

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Yumnu, 2012 SCC 73, [2012] 3 S.C.R. 777 | **Date:** 20121221**Docket:** 34090, 34091, 34340 |

**Between:**

**Ibrahim Yumnu**

Appellant

and

**Her Majesty the Queen**

Respondent

- and -

**Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Ontario Crown Attorneys’ Association, Information and Privacy Commissioner of Ontario, David Asper Centre for Constitutional Rights and Criminal Lawyers’ Association**

Interveners

**And Between:**

**Vinicio Cardoso**

Appellant

and

**Her Majesty the Queen**

Respondent

- and -

**Canadian Civil Liberties Association, British Columbia Civil Liberties Asssociation, Ontario Crown Attorneys’ Association, Information and Privacy Commissioner of Ontario, David Asper Centre for Constitutional Rights and Criminal Lawyers’ Association**

Interveners

**And Between:**

**Tung Chi Duong**

Appellant

and

**Her Majesty the Queen**

Respondent

- and -

**Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Ontario Crown Attorneys’ Association, Information and Privacy Commissioner of**

**Ontario, David Asper Centre for Constitutional Rights, Criminal Lawyers’ Association**

**and Attorney General of Alberta**

Interveners

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

|  |  |
| --- | --- |
| **Reasons for Judgment:**(paras. 1 to 90) | Moldaver J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ. concurring) |

R. *v.* Yumnu, 2012 SCC 73, [2012] 3 S.C.R. 777

Ibrahim Yumnu Appellant

v.

Her Majesty The Queen Respondent

and

Canadian Civil Liberties Association, British Columbia

Civil Liberties Association, Ontario Crown Attorneys’

Association, Information and Privacy Commissioner of

Ontario, David Asper Centre for Constitutional Rights

and Criminal Lawyers’ Association Interveners

‑ and -

Vinicio Cardoso Appellant

v.

Her Majesty The Queen Respondent

and

Canadian Civil Liberties Association, British Columbia

Civil Liberties Association, Ontario Crown Attorneys’

Association, Information and Privacy Commissioner of

Ontario, David Asper Centre for Constitutional Rights

and Criminal Lawyers’ Association Interveners

‑ and ‑

Tung Chi Duong Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Alberta, Canadian Civil Liberties Association,

British Columbia Civil Liberties Association, Ontario Crown

Attorneys’ Association, Information and Privacy Commissioner

of Ontario, David Asper Centre for Constitutional Rights and

Criminal Lawyers’ Association

 Interveners

**Indexed as: R. *v.* Yumnu**

2012 SCC 73

File Nos.: 34090, 34091, 34340.

2012:  March 14 and 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 — Appellants convicted of first degree murder and conspiracy to commit murder — Prior to jury selection, Crown requesting that police conduct criminal record checks of prospective jurors and also provide comments on whether any prospective jurors were “disreputable persons” — None of the information received in response by Crown disclosed to defence — Whether it was appropriate to seek such information — 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.*

 Following a trial in Barrie, Ontario, each of the appellants was convicted of two counts of first degree murder and two counts of conspiracy to commit murder. They appealed from their convictions, raising grounds relating to the adequacy of the trial judge’s charge to the jury. While the appeals were under reserve, the appellants became aware of a “jury vetting” practice in the Barrie area, consisting of inquiries conducted by the police, at the behest of the Crown Attorney’s office, as to whether potential jurors had a criminal record or whether they were otherwise “disreputable persons” who would be undesirable as jurors. It was ascertained that in the present case, vetting of the jury lists by the police in response to the Crown’s request netted information about 10 individuals who remained in the pool of prospective jurors at the peremptory challenge stage of the proceedings. None of this information was shared with the defence. The appeals were reopened to consider evidence and arguments concerning the propriety of the vetting practice and its impact on the appellants’ trial. The Court of Appeal dismissed all three appeals. With respect to the ground of appeal related to jury vetting, the Court of Appeal found that the Crown had failed to disclose information obtained from the jury vetting process that might have assisted the appellants in the exercise of their peremptory challenges, but it was not satisfied that the appellants suffered any prejudice from the Crown’s failure to meet its disclosure obligations. The Court of Appeal held that there was no basis to conclude that the Crown’s failure to disclose caused actual unfairness in the peremptory challenge process, or that the jury vetting practice created an appearance of unfairness.

 *Held*: The appeals should be dismissed.

 Jury vetting by the Crown and police gives rise to a number of concerns. First is the prospect of the Crown and police joining forces to obtain a jury favourable to their cause. Second is the fundamental precept of our justice system that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”. Third is juror privacy. There are, however, countervailing interests at play that warrant some limited checking and some minimal intrusions into the private lives of potential jurors. Only those persons eligible to serve as jurors should be permitted to participate in the process. Under provincial statutes and the *Criminal Code*, a potential juror’s criminal antecedents, and in some provinces his or her pending charges, may render that person ineligible for jury duty or result in his or her removal from the jury pool following a successful challenge for cause. Self‑reporting is one way of screening potential jurors, but it has proved to be less than satisfactory. Accordingly, absent legislation to the contrary, the authorities should be permitted to do criminal record checks on potential jurors to determine whether they are eligible to serve as jurors. In addition, in those provinces where the eligibility criteria cover persons who have been charged with a criminal offence, this is also something the authorities may properly check for. It is thus permissible for the Crown, with the assistance of the police, to do limited background checks using multiple police databases to identify potential jurors who, by virtue of their criminal conduct, are not eligible for jury duty. The imbalance resulting from the defence’s inability to conduct such searches is overcome by the disclosure obligations placed on the Crown. Information received by the Crown that is relevant to the jury selection process must be turned over to the defence, thereby restoring the balance. In return, defence counsel, as officers of the court, must make disclosure to both the court and Crown counsel where they know or have good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty or cannot serve on a particular case due to matters of obvious partiality.

 When it is discovered at the appeal stage that information about prospective jurors which should have been disclosed at trial was not disclosed, persons who seek a new trial on the basis that this non‑disclosure of information deprived them of their s. 7 *Charter* right to a fair trial 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. In addition to these two steps, in the event the jury would have been differently constituted, it may be that the Crown should then have the opportunity to show, on balance, that the jury was nonetheless impartial.

