

## The Jury Vetting Cases: New Insights on Jury Trials in Criminal Cases?

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# The Jury Vetting Cases: New Insights on Jury Trials in Criminal Cases?

Vanessa MacDonnell\*

## I. INTRODUCTION

In December 2012, the Supreme Court of Canada delivered its reasons for judgment in the jury vetting cases of *R. v. Yumnu*,<sup>1</sup> *R. v. Emms*<sup>2</sup> and *R. v. Davey*.<sup>3</sup> In each case, the Crown requested and received material “on the suitability of prospective jurors”<sup>4</sup> from the police. In *Yumnu* and *Emms*, the Crown also requested criminal record checks, which the police completed. When the parties expressed concern about this vetting in the Court of Appeal, the Court concluded in all three cases that it was not an attempt to undermine the impartiality of the jury.<sup>5</sup> It also held that there was no “reasonable possibility”<sup>6</sup> that the Crown’s actions had affected the make-up of the jury.<sup>7</sup> These findings played a significant role in the Supreme Court’s disposition of the appeals.

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<sup>1</sup> [2012] S.C.J. No. 73, [2012] 3 S.C.R. 777 (S.C.C.) [hereinafter “*Yumnu*”].

<sup>2</sup> [2012] S.C.J. No. 74, [2012] 3 S.C.R. 810 (S.C.C.) [hereinafter “*Emms*”].

<sup>3</sup> [2012] S.C.J. No. 75, [2012] 3 S.C.R. 828 (S.C.C.) [hereinafter “*Davey*”]. In fact, there were five cases. *Yumnu*’s appeal was heard along with the appeals of two co-accused, Cardoso and Duong.

<sup>4</sup> *Id.*, at para. 12. I will refer to the “suitability of prospective jurors” or “potential jurors” throughout.

<sup>5</sup> This conclusion is explicit in the Ontario Court of Appeal’s decisions in *Yumnu* and *Davey*, and implicit in its decision in *Emms*, though there is no doubt that this is Moldaver J.’s conclusion in the Supreme Court. See *Yumnu*, *supra*, note 1, at para. 34, citing *R. v. Yumnu*, [2010] O.J. No. 4163, 260 C.C.C. (3d) 421, at para. 95 (Ont. C.A.) [hereinafter “*Yumnu CA*”]; *Davey*, *id.*, at para. 23; *R. v. Emms*, [2010] O.J. No. 5195, 104 O.R. (3d) 201, at para. 61 (Ont. C.A.); *Emms*, *supra*, note 2, at para. 49.

<sup>6</sup> *Yumnu*, *id.*, at para. 75.

<sup>7</sup> *Id.*, at para. 8; *Emms*, *supra*, note 2, at para. 17; *Davey*, *supra*, note 3, at para. 21.

In three unanimous opinions, the Supreme Court explained that the Crown could request a criminal record check “on potential jurors to determine whether they are eligible to serve as jurors”,<sup>8</sup> but that any criminal record would have to be disclosed to the defence. If the police received additional material from this process suggesting that a juror might be ineligible or “partial”,<sup>9</sup> the Crown could rely upon it, but again it would need to be disclosed.<sup>10</sup> The Court also held that the Crown could only discuss matters of jury selection with officers working on the case (rather than with the police more broadly), and that it would have to disclose any relevant material received from those officers.<sup>11</sup> The Court went on to conclude that the Crown need not disclose “opinions”,<sup>12</sup> “general impressions, personal or public knowledge in the community, rumours or hunches”.<sup>13</sup>

While the Supreme Court’s ruling goes a long way toward eliminating the concerns associated with jury vetting, there is a disconnect between the Court’s description of the jury selection process and how counsel tend to think about jury selection in criminal trials.<sup>14</sup> While counsel are limited in their ability to influence the jury selection process, the Court might nevertheless have considered whether a full ban on jury vetting was needed to combat the risk — both real and perceived<sup>15</sup> — that the Crown might act unethically during the jury selection process.<sup>16</sup> In my view, the provincial government would do well to vest sole authority for conducting criminal record checks in the provincial authorities tasked with creating jury panels.<sup>17</sup>

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<sup>8</sup> *Yumnu, id.*, at para. 50.

<sup>9</sup> *Davey, supra*, note 3, at para. 10. I will refer to “partial”, “partiality” and “partial to the Crown” throughout.

<sup>10</sup> *Yumnu, supra*, note 1, at paras. 53-54.

<sup>11</sup> *Davey, supra*, note 3, at paras. 34, 38, 40-42.

<sup>12</sup> *Id.*, at para. 48.

<sup>13</sup> *Id.*, at para. 46.

<sup>14</sup> For a sampling of these views, see David Paciocco *et al.*, *Jury Selection in Criminal Trials: Skills, Science, and the Law* (Toronto: Irwin Law, 1997) [hereinafter “Paciocco *et al.*”].

<sup>15</sup> Tim Quigley, “Have We Seen the End of Improper Jury Vetting?” (2013) 98 C.R. (6th) 109, at 112 [hereinafter “Quigley”].

<sup>16</sup> *R. v. Bain*, [1992] S.C.J. No. 3, [1992] 1 S.C.R. 91 (S.C.C.) [hereinafter “*Bain*”]; Quigley, *id.*, at 112.

<sup>17</sup> Factum of the Criminal Lawyers Association in *R. v. Emms*, *R. v. Yumnu et al.* and *R. v. Davey*, at para. 13 [hereinafter “Criminal Lawyers Association Factum”]. For similar proposals, see Quigley, *id.*, at 111; Ann Cavoukian, *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report* (Toronto: Information and Privacy Commissioner, 2009), at 142-43 [hereinafter “Cavoukian, *Excessive Background Checks*”].

Beyond their immediate usefulness in deciding the issues before the Court, *Yumnu*, *Emms* and *Davey* also raise interesting questions about the essential and inalienable features of jury trials in criminal cases. These questions arise against the backdrop of a web of Charter<sup>18</sup> protections, including the section 7 right to disclosure; the section 11(d) right to a fair trial before an independent and impartial decision-maker; the section 11(f) right to trial by jury; and the section 15 right to equality.<sup>19</sup> One of the anomalies in the Supreme Court's jurisprudence in relation to juries and jury selection is its near absence of engagement with the right to trial by jury. This leaves some doubt as to whether the right to trial by jury consists of anything more than the bare right to be tried by a jury if charged with a certain category of offence.<sup>20</sup> While the Court does not invoke the right to trial by jury in *Yumnu*, *Emms* or *Davey*, its statements about the essential features of jury trials in criminal cases renew questions about the precise contours of the right.

In Part II of this article, I review the Supreme Court's decisions in *Yumnu*, *Emms* and *Davey*. In Part III, I suggest that despite the disconnect between the way the Court describes counsel's "role in the jury selection process"<sup>21</sup> and the way that some lawyers approach jury selection, the Court's decisions, if respected, largely address the possibility of unethical Crown conduct by jury vetting. In Part IV, I discuss the largely under-theorized right to trial by jury, and in Part V, I conclude.

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<sup>18</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter "Charter"].

