

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Davey, 2012 SCC 75, [2012] 3 S.C.R. 828 | **Date:** 20121221  **Docket:** 34179 |

**Between:**

**Troy Gilbert Davey**

Appellant

and

**Her Majesty the Queen**

Respondent

- and -

**Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Information and Privacy Commissioner of Ontario, David Asper Centre**

**for Constitutional Rights and Criminal Lawyers’ Association**

Interveners

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 88) | Karakatsanis J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell and Moldaver JJ. concurring) |

R. *v.* Davey, 2012 SCC 75, [2012] 3 S.C.R. 828

Troy Gilbert Davey Appellant

v.

Her Majesty The Queen Respondent

and

Canadian Civil Liberties Association,

British Columbia Civil Liberties Association,

Information and Privacy Commissioner of Ontario,

David Asper Centre for Constitutional Rights and

Criminal Lawyers’ Association Interveners

**Indexed as: R. *v.* Davey**

2012 SCC 75

File No.: 34179.

2012:  March 14, 15; 2012:  December 21.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for ontario

*Criminal law — Jurors — Selection — Appellant convicted of first degree murder for killing police officer — Prior to trial, Crown seeking personal opinions of local police officers as to “suitability” of prospective jurors for use in exercise of peremptory challenges — Neither annotated jury panel lists setting out opinions of local police officers nor fact that inquiries had been made was disclosed to defence — Whether it was appropriate to seek such opinions — Whether there should have been disclosure of same — Whether there is a reasonable possibility that such conduct affected trial fairness or gave rise to an appearance of unfairness, such that a miscarriage of justice occurred — Criminal Code, R.S.C. 1985, c. C‑46, s. 686(1)(a)(iii).*

D killed a police officer by slashing his throat. The only issue at trial was whether D had the requisite intent for murder, or whether he was guilty of manslaughter. D was convicted of first degree murder.

Approximately three weeks before trial, the jury panel lists were provided to both the Crown and the defence. The Crown sought the personal opinions of police officers from local police services regarding the suitability of prospective jurors, including any potential partiality for or against the Crown, for the purpose of exercising peremptory challenges. It was understood that police databases would not be used to check the lists, and that the comments were to be based on the officers’ knowledge of potential jurors in the community. One or two officers at each police service would review the lists and make general comments, such as “good”, “yes”, “ok” or “no”, or brief specific comments regarding relationships or roles in the community. The responses were compiled in a master list by an employee of the Crown office. Neither this list, nor the fact that inquiries had been made, was disclosed to the defence. Two of the jurors ultimately selected were noted as “good” and “ok” by the police services.

D appealed his conviction, alleging errors in the charge to the jury. While the appeal was pending, D requested and received the annotated jury panel lists. The Court of Appeal allowed the fresh evidence on the jury vetting issue, but ultimately dismissed the appeal, concluding that the police opinions were not “information” that was required to be disclosed; that the early release of the jury panel lists did not impact trial fairness; that the privacy rights of prospective jurors were not breached; and that the jury would not have been differently constituted if there had been disclosure of the police comments. Only the jury vetting issue has been appealed to this Court.

*Held*: The appeal should be dismissed.

Informal consultation with police officers must be approached with caution and the Crown should not engage in systematic consultations with police services regarding the suitability of jurors given the real risk that such inquiries could represent access to an informal database of the contacts a prospective juror has had with the police services and the criminal justice system. However, for the purpose of exercising its discretion in the peremptory challenge process, the Crown is permitted to ask the opinion of someone who is part of the prosecution team, or to consult with those assisting the prosecution, including individual police officers, regarding concerns relating to partiality, eligibility, or suitability of any prospective juror. Provided that any relevant information is disclosed, consultation that is limited to a few individual police officers does not, in itself, create an imbalance or an appearance of unfairness. Nor does it represent an unjustified invasion of juror privacy. It is consistent with the duty to uphold an impartial and competent jury. It is consistent with the right to exercise discretionary challenges. It is consistent with the rules of professional conduct. And it is consistent with consultation conducted by the defence.

If the Crown seeks the opinion of a police officer, any information received relevant to the selection process (touching on a potential juror’s eligibility, suitability, or ability to remain impartial) must be disclosed. However, general impressions, personal or public knowledge in the community, rumours or hunches, need not be disclosed. To the extent that the underlying information is readily ascertainable by members of the community, it is not linked to the prosecution’s role as an agent of the state, or to the Crown’s disproportionate access to resources, and there is no onus on the Crown to bring forward information that is readily obtainable elsewhere. This is not to say that the Crown is required to disclose the opinions of police along with the information on which those opinions are based. So long as the underlying information is disclosed, the defence will have access to the material on which the opinion is based, and can draw its own inferences for the purpose of exercising its peremptory challenges. However, where a police officer has knowledge, whether derived from her role as an officer or as a member of the community, that is relevant to the jury selection process, she must disclose it.

The assessment of the impact of a failure to disclose required under the *Dixon* test should be modified when the undisclosed information bears upon the choice of the trier of fact, rather than the merits of the case. Where the integrity of the choice of the trier of fact is at stake, the court must ask: first, whether the information ought to have been disclosed; and second, had the information been disclosed, whether there is a reasonable possibility that the jury would have been differently constituted. If not, trial fairness has not been compromised and the defence has not been prejudiced. Where non‑disclosure interferes with the accused’s use of his peremptory challenges to the extent that there is a reasonable possibility that the jury would have been differently constituted, this safeguard is undermined and the presumption that the jury is impartial may be displaced. The Crown would then have the opportunity to show, on balance, that the jury was impartial.