 With respect to the appearance of unfairness, there must be conduct on the part of the Crown and the police, within and surrounding the jury selection process, that would constitute a serious interference with the administration of justice and offend the community’s sense of fair play and decency. When conduct of that nature is found to exist, it matters not that the accused may otherwise have had a fair trial; nor is it necessary to find that the accused may have been wrongfully convicted. It is the conduct itself that gives rise to a miscarriage of justice and demands that a new trial be ordered.

 In the case at bar, the Court of Appeal acted as a court of first instance in respect of the jury vetting issue. In these circumstances, its findings, like those of a trial court, are entitled to deference. On the issue of trial fairness, there is no basis for interfering with the findings of the Court of Appeal on the impact — or the lack of impact — that the jury vetting practice had on the jury selection process. Although the Crown failed in its disclosure obligations, as found by the Court of Appeal, there was no reasonable possibility that the jury would have been differently constituted had the pertinent information obtained from the vetting process been disclosed. The appellants received a fair trial by an impartial jury.

 As for the appearance of unfairness and the suggestion that the verdicts are the product of a miscarriage of justice, although aspects of the Crown’s conduct were improper and should not be repeated, what occurred here did not constitute a serious interference with the administration of justice, nor was it so offensive to the community’s sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice. The record checks were carried out in good faith and there was no attempt on the part of the police or the Crown to obtain a favourable jury. There is no basis for ordering a new trial.

**Cases Cited**

 **Referred to:** *R. v.* *Latimer*, [1997] 1 S.C.R. 217; *R. v. Sussex* *Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Dixon*, [1998] 1 S.C.R. 244; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828.

**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(1), 632(*a*) to (*c*), 633, 634, 635, 638(1)(*a*) to (*f*).

*Juries Act*, R.S.O. 1990, c. J.3, ss. 4(b) [am. 2009, c. 33, Sch. 2, s. 38(1)], 18.2 [ad. *idem*, s. 38(2)], 20.

*Juries Act*, S.N.S. 1998, c. 16, s. 4(e).

*Jurors Act*, R.S.Q., c. J‑2, s. 4(*j*).

*Jury Act*, C.C.S.M. c. J30, s. 3(p), (r).

*Jury Act*, R.S.A. 2000, c. J‑3, s. 4(h)(ii).

*Jury Act*, R.S.B.C. 1996, c. 242, s. 3(1)(q).

*Jury Act*, R.S.N.W.T. 1988, c. J‑2, s. 5(a).

*Jury Act*, R.S.N.W.T. (Nu.) 1988, c. J‑2, s. 5(a).

*Jury Act,* R.S.P.E.I. 1988, c. J‑5.1, s. 5(i).

*Jury Act*, R.S.Y. 2002, c. 129, s. 5(a), (b).

*Jury Act*, S.N.B. 1980, c. J‑3.1, s. 3(*r*).

*Jury Act, 1991*, S.N.L. 1991, c. 16, s. 5(m).

*Jury Act, 1998*, S.S. 1998, c. J‑4.2, s. 6(h).

R.R.O. 1990, Reg. 680, Form 1.

**Authors Cited**

Canadian Bar Association. *Code of Professional Conduct*. Ottawa: The Association, 2009 (online: http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf).

Law Society of Upper Canada. *Rules of Professional Conduct*, updated April 26, 2012 (online: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159).

Ontario. Information and Privacy Commissioner. *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report*. Toronto: The Commissioner, 2009.

 APPEALS from a judgment of the Ontario Court of Appeal (Weiler, Gillese and Watt JJ.A.), 2010 ONCA 637, 269 O.A.C. 48, 260 C.C.C. (3d) 421, [2010] O.J. No. 4163 (QL), 2010 CarswellOnt 7383, upholding the convictions of the three accused for first degree murder and conspiracy to commit murder. Appeals dismissed.

 *Gregory Lafontaine*, *Vincenzo Rondinelli* and *Lori Anne Thomas*, for the appellant Ibrahim Yumnu.

 *Catriona Verner* and *Kristin Bailey*, for the appellant Vinicio Cardoso.

 *Timothy E. Breen*, for the appellant Tung Chi Duong.

 *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 Chan*, for the intervener the British Columbia Civil Liberties Association.

 *Paul J. J. Cavalluzzo* and *Shaun O’Brien*, for the intervener the Ontario Crown Attorneys’ 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.

 *Maureen McGuire*, for the intervener the Attorney General of Alberta (34340).

