable and objective observer. “We must look at whether a well-informed, reasonable person considering the whole of the circumstances would have perceived the trial as being unfair or as appearing to be so”: para. 73. Also see *R. v. Cameron* (1991) 2 O.R. (3d) 633 (Ont. C.A.).

[33] In this case, there are a number of factors that need to be weighed in carrying out the miscarriage of justice analysis. I will first examine a number of factors relating to the propriety of the conduct of the police and the Crown in carrying out the jury vetting in this case. Next, I will examine the importance of the jury selection process and peremptory challenges, and the effect the jury vetting in this case had on the peremptory challenges made and the resulting

composition of the jury. Finally, the gravity and impact of all these factors must be weighed in the miscarriage of justice analysis.

(b) Improprieties in Jury Vetting

[34] The first step in assessing the appellant's miscarriage of justice argument is to evaluate whether and the extent to which the police and the Crown acted improperly in their collection and use of jury vetting information.

(i) Compliance with the *Juries Act*

[35] The first, and perhaps most technical, of the irregularities that occurred in this case concerns the way in which the jury lists were obtained by the Crown.

[36] The *Juries Act*, R.S.O. 1990, c. J.3, s. 20 provides that jury panel lists are not to be disclosed until ten days before the sittings of the court for which the panel has been drafted. In this case, it appears that the Crown had obtained the lists and had the police commence the investigation of potential jurors about two weeks before it was properly entitled to the jury lists.

[37] In addition, the lists obtained by the Crown appear to have been the "administrative lists" containing the names and contact information (telephone numbers) of the prospective jurors and not the "jury panel lists" contemplated by s. 20 of the *Juries Act*, R.R.O. 1990, Regulation 680, ss. 2 and 9.

(ii) Collusion between Crown and police in jury vetting

[38] A more significant problem concerns the Crown's use of police resources in the course of jury vetting. This court noted in *Emms*, at para. 60, that:

> The most troubling aspects of the case are the misuse of the police databases and the wording of the letter from the Crown Attorney, especially inclusion of the phrase: "It would also be helpful if comments could be made concerning any disreputable persons we would not want as a juror." This use of police resources and attempt to align the Crown with the police is inconsistent with Crown counsel's obligation to ensure that the accused receives a fair trial.

[39] In the case at bar, the memo sent by the Crown attorney requesting that the jury checks be carried out was broadly worded: "it would be helpful if <u>comments and details</u> could be made concerning any disreputable persons we would not want as a juror" (emphasis in original). In my view, the addition of the words "and details" makes the language in this case even more troublesome than the request for police comments in *Emms*. In addition, the broader range of database searches carried out and the fact that all of the information collected, binders of it, was provided to the prosecuting Crowns suggest that the Crown made greater use of the police and the material collected than in *Emms*, worsening the appearance and consequences of the collusion.

(iii) Ontario privacy legislation

[40] The use of the police databases raises additional concerns in terms of provincial privacy legislation. On October 5, 2009, albeit after this trial took place,

the Information and Privacy Commissioner for Ontario released a report on related issues entitled “Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report”.

[41] The report made a number of findings, including findings that both Crown attorneys and the police did not comply with the applicable privacy legislation and that broad background checks, beyond criminal record checks to verify juror eligibility, breached the privacy legislation: *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 [FIPPA], and *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (MFIPPA). The Commissioner’s investigation revealed that the Ministry of the Attorney General had engaged in internal discussions on this issue since 1993, but had not issued a formal instruction to Crown Attorneys until 2006. According to the Commissioner, the formal instruction provided by the Ministry to the Crowns was not sufficiently clear and left some doubt as to what practices were acceptable.

[42] In her well-reasoned report, the Commissioner came to the following relevant conclusions (at pp. 131-132):

> A. The information contained in jury roll lists (consisting of eligible prospective jurors), jury panel lists, and additional background information about prospective jurors provided by the police qualifies as "personal information" as defined in section 2(1) of *FIPPA* and *MFIPPA*.
>
> …

H. [The Ministry of the Attorney General's] MAG's disclosure of jury panel lists to the police for the purpose of obtaining information that is relevant to jury selection in a specific criminal proceeding is in compliance with section 42 of *FIPPA*. However, MAG's disclosure of jury panel lists to the police for the purpose of obtaining information that is not relevant to jury selection in a specific criminal proceeding is not in compliance with section 42 of *FIPPA*.