In the present case, the Crown should not have canvassed the three local police services for their opinion on the suitability of prospective jurors. These opinions clearly reflected information obtained as police officers and as residents in the community. In light of the broad nature of the inquiry conducted by the court officers, the numerous notations for which no basis was disclosed, and the fact that information obtained in the course of police activity may have played a role in the formation of the bald opinions provided, the Crown ought to have erred on the side of caution and disclosed the annotated jury panel lists to the defence.

It was nonetheless open to the Court of Appeal to find that there was no reasonable possibility that defence counsel would have exercised its peremptory challenges differently and that the jury would have been the same had the comments been disclosed. Absent any reasonable possibility that the defence was prejudiced or the trial was unfair, this finding is entitled to deference. Furthermore, the Crown’s request for the police opinions and the failure to disclose those opinions were not so offensive to the community’s sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice. There was no appearance of unfairness that would shake the public’s confidence in the administration of justice.

**Cases Cited**

**Referred to:** *R. v. Spiers*, 2012 ONCA 798, 113 O.R. (3d) 1; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777; *R. v. Emms*, 2012 SCC 74, [2012] 3 S.C.R. 810; *R. v. Pizzacalla* (1991), 5 O.R. (3d) 783; *R. v. Latimer*, [1997] 1 S.C.R. 217; *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65; *R. v. Kakegamic*, 2010 ONCA 903, 272 O.A.C. 205; *R. v. Teerhuis‑Moar*, 2007 MBQB 165, 217 Man. R. (2d) 270; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Sherratt*, [1991] 1 S.C.R. 509; *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Fagan* (1993), 18 C.R.R. (2d) 191; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222; *R. v. Dixon*, [1998] 1 S.C.R. 244; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *R. v. Hobbs*, 2010 NSCA 62, 293 N.S.R. (2d) 126, leave to appeal refused, [2010] 3 S.C.R. vi; *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857; *R. v. Barrow*, [1987] 2 S.C.R. 694; *St‑Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 11(*d*).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 626 to 644, 638(1)(*c*), 686(1)(*a*)(iii).

*Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

*Juries Act*, R.S.O. 1990, c. J.3, ss. 18(2), 20.

*Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

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APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Blair and Juriansz JJ.A.), 2010 ONCA 818, 103 O.R. (3d) 161, 272 O.A.C. 108, 264 C.C.C. (3d) 465, 81 C.R. (6th) 254, [2010] O.J. No. 5194 (QL), 2010 CarswellOnt 9068, upholding the accused’s conviction for first degree murder. Appeal dismissed.

*Christopher Hicks* and *Theodore Sarantis*, for the appellant.

*Michal Fairburn*, *Deborah Krick*, *John S. McInnes* and *Susan Magotiaux*, for the respondent.

*Frank Addario*, for the intervener the Canadian Civil Liberties Association.

*Nader R. Hasan* and *Gerald J. Chan*, for the intervener the British Columbia Civil Liberties Association.

*William S. Challis* and *Stephen McCammon*, for the intervener the Information and Privacy Commissioner of Ontario.

*Cheryl Milne* and *Lisa Austin*, for the intervener the David Asper Centre for Constitutional Rights.

*Anthony Moustacalis* and *Peter Thorning*, for the intervener the Criminal Lawyers’ Association.

The judgment to the Court was delivered by

1. Karakatsanis J. — This is one of several cases before the Court dealing with the issue of jury vetting, which arose in the wake of the revelation that a number of Crown offices in Ontario had engaged in a practice of inquiring into the backgrounds of prospective jurors prior to the jury selection process.[[1]](#footnote-1) In the other four cases before this Court, *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777 (appellants Yumnu, Cardoso andDuong),and *R. v. Emms*, 2012 SCC 74, [2012] 3 S.C.R. 810, my colleague Moldaver J. addresses the issue of whether it is appropriate for the Crown to ask the police to access state databases in order to determine juror eligibility. He concludes that criminal record checks to determine eligibility under provincial legislation and under s. 638(1)(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, are not improper, provided any information obtained relevant to the jury selection process is disclosed to the defence.
2. In this case, the Crown’s office did not seek information regarding prospective jurors from any state database, and the police did not conduct any investigation. Instead, the Crown office sought the personal opinions of police officers from three local police services with regard to prospective jurors.
3. The issue in this case is whether it was appropriate for the Crown to seek the opinion of local police officers as to the “suitability” of prospective jurors, for the purpose of assisting the Crown in the exercise of its peremptory challenges and, if so, whether those opinions should have been disclosed. Ultimately, this case turns on whether there is a reasonable possibility that such conduct affected trial fairness or gave rise to an appearance of unfairness, such that a miscarriage of justice occurred.
4. This was a notorious case in the local community. There was no dispute that the appellant, Davey, killed a police officer by slashing his throat. The only issue at trial was whether the appellant had the requisite intent for murder, or whether he was guilty of manslaughter. On February 22, 2007, in Cobourg, Ontario, the appellant was convicted of first degree murder.
5. The appellant appealed his conviction to the Court of Appeal for Ontario, alleging errors in the charge to the jury. While the appeal was pending, the appellant requested and received the annotated jury panel lists. The Court of Appeal allowed the fresh evidence on the jury vetting issue, but ultimately dismissed the appeal (2010 ONCA 818, 103 O.R. (3d) 161). Only the jury vetting issue has been appealed to this Court.
6. The appellant seeks a new trial on the basis that the collection and non-disclosure of opinions from the court officers (police officers designated to assist Crown counsel with court-related duties) occasioned a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) of the *Criminal Code*. Three of the jurors chosen in this case had notations from a police officer stating either “good”, “ok”, or “no”. The appellant argues that there is a reasonable possibility that the defence would have exercised their peremptory challenges differently if they had known of these notations, and the jury would have been differently constituted. The appellant says that the Crown did not fulfil its disclosure obligations, breached the privacy rights of potential jurors, and accessed state resources, thus creating an imbalance in the jury selection process and the appearance of a jury favourable to the Crown. Thus, the appellant submits that the trial was unfair and that the appearance of unfairness requires a new trial.
7. The Court of Appeal concluded that the police opinions were not “information” that was required to be disclosed; that the early release of the jury panel lists did not impact trial fairness; that the privacy rights of prospective jurors were not breached; and that the jury would not have been differently constituted if there had been disclosure of the police comments. It dismissed the appeal.
8. In my view, there should be no systematic distribution of jury panel lists to police services for comment regarding the suitability of jurors. In exercising its peremptory challenges, 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. Further, the privacy interests of prospective jurors should be protected, except as necessary for the administration of the criminal justice system.
9. I agree, however, that the Crown may engage in targeted consultation with a limited number of individuals working on the case with the prosecution, including police officers, to discuss concerns relating to the partiality, eligibility or suitability of a prospective juror. Any information relevant to the selection process must be disclosed, including any information acquired in the execution of police duties. If it is unclear whether a bald police opinion is based upon such information, the opinion should be disclosed.
10. In this case, the Crown received opinions based upon consultation with the three local police services. The opinions provided were based at least in part upon police information about the prospective jurors. Those opinions should have been disclosed. However, the Court of Appeal found that there was no reasonable possibility that the jurors were partial to the Crown. The court’s finding that the jury would not have been differently constituted had those opinions been disclosed was available on the evidence in this case. There was no error in principle and I would not interfere with the Court of Appeal’s conclusion that the Crown’s conduct in this case did not prejudice trial fairness, and did not lead to an appearance of unfairness that requires a new trial. I would dismiss the appeal.