 The judgment of the Court was delivered by

 Moldaver J. —

I. Introduction

1. These appeals require the Court to decide whether it is permissible for the Crown, in conjunction with the police, to conduct background checks on prospective jurors through the use of police databases — and if so, to what extent and for what purposes.
2. On December 22, 2005, following a nine-month trial before Stong J. of the Ontario Superior Court of Justice and a jury, each of the appellants — Ibrahim Yumnu, Vinicio Cardoso, and Tung Chi Duong — was convicted of two counts of first degree murder and two counts of conspiracy to commit murder.
3. All three appellants appealed from their convictions to the Ontario Court of Appeal. Their appeals were heard together on April 6 and 7, 2009 and on February 1, 2010. At the proceedings in April 2009, the appellants raised grounds of appeal relating to the adequacy of the trial judge’s charge to the jury. At the end of the hearing on April 7, the court reserved its judgment.
4. Several months later, while the appeals remained under reserve, the appellants became aware of a “jury vetting” practice that the Crown Attorney’s office in Barrie, Ontario (the locale of the appellants’ trial) and police forces throughout the Judicial District of Simcoe County (the geographic area from which the jurors were selected) had apparently been following for some years. The vetting consisted of inquiries conducted by the police, at the behest of the Crown Attorney’s office, as to whether potential jurors had a criminal record or whether they were otherwise “disreputable persons” who would be undesirable jurors.
5. Once the widespread nature of this practice became known, inquiries were made and the appellants ordered transcripts of the jury selection process. The parties then produced a record, including affidavits upon which cross-examinations were conducted, and the appeals were reopened.
6. On February 1, 2010, the Court of Appeal heard arguments concerning the propriety of the vetting practice, including: its impact on the jury selection process and the composition of the jury; its impact on trial fairness; and, more broadly, its impact on the integrity of the criminal justice system and the administration of justice as a whole.
7. On October 5, 2010, the Court of Appeal (Weiler, Gillese and Watt JJ.A.) released comprehensive reasons for judgment dismissing all three appeals (2010 ONCA 637, 269 O.A.C. 48). Writing for the court, Watt J.A. concluded that certain features of the jury vetting process were inappropriate and should not be repeated. Other aspects were acceptable, subject to the Crown complying with its disclosure obligations.
8. In accordance with a concession from the Crown on appeal, Watt J.A. found that the Crown at trial had failed to disclose information obtained from the jury vetting process that might have assisted the appellants in the exercise of their peremptory challenges. In the end, however, he was not satisfied that the appellants suffered any prejudice from the Crown’s failure to meet its disclosure obligations. In his view, there was no reasonable possibility that the jury would have been differently constituted had disclosure been made; nor was there a basis for concluding that the Crown’s failure to disclose caused actual unfairness in the peremptory challenge process. Finally, it could not be said that the jury vetting practice created an appearance of unfairness that cast a pall over the entire proceeding. Accordingly, Watt J.A. rejected this ground of appeal. He also rejected the grounds relating to the alleged errors in the trial judge’s final instructions to the jury.
9. Before this Court, the appellants no longer challenge the adequacy of the trial judge’s instructions to the jury. Rather, the appeals centre on the jury vetting issue and the Court of Appeal’s treatment of it.
10. In a nutshell, the appellants complain that the jury vetting undertaken by the police, at the behest of the Crown, was highly improper. It compromised the integrity of the jury selection process and resulted in a jury that, if not favourably disposed to the Crown, might well have been differently composed had the appellants received the disclosure to which they were entitled.
11. On a more fundamental level, the appellants contend that the jury vetting conducted by the police, in conjunction with the Crown, strikes at the very heart of our criminal justice system and impinges on the sanctity of trial by jury that forms such a vital part of it. They say it raises the spectre of jury tampering and as such, it deserves this Court’s unqualified condemnation.
12. One of the appellants equates what occurred here to the situation in *R. v. Latimer*, [1997] 1 S.C.R. 217,where the police, with the approval of the Crown, approached prospective jurors and asked them to complete a questionnaire setting out their views on a number of issues pertinent to the case. In *Latimer*, this Court found that the conduct of the Crown constituted a flagrant abuse of process and an interference with the administration of justice. This gave rise to an appearance of unfairness and necessitated a new trial. According to the appellants, the conduct of the police and the Crown in the present case led to an appearance of unfairness and resulted in a miscarriage of justice. Hence, they request a new trial.
13. For the reasons that follow, I am unable to accede to the appellants’ arguments.
14. On the issue of trial fairness, I see no basis for interfering with the findings of the Court of Appeal on the impact — or more accurately, the lack of impact — that the jury vetting practice had on the jury selection process. The appellants received a fair trial by an impartial jury.
15. As for the appearance of unfairness and the suggestion that the verdicts are the product of a miscarriage of justice, I readily acknowledge that aspects of the Crown’s conduct were improper and should not be repeated. Nonetheless, I am not persuaded that what occurred here constituted a serious interference with the administration of justice, nor was it so offensive to the community’s sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice.
16. It follows, in my view, that there is no basis for ordering a new trial. I would accordingly dismiss the appeals.

II. Background

1. The situation here is somewhat unique in that the Court of Appeal acted as a court of first instance in respect of the jury vetting issue. By that, I mean that the evidence pertinent to that issue was assembled by the parties and the court made its findings of fact and carried out its legal analysis on the basis of that record. In these circumstances, the findings of the Court of Appeal, like those of a trial court, are entitled to deference.
2. The decision of the Court of Appeal is replete with detail and I see no need to replicate the court’s thorough review of the background facts, nor its comprehensive review of the jury selection process as a whole.
3. The jury vetting practice at issue occurred in the context of the appellants’ joint trial on two counts of first degree murder and two counts of conspiracy to commit murder. The trial was conducted in Barrie, Ontario. It commenced in January 2005 and lasted nine months.
4. On December 13, 2004, prior to the commencement of the jury selection process, someone from the Court Services Branch of the Ministry of the Attorney General for Ontario provided a copy of the jury panel lists to the Crown Attorney’s office in Barrie. The person responsible for providing the lists failed to comply with s. 20 of the *Juries Act*, R.S.O. 1990, c. J.3, which forbids disclosure of jury panel lists “until ten days before the sittings of the court for which the panel has been drafted”. The return date of the first panel in this case was set for January 24, 2005.
5. Upon receiving the lists, an administrative assistant in the Crown Attorney’s office sent a copy of them to every police force with jurisdiction in the Judicial District of Simcoe County. Accompanying the lists was a standard-form memorandum which read as follows:

 Please check the attached jury panel list, for the persons listed in your locality, and advise if any of them have criminal records. We are not able to provide birth dates.

 It would also be helpful if comments could be made concerning any disreputable persons we would not want as a juror. All we can ask is that you do your best considering the lack of information available to us.

 Please relay the information by telephone to [the Crown Attorney’s telephone number] on or before Wednesday, January 12, 2005.