I. MAG's collection of personal information relevant to criminal conviction eligibility criteria from the police is in compliance with section 38(2) of *FIPPA*. However, MAG's collection of personal information beyond information relevant to criminal conviction eligibility criteria is not in compliance with section 38(2) of *FIPPA*.

…

K. The collection by the police of personal information of prospective jurors in jury panel lists for the purpose of obtaining information relevant to juror criminal conviction eligibility is in compliance with section 28(2) of *MFIPPA* and section 38(2) of *FIPPA*. However, the collection by the police of personal information of prospective jurors in jury panel lists for the purpose of obtaining other information, not relevant to juror criminal conviction eligibility, is not in compliance with section 28(2) of *MFIPPA* or section 38(2) of *FIPPA*.

L. The use by the police of personal information of prospective jurors in jury panel lists and in police databases for the purpose of obtaining information relevant to juror criminal conviction eligibility criteria is in compliance with section 41 of *FIPPA* and section 31 of *MFIPPA*. Any use beyond this limited purpose is not in compliance with these provisions.

M. The disclosure by the police to MAG of personal information of prospective jurors relevant to juror criminal conviction eligibility is in compliance with section 42(1)(e) of *FIPPA* and section 32(c) of *MFIPPA*.

> However, the disclosure by the police to MAG of additional personal information of prospective jurors, beyond that which is relevant to juror criminal conviction eligibility, is not in compliance with section 42(1)(c) of *FIPPA* and section 32(c) of *MFIPPA*.

[43] In the present case extensive information was accumulated by the police from various sources, including CPIC and other internal police databases. This information included not only criminal conviction information, but also traffic violations, and occurrence reports detailing other contact the police had had with the potential jurors in the past. This primary information, provided in full to the Crown, was supplemented with annotations, such as already mentioned: "Flag, Hates police", etc. Presumably this significantly more extensive set of information was accumulated as a result of the Crown requesting "<u>comments and details</u>" (emphasis in the original) in their memo to the police.

[44] It is apparent from the very extensive information assembled by police and provided to the Crown that the checks carried out by the police went beyond the historically valid purpose of determining whether individuals on the jury panel had convictions for indictable offences rendering them potentially ineligible to sit as jurors. In my view, the fresh evidence in this case establishes that much of the information assembled by the police was the type of information that the Commissioner found to have been collected in violation of *FIPPA* and *MFIPPA*, and that the police ought not to have disclosed to Crown counsel.

[45] It is also clear that the nature and quantity of the information on prospective jurors provided to the Crown in this case distinguish it from other jury vetting cases dealt with by this court. In *Yumnu* the jury vetting was largely confined to criminal record checks and only annotated lists appear to have been provided to Crown counsel. In *Emms* only annotated lists were provided to Crown counsel and the annotations were largely limited to “ok” which Crown counsel understood to mean that the prospective juror did not have a criminal record. And in *Davey* police databases were not used to carry out background checks and there was no information collected that had to be disclosed to the accused.

(iv) The permissibility of jury vetting

[46] The Crown argues that the collection of information in this case accorded with the accepted practice for jury preparation that existed at the time, and that it complied with the Law Society of Upper Canada’s *Rules of Professional Conduct* [*Rules*]. The Crown referred specifically to the commentary under Rule 4.05(1) that reads as follows:

> A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the juror or with any member of the juror’s family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

[47] The *Rules* do not authorize Crowns to engage in jury vetting practices that run afoul of Ministry policy and violate privacy legislation. The jury vetting conducted in this case was in direct contravention of the March 2006 directive issued by the Attorney General for Ontario. The fact that the trial Crowns testified that they were unaware of the directive does not make the investigation of the prospective jurors proper.

[48] By accessing and using personal information contained in various government databases, the Crown misused police databases that the appellant could not access and, as found by the Privacy Commissioner for Ontario, contravened provincial privacy legislation. Clearly, this is not the type of investigation contemplated by the commentary to rule 4.05(1).

(v) Disclosure

[49] It is conceded by the Crown that all potentially relevant information assembled ought to have been disclosed to the appellant, and it was not.

(vi) What is the significance of the appellant's failure to request disclosure when information it obtained indicated that jury checks had been carried out?

[50] In *Khan*, LeBel J. identified trial counsel's response to an irregularity as a factor potentially relevant to determining whether the irregularity created a miscarriage of justice. In the case at bar, the Crown submits that trial counsel's failure to ask for disclosure of jury vetting information or for a mistrial weighs against a finding that there was a miscarriage of justice.