I.Background

1. Jury panel lists are usually disclosed 10 days before trial, in accordance with s. 20 of the *Juries Act*, R.S.O. 1990, c. J.3. In this case, the jury panel lists were provided to both the Crown and the defence about three weeks prior to trial. Defence counsel showed the lists to the appellant, his family, and possibly the local referring solicitor.
2. In accordance with the practice of the local Crown office in Cobourg, copies of the jury panel lists were provided to the court officers at the three local police services: the Cobourg Police Service, the Port Hope Police Service, and the local division of the Ontario Provincial Police. They were asked for their opinion on the suitability of prospective jurors, including any potential partiality for or against the Crown, for the purpose of exercising peremptory challenges. It was understood that police databases would not be used to check the jury lists, and that the comments were to be based on the officers’ knowledge of potential jurors in the community. One or two officers at each police service would review the lists and add general comments, such as “good”, “yes”, “ok” or “no”, or brief specific comments regarding relationships or roles in the community. The lists were sometimes provided to other officers for their review. The responses were compiled in a master list by an employee of the Crown office.
3. Neither the list, nor the fact that inquiries had been made, was disclosed to the defence, although when someone on the list was identified as the deceased’s brother-in-law, this was disclosed and the person was removed from the jury panel.
4. There were notations beside 118 names out of the total 400 potential jurors. Fifty-one notations said “good” or “yes”, without indicating the basis for the opinion. During the pre-screening process, 11 of those 51 prospective jurors disclosed a relationship with the police, or that they knew the victim in some capacity. One of those noted as “good” had a cousin who was a police officer killed in the line of duty.
5. This trial was notorious in the community. As a result, significant pre-screening was conducted in the courtroom. The panels were first vetted by the trial judge for partiality arising from relationships to any witness or trial participant; “inside” knowledge of the case; involvement in any other case involving similar allegations, and other bases for hardship. At defence counsel’s request, the trial judge also screened the panels by asking whether anyone was “closely associated with members of the police force or correctional services”. Forty-five prospective jurors reported some form of a police/corrections relationship during the pre-selection vetting process. Ten of those 45 had concrete notations on the Crown’s list: four were positive, with some details. In addition, six notations simply said “good” or “yes”; one said “no” and two were queries.[[2]](#footnote-2)
6. Seventy-two prospective jurors were excused, due to a police or corrections relationship (37), connections to the victim (13), or connections to the defence (22). Eight prospective jurors declared a police/corrections relationship but were not excused by the trial judge, because they indicated they could remain impartial. Six were challenged peremptorily: three by the Crown and three by the defence.
7. After the in-court vetting and the challenges for cause based upon prior knowledge of the case that might prevent prospective jurors from remaining impartial, there were 13 potential jurors with notations left. The Crown used those notations as one factor in exercising its peremptory challenges, but placed limited weight on the comments, as the basis for the opinion was not provided. The Crown challenged two potential jurors with a negative notation but also challenged one potential juror with a positive notation; and, significantly, did not challenge another with a negative notation. At the end of the selection process, the defence had five peremptory challenges remaining and the Crown had three peremptory challenges remaining.
8. Three of the jurors who tried the case had notations beside their names: “good”, “ok”, and “no”.
9. Following the selection of the jury, a court security officer reported that a juror may have made a comment indicating a bias against the accused. The Crown immediately notified the judge and defence counsel, suggesting that the juror be separated from the others until the judge could make a determination. The juror was discharged, and both defence counsel and the judge commended Crown counsel.

