



David Asper Centre for Constitutional Rights

**Brief of the David Asper Centre for Constitutional Rights
Regarding the Privacy Investigations of the Information and Privacy
Commissioner of Ontario**

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Contributors: Professor Lisa Austin, Research Assistant Kerri Lui,
and Executive Director Cheryl Milne

About the Centre

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the area of constitutional rights in Canada. The Centre houses a unique legal clinic that brings together students, faculty and members of the legal profession to work on significant constitutional cases. Through the establishment of the Centre the University of Toronto joins a small group of international law schools that play an active role in constitutional debates of the day. It is the only Canadian Centre in existence that attempts to bring constitutional law research, policy, advocacy and teaching together under one roof. The Centre aims to play a vital role in articulating Canada's constitutional vision to the broader world. The Centre was established through a generous gift to the law school from U of T law alumnus David Asper (LLM '07).

Our Mission: Realizing Constitutional Rights through Advocacy, Education and Research.

Our Objectives:

- To make a significant contribution to the quality of constitutional advocacy in Canada
- To be an expert resource on constitutional rights in Canada
- To increase the awareness and acceptance of Canadian constitutional rights

Executive Summary

Jurors are innocent members of the public in a criminal trial. They have not been charged with a crime. Nor did they consent to invasive background checks conducted by state agents, which disclosed private information about their mental illnesses and family problems to prosecutors. The widespread allegations of background checks conducted by police and utilized by Crown Attorneys to vet potential jurors threaten to undermine the fundamental tenets of our justice system if they are not properly addressed. Given its mandate, the submissions of the David Asper Centre for Constitutional Rights focus on the breaches of the jurors' *Charter* rights and their broader systemic implications, with a particular emphasis on access to justice principles.

The *Charter* Rights of Jurors

S. 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search and seizure”. Following the *Tessling* criteria, the jurors had an objectively reasonable expectation of privacy in the contents of their police files. The fact that the police, a third party, had possession of the information does not diminish this expectation. When the subject has a reasonable expectation of privacy, a warrantless search is prima facie unreasonable. The Court has made exceptions for searches authorized by a reasonable law and conducted in a reasonable manner. But the *Juries Act* does not expressly authorize the confirmation of juror eligibility through background checks. While sections 38(2) and 42(1)(d) of *FIPPA* may generally authorize obtaining further information about jurors, all reasonable searches must be consistent with *Charter* principles. The prosecutors' actions clearly went beyond what was necessary to determine eligibility. Moreover, the additional information was not legally relevant to the jury selection process. The searches were a fishing expedition in which the Crown searched all potential jurors with no grounds for reasonable suspicion. The searches were not reasonably conducted and therefore infringed the jurors' s. 8 rights.

The *Charter* Rights of the Accused

The Crown has a general legal obligation to disclose all relevant information to the accused. The decision of some prosecutors to withhold the information about prospective jurors, which was pertinent to the defence's case, is a serious breach of legal ethics and may infringe the accused's right to a fair hearing under s. 11(d). The purported widespread nature of the practice threatens the integrity of countless past jury trials. This aspect of the conduct of prosecutors is admittedly beyond the scope of the Privacy Commissioner's mandate and thus necessitates toward a broader independent investigation or public inquiry.

Systemic Implications

Potentially, the rights of thousands of prospective jurors have been breached. This gives rise to a significant access to justice problem. Many jurors are unaware that their rights have been infringed. Even if they are aware, jurors have no standing in the criminal proceeding and no access to remedies. Furthermore, even where procedures are available for jurors to challenge privacy breaches, the U.S. experience indicates that extremely few jurors are willing or able to initiate separate litigation.

The avoidance of jury duty by citizens is pervasive and well documented. The prospect of intrusive background checks will only worsen negative public sentiment and may encourage

more people to elude their civic obligations. This is likely to exacerbate existing concerns about jury representativeness, with particular regard to the underrepresentation of racialized and Aboriginal people.

The Court has stated that fairness is the “guiding principle of justice and the hallmark of criminal trial”. There is no doubt that the prosecutors’ actions were contrary to Crown policy and longstanding Supreme Court jurisprudence. These *Charter* breaches may bring the administration of justice into serious disrepute. On the basis of our analysis, we conclude that a full public inquiry or an independent investigation with a broader mandate is crucial to prevent the broader implications of these infringements from materializing.