[51] The Crown points to no less than 16 references to jury checks in materials disclosed to counsel at trial. Although there is disagreement about exactly when some of these notes were disclosed, the appellant's trial counsel acknowledge that they would have read some of the references to jury checks during the trial. They say that they did not ask for disclosure or make any inquiries concerning the nature or extent of the jury checks because they never suspected that anything improper had been done. Appellant's trial counsel were not from Barrie and were not aware of jury vetting practices of the Crown in that jurisdiction. They thought that whatever had been done was "completely innocuous and not worthy of disclosure" and so did not ask what the jury check references were about.

[52] I agree with the Crown that, because notes containing references to jury checks having been made were disclosed in the course of the trial, the appellant could have – and, in retrospect, should have – asked for disclosure of any relevant information obtained as a result of the checks. However, in the circumstances, the failure to do so carries little weight in the miscarriage of justice analysis. The appellant had no reason to suspect what was actually going on.

[53] I acknowledge that an after the fact analysis of the voluminous disclosure reveals that police officers devoted much more time to the juror checks than would be expected if they were merely carrying out simple CPIC checks. I

cannot, however, fault the appellant's trial counsel for not noticing the suspicious amount of time police devoted to jury vetting. The documents referring to juror checks were only produced in the course of the trial, after jury selection, by which point counsel were preoccupied with more pressing matters. The appellant's trial counsel would have had no reason to expect that jury vetting information would be of use to them at that point in the trial. They certainly would not have expected that, had they requested disclosure, it would have revealed improper conduct by the Crown in the jury selection process.

[54] In *Yumnu*, at paras. 99-105, this court held that defence counsel's failure to request disclosure of jury vetting information assumed a "place of prominence" in assessing the severity of the disclosure violation: para 104. In that case, the fact that the criminal records checks of potential jurors had been carried out would have been apparent to the appellants before the jury was selected. In addition, defence counsel received copies of police notes revealing not only that jury vetting had occurred, but also that databases had been consulted and the results of these inquiries noted.

[55] In the circumstances here, for the reasons I have given, I view the failure of the appellant's trial counsel to request disclosure as having marginal relevance and limited weight in the analysis of the miscarriage of justice issue. In this case it simply does not "assume a place of prominence" as it did in *Yumnu*.

(c) The Effect of the Improprieties on the Jury Composition

[56] The extent to which improprieties in jury vetting affect the ultimate composition of a jury plays a role in determining whether those improprieties give rise to a miscarriage of justice: see *Emms* at para. 58. In this case, the appellant submits that the improper information-gathering affected the Crown's use of peremptory challenges, and that the appellant would have used his peremptory challenges differently had the information been disclosed.

(i) The importance of the challenge process

[57] In evaluating the impact of the jury vetting in this case, it is important to consider the role that jury selection and the peremptory challenge system have in ensuring that trials are fair and are perceived as such.

[58] In *R. v. Cloutier,* [1979] 2 S.C.R. 709, the Supreme Court of Canada had occasion to comment on the *Criminal Code* provisions dealing with jury selection. The court rejected any interpretation of the jury selection provisions that "would disrupt the balance clearly established by the legislator between the rights of the accused and those of the prosecution": p. 10. Quoting from *Morin v. The Queen* (1890), 18 S.C.R. 407, at p. 424, the court emphasized the importance of respecting the jury selection process and not affording the Crown or defence any advantage of privilege not afforded by law.

> The object of the law certainly is to secure the prisoners a fair trial. How can this be accomplished if he is

> deprived of the privilege the law gives him in the selection of the jury by whom he is to be tried?
>
> In the present instance the objection taken is not raised on a mere technicality but is that the jury to whom the prisoner shall be given in charge shall be legally selected, chosen and sworn, and that neither the crown nor the prisoner shall have any advantage of privilege other than those conferred by law; but when the privileges are conferred by law they shall rigidly be respected.

[59] The court in *Cloutier* also explained that the right to peremptorily challenge is discretionary. It is not directed at those who could be challenged for cause. As the court explained at p. 9:

> The very basis of the right to peremptory challenges, therefore, is not objective but purely subjective. The existence of the right does not rest on facts that have to be proven, but rather on the mere belief by a party in the existence of a certain state of mind in the juror. The fact that a juror is objectively impartial does not mean that he is believed to be impartial by the accused or the prosecution; Parliament, when allowing each party a number of peremptory challenges, clearly intended that each party have the right to remove from the jury a number of individuals whom he does not believe to be impartial, though he could not provide evidence in support of such belief. The very nature of the right to peremptory challenges and the objectives underlying it require that its exercise be entirely discretionary and not subject to any condition.