II. Decision of the Court of Appeal (2010 ONCA 818, 103 O.R. (3d) 161)

1. Rosenberg J.A. concluded that there was no obligation to disclose the notations on the jury panel lists because they consisted of police “opinions” and not concrete information. The Court of Appeal also held that the early release of the lists did not affect the fairness of the trial, or the validity of the jury selection process, as the defence also received the lists early. Claims that the jury vetting violated provincial privacy legislation were not made out, and in any event, the court found that violations of privacy are not sufficient to undermine the fairness of the jury selection process.
2. Ultimately, the Court of Appeal found that the jury vetting did not afford the Crown an unfair advantage that affected trial fairness in this case. Crown counsel received only one-word opinions from police, which were not always relied upon. The Court of Appeal was unable to draw the inference that the jury would have been differently constituted.
3. Further, the Court of Appeal held that there was no appearance of unfairness, as a reasonable person would not conclude that the jury appeared biased: (1) the information was of limited use to the Crown; (2) the Crown disclosed instances where there was a real potential for bias; (3) there was pre-screening in which potential jurors were questioned about their connection to the police force; and (4) the jury vetting related to the use of peremptory challenges, which is an inherently arbitrary exercise.
4. The Court of Appeal also distinguished this case from situations in which the Crown deliberately sets out to engineer a favourable jury, as occurred in *R. v. Pizzacalla* (1991), 5 O.R. (3d) 783 (C.A.), or where the police personally question prospective jurors, as was the case in *R. v. Latimer*, [1997] 1 S.C.R. 217. Ultimately, this case did not give rise to the appearance of a miscarriage of justice.

III. The Issues

1. This appeal requires the Court to determine whether the Crown’s inquiry regarding potential jurors and the failure to disclose the related notations on the jury panel lists resulted in a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) of the *Criminal Code*. This raises the following questions:

1.As a matter of general principle, may Crown counsel seek the opinion of police officers as to the suitability of prospective jurors: If so, what must be disclosed?

2.Did the Crown’s failure to disclose the opinions and other information obtained affect the fairness of this trial?

3.Did the circumstances of this case create an appearance of unfairness that was a serious interference with the administration of justice, or was so offensive to the community’s sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice?

IV. Analysis

A. *General Principles: May Crown Collect Police Officers’ Opinions (and Other Information) Regarding Potential Jurors? What Must Be Disclosed?*

1. As Moldaver J. concludes in the companion cases, jury vetting, particularly if it goes beyond eligibility criteria, raises serious concerns for the administration of our criminal justice system: see *Yumnu*, at paras. 36-43. As such, any scrutiny of prospective jurors using government or police databases should be limited to criminal record checks for the purpose of determining juror eligibility under provincial legislation, or acceptability under s. 638(1)(*c*) of the *Criminal Code*. Any information obtained relevant to the selection process must be disclosed. This includes information bearing on the eligibility, partiality or suitability of potential jurors: see *Yumnu*, at paras. 50-55.
2. This case raises the issue of whether the Crown can make any further general inquiries of police officers beyond such limited criminal record checks. The appellant and a number of interveners submitted that no further checks should be permitted or, if they are, the results must be disclosed.
3. The Information and Privacy Commissioner of Ontario conducted an investigation in the wake of the disclosure of jury vetting by the Crown. Her report emphasized that the interests of prospective jurors against the collection and collation of their personal information by the state must be protected, except as necessary for the administration of justice. She concluded that there is a substantial public interest in protecting the privacy rights of prospective jurors as an essential component of the administration of criminal justice, and that any inquiries or investigation by the Crown, beyond conducting criminal record checks, should be carried out under court supervision.
4. The Crown agrees that there should be no systematic distribution of jury lists for comment regarding the prospective jurors. However, the Crown submits that it should be permitted to seek the opinions of police officers who form part of the prosecution team, or are associated with it, and that, in keeping with a balanced jury selection process, those opinions need not be disclosed.
5. In my view, informal consultation with police officers must be approached with caution. Seeking information regarding prospective jurors from members of police services presents a number of risks that threaten public confidence in jury selection and the administration of the criminal justice system.

(1) The Criminal Jury System

1. Our jury system is based upon trial by one’s peers: twelve randomly chosen, representative jurors. The jury reflects the common sense, the values, and the conscience of the community. The selection process must ensure an independent, impartial, and competent jury. It must promote public confidence in the jury’s verdict, and in the administration of criminal justice. It should also, to the extent possible, protect the legitimate privacy interests of prospective jurors. See *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.), at pp. 120-21; *R. v. Kakegamic*, 2010 ONCA 903, 272 O.A.C. 205, at paras. 42-44; *R. v. Teerhuis-Moar*, 2007 MBQB 165, 217 Man. R. (2d) 270, at paras. 117-25.
2. Challenges for cause and the court vetting process in ss. 626 to 644 of the *Criminal Code* are designed to ensure a jury that is eligible, impartial and competent. Subsequent to the amendments to the jury selection process following this Court’s decision in *R. v. Bain*, [1992] 1 S.C.R. 91, neither party has the right to select a jury, or has the positive power to shape a jury. Jurors are selected at random, and randomness ensures representativeness: *R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 525. As officers of the court, all counsel have a responsibility to uphold the *Charter* right, as guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, to an independent and impartial jury. Either party can challenge a juror for cause, based on objective grounds.
3. However, the *Criminal Code* gives the parties a limited opportunity to object to specific jurors chosen from the jury list. Peremptory challenges can be exercised on purely subjective grounds. Crown counsel, as local ministers of justice, exercise that choice on behalf of the public. The alternating order and equal number of peremptory challenges give both the Crown and the defence an equal opportunity to object to a limited number of potential jurors to address any other concerns regarding suitability or concerns that may fall short of proof of partiality. Our post-*Bain* jury selection process ensures equality of influence over the composition of the jury as between the parties.
4. The selection process permits some limited advance notice and a controlled review of jury panel lists.[[3]](#footnote-3) Any limited consultation by the Crown or defence counsel is subject to respect for privacy interests of the potential jurors as outlined by the rules of professional conduct. See the Law Society of Upper Canada’s *Rules of Professional Conduct* (online), Rule 4.05(1) and (2), and the Federation of Law Societies of Canada’s *Model Code of Professional Conduct* (online), Rule 4.05(1) and (2).