Summary of Conclusions and Recommendations

1. The interpretation of the legislation respecting the legality of the background searches must take into consideration the *Charter* rights of the individuals affected. Given the preceding analysis and assuming the facts as set out in the letter of request, we conclude that there have been *Charter* violations in respect of the privacy rights of prospective jurors.
2. We also conclude that there are serious implications for the public’s perception of the administration of justice which could seriously impact the willingness of people to serve on jury duty which already imposes significant hardship on individuals.
3. Given the lack of standing of potential jurors in the system and the widespread nature of the violations, a public inquiry or independent investigation that fully explores the incidence of the violations and the appropriate protections for the public is necessary to restore public confidence in the system.

Background

The David Asper Centre for Constitutional Rights (“the Centre”) has been invited to provide our views on the legal issues arising from the purported conduct of background checks on prospective jurors in criminal trials within the Province of Ontario. According to media reports, the prospective juror background checks were discovered by a defence lawyer who had heard that a prosecutor in an unrelated trial had admitted that the Crown had sought police assistance to identify prospective jurors with a criminal record or “other relevant occurrences in their lives relative to their ability to be appropriate jurors”.¹ His subsequent investigation revealed documents written on behalf of the Crown to OPP detachments and other police services requesting comments about “disreputable persons we would not want as jurors”.² Though once seen as limited to the Barrie area, the allegations have been raised in at least five separate trials in the Barrie, Windsor, Thunder Bay and Toronto areas. The Information and Privacy Commissioner has initiated an inquiry, with the assistance of the Ministry of the Attorney General, which will include questionnaires, investigative teams and briefs solicited from organizations.

Given its focus on constitutional rights, the Centre’s submissions will focus on analysis and recommendations in two key areas. First, we will present an overview of the impact of background checks on the *Charter* rights of jurors and the accused. Second, we will examine the potential broader systemic implications of the allegations, in respect of access to justice principles as they relate to the constitutional rights of those affected.

The *Charter* Rights of Jurors

Section 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search and seizure”.³ The Supreme Court has held that state actions constitute a search where they invade a “reasonable expectation of privacy”.⁴ 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.⁵ It is the opinion of the Center that the state conduct in these cases constituted an unreasonable search and therefore violated the s. 8 rights of prospective jurors.

Jurors have a Reasonable Expectation of Privacy

The conduct complained of constitutes a search within the meaning of s. 8 of the *Charter* if it invades a reasonable expectation of privacy.⁶ The Supreme Court’s decision in *R v. Tessling*

¹ Shannon Kari, “Police vetting jury pools” *The National Post* (25 May 2009), online: National Post <<http://www.nationalpost.com/news/story.html?id=1626697&p=2>>.

² *Ibid.*

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 8 [*Charter*].

⁴ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159 [*Hunter*].

⁵ See e.g. *R v. Collins*, [1987] 1 S.C.R. 265.

⁶ *R v. Tessling*, [2004] 3 S.C.R. 342 at para. 18 [*Tessling*].

provides the most recent articulation of the test for a reasonable expectation of privacy. An individual's subjective expectation of privacy must be shown to be objectively reasonable; *Tessling* outlines a number of criteria for making such a determination.⁷ Given the nature of the information disclosed to prosecutors by the police, many of these criteria for privacy clearly apply: this information was unquestionably part of the 'biographical core of personal information'⁸; it was also often related to activities within the jurors' homes; and it was neither publicly available nor abandoned.

Although this information was already in the hands of the police, a third party, this fact should not diminish one's reasonable expectation of privacy. The police had obtained the information for the purpose of police investigation, but it was not ordinarily available to the state for the purpose of vetting prospective jurors who are not themselves under criminal investigation in the relevant proceedings. In *R v. Mills*, Justices McLachlin (as she then was) and Iacobucci stated that:

*Privacy is not an all or nothing right. It does not follow from the fact that the Crown has possession of the records that any reasonable expectation of privacy disappears...Where private information is disclosed to individuals outside of those to whom, or for purposes other than for which, it was originally divulged, the person to whom the information pertains may still hold a reasonable expectation of privacy in this information...Third party records may fall into the possession of the Crown without the knowledge, consent, or assistance of the complainant or witness. [emphasis added].*⁹

The Court in *Mills* clearly found that the state cannot simply use information gathered for a particular purpose for other purposes. The subject of that information retains a reasonable expectation of privacy in that information. While *Mills* was arguably modified by the Court's judgment in *R v. Jarvis*¹⁰, in which it held that s. 8 was not infringed by tax auditors disclosing audit information to a criminal investigator for use in a subsequent prosecution¹¹, this decision is distinguishable from the juror background checks in two important respects. First, the information obtained by the prosecution in *Jarvis* was about the defendant, not an innocent third party. Second, the audit information was collected as part of a regulatory investigation and ultimately used for a congruent criminal proceeding, whereas the prospective jurors' files were likely compiled for police investigations and ultimately disclosed for use in an unrelated proceeding.