[60] Put differently, disruptions in the peremptory challenge process will not result in a jury or jurors that can be shown to be partial. Instead, it will impair one or other party's ability to fashion a jury that the party, subjectively, considers to be impartial.

[61] This court emphasized the importance of the challenge process in *R. v. Parks* (1993), 15 O.R. (3d) 324. Although the comment related to the challenge for cause process, it also applies to the peremptory challenge process. At para. 28 this court stated that "the accused's statutory right to challenge potential jurors for cause based on partiality is the only direct means an accused has to secure an impartial jury. The significance of the challenge process to both the appearance of fairness, and fairness itself, must not be underestimated." More recently, in *R. v. Gayle* (2001), 54 O.R. (3d) 36; 201 DLR (4th) 540 at para. 59, Sharpe J.A. commented that "[a]n important part of the jury selection process is the right of both the Crown and the defence to exercise peremptory challenges … The justification for allowing peremptory challenges is that they foster confidence in the jury trial process."

(ii) The role of Crown peremptory challenges

[62] Before turning to the effect of the jury vetting information in this case on the jury selection, I will address the Crown's submissions concerning the role of the Crown in the peremptory challenge process. The Crown submits that, in selecting a jury, the Crown seeks only an impartial jury, not one that might favour the Crown. The Crown argues, therefore, that the additional information it had available to it about potential jurors was, at worse, harmless and, at best, resulted in a jury that was more impartial to the benefit of the appellant.

[63] In my view, this submission misses the mark. Parliament created a regime that balances the rights of the Crown and the accused in the jury selection process. Where that balance is seriously disrupted the rights of the accused are violated, prompting cynicism and concern regarding fairness and partiality in the jury process.

[64] Further, the wording of the memo sent to police requesting the background checks as well as the suggestion by the trial Crown attorney that he looked to identify persons with "a negative attitude to law enforcement" suggests that the jurors the Crown sought to include in the jury, while impartial, may not be the type of juror that the appellant would want to sit in judgment of his case.

[65] In an attempt to justify the Crown's right to stand aside or peremptorily challenge many more potential jurors than the accused, the Crown in *R. v. Bain*, [1992] 1 S.C.R. 91 argued, as it does here, that "the Crown attorney, as an officer of the court would never act unfairly in the selection of a jury." The court rejected this submission explaining, at para. 5, that on occasion Crowns will demonstrate human frailties and utilize their stand aside and peremptory challenge rights "for the improper purpose of obtaining a jury that appears to be favourable to the Crown." As in *Bain*, we simply cannot in this case assume that the Crown used the improperly acquired information to select a jury that the appellant would view as being more acceptable, or at worse, would consider neutral. In fact, the appellant is not likely to view the Crown's use of the

information to weed out jurors who may have “a negative attitude to law enforcement” as being neutral.

[66] In *Bain* the court went on at para. 7 to state that “[juries] should not as a result of the manner of its selection appear to favour the Crown over the accused. Fairness should be the guiding principle of justice and the hallmark of criminal trials.” Where the jury selection process is unfair “the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness.” It will not be necessary in such a case, to show actual bias.

(iii) Would the jury have been differently constituted if the Crown had not had access to the improperly assembled information?

[67] The parties dispute whether the Crown’s access to jury vetting information had any impact on the composition of the jury.

[68] Given the passage of time and the imperfect reproduction of records produced in this court of the background checks it is impossible to say, with any precision, what use was made of specific pieces of information obtained. As noted earlier, the Crowns would have been looking for “significant MTO/HTA offence records”, indications of the “possibility of mental health issues”, summary conviction offences and indications of a “negative attitude to law enforcement” as might be revealed by convictions for driving while suspended.

[69] The appellant argues that, when the Crown’s peremptory challenges are analyzed, it becomes apparent that the Crown made extensive use of the

improperly assembled information. Most of the persons peremptorily challenged by the Crown had significant records for HTA offences or had other notations such as “possible record”.

[70] The appellant carried out a detailed analysis of the jurors peremptorily challenged by the Crown. In his view, this analysis shows that several of the peremptory challenges were made only as a result of the improperly obtained information.

[71] In response the Crown carried out its own detailed review of the peremptorily challenged jurors and submitted that no clear pattern of use emerges.