1. Information obtained in response to the memorandum was recorded on a copy of the jury panel lists kept at the Crown Attorney’s office.
2. I pause here to note that as of December 14, 2004, when the standard-form memorandum was sent to the various police forces in the Judicial District of Simcoe County, the Criminal Law Division of the Ontario Ministry of the Attorney General had not yet issued a Practice Memorandum on the subject of juror background checks. It was not until April 26, 2005, some four months into the trial, that the *draft* of the Practice Memorandum, referred to as PM [2005] No. 17, was circulated by email to Crown Attorneys throughout the province of Ontario. PM [2005] No. 17 came into effect on March 31, 2006, long after the trial in this matter had been completed, and was circulated to Crown Attorneys, as well as other organizations such as the Criminal Lawyers’ Association of Ontario and the Law Society of Upper Canada. The salient features of the Practice Memorandum are reproduced below:

 In choosing a jury, both Crown counsel and defence should have access to the same background information material. To that end, results of criminal record checks of potential jurors, if obtained by Crown counsel, should be disclosed to defence counsel. Crown counsel should not request police to undertake any further or other investigation into the list of jurors. Crown counsel should not request police to conduct out-of-court investigations into private aspects of potential jurors’ lives.

 Any concrete information provided by police to Crown counsel suggesting that a prospective juror may not be impartial should be disclosed to the defence. If background information relating to a prospective juror raises the issue of whether he/she is able to judge the case without bias, prejudice or partiality, Crown counsel should utilize the challenge for cause process to address these concerns. [Emphasis added.]

1. The vetting practice undertaken in this case was not new. It had been in place since the late 1990s when it was discovered, in the context of an ongoing jury trial in Barrie, that a person who had been selected as a juror was in the process of serving an intermittent sentence for a hybrid offence (see *R. v. E.A.* (Ont. Ct. (Gen. Div.)), transcript of discussion on January 6, 1998 about jurors serving an intermittent sentence (respondent’s authorities, vol. II, Tab 43, at pp. 34-38)). It is unclear whether the Crown in that case had proceeded by way of indictment so as to render the juror ineligible for jury duty under s. 4(b) of the *Juries Act* as it then read. Be that as it may, he had slipped through the cracks and the situation would have proved awkward, to say the least, if his sentencing obligations had prevented him from performing his jury duties.
2. In the present case, vetting of the jury lists by the police in response to the Crown’s memorandum netted information about a number of prospective jurors. For the most part, the information indicated that the person in question had no criminal record. In some instances, the prospective juror was referred to as a “victim/complainant”. Other notations identified persons who “possibl[y]” had a criminal record or who may have been involved in a motor vehicle infraction.
3. None of the information the Crown received about the prospective jurors was shared with the defence — at least not at the selection stage of the process. The record indicates that after the trial judge had excused a host of prospective jurors for reasons of personal hardship, and a challenge for cause on the basis of race had run its course, of the prospective jurors who remained in the pool at the peremptory stage of the proceedings, the Crown had information about 10 of them that it should have disclosed to the defence, but did not. Hence, the appellants entered the peremptory challenge phase of the process missing information that might have been useful in exercising their peremptory challenges.
4. With respect to the 10 people in question, on my review of the record, of the three appellants before us, the appellant Yumnu is the only one who may have used a peremptory challenge that he might otherwise have saved had he received the disclosure to which he was entitled. That said, each of the appellants, including Mr. Yumnu, had one or more peremptory challenges remaining to him at the end of the selection process.

III. Findings of the Court of Appeal

1. As mentioned, the parties assembled a record for the Court of Appeal on the jury selection issue. On the basis of that record, the Court of Appeal made a number of findings that had a direct bearing on the outcome of the appeal. Those findings retain their importance at this stage and they are summarized below.

A. *Issue 1: The Effect of Non-Disclosure on Trial Fairness*

1. First, the court reviewed the peremptory challenge phase of the process and determined that there was “no reasonable possibility that the jury would have been constituted differently had disclosure [of the pertinent information obtained from the vetting process] been made” (para. 122).
2. Second, the court found that even though the Crown had not complied with its disclosure obligations, the defence knew or should have known about the jury vetting practice no later than six weeks into the trial when the investigating officer’s notebook was turned over to defence counsel. The production of the officer’s notebook was not an attempt on the Crown’s part to belatedly comply with its disclosure obligations. Nonetheless, the notes contained a complete inventory of the checks undertaken by the investigating officer, including the names of prospective jurors and the information he had obtained about them. The notes also revealed that several police databases had been accessed and that information had been obtained about some of the prospective jurors that went beyond the question of whether they had a criminal record.
3. Against that backdrop, in assessing the impact of the Crown’s failure to comply with its disclosure obligations on the overall fairness of the trial process, the court considered it significant that five experienced defence counsel did not raise the issue of non-disclosure with the trial judge, either when they received the officer’s notebook or during the seven and a half months of trial that followed. Nor did counsel raise the issue at the outset of the appeal. Moreover, throughout the course of the appeal, trial counsel provided no information about what they knew (or did not know) about the record checks, nor did they offer an explanation for their failure to raise the disclosure issue in a timely fashion. I note parenthetically that the answers to those questions remain unsatisfactory to this day.
4. In the end, the court refused to give effect to the appellants’ submission that their right to a fair trial had been impaired by the failure of the Crown to meet its disclosure obligations. Watt J.A. put the matter succinctly as follows: “In this case, [the appellants] have failed to demonstrate a reasonable possibility that the non-disclosure affected either the outcome of the trial or the overall fairness of the trial process” (para. 107).

B. *Issue 2: Appearance of Unfairness*

1. Apart from defence counsel’s failure to raise the jury issue with the trial judge, the Court of Appeal made two critical findings concerning the conduct of the Crown and the police.
2. First, the court found that despite the scope of the Crown’s request in the December 14, 2004 memorandum, “the purpose of the police inquiries was to determine whether a prospective juror had a criminal record” (para. 94). Second, the court found that in the circumstances, the conduct of the Crown and the police did not “reveal [a] colourable use of legitimate criminal record checks of prospective jurors to obtain a favourable jury” (para. 95).
3. In the circumstances, the Court of Appeal declined to order a new trial on the basis of alleged improprieties surrounding the jury selection process. The Crown’s conduct, though improper in certain respects, was far less egregious than the conduct engaged in by the Crown and police in *Latimer* — and, in the court’s opinion, the jury vetting practice did not create an appearance of unfairness that necessitated a new trial.