In addition, it is not relevant that some of the prosecutors involved in the cases under investigation stated that they merely received the information from the police and did not

⁷ *Ibid.* at para. 32.

⁸ *R v. Plant*, [1993] 3 S.C.R. 281 at 293.

⁹ *R v. Mills*, [1999] 3 S.C.R. 668 at para. 108 [*Mills*].

¹⁰ *R v. Jarvis*, [2002] 3 S.C.R. 757 [*Jarvis*].

¹¹ Lisa Austin, "Information Sharing and the 'Reasonable' Ambiguities of Section 8 of the Charter" (2007), 57 U.T. Fac. L. Rev. 499 at 504.

actively solicit it.¹² In *R v. Dymont*, the Crown contended that the police's passive acceptance of the appellant's blood sample from a doctor did not amount to a seizure because the police had not demanded it.¹³ In rejecting this argument, Justice La Forest stated that the distinction between a seizure and a mere finding of evidence was "the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized".¹⁴ The focus of s. 8 is not about how the information was obtained but how the dissemination of that information impacts the individual.¹⁵

Jurors are innocent participants in a criminal trial. They are members of the public who have not been charged with a crime. Nor have they explicitly consented to invasive background checks by state agents such as the police, in which intensely private information, such as a history of mental illness and domestic disputes between the potential juror's parents, were disclosed to prosecutors.¹⁶ In these circumstances, the jurors had a reasonable expectation of privacy.

The Search of Jurors' Private Information was Unreasonable Because it was not Authorized by Law

Though a warrantless search is *prima facie* unreasonable where the subject has a reasonable expectation of privacy, the Court has made subsequent exceptions for searches authorized by law and carried out in a reasonable manner. It is important to emphasize that a law must be *reasonable* in order to authorize a search that does not infringe s. 8, meaning that it must strike a constitutional balance between privacy rights and law enforcement.

While the *Juries Act*¹⁷ stipulates that an individual cannot serve as a juror if they have been convicted of an indictable offence, amongst a few other disqualifications related to their occupations, it does not provide express authorization to obtain confirmation of this information beyond the Questionnaire as to Qualifications for Jury Service under the Regulation and the collection by the sheriff of information from the provincial assessment rolls. Nevertheless, two clauses in the *Freedom of Information and Protection of Privacy Act*¹⁸ (FIPPA) may, under different circumstances, suffice as a general 'authorization by law': s. 38(2) and s. 42(1)(d).

Section 38(2)¹⁹ pertains to the collection of personal information by the prosecutors. It states that "[n]o person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity".²⁰ The impugned prosecutorial actions are not expressly authorized by statute and are inconsistent with a constitutional interpretation of

¹² Shannon Kari, "Ontario probes jury checks" *The National Post* (11 June 2009), online: National Post <<http://www.nationalpost.com/news/story.html?id=1683378&p=2>>.

¹³ *R v. Dymont*, [1988] 2 S.C.R. 417.

¹⁴ *Ibid.* at para. 30.

¹⁵ *Supra* note 11 at 516-517.

¹⁶ Peter Small, "'Tainted' jury panels get the boot" *The Toronto Star* (6 June 2009), online: The Star <<http://www.thestar.com/Article/646623>>.

¹⁷ *Juries Act*, R.S.O. 1990, c. J.3, s. 4(b).

¹⁸ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [FIPPA].

¹⁹ This section is identical to the wording in s. 28(2) of *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56 [MFIPPA].

²⁰ *Supra* note 18, s. 38(2).

the sphere of “law enforcement” as defined in *FIPPA*.²¹ An interpretation of what is “*necessary* to the proper administration of a lawfully authorized activity” [emphasis added] must also reflect *Charter* values.

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.²² 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.²³ 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.²⁴ 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 jury selection.