(2) The Impact of Jury Vetting on the Criminal Jury System

1. In my view, the Crown should not engage in systematic consultations with police services regarding the suitability of jurors. There is a real risk that such inquiries could represent access to an informal database of the contacts a prospective juror has had with the police services and the criminal justice system. The defence does not have access to such state resources. This creates an imbalance and the jury might be perceived to be favourable to the Crown.
2. Further, these inquiries are contrary to the important privacy interests of all prospective jurors. As this Court held, in the context of the jury secrecy rule, in *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344, at para. 52:

Our system of jury selection is sensitive to the privacy interests of prospective jurors (see *R. v. Williams*, [1998] 1 S.C.R. 1128), and the proper functioning of the jury system, a constitutionally protected right in serious criminal charges, depends upon the willingness of jurors to discharge their functions honestly and honourably. This in turn is dependent, at the very minimum, on a system that ensures the safety of jurors, their sense of security, as well as their privacy.

1. Such inquiries may also appear to be an attempt on the part of the Crown to select a favourable jury. As Cory J. noted in *Bain*, at p. 103:

The jury is the ultimate decision maker. The fate of the accused is in its hands. The jury 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.

1. Finally, such inquiries raise the spectre of the undue blending of investigative and prosecutorial roles. The importance of keeping these activities separate was noted in the Ontario *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993), at p. 39: “. . . separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both”.

(3) The Scope of Acceptable Inquiries

1. I agree with the Court of Appeal that, for the purpose of exercising its discretion in the peremptory challenge process, the Crown is permitted to ask the opinion of someone who is part of the prosecution team, or to consult with those assisting the prosecution, including individual police officers, regarding concerns relating to partiality, eligibility, or suitability of any prospective juror. When controlled and limited to a few individual police officers, consultation does not, in itself, create an imbalance or an appearance of unfairness. For example, the officer in charge of the investigation routinely assists the Crown in the courtroom. Part of this assistance could include reviewing the jury list in advance of the hearing. However, except for criminal record checks as permitted in *Yumnu*, database searches and police investigation should not be permitted.
2. In principle, there is nothing wrong with the Crown’s using the collective experience and judgment of the prosecution team in exercising discretionary decisions. It is consistent with the duty to uphold an impartial and competent jury. It is consistent with the right to exercise discretionary challenges. It is consistent with the rules of professional conduct. And it is consistent with consultation conducted by the defence.
3. Provided that any relevant information is disclosed, such limited consultation does not represent the inappropriate use of police resources or information, and there is no imbalance that would give rise to a miscarriage of justice. This consultation would reflect a level playing field when it comes to jury selection and would guarantee each party the right to protect its discretionary and strategic choices. If the consultation is limited in this way, it does not represent an unjustified invasion of juror privacy.

(4) Disclosure Requirements

1. Obviously, if the Crown seeks the opinion of a police officer, any information received relevant to the selection process (touching on a potential juror’s eligibility, suitability, or ability to remain impartial) must be disclosed. This includes any information obtained as a result of the officer’s execution of police duties. The more difficult issue is whether the opinion of a police officer must be disclosed.
2. The Court of Appeal determined that the limit of the Crown’s disclosure obligations is reached where what is sought is nothing more than the personal opinions of police officers about potential jurors. After citing this Court’s decision in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 17, that the duty to disclose extends to “any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence”, Rosenberg J.A. concluded:

Police officers’ personal opinions about potential jurors are not relevant information relating to the investigation and are clearly not evidence to be adduced against the accused. Finally, such opinions are not “information” that will assist the accused in making full answer and defence. [para. 31]

1. The appellant submits that the Court of Appeal unduly narrowed the Crown’s disclosure obligations by requiring only that “concrete information” be disclosed, and not police officers’ opinions about prospective jurors. The information was far from being “clearly irrelevant”; it was of some use to the Crown, could have been of some use to the defence, and should therefore have been disclosed.
2. The respondent replies that disclosure has never extended to the opinions and general knowledge of prosecutors and police (except for those opinions capable of being evidence). The mere opinions of persons associated with the prosecution, with whom the Crown consults in preparation for trial, relating to tactical or discretionary decisions are not subject to the disclosure obligations. Just because those opinions may be useful to the defence does not give rise to disclosure obligations. The respondent equates the notations with the analysis, opinion and strategy protected by litigation or work product privilege.
3. This Court has recognized limits on disclosure obligations: the Crown must disclose all material unless it is (1) clearly irrelevant, such that it is not of any use to the defence; (2) protected by privilege; or (3) beyond the Crown’s control: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. However, in *R. v. Fagan* (1993), 18 C.R.R. (2d) 191 (Ont. Ct. (Gen. Div.)), Humphrey J. concluded: “I think any information about a juror that would realistically affect a decision as to whether to accept or challenge that juror is information which should be shared by the Crown with the defence” (p. 191). Further, as Fish J. observed in *Blank v. Canada* (*Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 55, the obligation to disclose is based on the Crown’s disproportionate access to vast resources.
4. It seems to me that general impressions, personal or public knowledge in the community, rumours or hunches, need not be disclosed: see *Yumnu*, at para. 64. To the extent that the underlying information is readily ascertainable by members of the community, it is not linked to the prosecution’s role as an agent of the state, or to the Crown’s disproportionate access to resources, and there is no onus on the Crown to bring forward information that is easily obtainable elsewhere. The same logic applies to information about a prospective juror readily available on the internet. Further, the subjective feelings, hunches, or suspicions of members of the prosecution’s team with regard to prospective jurors do not engage “the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence”: *Stinchcombe*, at p. 336. Thus, for instance, the Crown need not disclose observations regarding demeanour in the courtroom, or views based upon general experience and judgment, or upon public information.[[4]](#footnote-4)
5. When the Crown receives information that may bear on the jury selection process, it must disclose the information to the defence. As this Court recognized in *McNeil*, at para. 24: “. . . the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown”. While this statement was made in the context of the police’s duty to disclose relevant information uncovered during the investigation of a crime, it applies with equal force in the context of a police officer’s recommendations with regard to jury composition that are based on knowledge gathered in the course of law enforcement activities. The Crown must seek the basis for the opinions provided and determine whether they are based upon information that is reasonably accurate and reliably based.
6. This is not to say that the Crown is required to disclose the opinions of police along with the information on which those opinions are based. So long as the underlying information is disclosed, the defence will have access to the material on which the opinion is based, and can draw its own inferences for the purpose of exercising its peremptory challenges.
7. However, where a police officer has knowledge, whether derived from her role as an officer or as a member of the community, that is relevant to the jury selection process, she must disclose it. Where police officers are individual participants in the prosecution team, they too have a duty to uphold the administration of justice by bringing such knowledge forward.

