IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

B E T W E E N: **Court File No. 34179**

TROY GILBERT DAVEY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN: **Court File No. 34091**

VINICIO CARDOSO

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN: **Court File No. 34090**

IBRAHIM YUMNU

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN: **Court File No. 34087**

JAMES PETER EMMS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN: **Court File No. 34340**

TUNG CHI DUONG

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER
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PART I – OVERVIEW OF FACTS AND POSITION

Overview

1. The David Asper Centre for Constitutional Rights (Asper Centre) intervenes in this appeal to address the issue of the practice of jury vetting that took place in these appeals and argues that the Court should consider (1) the issue of jury vetting from the perspective of the jurors themselves as it constituted a breach of their right to privacy under the *Canadian Charter of Rights and Freedoms*; and (2) the impact of the practice on the administration of justice more generally when determining whether there has been a miscarriage of justice. The issue of background checks on prospective jurors has received minimal judicial attention in the courts.[1] However, given that jurors perform "one of the core legal and moral obligations by the state on its citizenry"[2] it is essential to consider the effect of such background checks from the perspective of such members of the public.

Facts

2. The Asper Centre accepts and relies upon the facts as set out in the records of both the Appellants and Respondent. The Asper Centre takes no position on any contested facts at issue in this case.

3. Of particular relevance to these submissions are the nature of the inquiries made and information gathered by the Crown in each of these appeals. In particular, it was noted in paragraph 49 of the Appellant Yumnu's factum that police reviewed police occurrence reports in relation to almost 400 potential jurors.[3] All parties have acknowledged the relevance of the findings of the Information and Privacy Commissioner, Ontario[4] to these appeals, and the nature of the background checks examined in that report. The description of the actions of the Crown across Ontario in relation to other similar cases, while not strictly relevant to the outcome of these appeals, is nonetheless relevant to the analysis of the rights

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[1] *Excessive Background Checks Conducted on Prospective Jurors – A Special Investigations Report*, (Information and Privacy Commissioner of Ontario, 2009) at 41.
[2] *R v Tele-Mobile Co (Telus Mobility)*, [2006] ONCJ. 229 at para. 66; affirmed in *Tele-Mobile Co. v Ontario,* [2008] 1 SCR 305.
[3] Factum of the Appellant Yumnu at para. 49.
[4] Information and Privacy Commissioner, Ontario, *supra* note 1.

at play and the needed guidance of this Court going forward, as suggested by the Respondent.[5]

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

4. The various Appellants have defined the legal issues in terms of the obligation to disclose the information gained by the Crown through the background checks conducted on the proposed jury members and whether that failure amounted to a miscarriage of justice. The Asper Centre takes the position that the Court should also consider the issue of jury vetting from the perspective of the jurors themselves and the impact of the practice on the administration of justice more generally. The jury vetting in question breaches the jurors' *Charter* rights and has broader systemic implications than simply the appearance of fairness of the trial from the perspective of the defence. The searches of jurors' private information unauthorized by law amounts to an unreasonable search in violation of section 8 of the *Charter*. By conducting such searches the police and prosecutors overreached the requirements of the *Juries Act,* the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"), and the *Municipal Freedom of Information and Protection Act* ("*MFIPPA*"). The Asper Centre takes the position that the Court must consider the unjust privacy violations incurred against jurors and the need to limit police and prosecutorial investigations to what are legislatively required in determining whether there has been a miscarriage of justice in these cases and to ensure that the administration of justice is not brought into disrepute.

PART III – STATEMENT OF ARGUMENT

5. The Crown must carry out its duties and powers in a manner consistent with *Charter* principles and values.[6] While failure to do so vis-à-vis the accused in a criminal proceeding may lead to a remedy within the context of that proceeding that is appropriate for the accused, failure to do so in regard to other participants in the justice system risks bringing the

[5] Respondent's Factum in Yumnu, Cardoso & Duong, at paras. 3-4.
[6] *R v Gayle* (2001), 154 CCC (3d) 221 at para. 64, citing *Slaight Communications Inc. v Davidson,* [1989] 1 SCR 1038 at 1078.

administration of justice into disrepute. While the Asper Centre takes no position on the availability of the remedies sought by the Appellants in this case, it submits that the actions of the Crown which have the effect of infringing the *Charter* rights of jurors should be condemned in the strongest of terms. The arguments that follow support the establishment of clear guidelines that uphold the privacy rights of Canadian citizens and maintain the integrity of the justice system.