Section 42(1)(d)²⁵ pertains to the disclosure of the personal information by the police. It states that “[a]n institution shall not disclose personal information in its custody or under its control except, where disclosure is made to an officer, employee, consultant or agent of the institution who *needs the record in the performance of their duties* and where disclosure is *necessary and proper* in the discharge of the institution’s functions” [emphasis added].²⁶ The Court’s judgment in *R v. Colarusso* is pertinent to the language about obtaining the information in the ‘performance of [one’s] duties’.²⁷ In that case, the majority of the Court stated that one’s reasonable expectation of privacy in one’s bodily fluids was not diminished because the coroner seized the evidence pursuant to his statutory duties.²⁸ Here, the argument that the background checks were required for prosecutors to perform their duties has not been raised. But presuming the argument is valid, *Colarusso* indicates that the duties would not reduce the jurors’ reasonable expectation of privacy in their police files. Nor would such duties escape the scrutiny of the *Charter*.²⁹

The Search of Jurors’ Private Information was Unreasonable Because it was Conducted in an Unreasonable Manner

An in-depth analysis of whether s. 38(2) or s. 42(1)(d) amount to an authorization by law or, if either section suffices as an authorization by law, whether the section(s) is a reasonable law is

²¹ *Ibid.*, s. 2(1).

²² Neil Vidmar, “Pretrial Prejudice in Canada: a Comparative Perspective on the Criminal Jury” (1996) 79 *Judicature* 249.

²³ *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 S.C.R. 863 at para. 26.

²⁴ *Hubbert*, *ibid.* at para. 27.

²⁵ This section is identical to the wording in s. 32 of *MFIPPA*.

²⁶ *Supra* note 18, s. 42(1)(d).

²⁷ The facts of *R v. Colarusso*, [1994] 1 S.C.R. 20 [*Colarusso*] in brief, are as follows: The accused was involved in two serious car accidents, in which he was knocked unconscious. The police arrested the accused and took him to a hospital, where urine and blood samples were taken for medical purposes. To determine the cause of the accident, per his duties in the *Coroner’s Act*, the coroner requested and received the samples. The samples were turned over the police for transportation to the Centre for Forensic Sciences. The police officer prepared a report for the Centre which determined which tests would be conducted. The results of these tests provided the core of the evidence raised to convict the accused.

²⁸ *Ibid.* at para. 87.

²⁹ *Supra* note 11 at 519-520.

beyond the scope and focus of this brief. Nevertheless, if the background checks fulfilled the requirements of either s. 38(2) or s. 42(1)(d) and those sections are reasonable, conclusions that we do not support, the search must be *conducted* in a reasonable manner. In other words, if these sections provide a general authorization for obtaining further information about jurors, this authorization must still be undertaken in a way that is consistent with the *Charter*. As aforementioned, it is clear that the prosecutors' actions went far beyond what was necessary to determine juror eligibility. There was no evidence that the prosecutors involved in the impugned cases reasonably believed that the proposed jurors were dishonest about their criminal histories.

Even if there was an air of reality to such a belief, it is unlikely that a few false submissions in a pool of more than a hundred people could justify the invasive nature of these background checks. In any event, the additional information is simply not considered to be legally relevant to the jury selection process. In *Cash Converters Canada Inc. v. Oshawa (City)*, the Ontario Court of Appeal expressed concerns about the mandated “wholesale transmission” of significant amounts of identifiable, personal information from second-hand storeowners to the police.³⁰ The Court of Appeal held that if the personal information was merely helpful to the activity, then it was not ‘necessary’ within the meaning of MFIPPA.³¹ If the goal of the activity could be accomplished in another way, the institution is obligated to choose the alternate route.³² Here, it is debatable whether obtaining information beyond a record of indictable offences was even helpful to that activity.

While the Supreme Court has allowed warrantless searches under a few exceptions, the background checks do not fall into these exceptions. The checks are not markedly different from the defence attorney’s request for a Crown witness’ prison records in *R v. Gingras*.³³ As in that case, the background checks, with the exception of the criminal record, had little, if anything, to do with juror eligibility. They amounted to a “fishing expedition”, as the *Gingras* disclosure request was described in the words of L’Heureux-Dubé J.³⁴

The border search cases³⁵ are an exception to the *Hunter* requirements because the “[s]tate has a compelling interest in the preservation of national sovereignty and the protection of its borders”.³⁶ Such public safety concerns could be characterized as of greater magnitude than routine crime investigation.³⁷ Given that the subject of the background checks were mere innocent members of the public and not the focus of a criminal investigation, they were conducted as part of a *less* than routine crime investigation. In contrast to these circumstances, the canine searches³⁸ are generally consistent with the *Charter* because they are minimally

³⁰ *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 at para. 38.

³¹ *Ibid.* at para. 40.

³² *Ibid.*

³³ *R v. Gingras*, [1992] A.J. No. 107 (Alta. Ca.) leave to appeal to S.C.C. refused, 22882 (August 10, 1992) [*Gingras*].