B. *Miscarriage of Justice*

1. In his concurring opinion in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, LeBel J. considered the scope of the miscarriages of justice contemplated by s. 686(1)(*a*)(iii). He concluded, at para. 69, that when considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice, “[t]he essential question in that regard is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness.”
2. In *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89, Cromwell J.A. provided a helpful summary of the two types of unfairness contemplated within the meaning of miscarriage of justice under s. 686(1)(*a*)(iii):

. . . the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice . . . . The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice . . . . [Citations omitted.]

C. *Was the Trial Unfair?*

1. The appellant urges this Court to use the two-part test developed in *R. v. Dixon*, [1998] 1 S.C.R. 244, to determine whether a new trial should be ordered for a breach of his right to disclosure under s. 7 of the *Charter*. Under this test, a lack of disclosure violates an accused’s right to full answer and defence where there is a reasonable possibility that the verdict might have been different, or where the lack of disclosure affected the overall fairness of the trial process: *R. v. Taillefer*, 2003 SCC 70,[2003] 3 S.C.R. 307.
2. However, it seems to me that the assessment of the impact of a failure to disclose that is required under the *Dixon* test should be modified when the undisclosed information does not bear on the merits of the case made by the prosecution or defence, but rather upon the choice of the trier of fact.
3. Adapting the *Dixon* principles to these circumstances, the court must ask: first, whether the information ought to have been disclosed; and second, had the information been disclosed, whether there is a reasonable possibility that the jury would have been differently constituted. If not, trial fairness has not been compromised and the defence has not been prejudiced.
4. However, even if one or two jurors may have been different, I am not persuaded, as the Nova Scotia Court of Appeal was in *R. v. Hobbs*, 2010 NSCA 62, 293 N.S.R. (2d) 126, leave to appeal refused, [2010] 3 S.C.R. vi, that this would necessarily end the inquiry. The jury selection process is designed to provide safeguards to ensure the impartiality of the jury: see *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857, at para. 65, and *R. v. Barrow*, [1987] 2 S.C.R. 694, at p. 714. The accused’s ability to exercise his peremptory challenges is one of these safeguards: see *Sherratt*, at pp. 532-33. Where non-disclosure interferes with the accused’s use of his peremptory challenges to the extent that there is a reasonable possibility that the jury would have been differently constituted, this safeguard is undermined. It seems to me that in such circumstances, the presumption that the jury is impartial is displaced. However, it may be that the Crown should then have the opportunity to show, on balance, that the jury was impartial.[[5]](#footnote-5) Given my conclusion in this case that the Court of Appeal was entitled to find that the jury would not have been differently constituted, I need not finally decide the matter.

(1) Was the Scope of the Crown’s Inquiry Inappropriate?

1. The Crown should not have canvassed the three local police services for their opinion on the suitability of prospective jurors. The lists went to court officers, who in turn consulted with other members of their respective police services. For example, in the case of the Port Hope Police Service, a number of sergeants and the Deputy Chief may have been consulted. Inquiries of this scope are inappropriate, as they engage police services in their law enforcement role, as opposed to individual police officers in their role as associated with the prosecution team.
2. The agreed statement of facts indicates that the Crown invited the police officers’ opinions regarding the jury panel lists based upon the court “officers’ knowledge of potential jurors in the community”: A.R., vol. I, at p. 37. Officers clearly understood that police databases were not to be used in checking the lists.
3. The Court of Appeal found that the notations on the jury panel lists amounted to personal opinions. However, the notations were clearly more than personal views. The opinions were more than the impressions and personal views of the court officers, and were not solely based on their interactions with the particular prospective jurors, or the jurors’ reputation in the community. Indeed, some of the specific notations were obviously based upon police information.[[6]](#footnote-6) Further, the court officers chose to consult with other police officers. An opinion of “suitability” from police services, including “any potential partiality for or against the Crown” (A.R., vol. I, at p. 37), could readily be based on information that the police services acquired in their law enforcement role. In the circumstances of this case, the opinions clearly reflected information obtained as police officers, and as residents in the community.

(2) Was the Crown Obliged to Disclose the Annotated Jury Panel Lists?

1. The Crown should have disclosed the notations on the jury panel lists. The inquiry conducted by the court officers produced numerous items of information regarding relationships in Cobourg and the surrounding area that reasonably might have assisted the accused in the jury selection process. In light of the broad nature of the inquiry conducted by the court officers, the numerous notations for which no basis was disclosed, and the fact that information obtained in the course of police activity may have played a role in the formation of the bald opinions provided, the Crown ought to have erred on the side of caution and disclosed the annotated jury lists to the defence.

(3) Did the Failure to Disclose Render the Trial Unfair?