A. Violation of the Prospective Jurors' Reasonable Expectation of Privacy

6. The Asper Centre's position is that jury vetting conducted in these cases violates section 8 rights of prospective jurors to be secure from unreasonable searches. This Honourable Court has held that state actions constitute a search where they invade a "reasonable expectation of privacy."[7] The information disclosed to the Crown or reviewed by police for the purpose of investigating potential jurors in these cases was highly personal and sensitive information. It included information about family relationships, allegations of criminal conduct without conviction, and information mined from government data bases, such as police occurrence reports, without the knowledge or consent of the individuals. In addition, the Information and Privacy Commissioner found that in similar cases across the province personal information such as young offender records, disputes with neighbours, criminal charges even if withdrawn, mental health history including suicide attempts[8] and personal family issues were collected in some jurisdictions.[9]

7. Although the Court has recognized a number of factors that might operate to discount a reasonable expectation of privacy in some circumstances, such as whether the subject matter was in public view, abandoned, or in the hands of third parties and not subject to an obligation of confidentiality, none are present here.[10] The information at issue was not publicly available nor was it abandoned. Although it was in the hands of third parties, it was held pursuant to statutory obligations that forbid its disclosure in these circumstances.[11]

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[7] *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145 at 159.
[8] A mental health intervention by police was the nature of the information disclosed in *R v Bradey* (May 14, 2009), unreported judgment of the Ontario Superior Court of Justice.
[9] Information and Privacy Commissioner, Ontario, *supra* note 1 at pp. 69, 73, 83.
[10] *R v Tessling*, [2004] 3 SCR 432 at para. 32.
[11] Information and Privacy Commissioner, Ontario, *supra* note 1.

8. The Asper Centre submits that the statutory obligations regarding this information, as set out in FIPPA and MFIPPA, should factor strongly in the Court's privacy analysis. This Court has held, in relation to the federal *Privacy Act* that is the analog to Ontario's FIPPA and MFIPPA, that it has a quasi-constitutional status[12] and that, when in conflict, privacy prevails over access.[13] The quasi-constitutional status of the obligations set out in data protection legislation should mean that the information in question should be protected even more strongly than if it was subject to a private law obligation of confidentiality.

9. The fact that the third party holding this information was another branch of the state should not alter the privacy analysis. This Court has previously held that the fact that a coroner has a blood sample does not mean that the police can obtain it without a warrant.[14] It has also held that the fact that the Crown has obtained the therapeutic records of a complainant does not mean that the accused gets automatic access to it.[15] The residual privacy interest in criminal investigation files and the contents of Crown's files has been specifically acknowledged by this Honourable Court.[16]Based upon similar analysis, the Asper Centre respectfully disagrees with the Court of Appeal's characterization of the opinions of police officers as being of a fundamentally different nature than the other information gathered through data bases.[17] Where police officers have formed opinion through their duties, by responding to calls from the public reports of which will ultimately be found in police occurrence reports, these opinions are based upon the same personal information that may engender reasonable expectations of privacy.

10. The context in which the police obtained this information is important. The information accessed included information from "*all* contacts involving the police, *regardless* of whether prospective jurors had been witnesses, victims, or accused."[18] As noted in the factum of the Appellant Yumnu, police occurrence reports were reviewed in that case for almost 400

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[12] *Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773 at para. 25; *H. J. Heinz Co. of Canada Ltd. v Canada (Attorney General)*, [2006] 1 SCR 441 at para. 28.
[13] *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para. 48; *H. J. Heinz Co. of Canada Ltd. v Canada (Attorney General)*, *ibid.* at para. 26.
[14] *R v Colarusso* [1994] 1 SCR 20; see also *R v Dyment*, [1988] 2 SCR 417 at 428-29.
[15] *R. v. Mills*, [1999] 3 SCR 668.
[16] *R v McNeil*, [2009] 1 SCR 66 at paras. 12, 19.
[17] *R v Davey*, [2010] OJ No 5194 (CA) at para. 31.
[18] Information and Privacy Commissioner, Ontario, *supra* note 1, p. 83.

individuals.[19] These reports include information of situations where individuals are at their most vulnerable and seeking the aide of the state.