<sup>19</sup> See Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed. (Toronto: Thomson Reuters, 2010) [hereinafter "Stuart"]; Factum of the Intervener David Asper Centre for Constitutional Rights in *R. v. Kokopenace*, 2013 ONCA 389 and *R. v. Spiers*, 2012 ONCA 798 [hereinafter "Asper Centre Factum"]. See also Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1992-1993) 38 McGill L.J. 147 [hereinafter "Petersen"].

<sup>20</sup> Stuart, *id.*, at 455. Section 11(f) of the Charter states: "Any person charged with an offence has the right ... (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment." The *Criminal Code*, R.S.C. 1985, c. C-46 also provides an entitlement to — and sometimes effectively mandates — a jury trial: see ss. 471, 473, 565(2) and 568, cited in Peter Sankoff, "Rewriting the *Canadian Charter of Rights and Freedoms*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process" (2008) 40 S.C.L.R. (2d) 349, at 361-62 [hereinafter "Sankoff"]. See also Benjamin L. Berger, "*Peine Forte et Dure*: Compelled Jury Trials and Legal Rights in Canada" (2003) 48 Crim. L.Q. 1 [hereinafter "Berger"]; *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.) [hereinafter "*Turpin*"].

<sup>21</sup> *Bain*, *supra*, note 16, at 116, *per* Gonthier J., dissenting. I will refer to counsel's "role in the jury selection process" throughout.

## II. THE CASES

### 1. *Yumnu*

In *Yumnu*, three co-accused were tried and convicted of second degree murder and conspiracy to commit murder.<sup>22</sup> Following oral argument on appeal, it emerged that the police had vetted potential jurors prior to the jury being selected.<sup>23</sup> Specifically, the Crown had forwarded the jury panel lists to the police and requested that they indicate if potential jurors had a criminal record or were otherwise “disreputable persons we would not want as a juror [*sic*]”.<sup>24</sup> The police complied with the request, and provided the Crown with the result of the criminal record checks as well as other material collected in the process.<sup>25</sup>

The Ontario Court of Appeal concluded that “the purpose of the police inquiries was to determine whether a prospective juror had a criminal record”<sup>26</sup> (which would be relevant to his or her eligibility for jury duty), and that there was no ill motive on the part of the Crown or the police in conducting the vetting.<sup>27</sup> The Court also concluded that the Crown’s actions “had no impact on the composition of the jury”<sup>28</sup> and that the Crown and the police’s actions did not render the trial unfair or “bring the administration of justice into disrepute”.<sup>29</sup> The Supreme Court affirmed these conclusions.

Writing for the Court, Moldaver J. noted that jury vetting was “risky business”,<sup>30</sup> a course of conduct that could not only render trials unfair but that could also impact upon the “integrity of the criminal justice system”.<sup>31</sup> Despite this, he concluded that some jury vetting could continue. The Crown could request criminal record checks from police due to shortcomings in the existing system of relying on individual jurors to remove themselves if they were not eligible for jury duty because of a prior criminal conviction.<sup>32</sup> In addition, while the police were not entitled

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<sup>22</sup> *Yumnu, supra*, note 1, at paras. 1, 19.

<sup>23</sup> *Id.*, at para. 4.

<sup>24</sup> *Id.*, at para. 21.

<sup>25</sup> *Id.*, at para. 25.

<sup>26</sup> *Yumnu CA, supra*, note 5, at para. 94, cited in *Yumnu, supra*, note 1, at para. 34.

<sup>27</sup> *Yumnu, id.*, at para. 82.

<sup>28</sup> *Id.*, at para. 88.

<sup>29</sup> *Id.*, at para. 37.

<sup>30</sup> *Id.*, at para. 36.

<sup>31</sup> *Id.*, at paras. 37, 38.

<sup>32</sup> *Id.*, at paras. 48-50.

to seek out additional facts about potential jurors, material that came to the police's attention through the process of completing a criminal record check could be passed on to the Crown, who could make use of it as needed during the jury selection process.<sup>33</sup> All such material, Moldaver J. held, would also be required to be disclosed.<sup>34</sup>

Justice Moldaver then made two observations about the existing process of conducting criminal record checks. He noted that because the Crown knows little more than the name and profession of potential jurors, the police are often required to consult more than one source to be able to say with sufficient certainty whether an individual has a criminal record.<sup>35</sup> As he explains:

[T]he more databases accessed, the more likely it is that the authorities will come upon information that goes beyond a particular province's eligibility criteria as it relates to prior or ongoing criminal activity, or the criteria needed to bring a challenge for cause under s. 638(1)(c) of the Code.<sup>36</sup>

If the government provided the Crown with more data about potential jurors, the police would need to consult fewer sources.<sup>37</sup> This would mean that there would be less chance that a criminal record check would "inadvertently"<sup>38</sup> turn up other material about potential jurors.<sup>39</sup> Justice Moldaver also noted that the Provincial Jury Centre, which assembles jury panels and serves as a stand-in for sheriffs for the purposes of the *Juries Act*,<sup>40</sup> has jurisdiction under section 18.2 of the *Juries Act* to "request that a criminal record check, prepared from national data on the Canadian Police Information Centre database, be conducted" for the purpose of determining juror eligibility.<sup>41</sup> The Provincial Jury Centre's current practice is to conduct spot checks involving approximately

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<sup>33</sup> *Id.*, at paras. 53-54.

<sup>34</sup> *Id.*, at paras. 51, 55.

<sup>35</sup> *Id.*, at paras. 56-57.

<sup>36</sup> *Id.*, at para. 58.

<sup>37</sup> *Id.*, at paras. 56, 59.

<sup>38</sup> *Id.*, at para. 53.

<sup>39</sup> *Id.*, at paras. 58-59.

<sup>40</sup> R.S.O. 1990, c. J.3.

<sup>41</sup> *Id.*, s. 18.2(1). See also *Yumnu*, *supra*, note 1, at para. 60. This provision was added in 2009 following the release of a report by the Ontario Information and Privacy Commissioner on jury vetting which "recommended [that] the Provincial Jury Centre ... be the only agency entitled to access criminal records databases": Marie Comiskey, "Does *Voir Dire* Serve as a Powerful Disinfectant or Pollutant? A Look at the Disparate Approaches to Jury Selection in the United States and Canada" (2011) 59 *Duke L. Rev.* 733, at 750-51 [hereinafter "Comiskey"].