³⁴ *R v. O’Connor*, [1995] 4 S.C.R. 411 at para. 125 [*O’Connor*].

³⁵ See e.g. *R v. Simmons*, [1988] 2 S.C.R. 495 and *R v. Monney*, [1999] 1 S.C.R. 652.

³⁶ *R v. Kang-Brown*, 2008 SCC 18 at para. 70 [*Kang-Brown*].

³⁷ *Ibid.* at para. 18.

³⁸ See e.g. *R v. A.M.*, 2008 SCC 19.

intrusive³⁹ and subject to after-the-fact judicial review.⁴⁰ Again, the background checks cannot possibly be construed as “minimally intrusive”.

Regardless, the authorities do not have unlimited latitude in exercising these powers. In *R v. Kang-Brown*, a majority of the Court emphasized the importance of scrutinizing the stated grounds of reasonable suspicion when the search was initiated.⁴¹ No such grounds were provided. Instead of investigating only those who were suspected of submitting false questionnaires, the Crown chose to search all potential jurors. Thus, the jurors’ reasonable expectation of privacy in their police files and the unreasonable manner in which the searches were conducted lead to the conclusion that their s. 8 rights were infringed.

The Charter Rights of the Accused

Given the anticipated submissions of other organizations and the limited mandate of the Privacy Commissioner, we will only comment briefly on the impact of the background checks on the *Charter* rights of the accused. Selection of a jury engages the accused’s *Charter* rights under s. 11(d) (fair hearing) and s. 11(f) (benefit of a trial by jury).⁴² Since *R v. Stinchcombe*⁴³, it has been established law that the Crown has a general legal obligation to disclose all relevant information to the accused, pursuant to the principle of fundamental justice of the right to full answer and defence under s.7 of the *Charter* and as integral to a fair hearing under s. 11(d). While the Crown does not need to produce material that is clearly irrelevant, it must disclose if relevance is questionable.⁴⁴ Any transgressions of this duty are considered “a very serious breach of legal ethics”.⁴⁵ This duty extends to statements obtained from persons who have provided relevant information but will not be called as Crown witnesses.⁴⁶ The Supreme Court has recently affirmed this broad right to disclosure and held that it applies directly to the police.⁴⁷

It is a reasonable conclusion that by analogy any information obtained by the Crown about all prospective jurors must be disclosed to the defence. This position is substantiated by Justice Stephenson’s judgment in *Bain*, which held that prosecutorial standbys were unconstitutional in part because they diminished the accused’s role in jury selection.⁴⁸ This imbalance was contrary to the *Charter* because the appearance of impartiality is an essential element of s. 11(d).⁴⁹ Similarly, withholding pertinent information about potential jurors would negatively affect the appearance of impartiality.

³⁹ *Ibid.* at para. 9.

⁴⁰ *Ibid.* at para. 90.

⁴¹ *Supra* note 36 at para. 96.

⁴² *R. v. Sherratt*, [1991] 1 S.C.R. 509.

⁴³ *R v. Stinchcombe*, [1991] 3 S.C.R 326.

⁴⁴ *Ibid.* at para. 20.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at para. 33.

⁴⁷ *R v. McNeil*, 2009 SCC 3.

⁴⁸ *R v. Bain*, [1992] 1 S.C.R. 91 at para. 112 [*Bain*].

⁴⁹ *Ibid.*

Our conclusion that the information was obtained in breach of the prospective jurors' *Charter* rights impacts on the disclosure requirements on the Crown. Arguably it is information that the Crown should not have legally acted upon or taken into consideration. Further sharing of the information, although ostensibly lending fairness to the criminal process vis-à-vis the accused and the Crown, is a further breach of the jurors' right to privacy under the *Charter*.

The impact of the alleged conduct on the integrity of past trials is clearly beyond the mandate of the Privacy Commissioner. For this reason, along with the systemic implications outlined below, there is a critical need for an independent investigation or public inquiry that has a sufficiently broad mandate to address the nature of all of the potential *Charter* rights infringements, to make recommendations to better protect the public, and to restore confidence in our criminal justice system.