11. Some of this information might include information that was itself collected through an intrusion on privacy, albeit a justified one. For example, this Court held that a police response to a 911 call may intrude upon the privacy of the home to the extent necessary to ascertain the health and safety of the 911 caller.[20] Using this information for different, unconnected, purposes exceeds the scope of the original justification for its collection and thereby violates the privacy of the individuals concerned.

12. This Court has repeatedly stressed the balancing that lies at the heart of the s.8 analysis.[21] In the present case it is important to note that the jurors themselves are not under investigation but are being asked to *serve* the justice system. Violations of their privacy are likely to undermine their willingness to serve. Therefore privacy and the administration of justice are not necessarily at odds in this context, needing to be balanced against one, another but instead line up and point in the same direction.

13. The Respondent has argued that the privacy rights of third parties may only be relevant in relation to the accused's own right to privacy.[22] Contrary to the Respondent's submissions, it is not simply an individual right that belongs to the accused. Rather, this Honourable Court has specifically acknowledged the privacy rights of witnesses and complainants as balanced against the accused rights to full answer and defence in *R v Mills*,[23] rejecting a hierarchical approach to the rights analysis. Indeed, Justice Charron while at the Ontario Court of Appeal specifically acknowledged the privacy rights of jurors in the context of challenge for cause proceedings,

> It is inevitable in any case that each juror will bring his or her own feelings, opinions and beliefs to the deliberations. This fact alone does not translate into partiality. Candidates for jury duty are not, under our system, routinely subjected to questioning on those feeling, opinions and beliefs in an attempt to uncover some possible source of partiality. *Such an approach would constitute an unwarranted invasion of their privacy interests*. [Emphasis added][24]

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[19] Factum of the Appellant Yumnu at para. 49.
[20] *R v Godoy*, [1999] 1 SCR 311.
[21] *Hunter et. al. v Southam, Inc.* , *supra* note 7; *R v Tessling*, supra note 10.
[22] Respondent's Factum in Yumnu, Carodoso & Duong at paras. 153-154.
[23] *R v Mills, supra* note 15 at para. 17.
[24] *R v A.K.,* [1999] OJ No 3280 at para. 50.

B. Background Checks Unauthorized by Law Amount to an 'Unreasonable Search'

14. A search without a warrant is prima facie unreasonable unless there are exigent circumstances or it is authorized by a reasonable law and undertaken in a reasonable manner.[25]

15. No statute authorizes the intrusive background checks conducted on prospective jurors. The background checks were not expressly authorized by the *Juries Act*. The *Juries Act* states that an individual cannot serve as a juror if they have been convicted of an indictable offence. However, the *Act* does not grant police or prosecutors express authorization to obtain such information beyond the Questionnaire as to Qualifications for Jury Service and the collection by the sheriff of information from provincial assessment rolls.[26]

16. The Canadian jury selection process has traditionally presumed that the individual biases of jurors will be counteracted by their sworn oath to decide the case impartially.[27] Canadian courts have established respect for the privacy rights of jurors by limiting invasive questioning of potential jurors in ways that some of the information in these appeals was utilized in challenge for cause proceedings.[28]In *R v Hubbert*, the Ontario Court of Appeal stated that the purpose of a challenge for cause was not to find out the "personality, beliefs, prejudices, likes or dislikes" of a potential juror.[29] Moreover, the Court of Appeal criticized the influence of the more intrusive U.S. challenge process on the Canadian system because of its unfairness to jurors.[30] Given these underlying principles, the alleged collection and use of information, beyond the specific challenge for cause, by parties to the criminal trial process is unlikely to be 'necessary' to the proper administration of justice.

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[25] *R v Collins*, [1987] 1 SCR 265.
[26] *Juries Act,* R.S.O. 1990, c.J3, s. 4(b).
[27] Neil Vidmar, "Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury" (1996) 79 *Judicature* 249
[28] *R v A.K., supra* note 24; *R v Gayle supra* note 6.
[29] *R v Hubbert*, [1975] O.J. No. 2595 (Ont. C.A.) at para. 21 [*Hubbert*], aff'd [1977] 2 S.C.R. 267. See also *R v Find*, [2001] 1 SCR 863 at para. 26.
[30] *Hubbert, ibid,* at para. 27.