10 per cent of the jury panel.<sup>42</sup> While Moldaver J. could be read as implying that the Provincial Jury Centre could assume full responsibility for completing criminal record checks of potential jurors, he also noted that not all provincial juries legislation confers this authority on the body that assembles jury panel lists.<sup>43</sup>

Turning to the issue of disclosure, Moldaver J. noted that while the Crown is required to disclose “information received by the Crown that is relevant to the jury selection process”,<sup>44</sup> it need not disclose material related to “the prospective juror’s general reputation in the community ... feelings, hunches, suspicions, innuendo, or other such amorphous information”.<sup>45</sup> While he declined to deal fully with the issue of whether the defence was also required to make disclosure in similar circumstances, Moldaver J. noted that defence counsel would be required to advise the court and the Crown if counsel had “good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty”<sup>46</sup> or if there was “good reason to believe that a potential juror cannot serve on a particular case due to matters of obvious partiality”.<sup>47</sup>

Finally, Moldaver J. made a series of general comments about the Crown and the defence’s role in jury selection and about the function of the jury.<sup>48</sup> After noting that “[t]he process is not governed by the strictures of the adversarial model, nor should it be”,<sup>49</sup> Moldaver J. went on to articulate four basic features of the jury: eligibility, impartiality, representativeness and competence.<sup>50</sup> He noted that impartiality was constitutionally mandated, and that jury selection should be approached with the objective of ensuring that the accused receives a trial consistent with the section 11(d) right to a fair trial by an independent and impartial decision-maker.<sup>51</sup>

Justice Moldaver then applied a “modified”<sup>52</sup> version of the *Dixon/Taillefer*<sup>53</sup> test to determine whether the Crown’s failure to disclose

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<sup>42</sup> *Yumnu, id.*, at para. 61.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, at para. 51.

<sup>45</sup> *Id.*, at para. 64.

<sup>46</sup> *Id.*, at para. 66.

<sup>47</sup> *Id.*, at para. 67.

<sup>48</sup> *Id.*, at paras. 70-72.

<sup>49</sup> *Id.*, at para. 71.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, at para. 72.

<sup>52</sup> *Davey, supra*, note 3, at para. 56. I will refer to the test as “modified” throughout.

<sup>53</sup> *R. v. Dixon*, [1998] S.C.J. No. 17, [1998] 1 S.C.R. 244 (S.C.C.) [hereinafter “*Dixon*”]; *R. v. Taillefer*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307 (S.C.C.) [hereinafter “*Taillefer*”].

the material in its possession about potential jurors warranted a new trial. He expressed the relevant legal standard as follows:

[P]ersons who seek a new trial on the basis that such non-disclosure deprived them of their right to a fair trial under s. 7 of the *Charter* must, at a minimum, establish that: (1) the Crown failed to disclose information relevant to the selection process that it was obliged to disclose; and (2) had the requisite disclosure been made, there is a reasonable possibility that the jury would have been differently constituted.<sup>54</sup>

Focusing his analysis on the second requirement, Moldaver J. affirmed the Court of Appeal's conclusion that the accused could not show that the jury would have been "differently constituted" but for the Crown's failure to provide the material in its possession to the defence.<sup>55</sup>

Justice Moldaver also dealt with the question of whether the jury vetting in this case occasioned a miscarriage of justice.<sup>56</sup> He emphasized that the Court of Appeal had concluded that "[t]here was no attempt on the part of the police or the Crown to uncover information about prospective jurors in an effort to obtain a favourable jury".<sup>57</sup> He added that the *Rules of Professional Conduct* contemplated that the Crown might undertake some form of vetting of potential jurors,<sup>58</sup> and that the Crown had acted "in good faith".<sup>59</sup> Taking these factors into account, as well as the fact that the Crown's actions "had no impact on the composition of the jury ... the outcome of the trial or the overall fairness of the trial process",<sup>60</sup> Moldaver J. concluded that there had been no miscarriage of justice.

## 2. *Emms*

In *Emms*, the Court applied the legal principles articulated in *Yumnu* and reached a similar result.<sup>61</sup> *Emms* was charged with multiple counts of fraud. When the Crown received the jury panel lists, it forwarded those lists to the police and requested that the police

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<sup>54</sup> *Yumnu, supra*, note 1, at para. 75.

<sup>55</sup> *Id.*, at para. 77.

<sup>56</sup> *Id.*, at para. 79.

<sup>57</sup> *Id.*, at para. 82.

<sup>58</sup> *Id.*, at para. 82.

<sup>59</sup> *Id.*, at para. 83.

<sup>60</sup> *Id.*, at para. 88.

<sup>61</sup> *Emms, supra*, note 2, at para. 5.

complete criminal record checks. As in *Yumnu*, the Crown indicated that “[i]t would also be helpful if comments could be made concerning any disreputable persons we would not want as a juror [*sic*]”.<sup>62</sup> Emms’ trial post-dated the release of a Practice Memorandum by the Ontario Ministry of the Attorney General placing significant constraints on jury vetting by the Crown.<sup>63</sup> The Practice Memorandum stated that jury vetting should not extend beyond completing criminal record checks. It also directed that the results of these checks should be shared with the defence.<sup>64</sup> Despite the issuance of the Practice Memorandum, the Crown continued to request not only that criminal record checks be completed, but also that the police provide material relevant to the suitability of potential jurors.<sup>65</sup> In this particular case, the police provided the Crown with other data it had gathered in the process of completing the criminal record checks. It also expressed its approval or disapproval of individuals on the jury panel list.<sup>66</sup> Defence counsel was not provided with any of this material.<sup>67</sup>

The Court of Appeal held that while the defence used two peremptory challenges that it probably would not have used but for the Crown’s failure to disclose the material it received from police, the resulting jury was impartial, and the outcome of the trial would have been the same had proper disclosure been made.<sup>68</sup> Justice Moldaver affirmed these findings, noting that *Emms* had not satisfied the second branch of the modified *Dixon/Taillefer* test.<sup>69</sup>

Justice Moldaver also rejected the argument that the actions of the Crown and the police had occasioned a miscarriage of justice, even though the case had proceeded after the Ministry of the Attorney General had issued the jury vetting Practice Memorandum.<sup>70</sup> In his view, the Crown’s actions could not be attributed to “malevolence or intentional

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<sup>62</sup> *Id.*, at para. 7.

<sup>63</sup> *Id.*, at para. 11. See also Quigley, *supra*, note 15, at 112.

<sup>64</sup> *Emms, id.*, at para. 11.

<sup>65</sup> *Id.*, at para. 44.

<sup>66</sup> *Id.*, at paras. 8-9.

<sup>67</sup> *Id.*, at para. 10.

<sup>68</sup> *R. v. Emms*, [2010] O.J. No. 5195, 104 O.R. (3d) 201, at paras. 49, 50 (Ont. C.A.) [hereinafter “*Emms CA*”], cited in *Emms, supra*, note 2, at para. 17.

<sup>69</sup> See *supra*, note 53; *Emms, id.*, at para. 29.