1. The appellant submits that the failure to disclose the notations involving three jurors violated his right to a fair trial. Given the scarcity of information usually provided about jurors, the defence says that the value of the officers’ opinions in making challenge decisions was significant. Here, the defence argues that it would have used its peremptory challenges differently. Specifically, there was a reasonable possibility that, had the defence had access to the annotated jury panel lists, they would have challenged the two jurors with “good” and “ok”, as they would have recognized that a positive notation tended to be associated with a positive relationship with police and — in a trial involving the killing of a police officer — tended to suggest that a prospective juror was partial to the Crown.
2. The appellant relies on *Hobbs*, for the proposition that a new trial is warranted where there is a reasonable possibility that the accused would have used his challenges differently, leading to a jury that may have been differently constituted.
3. In *Hobbs*, the lead investigator verified the names on the jury list against two different state databases. TheCrown conceded in that case that there was a reasonable possibility that the defence would have exercised its peremptory challenges differently in two instances if it had had the undisclosed information. The Nova Scotia Court of Appeal found that the jury would have been differently constituted.
4. Here, the Court of Appeal found that it was speculative “that the accused might possibly have exercised his peremptory challenges in a different way” (para. 33). Rosenberg J.A. concluded that he was unable to draw the inference that the jury would have been differently constituted in this case. Further, in determining that there was no appearance of unfairness, he found that the composition of the jury that tried the appellant’s case would not raise a reasonable apprehension of bias.
5. The Court of Appeal dealt with this issue as a court of first instance. It had the benefit of hindsight and the record created by the extensive pre-screening and challenges for cause that took place in this case. Its findings of fact deserve deference: see *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at para. 36.
6. For the reasons that follow, I am satisfied that the Court of Appeal did not err in principle and it was open to the court to find that there was no reasonable possibility that the jury would have been differently constituted.

(a) *The Nature of the Notations Regarding the Jurors Selected*

1. The appellant’s submissions are premised upon the argument that there was a tendency for the police to make positive notations for individuals who had positive relationships with the police and thus were partial to the prosecution. The record does not support the inference that a positive notation meant a close relationship with the police.
2. First, the proposition that a positive notation tended to indicate a relationship with the police was true for only a small percentage of those who had a positive notation. Of the 51 positive opinions with no other information, the pre-screening process disclosed that only 11 were associated with a police/corrections relationship (most of those were of a general nature, including people who knew the deceased officer and/or his family). Of the 45 people who disclosed a police/corrections relationship in the pre-screening process, only 10 had positive notations (one was negative and two were queries).
3. Second, all prospective jurors were asked by the judge in the pre-screening process to disclose any general or specific relationship with the police or corrections. Juror 7 (“ok”) and juror 8 (“good”) did not disclose any such relationship. In many cases, specific information noted by police on the jury list was ultimately mentioned by the prospective jurors in court during the pre-screening process. The extensive pre-screening process and the challenge for cause eliminated any concern that “good” or “ok” meant a prospective juror had a relationship with police.
4. Finally, in consulting with the three local police services, the Crown asked for the court officers’ opinions about the “suitability” of prospective jurors, including partiality for or against the Crown. In that context, a positive indication of suitability implies no partiality for either party.
5. As a result, I agree with the Court of Appeal that a positive notation did not mean that a juror was partial towards the Crown or had a close relationship with police; or that a negative notation meant partiality towards the accused. For all these reasons, it was open to the court to find that neither defence counsel nor an informed member of the public would be concerned that there was a reasonable possibility that jurors with positive notations who made it through the pre-screening and challenge for cause were partial towards the Crown.

(b) *Impact on the Defence’s Peremptory Challenges*

1. Although two of the jurors were noted as “good” and “ok”, those notations obviously had little value, as the Crown placed little reliance on the notations in exercising its peremptory challenges. Even with access to the annotated list, defence counsel would have observed Crown counsel challenge a prospective juror with a “good” notation and allow a prospective juror with a “no” notation to become a juror, before the two jurors with “good” and “ok” went unchallenged. As noted in the evidence of Crown counsel, the pre-screening process allowed counsel to assess some prospective jurors based upon their responses in court. Thus, it was open to the Court of Appeal to find that defence counsel would have understood the notations to be of very little value.
2. Further, the defence had five challenges left at the end of jury selection, which indicates that, in light of the extensive disclosure provided in pre-screening and during the challenge for cause, they were satisfied with the jury selected. In these circumstances, the bald opinions “good” and “ok” were superseded by the extensive pre-screening done with the trial judge, and the information it disclosed about the prospective jurors.
3. In conclusion, it was open to the Court of Appeal to find on this record that there was no reasonable possibility that defence counsel would have exercised its peremptory challenges differently, and that the jury would have been the same had the comments been disclosed. This finding is entitled to deference. As a result, I am unable to find that there is a reasonable possibility that the defence was prejudiced or the trial was unfair.

D. *Appearance of Unfairness*

1. Where no actual prejudice has been demonstrated, in order to warrant a new trial the appearance of unfairness must be pronounced, such that it would be a serious interference with the administration of justice and offend the community’s sense of fair play and decency. In determining whether the conduct reaches the level of a miscarriage of justice, “[w]e 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”: *Khan*, *per* LeBel J., at para. 73.
2. The appellant contends that an appearance of unfairness sufficient to give rise to a miscarriage of justice arose in this case due to the informational imbalance in favour of the Crown, an appearance of bias on the part of the jury, and the Crown’s violation of provincial statutes.

(1) Informational Imbalance in Favour of the Crown

1. In this case, two of the jurors ultimately selected were noted as “good” and “ok” by the police services serving Cobourg and its surrounding areas. However, those notations obviously had little value, as the factual basis for the opinion was not provided. That the notations had little impact on the jury selection process is further evident in the fact that Crown counsel placed little reliance on the notations in exercising its peremptory challenges, challenging a juror with a positive notation and not challenging another with a negative notation.