17. Beyond the question of criminal conviction eligibility, the collection, use and disclosure of personal information of jurors by the police and/or MAG is not in compliance with FIPPA and MFIPPA.[31]

18. The search in question was also not undertaken in a reasonable manner. A majority of this Court in *R v Kang-Brown* emphasized that where there is no prior judicial authorization for a search then "after-the-fact judicial scrutiny of the grounds for the alleged 'reasonable suspicion' must be rigorous" and not based on speculation.[32] In these appeals the Crown engaged in a fishing expedition by choosing to search all potential jurors and not only those suspected of submitting false questionnaires.

19. When this fishing expedition also violates the terms of quasi-constitutional privacy legislation then serious rule of law questions are raised. Rule of law values regarding placing constraints on the arbitrary exercise of state authority have informed search and seizure law in Canada and the United States since *Entick v. Carrington*.[33]

20. Finally the disclosure of this information has significant practical implications for individual jurors. The privacy rights of jurors directly relates to safety. Section 631 of the *Criminal Code*, regarding the empaneling of juries, was amended in 2011.[34] The purpose of the amendment was to increase the level of privacy that jurors could expect and "...enable them to perform their duties without fear of intimidation or physical injury."[35] This followed the *Report on Jury Reform*, which recommended that access to juror information be limited "... to protect the anonymity and safety of jurors...."[36] Although the amendment increased juror privacy by requiring that juror numbers be called instead of names, the previous legislation was explicit in stating that a judge could require only identifying numbers to "...protect the privacy or safety of the members of the jury...."[37] The misuse of personal information by

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[31] Information and Privacy Commissioner, Ontario, *supra* note 1.
[32] *R v Kang-Brown*, 2008 SCR 456 at para. 26.
[33] *Entick v Carrington*, 95 ER 807 (King's Bench) 1765. Cited in *Hunter v. Southam*, at 158 (per Dickson J.). The Honorable M. Blane Michael, "Reading the Fourth Amendment: Guidance From the Mischief that Gave it Birth" (2010) 85 NYUL Rev. 905.
[34] *Fair and Efficient Criminal Trials Act*, S.C. 2011, c. 16
[35] Legislative Summary of Bill C-53, Library of Parliament, Publication No. 40-3-C53-E, p. 9
[36] Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Jury Reform*, Department of Justice Reports and Working Papers, May 2009,p.21
[37] *Criminal Code*, s. 631(3.1) prior to 2011-08-14

police and prosecutors erodes the reputation of administration of justice by making a mockery of juror privacy rights.

C. Intrusive Background Checks Bring the Administration of Justice into Disrepute

21. The essential role of the jury in our justice system has been described as an "excellent fact finder," "conscience of the community," a final bulwark against oppressive laws or their enforcement,"[38] and a "public institution which benefits society in its educative and legitimizing roles."[39] To so egregiously disregard the rights of people who serve this important function must be viewed as bringing the administration of justice into disrepute. Peterson noted that, "in evaluating jury selection procedure, it is critical to move beyond an examination of the rights of the accused and of the victim to a consideration of the rights of prospective jurors."[40]

22. The Appellants have argued that the failure to disclose the information obtained in the background checks of jurors amounts to a miscarriage of justice owing to the impact on the fairness of the trial and the ability of the accused to make full answer and defence. However, further disclosure of this information, illegally obtained, will not alleviate the broader systemic issue of the impact that this practice has on public confidence in the administration of justice. As noted in *R v Mills*, the assessment of the fairness of the trial process must also be made "from the point of view of fairness in the eyes of the community."[41] As the Ontario Court of Appeal noted in *R v Hubbert*, the process "must be fair to prospective jurors as well as the accused."[42]

23. Jurors are providing a necessary and frequently thankless task in the justice system. They are often exposed to graphic evidence during the course of deliberation without having the background or exposure to evidence of a trial judge.[43] Moreover, "...from the perspective of an individual juror, the jury system is, at best, an inconvenience, and at worst, a major