<sup>70</sup> *Emms, id.*, at paras. 43-44.

wrongdoing”,<sup>71</sup> nor was there anything to suggest that the Crown’s goal had been to craft a “favourable” jury.<sup>72</sup>

### 3. *Davey*

Justice Karakatsanis authored the final opinion in the trilogy. *Davey* was a high-profile murder case in which the victim was a police officer.<sup>73</sup> Before the jury was selected, the Crown forwarded jury panel lists to police detachments in the area and made a similar request for material as in *Yumnu* and *Emms*.<sup>74</sup> In concluding that the Crown went too far, Karakatsanis J. stated that “the Crown should not have the advantage of the use of state resources, which are not available to the defence, to choose a jury that may be perceived to be favourable to the Crown”.<sup>75</sup> She went on to conclude, however, that the Crown was not barred from seeking the input of police officers who were directly involved in the case.<sup>76</sup> If a police officer provided “relevant information”<sup>77</sup> to the Crown, or where it was “unclear whether a bald police opinion [wa]s based upon such information”,<sup>78</sup> the Crown would be required to disclose the material.<sup>79</sup> Mere “opinions” did not generally need to be disclosed, however.<sup>80</sup>

In reaching these conclusions, Karakatsanis J. reviewed the basic features of the jury in criminal cases, providing a slightly different itemization than Moldaver J. in *Yumnu*. She noted that juries ought to be “independent, impartial and competent”.<sup>81</sup> She observed that “neither party has the right to select a jury, or has a positive power to shape a jury”,<sup>82</sup> and that “[j]urors are selected at random, and randomness ensures representativeness”.<sup>83</sup> She also emphasized that at the jury selection stage, the Crown and the defence have a common purpose: “[a]s officers

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<sup>71</sup> *Id.*, at para. 44.

<sup>72</sup> *Id.*

<sup>73</sup> *Davey*, *supra*, note 3, at paras. 4, 15.

<sup>74</sup> *Id.*, at para. 12.

<sup>75</sup> *Id.*, at para. 34.

<sup>76</sup> *Id.*, at para. 9.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, at para. 9.

<sup>80</sup> *Id.*, at para. 46.

<sup>81</sup> *Id.*, at para. 30.

<sup>82</sup> *Id.*, at para. 31.

<sup>83</sup> *Id.*

of the court, all counsel have a responsibility to uphold the *Charter* right ... to an independent and impartial jury”.<sup>84</sup>

Justice Karakatsanis then applied the modified *Dixon/Taillefer* test described by Moldaver J. in *Yumnu*. She stated in *obiter* that before a court concluded that a new trial should be ordered in a case in which the modified test was satisfied, the court should first ask whether “on balance ... the jury was impartial”.<sup>85</sup> Applying the test, she concluded that while the Crown’s disclosure was insufficient, this did not affect the make-up of the jury. She also held that the accused had received a fair trial by an impartial jury.<sup>86</sup> She noted that due to the high profile nature of the case, the Court had put many questions to potential jurors as part of the jury selection process, and that a large number of potential jurors who might have been partial were ruled out as a result.<sup>87</sup>

Finally, Karakatsanis J. also concluded that the Crown and the police’s conduct did not give rise to an “appearance of unfairness” sufficient to constitute a miscarriage of justice.<sup>88</sup> Justice Karakatsanis noted that the extensive questioning by the court during the selection process eliminated individuals who might have been considered pro-police.<sup>89</sup> She was also favourably impressed by the Crown’s decision to disclose both that the victim’s brother-in-law appeared on the jury panel list<sup>90</sup> and that one of the jurors made a comment adverse to the accused before trial.<sup>91</sup>

### III. THE PROBLEM OF JURY VETTING

The jury vetting cases raise interesting questions about counsel’s role in the jury selection process. Indeed, in *Yumnu*, *Emms* and *Davey*, the Court proceeded on the assumption that the police and the Crown could do great damage by “investigating”<sup>92</sup> members of the jury panel. “The mere thought of the Crown and the police ‘checking out’ potential jurors carries with it the spectre of jury tampering and the evils associated with

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*, at para. 55.

<sup>86</sup> *Id.*, at para. 10.

<sup>87</sup> *Id.*, at para. 15.

<sup>88</sup> *Id.*, at para. 74.

<sup>89</sup> *Id.*, at para. 77.

<sup>90</sup> *Id.*, at paras. 13, 78.

<sup>91</sup> *Id.*, at paras. 19, 78.

<sup>92</sup> *Yumnu*, *supra*, note 1, at para. 52. I will use this language throughout.

it”,<sup>93</sup> Moldaver J. warned in *Yumnu*. “Care must be taken to guard against this. The integrity of our criminal justice system hangs in the balance.”<sup>94</sup>

The Court’s high rhetoric is at odds with the Crown’s actual ability to influence the make-up of the jury through jury vetting. Before elaborating, I should say that I believe the Court was correct to remind the Crown of the constitutional imperatives of impartiality and full disclosure. I also agree with Tim Quigley that the Court “failed to place enough stress on the appearance of justice” and that it should have concluded that miscarriages of justice had occurred.<sup>95</sup> But the Court’s comments create the false impression that the Crown could have used the material it received from police to craft a pro-Crown jury. This is simply not the case. The Crown cannot “select” jurors *per se*; it can only exercise a peremptory challenge to “exclude”<sup>96</sup> a particular juror from the jury, or make submissions on why a particular juror should be dismissed for cause.<sup>97</sup> If no basis for a challenge for cause exists, then the Crown can only challenge the juror if it has peremptory challenges available to it. In other words, the Crown has no ability to “select” jurors whom it believes might favour its position.

In addition, the constitutional (and longstanding common law) imperative of impartiality means that the Crown is permitted — perhaps even required — to exclude potential jurors who may be biased against the Crown.<sup>98</sup> Thus, it cannot be assumed that excluding individuals who might be pro-defence involves a form of “jury tampering” — indeed, the opposite may well be true. If sufficient evidence of partiality exists, then a potential juror may be challenged for cause.<sup>99</sup> Where the Crown suspects but cannot establish partiality,<sup>100</sup> on the other hand, it is appropriate for a peremptory challenge to be used.

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<sup>93</sup> *Id.*, at para. 38.

<sup>94</sup> *Id.* See also *Davey*, *supra*, note 3, at para. 29.

<sup>95</sup> Quigley, *supra*, note 15, at 112. See also Factum of the British Columbia Civil Liberties Association in *R. v. Emms*, *R. v. Yumnu et al.*, and *R. v. Davey* [hereinafter “BCCLA Factum”].

<sup>96</sup> *Bain*, *supra*, note 16, at 115, *per* Gonthier J., dissenting on other grounds. I will use this term throughout.

<sup>97</sup> *Davey*, *supra*, note 3, at para. 31; *Bain*, *id.*, at 115, *per* Gonthier J., dissenting on other grounds.

<sup>98</sup> See *Bain*, *id.*, at 156, *per* Stevenson J.: “It is, indeed, proper for the Crown to use the process to put aside jurors who may be partial to the accused.”

<sup>99</sup> *Id.*, at 153, *per* Stevenson J.

<sup>100</sup> *R. v. Gayle*, [2001] O.J. No. 1559, 54 O.R. (3d) 36, at para. 59 (Ont. C.A.) [hereinafter “*Gayle*”], citing *R. v. Cloutier*, [1979] S.C.J. No. 67, 48 C.C.C. (2d) 1, at 20-21 (S.C.C.); *Bain*, *supra*, note 16, at 152-53, *per* Stevenson J.; Neil Vidmar, “The Canadian Criminal Jury: Searching for a Middle Ground” (1999) 62 *Law & Contemp. Probs.* 141, at 158 [hereinafter “Vidmar”].