IV. Analysis: The Acceptable Bounds of Jury Vetting

1. Jury vetting by the Crown and police is a risky business. It gives rise to a number of concerns — some more troublesome than others — but all worthy of consideration.
2. Foremost among the concerns is the prospect of the Crown and police joining forces to obtain a jury favourable to their cause. Nothing could do more harm to the criminal justice system; nothing could more readily bring the administration of justice into disrepute.
3. 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 it. Care must be taken to guard against this. The integrity of our criminal justice system hangs in the balance.
4. Closely aligned with the first concern is the fundamental precept of our justice system that “justice should not only be done, but should manifestly and undoubtedly be seen to be done” (*per* Lord Hewart C.J. in *R. v. Sussex* *Justices*, *Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259).
5. Appearances count. And regardless of the Crown’s good intentions, aligning itself with the police and using their vast resources to investigate potential jurors could be seen by some as incompatible with the Crown’s responsibility, as an officer of the court, to ensure that every accused receives a fair trial. Randomness and representativeness are two of the qualities we look for in juries. Widespread checking could give rise to a suggestion of stereotyping and arbitrariness in the selection process, particularly if it could be shown that peremptory challenges were being used to remove certain types or classes of people who would otherwise be eligible to serve as jurors.
6. Another concern is juror privacy. Jurors give up much to perform their civic duty. In some instances, serving on a jury can be a difficult and draining experience. Long trials in particular can take a toll on an individual’s personal and professional life.
7. Jury duty is precisely that — a duty. People are not asked to volunteer; they are selected at random and required to serve unless they are otherwise exempted or excused. Once selected, jurors become judges of the facts. Their personal lives at that point are no more relevant than that of the presiding judge.
8. Jurors deserve to be treated with respect. Subject to a few narrow exceptions, they are entitled to know that their privacy interests will be preserved and protected. I note that the subject of prospective jurors’ privacy was addressed in a recent report of Ontario’s Information and Privacy Commissioner, Ann Cavoukian: see *Excessive Background Checks Conducted on Prospective Jurors*: *A Special Investigation Report* (2009) (“IPC Report”).
9. The concerns that I have identified are very real and they are to be taken seriously. There are, however, countervailing interests at play that warrant some limited checking and some minimal intrusion into the private lives of potential jurors.
10. Manifestly, only those persons eligible to serve as jurors should be permitted to participate in the process. Impartiality is equally essential. Those who serve as jurors must be capable of putting aside their biases, prejudices, and any tentative opinions they might hold about the case. In short, they must be able to render a true verdict according to the evidence.
11. Section 626(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that “[a] person who is qualified as a juror according to . . . the laws of a province is qualified to serve as a juror in criminal proceedings in that province.” Each province and territory in Canada has its own eligibility criteria for jurors. In Ontario, the province from which the present appeals originate, s. 4(b) of the *Juries Act* currently states that anyone who “has been convicted of an offence that may be prosecuted by indictment” and who has not been granted a pardon for that conviction, is ineligible to serve as a juror. I note that until 2010, s. 4(b) of the *Juries Act* provided that a person was ineligible to serve as a juror in Ontario if he or she “ha[d] been convicted of an indictable offence” and had not been granted a pardon. In the case of a hybrid offence, this was interpreted to mean a conviction where the prosecutor chose to proceed by indictment (see IPC Report, at pp. 33-34). In 2010, the *Juries Act* was amended to broaden the scope of juror ineligibility (S.O. 2009, c. 33, Sch. 2, s. 38(1)). This amendment addressed the problem that criminal record databases do not record whether, in respect of hybrid offences, the Crown proceeded by way of summary conviction or by indictment. Other provinces have different eligibility requirements, including some that preclude persons “charged” with a criminal offence from serving on a jury. For instance, individuals are ineligible to serve as jurors: in Alberta, if “charged with a criminal offence” (*Jury Act*, R.S.A. 2000, c. J-3, s. 4(h)(ii)); in British Columbia, if “currently charged with an offence under the *Criminal Code*” (*Jury Act*, R.S.B.C. 1996, c. 242, s. 3(1)(q)); in Newfoundland and Labrador, if charged with an indictable offence (*Jury Act, 1991*, S.N.L. 1991, c. 16, s. 5(m)); and in Quebec, if charged or convicted of a “criminal act” (an indictable offence) (*Jurors Act*, R.S.Q., c. J-2, s. 4(*j*)) (for the relevant legislation in the other provinces and territories, see: *The Jury Act, 1998*, S.S. 1998, c. J-4.2, s. 6(h); *The Jury Act*, C.C.S.M. c. J30, s. 3(p) and (r); *Jury Act*, S.N.B. 1980, c. J-3.1, s. 3(*r*); *Juries Act*, S.N.S. 1998, c. 16, s. 4(e); *Jury Act*, R.S.P.E.I. 1988, c. J-5.1, s. 5(i); *Jury Act*, R.S.Y. 2002, c. 129, s. 5(a) and (b); *Jury Act*, R.S.N.W.T. 1988, c. J-2, s. 5(a); and *Jury Act*, R.S.N.W.T. (Nu.) 1988, c. J-2, s. 5(a)).
12. Under s. 638(1)(*c*) of the *Code*, either the prosecutor or the accused may challenge a potential juror for cause on the basis that “[the] juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months”.
13. As is apparent, under provincial statutes and the *Criminal Code*, a potential juror’s criminal antecedents — and in some instances, his or her pending charges — may render that person ineligible for jury duty or result in his or her removal from the jury pool following a successful challenge for cause. Self-reporting is one way of screening potential jurors who, by virtue of their involvement with the criminal law, are ineligible under provincial law from serving as jurors. In Ontario, at the time of the appellants’ trial, a self-reporting questionnaire was sent to potential jurors asking:

 7. HAVE YOU BEEN CONVICTED OF AN INDICTABLE OFFENCE FOR WHICH YOU HAVE NOT BEEN GRANTED A PARDON?

 An indictable offence is a serious offence and does not include violations of provincial statutes such as traffic and liquor laws. Nor are some Criminal Code offences indictable; for example, causing a disturbance, taking a motor vehicle without the owner’s consent and vagrancy are not indictable offences. A person who has been convicted of an indictable offence is ineligible to serve as a juror, unless he or she has subsequently been granted a pardon.