Systemic Implications

The potential *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. First, there is a significant access to justice problem. It is likely that most jurors remain unaware that their rights may have been breached and will make no attempt to seek rectification. Even if they become aware of the breaches, jurors have no standing in the criminal proceeding and therefore have no access to remedies for *Charter* infringements. Though the parties have standing to raise a juror's right to privacy, as defence counsel have done in the cases of concern to this investigation, the parties' interests are not always aligned with those of the jurors.⁵⁰ In *R v. O'Connor*, then Justice McLachlin 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".⁵¹ 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 persons who happen to be searched".⁵²

Unfortunately, Canadian literature on juror rights and jury selection is very limited. While one must keep in mind the significant discrepancies between the two legal systems⁵³, there is no apparent reason to rule out U.S. literature on jurors' opinions as inapplicable in the Canadian context. American authors have recognized the remedial gap created by the inability of jurors to challenge privacy breaches. Typically, case law focuses on the appellants' questions, rather than the concerns of the jurors.⁵⁴ As a result, trial courts recognize juror privacy rights but are constrained in protecting those rights by the rights of other parties (the accused, the Crown or the media). Even if procedures were available for jurors to challenge privacy breaches, most are unlikely to challenge the court's ruling via the appellate process, given that they are not

⁵⁰ David Weinstein, "Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options" (1997) 70:1 Temp. L. Rev. 1 at 18.

⁵¹ *Supra* note 34 at para. 192.

⁵² *R v. Patrick*, 2009 SCC 17 at para. 32.

⁵³ See generally *supra* note 22.

⁵⁴ Paula L. Hannaford, "Safeguarding Juror Privacy" (2001) 85 Judicature 18 & 44 at 20.

represented by counsel or in court voluntarily.⁵⁵ Despite the often highly invasive nature of the U.S. voir dire process⁵⁶, the number of cases in which jurors have actually initiated litigation is nearly non-existent.⁵⁷

Second, avoidance of jury duty is a well-documented cultural phenomenon. If prosecutors reasonably believed that prospective jurors were dishonest, the most likely rationale for dishonesty is to avoid service. In a 1996 survey of U.S. trial judges, the most common reason for suspected dishonesty in completed jury questionnaires was avoidance of service.⁵⁸ Recently, a mistrial was declared in Hamilton, Ontario because twenty-five out of seventy-two potential jurors affirmatively stated that they were unable to judge the evidence in the case without bias or prejudice because the accused persons were black or non-white men.⁵⁹ While that incident may be reflective of mere prejudice, the more likely conclusion seems to be that jury duty is so disliked that well-educated people, including a pathologist, a physiotherapist, a chartered accountant and two company executives, would prefer to be known as bigots than serve as jurors. Further, the literature suggests that prospective jurors are willing to admit to a litany of personally embarrassing facts to avoid serving.⁶⁰ Others would prefer to disenfranchise themselves by not registering on voter lists.⁶¹ Some jurisdictions in the United States have witnessed judges sending police to roam public areas to secure sufficient jurors for a jury trial.⁶²

The prospect of intrusive background checks is likely to exacerbate existing negative sentiments about jury duty. In *Fagan*, the trial judge agreed with counsel, albeit in the context of Crown disclosure to the defence, that there was a concern that jurors who volunteered their service would be stigmatized by the disclosure of past offences that were too minor to disqualify them for jury duty.⁶³ American studies indicate that perceived insensitivity to prospective jurors' privacy concerns is a known cause of dissatisfaction with jury service.⁶⁴ In particular, jurors object to inadequate court procedures regarding the protection of their privacy and mandatory disclosure of personal information, which appear to respondents as irrelevant or present the risk that the information will be used for other ulterior purposes.⁶⁵ In a 1991 study, twenty-five percent of jurors did not disclose prior criminal victimization by themselves or their family members during the voir dire.⁶⁶ A subsequent study conducted by Judge Gregory Mize of the

⁵⁵ *Supra* note 50.

⁵⁶ See generally Mary R. Rose, "Expectations of Privacy?: Jurors' views of voir dire questions" (2001) 85 *Judicature* 10 & 43.

⁵⁷ *Ibid.* Please refer to *Brandborg v. Lucas*, 891 F. Supp. 342 (E.D. Tex. 1995) (Texan woman successfully refuses to answer some questions on jury questionnaire on the grounds that they were very private and irrelevant) and *Bobb v. Municipal of California*, 192 Cal. Rptr. 270 (1983) (juror, an attorney, successfully refused to answer question regarding her husband's occupation unless question asked of male jurors as well).

⁵⁸ Nancy J. King, "Juror Delinquency in Criminal Trials in America" (1996) 94 *Mich. L. Rev.* 2673.

⁵⁹ Rosie DiManno, "Racial bias runs surprisingly deep" *The Toronto Star* (27 June 2009), online: [The Star <http://www.thestar.com/news/columnist/article/657601>](http://www.thestar.com/news/columnist/article/657601).

