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## Jury vetting's legal upshot

A Case In Point

Presented by



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More than 800 people in Simcoe County, north of Toronto, were most likely preparing for the holidays in December 2004 when, unbeknownst to them, police were conducting secret checks into their backgrounds.

Confidential databases that contain a wide range of information were used in the probe. This was not a criminal investigation, but a search to see if any of them on a list of potential jurors had an indictable offence conviction that would make them ineligible to perform their civic duty.

In the end, not a single person was found to have such a conviction. Yet police still passed on the data to the Crown for use in jury selection in the trial of Ibrahim Yumnu and two other co-accused, who were later convicted of murder.

The Crown office in Barrie, where the main courthouse in Simcoe County is located, has said it was trying to make sure ineligible people don't end up on a jury.

It is a refrain echoed in many other parts of the country. Five provinces, including Ontario, maintain that it is fine for the Crown to conduct criminal record checks in a jury selection process based on self-reporting.

This is despite the fact that no provincial Juries Act expressly grants this authority. It is up to the courts to confirm eligibility.

As well, the Canadian system permits only limited inquiries into the backgrounds of juries and their beliefs, unlike the process in the United States. Nearly 20 years ago, the Supreme Court of Canada stressed that the Crown and defence are entitled to an impartial jury, not a "favourable" one.

The Crown rationale is that former convicts, previously sentenced for crimes that make them ineligible, will somehow slip through the system unnoticed and end up on a jury judging one of their alleged peers.

"It is of importance to the administration of justice, society at large and victims in particular that no person with a criminal record for an indictable offence sits as a judge on the facts on a trial," wrote Ontario's chief prosecutor John Ayre in an internal memo this spring.

But the evidence from the Yumnu case suggests this may be a phantom concern.

"Most people want to get out of jury duty," noted Sanjeev Anand, a criminal law professor at the University of Alberta who said he doubts convicted criminals are trying to serve as jurors.

The practice of police conducting searches for the Crown also opens up the possibility of the prosecution using it to gain an improper advantage in jury selection. "You could be trying to tilt the process," Mr. Anand said.

A report issued by the Ontario Privacy Commissioner this week reveals that about one in three Crown offices had conducted checks and obtained information that was contrary to the Juries Act and even beyond what the Ministry of the Attorney-General believed was acceptable.

The Crown jury lists in the Yumnu case, which have now been filed with the Ontario Court of Appeal, were colour-coded. Prosecutors Mike Flosman and Gisele Miller (now a Superior Court judge) had pink or yellow lines through certain names, based on information obtained through the police background checks.

The Privacy Commissioner report confirmed that the practice in Barrie was routine and dates back at least 13 years.

There were also questionable policies in other parts of the province. The lead investigator and court liaison officer in Bracebridge would sit with the Crown in the courtroom and pass on "personal knowledge" about potential jurors. The "personal knowledge" was not disclosed to the defence.

Ontario Attorney-General Chris Bentley indicated after the Privacy Commissioner report was issued this week that he would act on her recommendations. They included an end to background checks and the assignment of responsibility for determining eligibility to the independent provincial jury centre.

The province should also consider changes to the Juries Act, suggested Lisa Austin, a law professor at the University of Toronto.

"From a policy perspective, any jury checks should be expressly authorized through legislation. The government must also demonstrate the need for it," said Ms. Austin, who was part of a submission to the Privacy Commissioner on this issue on behalf of the David Asper Centre for Constitutional Rights.

While there may be new rules in place in Ontario, it is not clear if any prosecutors will be sanctioned for what may have been professional misconduct.

Mr. Bentley would say only that it was a matter for the courts and the Law Society (which regulates lawyers in Ontario), when asked by the media this week if any Crowns would be disciplined.

A spokesman for the Law Society said yesterday that it is conducting "investigations" but its rules do not permit disclosure of any details of an investigation.

The Court of Appeal is expected to hear arguments in the Yumnu case late next month. It will be the first time an

appellate level court has been asked to decide on what the legal remedy should be for jury vetting. Yumnu's lawyers are ultimately seeking a new trial.

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