What is left, then, in terms of unacceptable behaviour in which the Crown might engage, and is there any relationship between this behaviour and jury vetting? To begin, the Crown might exercise its peremptory challenges in a discriminatory manner.<sup>101</sup> This compromises the representativeness and the impartiality of the jury.<sup>102</sup> Discriminatory jury selection may or may not be based on material derived from jury vetting. There was no evidence in *Yumnu*, *Emms* or *Davey* that jury vetting provided the Crown with material that could have formed the basis of a discriminatory use of the Crown's peremptory challenges. Post-trilogy, it seems unlikely that the process of completing a criminal record check would produce material that the Crown could use to exercise its peremptory challenges in a discriminatory manner, though it should be noted that by their very nature, peremptory challenges require counsel to make stereotypical assumptions about individuals and groups.

The Crown might also choose not to challenge a juror whom it believes to be partial to its case.<sup>103</sup> It may have formed this opinion based on material derived from jury vetting. But the chances of the police coming across this kind of material during the jury vetting process have always been low. Post-trilogy, they approach zero. The evidence in these three appeals and in another prominent jury vetting case in Ontario, *R. v. Spiers*,<sup>104</sup> suggests that jury vetting turned up a variety of material about potential jurors, most of it about their criminal past.<sup>105</sup> Occasionally the police found evidence to suggest that an individual frequently reported matters to the police or that he or she had been a "victim" or a "complainant" in an unrelated matter,<sup>106</sup> but this evidence is less likely to surface now that the police may only perform criminal

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<sup>101</sup> See, e.g., *R. v. Pizzacalla*, [1991] O.J. No. 2008, 5 O.R. (3d) 783 (Ont. C.A.). See also *Gayle, id.*, at para. 65. Note that in *Gayle*, the Court dealt with the issue under s. 11(f). See also Petersen, *supra*, note 19; Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham, ON: LexisNexis Canada, 2011), at 664 [hereinafter "Penney *et al.*"].

<sup>102</sup> Asper Centre Factum, *supra*, note 19, citing *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 48 (S.C.C.) [hereinafter "*Williams*"]; Petersen, *id.*

<sup>103</sup> Such a practice was condemned in *Bain, supra*, note 16, at 119, *per* Gonthier J., dissenting: "[T]he Crown Attorney should use the means at his or her disposal to exclude prospective jurors that could be biased in favour of the prosecution even if the defence is not aware of this fact." But see *Bain, id.*, at 159, *per* Stevenson J., cited in Penney *et al., supra*, note 101, at 663: "The peremptory challenge is not, in itself, under attack. It may be used for partisan considerations, and so long as the right of exercise is proportionate neither the Crown nor the accused can be said to have an unconstitutional advantage."

<sup>104</sup> [2012] O.J. No. 5450, 113 O.R. (3d) 1 (Ont. C.A.) [hereinafter "*Spiers*"]. See also factum of appellant Clare Spiers in *Spiers* [hereinafter "*Spiers Factum*"].

<sup>105</sup> *Yumnu, supra*, note 1, at paras. 53-54.

<sup>106</sup> *Yumnu, id.*, at para. 25; *Spiers Factum, supra*, note 104, at para. 16.

record checks and offer existing knowledge if they are directly involved in the case.

In sum, the vast majority of this evidence could not be used by the Crown for any purpose other than to eliminate from the jury pool individuals who might be biased against the Crown. It is far from clear that there is anything preventing the Crown from drawing the inference that individuals who have had previous experiences with law enforcement might not be impartial, and challenging the individual on that basis. The Crown might similarly conclude that an individual who has made a complaint on a previous occasion or who has been a victim might have a difficult time maintaining impartiality. In this context, would the Crown also be required to exclude the juror?

The starting point in answering this question is that the Crown and the defence have an obligation to do what they can to ensure that the jury is impartial.<sup>107</sup> If the Crown has reason to believe that a juror may be partial, either for or against the Crown, then it has an ethical obligation to exclude that juror. But here additional complications arise. Where there is clear evidence of bias, the Crown may challenge a juror for cause. In the vast majority of cases, however, the Crown and the defence will be making its decisions about whether to challenge a juror on the basis of something less than conclusive evidence of bias or impartiality. In many cases, the Crown or the defence may only have a “hunch”<sup>108</sup> or an “instinct”<sup>109</sup> about the likely partiality of the witness. In these circumstances, we cannot confidently suggest that the Crown is in breach of its obligations if it fails to challenge someone whom it has a “hunch” may be biased. As a general rule, however, the standard for challenging a juror who might not be impartial should be the same regardless of whether the individual’s partiality favours or disadvantages the Crown.

Occasionally, the Crown may decide not to challenge a juror whom it ought to challenge, either because it is not satisfied that there is enough evidence of partiality, or because of what the Supreme Court of Canada in *R. v. Bain* called “human frailt[y]”.<sup>110</sup> This is why the presence of defence counsel is crucial. The defence’s role in jury selection includes being particularly vigilant for jurors who might not be impartial but who

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<sup>107</sup> See generally Penney *et al.*, *supra*, note 101, at 439-41.

<sup>108</sup> Davey, *supra*, note 3, at para. 46.

<sup>109</sup> Paciocco *et al.*, *supra*, note 14, at 177.

<sup>110</sup> *Bain*, *supra*, note 16, at 102, cited in *Spiers*, *supra*, note 104, at para. 65; *Gayle*, *supra*, note 100, at para. 59.

the Crown has less of an incentive to challenge. Equally crucially, however, the defence can only participate effectively in jury selection if the Crown and the defence have “equal information about the prospective jurors”.<sup>111</sup> It is unsurprising, then, that disclosure plays such a key role in the Court’s reasons in *Yumnu*, *Emms* and *Davey*. If the defence does not have access to the same material as the Crown, then it cannot effectively weed out partiality that inures to the benefit of the Crown.

Thus, in the normal course, the Crown’s ability to “tamper” with the jury is limited. Post-trilogy, the Crown must disclose any relevant evidence uncovered through a criminal record check or by speaking to police who are directly involved in the case.<sup>112</sup> This means that in practice, the Crown and the defence should have “equal information”.<sup>113</sup> To the extent that the Crown falls short of its obligation to discharge jurors who might be partial to the Crown, the defence is equipped with the material it needs to challenge the juror. The result is that the Crown’s ability to “tamper” with the jury is greatly reduced.

Justice Moldaver notes in *Yumnu* that the Provincial Jury Centre has the statutory authority to request that criminal record checks be conducted by the police on its behalf. He notes, however, that not all provinces have such provisions in their provincial juries legislation. In my view, the provincial government would do well to transfer sole control over criminal record checks to the Provincial Jury Centre.<sup>114</sup> This would eliminate the possibility that a criminal record check would “inadvertently”<sup>115</sup> turn up material about potential jurors, and would provide further protection against the risk — real or perceived<sup>116</sup> — that the Crown might not exercise its peremptory challenges ethically.<sup>117</sup> It would also remove the perception of collusion between the Crown and

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<sup>111</sup> Factum of the appellant Cardoso in *R. v. Yumnu*, *supra*, note 1, at para. 30 [hereinafter “Cardoso Factum”]. See also factum of the appellant Davey in *Davey*, *supra*, note 3, at paras. 52-53.