⁶⁰ See e.g. John P. Richert, "Jurors' Attitudes Toward Jury Service" (1976) 2 *Just. Sys. J.* 233 at 240. In this empirical study, Richert found that fifty-three prospective jurors cited incontinence as a reason for avoiding jury duty.

⁶¹ *Supra* note 54 at 19.

⁶² Jenny B. Davis, "Sidewalk summonses" (2008) 94:3 *A.B.A. J.* 15.

⁶³ *R v. Fagan*, [1993] O.J. No. 467 at para. 2 [*Fagan*].

⁶⁴ *Supra* note 54 at 18.

⁶⁵ *Ibid.* at 20.

⁶⁶ *Ibid.* at 23.

D.C. Superior Court discovered that twenty eight percent of jurors did not divulge information that was requested and relevant, in the opinion of the judge, to their ability to serve fairly and impartially.⁶⁷

An increase in negative perceptions about jury duty may not only increase non-response rates to jury questionnaires⁶⁸ but also impact existing concerns about representative juries. While Canadian jurisprudence has historically defined representativeness as formal equality, or the absence of overt bias or exclusion of certain groups, the case law arguably indicates that there is a movement towards qualified, cautious acceptance of the value of representative juries, in order to foster the perception of impartiality.⁶⁹ This argument is supported by the findings of the 1995 *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*. The Commission found that racialized people tended to believe that members of their own communities were under-represented on juries, which further promoted distrust of the justice system.⁷⁰ It conducted a small population survey of 417 black, 435 white and 405 Chinese residents of Toronto, which found that no black residents had served on a jury while ten white and five Chinese residents had served.⁷¹ Last fall, an official at the Ministry of the Attorney General admitted that aboriginal people had been systematically excluded as jurors for the last eight years but failed to investigate.⁷² This is of particular concern given the Supreme Court's recognition of overrepresentation in penal institutions as a crisis in our justice system⁷³ and its recognition of a realistic possibility of bias among jurors towards Aboriginal people.⁷⁴

Unsurprisingly, juries are often unrepresentative on a number of other dimensions besides race. It is uncontroversial to state that compensation for jury duty in Ontario is meager.⁷⁵ As in the United States, many professionals⁷⁶ and small business owners, on the basis of undue hardship, are statutorily or de facto exempt from serving on juries. A 1999 American survey found that over fifty percent of prospective jurors would not be paid their regular salary or wages for the

⁶⁷ Gregory E. Mize, "On Better Jury Selection: Spotting UFO Jurors Before they Enter the Jury Room" (1999) 36 Court Review 10. Please note that the information requested by Judge Mize would not have been considered relevant nor would it have been requested in the Canadian context.

⁶⁸ A 1998 American Judicature Society survey of court administrators found that the national summons nonresponse rate was twenty percent in state courts and eleven percent in federal courts. See Robert G. Boatright, "Why citizens don't respond to jury summonses" (1999) 82 Judicature 156 at 157.

⁶⁹ See generally Emily Morton, "Two Conceptions of Representativeness in the Canadian Jury Selection Process: A Case Comment on *R v. Gayle*" (2003) 61 U. T. Fac. L. Rev. 105.

⁷⁰ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) at ii, 59, 250-51 cited in David M. Tanovich, David Paciocco and Steven Skurka, *Jury Selection in Criminal Trials: Skills, Science and the Law* (Concord, Ont.: Irwin Law, 1997) at 223.

⁷¹ *Ibid.*

⁷² Christie Blatchford, "Aboriginal families no closer to answers about jury selection" *The Globe and Mail* (24 June 2009), online: The Globe and Mail < <http://www.theglobeandmail.com/news/national/aboriginal-families-no-closer-to-answers-about-jury-selection/article1192851/>>.

⁷³ *R. v. Gladue*, [1999] 1 S.C.R. 688.

⁷⁴ *R. v. Williams*, [1998] 1 S.C.R. 1128.

⁷⁵ In Ontario, jurors are currently paid nothing for the first ten days, \$40 a day for days eleven to forty-nine and \$100 a day thereafter.

⁷⁶ *Supra* note 17, s. 3.(1).

time spent as a juror.⁷⁷ This has potentially led to a disproportionate numbers of retired, young and unemployed people serving as jurors.⁷⁸

The combination of underrepresentation of the racialized and wealthier population segments coupled with new, serious privacy concerns may only convince more citizens to rationalize avoidance of their civic duties and further homogenize the composition of juries. Such concerns are supported by the Supreme Court's majority judgment in *Dagenais*, which suggested that a publication ban would assist in maximizing the likelihood of witnesses testifying and encouraging the reporting of sexual offences⁷⁹. In a converse analogy, privacy concerns created by the background checks could discourage prospective jurors from service.