[72] I do not propose to review each and every Crown peremptory challenge. What clearly emerges from the fresh evidence is an acknowledgment by the trial Crowns that they received, reviewed and, at least to some degree, relied on the information obtained in exercising their peremptory challenges. In addition, some of the notations on the jury lists opposite the names of persons peremptorily challenged by the Crown are clearly the product of the improperly obtained information and are the type of information Crowns might rely on in exercising their peremptory challenges.

[73] By way of example, a jury panel list has a notation opposite the name of a person who was peremptorily challenged by the Crown. The notation is as

follows: “No, 7 HTA … 4 collisions … 51”. This juror was peremptorily challenged by the Crown. Notations such as this one lead me to the conclusion that, on balance, it is more likely than not that the improperly assembled material assisted the Crown in the exercise of its peremptory challenges and, had this information not been available to the Crown, at least one of the prospective jurors peremptorily challenged would not have been peremptorily challenged by the Crown. Nothing suggests that had the person not been challenged by the Crown the person would have been challenged by the appellant’s trial counsel. In my view, therefore, the appellant has shown that the improperly assembled information resulted in a process in which the Crown shaped the jury differently than it would have been able to otherwise.

(iv) Would the jury have been differently constituted if proper disclosure of the information had been made to the appellant?

[74] Leaving aside the impropriety of the Crown having the extensive jury vetting information in this case, I will now consider the issue of the composition of the jury from a different perspective. Did the failure to disclose the jury vetting information have an impact on the composition of the jury in this case?

[75] In its fresh evidence, the appellant included an affidavit from trial counsel that, had trial counsel had the same information available to it as was available to the Crown, there are at least five jurors who were selected for the jury that trial counsel would have challenged. The appellant further argues that had he known

the basis of the Crown's peremptory challenges, he would have "challenged the challenge" through a procedure described in *R. v. Gayle*. According to the appellant, therefore, but for the Crown's failure to disclose, the jury would have been differently constituted.

[76] The Crown, for its part, argues that trial counsel would have made no different peremptory challenges if the jury vetting information had been disclosed. In the Crown's submission, trial counsel's explanations concerning which jurors would have been challenged are internally inconsistent, frivolous, and lack support. The Crown also maintains that there is no merit in the appellant's submission that he could have challenged the Crown's use of its peremptory challenges under *Gayle*.

[77] Both the appellant and the Crown embarked on a detailed analysis of the selected jurors to bolster their position as advanced to this court.

[78] Again, I see no need to carry out a case-by-case review of each juror selected for the trial. Peremptory challenges are not based on science and cannot be subjected to a Cartesian analysis. They are, to a large extent, exercised on the basis of gut instinct or impression by the counsel involved.

[79] One example will suffice. The appellant's trial counsel explains that the information the Crown is likely to have had with respect to a juror suggests that this juror had had six contacts with the police including calling to report a

“suspicious person” dressed in black, reporting several petty crimes and asking the police for advice about a civil problem. The appellant’s counsel testified that had he known of this information he would have viewed this person as a serial complainant and an overly suspicious person, the type of person that he would peremptorily challenge.

[80] The appellant’s trial counsel goes on to explain that, when he was making final submissions to the jury at the end of the trial, he remembers that this specific juror appeared to be “completely disinterested” in the position of the defence.

[81] The Crown’s response is that the appellant has misconstrued the information available to the Crown about this juror. The various contacts listed in the jury vetting materials are in respect of an address and are not tied to this specific individual. According to the Crown no link can be made between the six complaints and the juror.

[82] I disagree with the Crown’s submission on this point. Although the various complaints are, as the Crown maintains, in reference to an address and not to the specific juror, the materials produced also show that the juror resided at that address. As a result, it is not unreasonable for the appellant’s trial counsel to view the link between the individual, the address and the various complaints to be sufficient to warrant the exercise of a peremptory challenge.

[83] In light of the record, therefore, and having regard to the sworn evidence of trial counsel it is likely that, had they been provided with the disclosure, appellant's trial counsel would have challenged some of the jurors ultimately selected in this case. As a result I am satisfied that, but for the failure of the Crown to make disclosure of the improperly assembled information, the jury would have been differently constituted in this case.

[84] Given this finding, it is not necessary to consider whether non-disclosure prejudiced the appellant by denying his trial counsel the opportunity to attempt to challenge the Crown's peremptory challenges.

(d) The Impact of the Irregularities

[85] The central question is whether the cumulative impact of the irregularities outlined above so disrupted the balance between the rights of the accused and those of the prosecution such that "a well-informed, reasonable person considering the whole of the circumstances would have perceived the trial as being unfair or as appearing to be so": *Khan*, at para. 73.