<sup>112</sup> I take it that the *R. v. Stinchcombe*, [1995] S.C.J. No. 21, [1995] 1 S.C.R. 754 (S.C.C.) standard of “not clearly irrelevant” is what in fact applies here.

<sup>113</sup> Cardoso Factum, *supra*, note 111, at para. 30.

<sup>114</sup> Criminal Lawyers Association Factum, *supra*, note 17, at para. 13. For similar proposals, see Quigley, *supra*, note 15, at 111; Cavoukian, *Excessive Background Checks*, *supra*, note 17, at 142-43.

<sup>115</sup> *Yumnu*, *supra*, note 1, at para. 53.

<sup>116</sup> See Quigley, *supra*, note 15, at 112.

<sup>117</sup> Concerns about how peremptory challenges are exercised have led to calls for the repeal of the *Criminal Code* provisions that permit them: see, e.g., Petersen, *supra*, note 19. A thorough examination of this proposal is beyond the scope of this paper, though the arguments in favour of repeal are compelling. Thank you to Professor Bill Stuntz for sharing his insights on the problems associated with peremptory challenges with his criminal procedure class, which I took in 2008.

the police that the Court expresses concern about in these cases.<sup>118</sup> In this respect, it is interesting to note that the Court's earlier, more realistic statements about the potential ethical shortcomings of the Crown did not find their way into these judgments, particularly in a case in which the Crown did not comply with its own Practice Direction.<sup>119</sup> Had the Court taken note of the possible "human frailties" of Crown counsel (and the police), it might have been unwilling to sanction any jury vetting.<sup>120</sup>

A final point: the Court does not deal in any depth with the question of whether the defence might also be required to disclose material relevant to jury selection to the Crown, noting only that the defence must advise the Crown and the court if they have material suggesting that a potential juror is ineligible or if they "know or have good reason to believe that a potential juror cannot serve on a particular case due to matters of obvious partiality".<sup>121</sup> While the defence does not have a duty of disclosure in other contexts, these obligations seem obvious and uncontroversial. The accused would not be disadvantaged by such an obligation, given that at the jury selection stage, the Crown and the defence are united in the common purpose of ensuring impartiality. In any event, it seems unlikely that the comparatively under-"resource[d]"<sup>122</sup> defence would engage in extensive vetting.

#### IV. THE CONTENT OF THE SECTION 11(f) RIGHT TO TRIAL BY JURY

As has been noted, the right to trial by jury has played surprisingly little role in the Supreme Court of Canada's jurisprudence in relation to juries and jury selection, and *Yumnu*, *Emms* and *Davey* are no exception.<sup>123</sup> One of the most extensive discussions of the right can be found in *R. v. Turpin*, a case that raised the issue of whether the right to trial by jury included a right *not* to be tried by a jury.<sup>124</sup> By contrast, the Court has adverted to the right to a fair trial by an independent and

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<sup>118</sup> *Yumnu*, *supra*, note 1, at para. 38; *Davey*, *supra*, note 3, at para. 34.

<sup>119</sup> See Quigley, *supra*, note 15, at 112, referring to *Emms*, *supra*, note 2. Quigley, *id.*

<sup>121</sup> *Yumnu*, *supra*, note 1, at paras. 65-67.

<sup>122</sup> *Id.*, at para. 40.

<sup>123</sup> Stuart, *supra*, note 19, at 454.

<sup>124</sup> *Turpin*, *supra*, note 20; Stuart, *id.*, at 459-60. For a critique of *Turpin*, see Berger, *supra*, note 20.

impartial decision-maker in a number of jury selection cases, including *Yumnu* and *Davey*.<sup>125</sup>

On one level, it is not surprising that the Supreme Court failed to mention, much less consider, the applicability of section 11(f) of the Charter.<sup>126</sup> The right to a fair trial before an independent and impartial decision-maker arguably encompasses most of the constitutional concerns that might be raised by an accused in the context of a jury trial.<sup>127</sup> The jury vetting cases were not framed as section 11(f) cases, and the Court was clearly preoccupied with both the disclosure issues and with whether the jury selected was impartial within the meaning of section 11(d). In the only other jury vetting case to be heard by the Supreme Court since 1982, *R. v. Latimer*,<sup>128</sup> the Court did not refer to the Charter at all, preferring to rest its reasoning on the “fundamental tenet of the criminal justice system” that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.<sup>129</sup> Nevertheless, it is worth asking whether some of the essential features of the jury identified and re-affirmed by the Court in these cases might ultimately find recognition as elements of the right to trial by jury, or whether the right is destined to remain neglected, conferring little more than the bare right to be tried by a jury if charged with a certain category of offence.<sup>130</sup>

Theorizing about the jury through the lens of constitutional rights only gets us so far, of course. Individual rights are not the Court’s sole concern at the jury selection stage.<sup>131</sup> Juries perform a “democratic” function,<sup>132</sup> and this means that the process of selecting the jury has a

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<sup>125</sup> See *Yumnu*, *supra*, note 1, at para. 72; *Davey*, *supra*, note 3, at para. 31.

<sup>126</sup> But see *R. v. Parks*, [1993] O.J. No. 2157, 15 O.R. (3d) 324, at para. 28 (Ont. C.A.) [hereinafter “*Parks*”]: “The accused’s right to challenge for cause based on partiality is essential to both the constitutional right to a fair trial and the constitutional right, in cases where the accused is liable to five or more years’ imprisonment, to trial by jury.”

<sup>127</sup> Thank you to Leo Russomanno for pointing this out to me. See also Berger, *supra*, note 20, at 12.

<sup>128</sup> *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.).

<sup>129</sup> *Id.*, at para. 43, citing *R. v. Sussex Justices*, [1924] 1 K.B. 256, [1923] All E.R. Rep. 233, at 259 (K.B. Div.).

<sup>130</sup> Stuart, *supra*, note 19, at 455. Penney *et al.* suggest that “the principles of impartiality and representativeness [inhere] in the right to a jury trial”: see Penney *et al.*, *supra*, note 101, at 642. Sankoff takes the position that “[i]n its current form, section 11(f) effectively operates as a shield, prohibiting the government from abolishing trial by jury in cases of a serious nature”: see Sankoff, *supra*, note 20, at 361.

<sup>131</sup> Turpin, *supra*, note 20, at 1309; Sankoff, *id.*, at 362. Sankoff goes on to make the case against this state of affairs.

<sup>132</sup> Graham Parker, “Trial by Jury in Canada” (1987) 8 J. Legal Hist. 178; Lynn Smith, “Charter Equality Rights: Some General Issues and Specific Applications in British Columbia to

“social” dimension that is not co-extensive with the interests of either the accused or the Crown.<sup>133</sup> Moreover, even the broader legal framework does not capture all of the factors relevant to jury selection. As Moldaver J. explains in *Yumnu*:

[W]hile there are various rules and regulations that govern the selection of juries, much of what occurs is rooted in custom. The process must take into account the needs of the people and the special problems that may exist in the locale or region in which the trial is being held. Flexibility is essential, as is common sense, good judgment and good faith on the part of those who play a central role in the process.<sup>134</sup>

That being said, the Charter does confer a right to trial by jury. To the extent that the accused has a right to a jury with certain features, the jury vetting cases might provide some insight into the content of that right.