(IPC Report, Appendix 8)

1. While useful, self-reporting has proved to be less than satisfactory. Under the regime that existed when the trial in this case was conducted, potential jurors may not have known whether the offence for which they had been convicted was an indictable offence (which would have included a hybrid offence only if the Crown had proceeded by way of indictment). Following the IPC Report in 2009 in Ontario, along with the amendment of the *Juries Act*, the self-reporting questionnaire has been improved and provides a more comprehensive explanation of what constitutes an indictable offence (see R.R.O. 1990, Reg. 680, Form 1, “Questionnaire about Qualifications for Jury Service”). Even with that, there is no certainty that prospective jurors will read the explanatory notes; nor is it clear that those who do will fully understand them. Well-intentioned individuals may still provide inaccurate information. Moreover, the explanatory notes leave out broad categories of offences that could give rise to indictable convictions, such as income tax evasion. And finally, as reporting procedures are not uniform throughout the country, some are likely to produce more accurate responses than others. In short, self-reporting can result in relevant criminal background information slipping through the cracks. It is not a substitute for criminal record checks.
2. It follows, in my view, that absent legislation to the contrary, the authorities should be permitted to do criminal record checks on potential jurors to determine whether they are eligible to serve as jurors under provincial law and/or whether they may be subject to a challenge for cause under s. 638(1)(*c*) of the *Code*. In those provinces where the eligibility criteria cover persons who have been charged with a criminal offence, this too is something the authorities may properly check for.
3. In that narrow sense, I consider it permissible for the Crown, with the assistance of the police, to do limited background checks using police databases to identify potential jurors who, by virtue of their criminal conduct, are not eligible for jury duty under provincial law or who are subject to being challenged for cause under s. 638(1)(*c*) of the *Code*. I recognize that the defence bar does not have the same prerogative. It cannot avail itself of the information stored in police databases. But any resulting imbalance is, in my view, overcome by the disclosure obligations placed on the Crown. Information received by the Crown that is relevant to the jury selection process must be turned over to the defence, thereby restoring the balance.
4. I also recognize that the Crown and the police are separate entities and that the police ought not to be seen as Crown agents tasked with the responsibility of investigating potential jurors for partiality, much less obtaining a jury favourable to the Crown’s cause. But any perception of impropriety must be assessed in context, which in this case means taking into account the circumscribed nature of the police mandate and the important objective it serves. Viewed that way, I do not believe that a reasonable member of society would find it offensive for the Crown and the police to engage in the limited form of checking I consider permissible.
5. In the course of performing valid criminal background checks through the use of police databases, the authorities may inadvertently come across information that falls outside the scope of the provincial eligibility criteria or the criteria specified in s. 638(1)(*c*) of the *Code*. For example, in Ontario, the authorities may learn that a prospective juror does not have a criminal record but that he or she is presently charged with a criminal offence, or perhaps even a provincial offence, that may render the prospective juror unsuitable or raise concerns about his or her ability to remain impartial. Equally, a database scan may reveal a potential juror’s prior conviction for a pure summary offence (not captured by s. 4(b) of Ontario’s *Juries Act* or s. 638(1)(*c*) of the *Code*) for which the person is currently serving an intermittent sentence, thereby calling into question his or her suitability for jury duty. Alternatively, the authorities may discover that a potential juror has been a complainant on a prior occasion and may, for that reason, find it difficult to remain impartial, either generally or in the particular circumstances of the case at hand.
6. The authorities cannot set out to find this type of information — but if it comes to their attention in the course of performing valid criminal background checks, they need not turn a blind eye to it. It could form the basis for any of the following procedures in the courtroom:

(1) a request to the trial judge to excuse the juror under s. 632(*a*) to (*c*) of the *Code* on grounds of obvious partiality, personal hardship, or other reasonable cause;

(2) a request to the trial judge to stand the juror aside under s. 633 of the *Code* for reasons of personal hardship or any other reasonable cause, including potential partiality;

(3) a request to challenge a juror for cause for any of the reasons set out in s. 638(1)(*a*) to (*f*) of the *Code*; and

(4) a reason to exercise or refrain from exercising a peremptory challenge under ss. 634 and 635 of the *Code*.