[86] There can be no doubt that the public and an accused would view with grave suspicion a jury selection process that unfairly favours the Crown. The Crown has access to many confidential sources of information maintained by the police. Where, therefore, the Crown uses improper means to give itself significant

advantages in the exercise of its peremptory challenges there will come a point where, in my view, the jury selection process is defective.

[87] What then would the well-informed, reasonable person perceive about how the peremptory challenge process functioned in this case? The record shows that both the Crown and the appellant were allowed the appropriate number of challenges and the judge followed the proper procedure for their exercise. However, the record also shows that:

> (a) Information was assembled by the Crown to assist it in the exercise of its challenges. The information assembled (i) was in breach of Crown policy as outlined in the March 2006 memo from the Attorney General for Ontario; (ii) was found to be in breach of provincial privacy legislation by the Privacy Commissioner for Ontario; (iii) involved the use of a very significant amount of resources not available to the appellant; and (iv) used lists released more than 10 days before the court sittings contrary to the *Juries Act*.
>
> (b) The memo sent by the Crown attorney requesting that the jury checks be carried out was broadly worded stating that "it would be helpful if comments and details could be made concerning any disreputable persons we would not want as a juror." [Emphasis in original.] As set out in *Emms*, "this use of police resources and attempt to align the Crown with the police is inconsistent with Crown counsel's obligation to ensure that the accused receives a fair trial".
>
> (c) The assembled information was not shared with the appellant contrary to Crown policy and its disclosure obligations.

> (d) The information assembled was voluminous and was used by the Crown to assist in shaping the jury; and
>
> (e) The appellant has shown that, had he had access to the information that ought to have been disclosed, he would have exercised his peremptory challenges differently resulting in a jury that he would have considered to have been more impartial.

[88] As noted by the Crown, the well-informed, reasonable person would also know that the appellant's trial counsel failed to request full disclosure and a remedy after he became aware that there had been some jury vetting. For the reasons outlined earlier in these reasons, although I agree that it is a factor to be considered, I view it as having little significance in the circumstances of this case.

[89] When all the factors are weighed and viewed cumulatively, I conclude that the well-informed and reasonable person would perceive the jury selection process in this case to be unfair. The improprieties have resulted in a significant mismatch in the amount of information relevant to jury formation, with the Crown having much more information available to it than was available to the appellant. This mismatch came about in large measure because of breaches by the Crown of its own policies, misuse of police databases and, as explained, breaches of privacy legislation. Finally, the appellant has established that both the improprieties and the failure to disclose have resulted in the appellant being tried by a jury differently constituted than if the breaches had not occurred.

[90] In my view, the major purpose of peremptory challenges, “to foster confidence in the jury trial process”: *Gayle*, at para. 59, was undermined to such a degree as to create the appearance of unfairness. The extent of the imbalance created and the significance of the improprieties have so tainted the appearance of a fair process as to amount to a miscarriage of justice and lead reasonable people to believe that the appearance of justice has been undermined.

(e) Other Issues

[91] I have not dealt with the appellant’s ground of appeal relating to underrepresentation of on-reserve Aboriginal people on the jury roll. That issue was also raised in *R. v. Kokopenace* and the two cases were heard together. Given my reasons on the jury vetting issue and the result that follows, I find it unnecessary to deal with the underrepresentation issue in these reasons.

[92] With respect to other grounds of appeal advanced by the appellant I am of the view that it is neither necessary nor desirable for me to deal with them in light of my conclusion that a new trial should be held. Those issues are either based on the evidence led at trial or are to be determined on well-settled legal principles. If they arise anew they are best dealt with by the judge hearing the new trial.

REMEDY

[93] The appellant submits that the extent of the Crown's misconduct and seriousness of the failure to disclose justify ordering the Crown to pay the costs of the new trial and of this appeal. I agree that the Crown had access to a great deal of improperly acquired information and that the breach of the Crown's disclosure obligations was serious. The appellant has not, however, shown that there was any malicious intent or intentional breaches by the trial Crowns. Despite the seriousness of the breaches, I consider ordering a new trial to be an adequate remedy and do not view this case to be one in which costs ought to be awarded to discipline and discourage "flagrant and unjustified" or "egregious" instances of non-disclosure. See *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, and *R. v. Tiffin*, 2008 ONCA 306, 90 O.R. (3d) 575.

[94] For these reasons I would allow the conviction appeal and direct a new trial.

"Paul Rouleau J.A."
"I agree S.T. Goudge J.A."
"I agree H.S. LaForme J.A."

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