Justices Moldaver and Karakatsanis refer to similar essential features of the jury — eligibility, independence, impartiality, randomness, representativeness and competence — but they do not go so far as to say that these features are guaranteed by section 11(f). This is consistent with the Court’s general reluctance to provide guidance on the content of section 11(f). In my view, there are two main reasons for this state of affairs. First, many of these features are protected by section 11(d). Second, the Court may be reluctant to read the right to trial by jury expansively because to do so would threaten the historic approach to jury selection and — by extension — certain accepted truths about juries.<sup>135</sup> In at least some instances, it would require courts to permit additional inquiries into whether the jury actually possessed the features required of it by the Charter. This would expand the scope of in-court vetting of potential jurors beyond that currently permitted by the *Criminal Code* and the common law and would undermine the dubious but entrenched presumption that jurors are impartial, competent and the like.<sup>136</sup>

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Elections, Juries and Illegitimacy” (1984) 18 U.B.C. L. Rev. 351, at 391 [hereinafter “Smith”]; Christopher Granger *et al.*, *Canadian Criminal Jury Trials* (Toronto: Carswell, 1989), at 9. See also *Yumnu*, *supra*, note 1, at para. 71.

<sup>133</sup> *Turpin*, *supra*, note 20, at 1309-10. See also *Yumnu*, *id.*

<sup>134</sup> *Yumnu*, *id.*, at para. 72.

<sup>135</sup> Thank you to Julia Hughes for sharing a similar insight with me in the context of the Court’s reluctance to rely on social science evidence in the criminal law context. See also Vidmar, *supra*, note 100; Sankoff, *supra*, note 20, at 368-69; Dianne Martin, “Book Review of *Jury Selection in Criminal Trials: Skills, Science and the Law*” (1998-99) 30 *Ottawa L. Rev.* 318 [hereinafter “Martin”].

<sup>136</sup> Penney *et al.*, *supra*, note 101, at 652, citing *R. v. Sherratt*, [1991] S.C.J. No. 21, [1991] 1 S.C.R. 509 (S.C.C.) [hereinafter “*Sherratt*”]; Vidmar, *supra*, note 100, at 150, citing *R. v. Hubbert*,

Interestingly, this presumption is less intact in the context of the guarantee of a fair trial by an independent and impartial decision-maker.<sup>137</sup> In fact, the Court has denounced the very judicial hesitation that we see in the context of the right to trial by jury.<sup>138</sup> It may be that because section 11(d) contains an explicit guarantee of a fair trial by an independent and impartial decision-maker, the Court feels that it has little choice but to give content to the right. In addition, the *Criminal Code* sets out a detailed scheme for challenges for cause and peremptory challenges. In other words, “Parliament itself has acknowledged that jurors may sometimes be unable to set aside their prejudices and act impartially between the Crown and the accused, despite our hope and expectation that they will do so”.<sup>139</sup>

While in-court vetting of potential jurors does not raise the same issues as the jury vetting conducted by the Crown and the police in *Yumnu, Emms and Davey*,<sup>140</sup> its expansion *would* move the Court further away from the existing paradigm of jury selection.<sup>141</sup> We need not regard this as problematic. Courts have never taken the position that the values to which the jury selection process seeks to be faithful are best accomplished by a hands-off approach.<sup>142</sup> Those who are concerned that it would unacceptably alter the jury selection process to recognize a right to a jury with certain features need look no further than the Court’s

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[1975] O.J. No. 2595, 29 C.C.C. (2d) 279 (Ont. C.A.), affd [1977] S.C.J. No. 4, [1977] 2 S.C.R. 267 (S.C.C.); *Williams*, *supra*, note 102, at para. 13; *R. v. Burke*, [2002] S.C.J. No. 56, [2002] 2 S.C.R. 857, at para. 65 (S.C.C.), *per* Major J.; *Gayle*, *supra*, note 100, at para. 22; *Parks*, *supra*, note 126, at paras. 21-22, noting that “the ‘presumption’ . . . is well established, both as a fundamental premise of our system of trial by jury and as an operative principle during the jury selection process”. See also BCCLA Factum, *supra*, note 95, at para. 31.

<sup>137</sup> In the context of challenges for cause, see *Parks*, *id.*, at paras. 32, 41.

<sup>138</sup> See *Williams*, *supra*, note 102, at para. 51:

[B]ehind the conservative approach some courts have taken, one detects a fear that to permit challenges for cause on the ground of widespread prejudice in the community would be to render our trial process more complex and more costly, and would represent an invasion of the privacy interests of prospective jurors without a commensurate increase in fairness. Some have openly expressed the fear that if challenges for cause are permitted on grounds of racial prejudice, the Canadian approach will quickly evolve into the approach in the United States of routine and sometimes lengthy challenges for cause of every juror in every case with attendant cost, delay and invasion of juror privacy.

<sup>139</sup> *Williams*, *id.*, at para. 24.

<sup>140</sup> BCCLA Factum, *supra*, note 95, at para. 35.

<sup>141</sup> *Id.*

<sup>142</sup> Peremptory challenges and challenges for cause have been permitted by the *Criminal Code* in one form or another since its enactment in 1892 (see Penney *et al.*, *supra*, note 101, at 663, n. 207), and the practice dates back to before 1305: *id.*, at 663. See also *Williams*, *supra*, note 102; *Sherratt*, *supra*, note 136; *Parks*, *supra*, note 126, at para. 58.

gradual acceptance of a greater scope for questions to be put to potential jurors about their ability to impartially judge a case involving a racialized accused to see that permitting such inquiries will not fundamentally re-orient the jury system<sup>143</sup> or open the door to “U.S.-style jury *voir dire*”.<sup>144</sup> The Supreme Court has placed significant trust in the ability of trial judges to “[control] the challenge process to prevent its abuse, to ensure that it is fair to the prospective juror as well as to the accused, and to prevent the trial from becoming unnecessarily delayed by unfounded challenges for cause”.<sup>145</sup> It has also rejected precisely the sorts of arguments that may be holding the Court back from giving constitutional recognition of other features of the jury.

To provide just one example, in *Davey*, Karakatsanis J. re-states the now well-accepted principle that “randomness ensures representativeness”.<sup>146</sup> This principle has been shown to be quite problematic,<sup>147</sup> most recently in criminal trials and coroner’s inquests involving indigenous accused and deceased, respectively.<sup>148</sup> These events led the Ontario Government to request an independent review of “First Nations representation on Ontario juries” by former Supreme Court of Canada Justice Frank Iacobucci.<sup>149</sup> His report, delivered in February 2013, outlines serious deficiencies in the representation of indigenous people on juries in the Province of Ontario.

While the Supreme Court has hinted that representativeness is a pre-requisite to a fair trial and thus may find protection under

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<sup>143</sup> *Williams, id.; Parks, id.* In the pre-trial publicity context, see *Sherratt, id.*

<sup>144</sup> BCCLA Factum, *supra*, note 95, at para. 35; Comiskey, *supra*, note 41, at 734; Vidmar, *supra*, note 100, at 150-51, 160. See also *Williams, id.*, at paras. 51-56.