(2) Apprehension of Bias

1. For the reasons outlined above, an informed member of the public would be satisfied that the extensive in-court vetting process removed anyone with a connection or any partiality to the Crown. All those with a police or corrections relationship were asked to identify themselves. Large numbers of potential jurors who disclosed relationships with police, corrections, witnesses or the defence were excused by the trial judge. The extensive pre-screening process and the challenge for cause eliminated any concern that “good” or “ok” meant a prospective juror was partial to the Crown.
2. Further, an observer would also be aware that Crown counsel in this case demonstrated sensitivity to any hint of partiality against the accused. Crown counsel had a relative of the deceased removed from the jury list and disclosed the potential bias of one of the jurors, earning commendation for his professionalism from both the trial judge and experienced defence counsel. While the Crown’s failure to disclose the annotated jury lists was serious and must not be repeated, it was not motivated by improper purposes, such as an attempt to secure a jury favourable to the Crown.

(3) Infringement of Provincial Legislation

(a) *Juries Act*

1. The appellant submits that the unfairness in this case is highlighted by the fact that the Crown violated s. 20 of the *Juries Act*, which is intended to ensure that the parties have equal access to information.
2. Section 20 of the *Juries Act* provides that the sheriff must keep the jury roll “under lock and key . . . until ten days before the sittings of the court”. The Crown Attorney does not administer the Act. The Ministry staff manages jury administration on behalf of the Ontario Superior Court of Justice.
3. The trial was scheduled to commence January 8, 2007. The Crown received the list early, on December 18, 2006. The parties have agreed that “[i]t was not policy for the Cobourg Crown’s office to obtain the list outside the 10-day period, nor did the Crown ask for the list outside the period in this case. The list was simply sent to their office early. It is reasonable to infer that the Christmas holidays may have impacted the timing of the release of the list in this case”: A.R., vol. I, at p. 35. The defence also received the list early.
4. I agree with the Court of Appeal that there was no evidence that the Crown obtained an unfair advantage by reason of the early release of the list. There is no evidence that the Crown used the extra time for additional investigation.

(b) *Privacy Violation*

1. The appellant says that the consultation process violated the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. I agree with the Court of Appeal’s conclusion: “. . . the appellant has not articulated how the alleged violation of this provincial legislation undermined the fairness of his trial and, in particular, how alleged violations of the privacy rights of others (the potential jurors) affected his right to a fair trial” (para. 29).

(4) Conclusion on Appearance of Unfairness

1. In the context of jury selection, the fundamental goal of Crown disclosure is to ensure that the accused has access to relevant information known to the Crown and the police. This Court recognized in *Bain* that where the Crown has additional power over the defence in the jury selection process, an appearance of unfairness is created (p. 104). Jury vetting is a practice that risks undermining the personal privacy of prospective jurors, our jury system, and the administration of criminal justice.
2. The Crown had recourse to law enforcement resources that were not available and not disclosed to the defence. This created an imbalance, particularly in a case where the victim was a police officer. It was inappropriate for the Crown to broadly canvass police services for comment on prospective jurors. This conduct should not be repeated.
3. On the other hand, the police services clearly understood that state databases were not to be searched, and no investigation was conducted. The usefulness of the bald opinions was limited. Crown counsel was not motivated by improper purposes, and was diligent in twice disclosing information that might suggest partiality against the defence. The defence also conducted its own consultation with local residents. The pre-screening process, conducted by the trial judge in the presence of counsel, provided a much more detailed disclosure of useful information than that which was contained on the annotated jury list.
4. For these reasons, I do not think that a reasonable person would see the circumstances of this case as rising to the level of either risk of a partial jury or unfairness of the trial. The Crown’s request for the police opinions and the failure to disclose those opinions were not so offensive to the community’s sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice. There was no appearance of unfairness that would shake the public’s confidence in the administration of justice.
5. The appellant had a fair trial and there was no miscarriage of justice. I would dismiss the appeal.

*Appeal dismissed.*

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Solicitor for the respondent:  Attorney General of Ontario, Toronto.

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Solicitor for the intervener the David Asper Centre for Constitutional Rights:  University of Toronto, Toronto.

Solicitors for the intervener the Criminal Lawyers’ Association:  Anthony Moustacalis, Toronto; Brauti Thorning Zibarras, Toronto.

1. The parties brought to our attention that while these appeals were under reserve, the Ontario Court of Appeal released a further decision regarding jury vetting, *R. v. Spiers*, 2012 ONCA 798, 113 O.R. (3d) 1. [↑](#footnote-ref-1)
2. The figures regarding the relationships of prospective jurors in the community have been determined based on the information disclosed in the transcript of the jury selection held on January 8 and January 9, 2007, before Scott J. of the Ontario Superior Court of Justice in Cobourg. [↑](#footnote-ref-2)
3. In Ontario, the occupations are also listed pursuant to s. 18(2) of Ontario’s *Juries Act*, which requires the sheriff to include the name, the number of each name on the jury roll, the juror’s place of residence, and the juror’s occupation, on the panel list. [↑](#footnote-ref-3)
4. For instance, in this case, notations included: “nice lady” (accompanied by “no”); “owner [a named business]” (accompanied by “good”). [↑](#footnote-ref-4)
5. Even if the Crown could establish that the trial was fair by showing that the jury was impartial, it may be necessary for the Crown to establish that the interference with the accused’s right to meaningfully engage in the peremptory challenge process, as provided by the *Criminal Code*, did not give rise to an appearance of unfairness that would amount to a miscarriage of justice. [↑](#footnote-ref-5)
6. Some specific factual notations, such as “cmplnt. in two thefts”, and “no (witness in [B] case)”, make it clear that officers relied upon police information. [↑](#footnote-ref-6)