Moreover, unrectified *Charter* breaches involving the privacy of jurors and an increasingly troubled public perception of jury duty could have the ultimate effect of bringing the administration of justice into serious disrepute. In *R v. Bain*, Justice Cory emphasized that because the jury was the ultimate decision maker, its selection could not result in the appearance of favouritism towards the Crown.⁸⁰ He further stated that fairness was the "guiding principle of justice and the hallmark of criminal trials".⁸¹ In *O'Connor*, Justice L'Heureux-Dubé focused on the role of human dignity as the core of the *Charter* and stated that conducting a prosecution in a way that is contrary to the "community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused".⁸²

Over ten years ago, the Court was strongly critical of the actions of the Crown counsel in *R v. Latimer*⁸³, which involved the preparation of a questionnaire asking prospective jurors about issues such as religion, abortion and euthanasia. Chief Justice Lamer described the Crown's actions as "nothing short of a flagrant abuse of process and interference with the administration of justice" which "contravened a fundamental tenet of the criminal justice system".⁸⁴ The prosecutor narrowly avoided a conviction for obstruction of justice. However, one of the grounds for his acquittal was the fact that there was no policy regarding prospective juror background checks at the time of the charges.⁸⁵ The existence of the 2006 memo to prosecutors⁸⁶ has made it clear that this is no longer the case.

Even in 1997, within the context of a very high profile case and far more uncertainty over Crown policies, the juror background checks conducted by the Crown were such an obvious error in judgment that they required very brief comment by Chief Justice Lamer.⁸⁷ Such uncertainty no

⁷⁷ *Supra* note 68 at 162.

⁷⁸ John Paul Ryan, "The American Trial Jury: Current Issues and Controversies" (1999) 65:7 Soc. Education 459 at 461.

⁷⁹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 883.

⁸⁰ *Supra* note 47 at para. 7.

⁸¹ *Ibid.*

⁸² *Supra* note 34 at para. 63.

⁸³ *R v. Latimer*, [1997] 1 S.C.R. 217 [*Latimer*].

⁸⁴ *Ibid.* at para. 43.

⁸⁵ *R v. Kirkham*, [1998] S.J. No. 458 (Q.B.) at para. 20.

⁸⁶ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 39 (26 May 2009) (Hon. Chris Bentley).

⁸⁷ *Supra* note 83 at para. 43.

longer exists. The cases implicated in this investigation were fairly routine cases and did not garner anywhere near the degree of publicity attracted by the *Latimer* case. If the actions of the prosecution in a single case were sufficient to contravene the fundamental tenets of the criminal justice system, then the potential implications of the current predicament on public perception and faith in the justice system may be dire and far-reaching.

Conclusions

The *Charter* breaches that may have occurred in respect of the alleged background checks conducted by police and provided to the Crown, are not trivial. They affect a potentially large number of people who are without a voice in the criminal justice system, but who are nonetheless critical to its proper functioning. It is the Centre's conclusion that practices that involve searches into police occurrences or other police records relating to the personal backgrounds of individual prospective jurors breach the privacy rights of those jurors under s.8 of the *Charter*. In addition, the use by Crown Attorneys of this information, without disclosure to the accused in a criminal trial, to potentially vet jurors, perpetrates further *Charter* breaches that jeopardize the fairness of criminal proceedings, potentially going back over a long period of time and in a number of judicial districts in the Province of Ontario. While we laud the initiative of the Privacy Commissioner to conduct this investigation and acknowledge the co-operation of the Attorney General of Ontario in reviewing the alleged practices, we conclude that the government must conduct a full public inquiry, or independent investigation with a broader mandate, into this matter in order to restore public confidence in our justice system.

Conclusions and Recommendations

1. The interpretation of the legislation respecting the legality of the background searches must take into consideration the *Charter* rights of the individuals affected. Given the preceding analysis and assuming the facts as set out in the letter of request, we conclude that there have been *Charter* violations in respect of the privacy rights of prospective jurors.
2. We also conclude that there are serious implications for the public's perception of the administration of justice which could seriously impact the willingness of people to serve on jury duty which already imposes significant hardship on individuals.
3. Given the lack of standing of potential jurors in the system and the widespread nature of the violations, a public inquiry or independent investigation that fully explores the incidence of the violations and the appropriate protections for the public is necessary to restore public confidence in the system.