1. Of course, it goes without saying that any information the authorities obtain that is relevant to the jury selection process must be disclosed to the defence. This would include information relevant to eligibility, s. 638(1)(*c*) and any of the other matters I have identified.
2. Checking for a prospective juror’s criminal record is not as easy as one might think. As Watt J.A. observed, at para. 92, jury panel lists lack crucial information the authorities need to ensure that the results of inquiries made through the various databases available to them are accurate. The more information the authorities have about the prospective juror — and by that I am referring to details such as full name, date of birth, fingerprint search number, and so on — the less intrusive the search need be. Access to one database, most likely the Canadian Police Information Centre (“CPIC”), will usually be all that is required.
3. Contrast this with the situation where the authorities have virtually no information about the prospective juror other than his or her name and occupation. To be sure, this is problematic, especially when the individual has a common name. Cross-referencing and cross-checking through the use of multiple databases may be the only means the authorities have to ensure that the right person is being checked. And even then, there can be no guarantees.
4. Of course, the 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*. In other words, the broader the search, the greater the intrusion into the prospective juror’s privacy interests.
5. In an ideal world, it would be preferable if the persons doing the checking had available to them the information needed to do pinpoint searches through a single database. That would be one way of better protecting the privacy interests of prospective jurors.
6. Ontario has taken some steps in this regard following the release of the IPC Report. Without going into detail, under s. 18.2 of the *Juries Act* (enacted in 2010, see S.O. 2009, c. 33, Sch. 2, s. 38(2)), the sheriff may request that a criminal record check be conducted using the CPIC database, on any person selected for inclusion on a jury panel. A questionnaire completed by the prospective juror and sent to the Provincial Jury Centre contains personal information that enables the Centre to engage in pinpoint searches.
7. According to the Crown, such searches are conducted on a random basis and only cover about 10 percent of the names on panel lists (R.F., at para. 85, fn. 37). As such, they do not provide certainty that persons who are ineligible under s. 4(b) of the *Juries Act* or subject to being challenged under s. 638(1)(*c*) of the *Code* will be detected. Moreover, there is no legislative equivalent to s. 18.2 of the Ontario *Juries Act* in the territories and most of the other provinces.
8. I propose to say no more about s. 18.2 of the *Juries Act*. Its impact, if any, on the Crown’s right to have limited background checks conducted on potential jurors through the use of police databases is not before us. Nor is it our mandate to consider solutions that might better preserve and protect the privacy interests of prospective jurors, including the personnel who should be doing the checking and the means by which they may gain access to the pertinent information. Our task is to determine whether it was permissible for the authorities to perform the checks they did in the instant case and, if so, to what extent and for what purposes.
9. The case before us deals with background prospective juror checks conducted through the use of police databases. For reasons already discussed, absent legislation to the contrary, I am satisfied that the authorities can use such databases to discover whether prospective jurors have engaged in criminal conduct that would render them ineligible to serve as a juror under provincial law, or subject them to a challenge for cause under s. 638(1)(*c*) of the *Code*. As well, absent legislation to the contrary, I am of the view that the authorities are entitled to access multiple databases, where necessary, to uncover the requisite information. As indicated, where this leads to the inadvertent discovery of other information that may be relevant to the jury selection process, the authorities need not turn a blind eye to it. It should be conveyed to the Crown and disclosed to the defence. That will go some way towards achieving the level playing field that should exist between the Crown and the defence during the jury selection process.
10. To be clear, when I speak of information that is relevant to the jury selection process, I am *not* talking about matters of public knowledge, such as a prospective juror’s general reputation in the community, nor am I referring to such things as feelings, hunches, suspicions, innuendo, or other such amorphous information. I am speaking rather about information that rises above the general and is both reasonably accurate and reliably based. At para. 76 of his reasons for the Court of Appeal, Watt J.A. made the following observation about the disclosure obligations of the Crown, with which I agree:

 The disclosure obligations of the prosecutor are well defined. Circumscribed, not infinite. Those obligations are not co-extensive with the entire storehouse of information, knowledge and experience, in brief the stock-in-trade a prosecutor may acquire by exposure to daily appearances in the courts and interactions with the police, witnesses, victims and the communities at large in their jurisdiction. Equality of knowledge and community intelligence, like equivalence in skill and experience as between opposing counsel in a criminal trial, is not a constitutional requirement or a principle of fundamental justice.

1. The question of there being a reciprocal obligation on the part of the defence to disclose information in its possession that could impact on the jury selection process was raised only tangentially on this appeal. It was not fully argued. Accordingly, I propose to limit my remarks to two situations where it is self-evident that defence counsel, as officers of the court, must make disclosure to both the court and Crown counsel to preserve the integrity of the process.
2. First, where defence counsel know or have good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty under provincial law or subject to being challenged for cause under s. 638(1)(*c*) of the *Code*, this should be disclosed.
3. Second, where defence counsel know or have good reason to believe that a potential juror cannot serve on a particular case due to matters of obvious partiality, this too should be disclosed.
4. The second situation comports with Rule 4.05 of the *Rules of Professional Conduct* of the Law Society of Upper Canada (online) and Rule 9, note 21 of the *Code of Professional Conduct* of the Canadian Bar Association (online). Under those rules, lawyers are permitted to investigate prospective jurors to ascertain any basis for a challenge, but in doing so, they must not directly or indirectly communicate with the juror or a member of his or her family. The rules further provide that when acting as an advocate, a lawyer must disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or prospective juror

 (a) has or may have an interest, direct or indirect, in the outcome of the case,

 (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any [party], or

 (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness, . . .

1. As for the first situation, I consider it axiomatic that as officers of the court, defence counsel who know or have good reason to believe that a prospective juror, by reason of his or her criminal conduct, is ineligible to serve as a juror under provincial law or is subject to being challenged for cause under s. 638(1)(*c*) of the *Code*, cannot remain mute. Disclosure must be made in such circumstances to protect the integrity of the process and the administration of justice at large.
2. I conclude this aspect of my reasons with two trite but important observations.
3. First, jury selection is not a game and it should not be approached as though it were. Winning and losing are concepts that ought not to be associated with it. The process is not governed by the strictures of the adversarial model, nor should it be, in my view. The idea at the end of the day is not to obtain a jury that is partial to one side or the other. We are looking for jurors who are eligible, impartial, representative and competent. The jury does not belong to the parties; it belongs to the people.
4. Second, while 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, including judges, Crown and defence counsel, the police, and court administration personnel. In the end, it is essential to keep in mind that from start to finish, the jury selection process is designed to make good on the constitutional promise, enshrined in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, that everyone charged with an offence has the right to be tried by an independent and impartial tribunal. Attempts by one side or the other to obtain a favourable jury are inimical to that ideal and the parties should be guided by this and conduct themselves accordingly.