<sup>145</sup> *Williams, id.*, at para. 13, citing *Hubbert, supra*, note 136. See also *Sherratt, supra*, note 136, at 510; BCCLA Factum, *id.*, at para. 35.

<sup>146</sup> *Davey, supra*, note 3, at para. 31. See also Penney *et al.*, *supra*, note 101, at 643. But see *Bain, supra*, note 16, at 113, *per* Gonthier J., dissenting: “[R]andomness is not a panacea. Indeed, in order to bolster the impartiality of the jury, the *Criminal Code* offers to the parties various means of challenging prospective jurors, whether collectively or individually . . . In *Sherratt, supra*, the majority of this Court has recognized that these challenges contribute to the impartiality of the jury and sometimes even improve its representativeness.”

<sup>147</sup> Smith, *supra*, note 132; Martin, *supra*, note 135, at 319-21.

<sup>148</sup> See Hon. Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ministry of the Attorney General, 2013), at 13-14 [hereinafter “Iacobucci”], citing “coroner’s inquests into the deaths of Jacy Pierre and Reggie Bushie” as well as *R. v. Kokopenace*, [2013] O.J. No. 2752, 115 O.R. (3d) 481 (Ont. C.A.) [hereinafter “Kokopenace”]. See also Asper Centre Factum, *supra*, note 19; “Province Moves on Iacobucci Report”, *Law Times*, July 1, 2013.

<sup>149</sup> Iacobucci, *id.*

section 11(d),<sup>150</sup> some members of the Court have expressed skepticism about whether representativeness should be recognized as a constitutionally guaranteed feature of jury trials in criminal cases. In *R. v. Sherratt*, the Supreme Court explained that “the *Charter* right to trial by jury is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community”.<sup>151</sup> In *Williams*, the Court noted that “a representative jury pool” was an “essential safeguard” of “the accused’s section 11(d) *Charter* right”.<sup>152</sup> But in *R. v. Biddle*, McLachlin C.J.C., writing for herself in the context of a challenge to a jury comprised of 12 women, expressed doubt about whether the accused should be permitted to challenge the jury pool or the resulting jury on the ground of lack of representativeness. She stated:

To say that a jury must be representative is to set a standard impossible of achievement. The community can be divided into a hundred different groups on the basis of variants such as gender, race, class and education. Must every group be represented on every jury? If not, which groups are to be chosen and on what grounds? If so, how much representation is enough? Do we demand parity based on regional population figures? Or will something less suffice? I see no need to start down this problematic path of the representative jury, provided the impartiality and competence of the jury are assured. Representativeness may be a means to achieving this end. But it should not be elevated to the status of an absolute requirement.<sup>153</sup>

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<sup>150</sup> *Sherratt*, *supra*, note 136; *Williams*, *supra*, note 102; *R. v. Biddle*, [1995] S.C.J. No. 22, [1995] 1 S.C.R. 761 (S.C.C.) [hereinafter “*Biddle*”], cited in *Gayle*, *supra*, note 100. See also Petersen, *supra*, note 19. Provincial appellate courts have reached the same conclusion: see Penney *et al.*, *supra*, note 101, at 645; *Kokopenace*, *supra*, note 148.

<sup>151</sup> *Sherratt*, *supra*, note 136, at 525. She went on to say, however, that “[t]he random selection process, coupled with the sources from which this selection is made, ensures the representativeness of Canadian criminal juries ... Thus, little if any objection can be made regarding this crucial characteristic of juries”: *id.* She acknowledged that in some circumstances the use of peremptory challenges by the Crown and defence “can impact on the representativeness of the jury in some situations”: *id.*, at 526.

<sup>152</sup> *Williams*, *supra*, note 102, at para. 47.

<sup>153</sup> *Biddle*, *supra*, note 150, at para. 58. See also *Biddle*, *id.*, at para. 53, where Gonthier J. stopped short of finding that representativeness was a constitutional imperative; *Gayle*, *supra*, note 100, at para. 57. In *Charter Justice*, *supra*, note 19, at 460-61, Stuart expresses the view that s. 11(f) does not include a “right to a representative jury”. Penney *et al.* take the view that while there is such a right, “the measure of representativeness required ... is limited”: Penney *et al.*, *supra*, note 101, at 643, citing *R. v. Church of Scientology*, [1997] O.J. No. 1548, 33 O.R. (3d) 65 (Ont. C.A.). See also *Kokopenace*, *supra*, note 148. For a discussion of the representativeness cases, see Regina

With respect, McLachlin C.J.C.'s comments (in *obiter*) overstate the concerns that might arise from guaranteeing a representative jury and understate courts' ability to craft a doctrine that ensures an adequate degree of representativeness. Courts would do well to consider recognizing the constitutional nature of representativeness by confirming that representativeness is a component of the right to trial by jury under section 11(f). The Court could also read sections 11(d) and 11(f) together to reach such a result.<sup>154</sup>

Moreover, there is no reason to be concerned that a right to a representative jury would bring about significant additional costs or delays in the trial process.<sup>155</sup> Representativeness is usually an issue that is considered at the level of the jury panel, though challenges have also been brought to the make-up of the jury that is actually selected.<sup>156</sup> In other words, a right to a representative jury would intrude very little, if at all, into the jury selection process. Indeed, many of Iacobucci J.'s recommendations in his *Report on First Nations Representation on Ontario Juries* relate to the development of jury panel lists rather than the process to be followed at the jury selection stage.<sup>157</sup>

## V. CONCLUSION

The Supreme Court's decisions in *Yumnu*, *Emms* and *Davey* provide clear guidance on the extent to which the Crown may engage in jury vetting. In my view, the provincial governments should vest exclusive authority for performing criminal record checks in the provincial jury authority charged with compiling jury panels. As Cory J. stated in *Bain*, "[t]he protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor and or control. Rather the offending [power] should be removed."<sup>158</sup>

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Schuller & Neil Vidmar, "The Canadian Criminal Jury" (2011) 86:2 Chicago-Kent L. Rev. 497, at 501 [hereinafter "Schuller & Vidmar"].

<sup>154</sup> The Court of Appeal did just this in the recent decision of *Kokopenace, id.*, at paras. 25-26, *per* LaForme J.A.

<sup>155</sup> For a review of these concerns, and their ultimate rejection, see *Sherratt, supra*, note 136.

<sup>156</sup> *Sherratt, id.*, at 525; *Penney et al., supra*, note 101, at 640; Schuller & Vidmar, *supra*, note 153, at 501.

<sup>157</sup> See Iacobucci, *supra*, note 148.

<sup>158</sup> *Bain, supra*, note 16, at 104, *per* Cory J.

The jury vetting cases do not get us much further in terms of understanding the content of the right to trial by jury. I have suggested that some, if not all, of the essential features of the jury might properly be considered to be constitutionally guaranteed by section 11(f). At the very least, the Court ought to read sections 11(d) and 11(f) together, so that section 11(d) does not do all the conceptual heavy-lifting and so that the right to trial by jury does not become a merely vestigial right.