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[38] *R v Sherrat*, [1991] 1 SCR 509 at 523-524.
[39] *R v Turpin*, [1989] 1 SCR 1296 at 1310.
[40] Cynthia Petersen, *Institutionalized Racism: the Need for Reform of the Criminal Jury Section Process* (1993), McGill LJ 147 at 165 – She is referring in particular to the equality rights of potential jurors as representatives of minority communities.
[41] *R v Mills, supra,* note 15 at para. 72.
[42] *Hubbert supra* note 29.
[43] Bertrand, L.D., Paetsch, J.J., Anand, S., *Juror Stress Debriefing: A Review of the Literature and an Evaluation of a Yukon Program*, March 2008, *www.ucalgary.ca/~crilf/publications/Jury_Stress_Final_Report.pdf*

disruption to the juror's daily life."[44] To mitigate the hardships associated with jury duty, confidence that the juror is fulfilling an essential role is necessary. That conviction comes from a belief that a juror is part of a moral and just system.

24. Unfortunately, "...a significant plurality of the public is dissatisfied with the practice of the system or what they perceive the system to be doing."[45] Unauthorized checks that overreach the limits laid out in the *Juries Act*, as well as MFIPPA and FIPPA, perpetuate that view, bringing the administration of justice into disrepute and may reduce the willingness of people to participate in the system.

25. The importance of maintaining public confidence in the justice system was expressed in *R v Huard* (2009), one of two cases in Ontario in which a mistrial was declared as a direct result of jury vetting. Thomas J. expressed that "the effect on the overall fairness of the trial process includes the public's perception of trial fairness and the concern for their continued confidence in the jury system."[46]

26. The *Charter* violations, and in particular the impact of the background checks on potential jurors, give rise to broad and troubling implications for the entire justice system. The simple fact that most jurors remain unaware that their rights may have been breached and will make no attempt to seek rectification raises significant access to justice issues. Even if they were to become aware of the breaches, jurors have no standing in the criminal proceeding, and therefore, no access to remedies for such *Charter* infringements. In *R v O'Connor*, Justice McLachlin, as she then was, expressed concern about the "protection of privacy of third parties who find themselves, through no fault of their own, caught up in the criminal process."[47] Similarly, in *R v Patrick*, Justice Binnie wrote about the concern of accounting for the "spectre of random and warrantless searches which produce nothing except embarrassment and perhaps humiliation for the innocent person who happen to be searched."[48]

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[44] *R v Tele-Mobile Company (Telus Mobility), supra* note 2 at para. 66.
[45] Roberts, J.V., *Public Confidence in Criminal Justice in Canada*, Canadian Journal of Criminology and Criminal Justice, April 2007, p. 175
[46] *R v Huard*,[2009] OJ No 1383 at para. 35.
[47] *R v Mills, supra* note 15.
[48] *R v Patrick*, [2009] 1 SCR 579.

27. While there is no specific remedy requested on behalf of the jurors, the breach of their section 8 rights initially by the police and Crown, then furthered by disclosure to the defence, must inform the analysis of fairness in the trial process and the response by this Honourable Court. While the 2006 Ministry of the Attorney General directive specifically prohibites the conduct of the Crown, we ask that this Honourable Court provide clear guidelines in its analysis of the issues in these appeals that ensure that inquiries that stray beyond the statutory definitions of jury qualifications (i.e. criminal conviction eligibility) will be viewed in the most negative light and clearly lead to significant consequences.

28. The lack of a meaningful remedy for those whose privacy rights have been violated within these proceedings provides all the more reason for this Honourable Court to set guidelines for the conduct of parties to such proceedings who have standing. As noted by L'Heureux-Dubé J. in *R v O'Conner* and LaForest J. in *R v Dyment*, the essence of privacy once invaded can seldom be regained. Thus "invasions must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated."[49]

PART IV – COSTS

29. The Asper Centre seeks no costs and respectfully requests that no costs be awarded against it.

PART V – ORDER REQUESTED

30. The Asper Centre takes no position on the disposition of the appeals but requests that it be allowed 10 minutes to provide oral representations.

All of which is respectfully submitted, this 28th day of February, 2012

_____ _____

Cheryl Milne Lisa Austin

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[49] *R v O'Connor*, [1995] 4 SCR 411 at para. 199; *R v Dyment*, *supra* note 14 at 430.

PART VI: TABLE OF AUTHORITIES

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