V. Application to This Appeal

A. *Issue 1: The Effect of Non-Disclosure on Trial Fairness*

1. Before considering the effect of non-disclosure on trial fairness as it relates to the instant case, I propose to set out the principles that apply when it is discovered, at the appeal stage, that information about prospective jurors which should have been disclosed at trial was not disclosed.
2. In *R. v. Dixon*, [1998] 1 S.C.R. 244, and *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, this Court set out the principles that apply when information that should have been disclosed at trial is discovered for the first time at the appeal stage. Persons 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 show that (1) the Crown failed to comply with its disclosure obligations, and (2) there is a reasonable possibility that the failure to disclose affected the outcome of the trial or the overall fairness of the trial process (*Taillefer*, at para. 71).
3. Adapting those principles to the issue at hand, I am of the view that persons who seek a new trial on the basis that non-disclosure of information about potential jurors deprived them of their s. 7 *Charter* right to a fair trial 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.
4. In addition to these two steps, as my colleague Karakatsanis J. points out at para. 55 of *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, in the event that the jury would have been differently constituted, it may be that the Crown should then have the opportunity to show, on balance, that the jury was nonetheless impartial. Since the present appeals can be resolved without addressing that issue, I propose to leave it for another day.
5. For present purposes, I am prepared to accept that the Crown failed in its disclosure obligations. It is on step 2 that the appellants’ case founders. As discussed earlier, the Court of Appeal found that there was no reasonable possibility that the jury would have been differently constituted had the pertinent information obtained from the vetting process been disclosed. Of the prospective jurors considered at the peremptory challenge stage of the proceedings, the Crown had information about 10 of them that it should have disclosed. With respect to those 10 people, Mr. Yumnu is the only appellant who used a peremptory challenge that he might otherwise have saved had he received the disclosure to which he was entitled. That said, each of the appellants, including Mr. Yumnu, had one or more peremptory challenges remaining at the end of the selection process. On the record before it, the Court of Appeal was entitled to come to the conclusion that the jury would not have been composed differently had disclosure been made. I see no basis for interfering with that conclusion. It follows that the appellants have not met the test, and their argument that the trial was unfair must fail.

B. *Issue 2: Appearance of Unfairness*

1. That leaves one issue for discussion — did the Court of Appeal err in concluding that the conduct of the police and the Crown did not result in a miscarriage of justice?
2. To be clear, when I speak of a miscarriage of justice in this context, I am referring to conduct on the part of the Crown and the police, within and surrounding the jury selection process, that would constitute a serious interference with the administration of justice and offend the community’s sense of fair play and decency. When conduct of that nature is found to exist, it matters not that the accused may otherwise have had a fair trial; nor is it necessary to find that the accused may have been wrongfully convicted. It is the conduct itself that gives rise to a miscarriage of justice and demands that a new trial be ordered.
3. With those principles in mind, I turn to the conduct of the Crown and the police in this case to determine whether it crossed the line and resulted in a miscarriage of justice. In concluding that it did not, I begin by reiterating two critical findings made by the Court of Appeal concerning the conduct of the Crown and the police.
4. First, the court found that despite the scope of the Crown’s request in the December 14, 2004 memorandum, the purpose of the police inquiries was to determine whether a prospective juror had a criminal record. Second, the court found that in the circumstances, the impugned conduct did not reveal a colourable use of legitimate criminal record checks to obtain a favourable jury.
5. Those findings, which were open to the Court of Appeal to make, satisfy me that the record checks were carried out in good faith. There 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. In its December 14, 2004 memorandum to various police forces, the Crown should not have asked the police to go beyond criminal record checks and use their databases to provide “comments . . . concerning any disreputable persons we would not want as a juror” — although this may not have been clearly understood at the time, given that PM [2005] No. 17, the Practice Memorandum on juror background checks, had not been formalized and did not come into effect until March 31, 2006. Moreover, under the *Rules of Professional Conduct* of the Law Society of Upper Canada and the *Code of Professional Conduct* of the Canadian Bar Association, inquiries made by the parties for the purpose of exercising a challenge for cause were not prohibited. Be that as it may, certainly there was no attempt by the investigating officer to hide the information he obtained from the record checks, be it criminal record information or information that went beyond that. The additional information was recorded in his notebook and was there for anyone to see, including the five defence counsel who received a copy of his notes six weeks into the trial.
6. The fact that the Crown and the police were acting in good faith is important — although not determinative — in assessing whether the conduct in question crossed the forbidden line.
7. That brings me to the nature of the impugned information and the manner in which it was obtained.
8. I have explained that it was permissible for the police to conduct criminal record checks to determine if a prospective juror was eligible to serve as a juror under provincial law and/or was subject to being challenged for cause under s. 638(1)(*c*) of the *Code*. I have also pointed out that it can be very difficult to discover whether or not a particular person has a criminal record. The use of multiple police databases may be required to make the inquiry meaningful and, even then, certainty will not always be achieved.
9. In carrying out legitimate criminal record checks, the police are liable to happen upon information that could be relevant to the selection process. As discussed, where that occurs, the police need not turn a blind eye to it. Rather, they should bring it to the Crown’s attention and the Crown should disclose it to the defence.
10. In this case, the investigating officer came upon information of that kind while conducting individual prospective juror record checks. He made it available to the Crown, as he should have. The Crown went wrong in failing to disclose it to the defence prior to the commencement of the selection process.
11. While the failure to disclose was serious, it was not done for improper reasons. And in the end, according to the findings of the Court of Appeal, it had no impact on the composition of the jury, nor did it affect the outcome of the trial or the overall fairness of the trial process.
12. In these circumstances, while the Crown should not have asked the police to use police databases to detect “disreputable persons”, and while it should have disclosed to the defence information it received that may have been relevant to the selection process, I am not persuaded that what occurred here constituted a serious interference with the administration of justice, nor was it so offensive to the community’s sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice.

VI. Conclusion

1. The appellants had a fair trial and I am not persuaded that the proceedings constituted a miscarriage of justice. Accordingly, I would dismiss the appeals from conviction.

 *Appeals dismissed.*

 Solicitors for the appellant Ibrahim Yumnu:  Lafontaine & Associates, Toronto.

 Solicitors for the appellant Vinicio Cardoso:  Hicks Adams, Toronto.

 Solicitors for the appellant Tung Chi Duong:  Fleming, Breen, Toronto.

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

 Solicitors for the intervener the Canadian Civil Liberties Association:  Addario Law Group, Toronto.

 Solicitors for the intervener the British Columbia Civil Liberties Association:  Ruby Shiller Chan Hasan, Toronto.

 Solicitors for the intervener the Ontario Crown Attorneys’ Association:  Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

 Solicitor for the intervener the Information and Privacy Commissioner of Ontario:  Information and Privacy Commissioner of Ontario, Toronto.

 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.

 *Solicitor for the intervener the Attorney General of Alberta:  Attorney General of Alberta, Edmonton.*