IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2008

BETWEEN **DEBORAH GORDON-SMITH**

Appellant

AND **THE QUEEN**

Respondent

Hearing 3 December 2008

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel G J X McCoy and K H Cook for the Appellant
D B Collins QC and C Brown for the Respondent
D J Boldt – Amicus

CRIMINAL APPEAL

10.05:47am

McCoy Please Your Honours I appeal for the Appellant together with Mr Cook.

Elias CJ Thank you Mr McCoy, Mr Cook.

Collins QC Mr Brown and I for the respondent.

Elias CJ Thank you Mr Solicitor, Mr Brown.

Boldt May it please Your Honours I appear as amicus.

Elias CJ Thank you Mr Boldt. Yes Mr McCoy.

McCoy Your Honours jury vetting as practised in New Zealand discloses, in our submission, an erratic, inconsistent and occasionally even abusive regional variation. The current practice can be described very shortly. Police Officers provide to the Crown Prosecutor two different groups of information. The first group can perhaps be described as criminal

litigation outcomes. It includes not every outcome, but it includes every conviction, every acquittal, every time a charge is withdrawn by leave. The second grouping of information provided to the prosecutor can be described as Police intelligence and it principally consists of unverified or unverifiable information as to whether a person has an association with a known criminal, a family member of a criminal and matters of that nature. It also includes information about whether a person has been a victim of crime themselves. Now, it's the submission of the appellants that the current procedure in New Zealand is not authorised by law and indeed means that the administration of justice seriously malfunctions in practice. Our submission goes further and makes the point that there are indeed treacherous implications for the administration of justice because jury vetting is clandestine, it is unaccountable and what it's doing is involving and invading the constitutive process leading to the formation of a jury. An aspect of a trial itself. Our submission is that whilst the Crown professes to create an impartial jury, it is designedly creating a favourable one. And it's doing that based on information which is not available currently to the defence. Now I will take Your Honours, if I might, to the current statutory framework. I am conscious of the fact that there have been a number of statutory developments since the original 1981 Act that impinge and intercept on that Act. If you would please turn to volume 8, items 1, the Juries Act 1981,

Elias CJ Mr McCoy, it has occurred to me that this term vetting may be a bit loaded. You are really talking about the provision of information?

McCoy I'm talking in a compendious way about the provision of any information

Elias CJ Yes.

McCoy By the Police to the prosecutor which the prosecutor assimilates and takes into account for the purposes of exercising a pre-emptory challenge.

Elias CJ Yes. I know that the cases do refer to jury vetting, but is it a term that you are particularly wedded to

McCoy I'm not overly

Elias CJ No

McCoy I'm not wedded to. I'm not enamoured by it.

Elias CJ For myself I think I might rather like to avoid it because it is a little pejorative and it's not really very accurate if what your talking about is simply provision of information which isn't available to the defence and which is attained by the Police because of their particular powers and responsibilities.

McCoy I'm perfectly content to adopt a parallel formula

Elias CJ Yes.

McCoy That conveys that.

Elias CJ I just wanted to explore that.

McCoy I don't mean by the expression that it's conclusionary or pejorative.

Elias CJ No, no.

McCoy Because the lawfulness has yet to be ascertained.

Elias CJ Yes, thank you.

McCoy Yes thank you Your Honour. Could I ask your attention please to the Juries Act 1981 and first of all note the long title. It's a consolidating Act and ask the Court to note that by section 3 it expressly binds the Crown. By section 4 this Act applies to all juries whether civil or criminal.

Now what is of some significance Your Honours is that the only reference to the Police in the Juries Act or Regulations, Rules, is found in section 8(g) of the 1981 Act and that is simply an exclusion that "employees of the Police and Traffic Officers cannot be members of a jury". Now this has manifest significance. Nowhere in the entire Act are the Police mentioned as having any express or indeed any other powers in relation to the composition of a jury, which is a matter going to the administration of justice rather than has as been put by my learned friend a matter of law enforcement. A point to which I will specifically return. So it is not just the curiosity but it's highly implicative of the true position that nowhere in the Juries Act are the Police expressed resourced with the significant power, the lawfulness of which is at issue today.

I want to bring to your attention now, however, that the current Juries Amendment Act 2008 which comes into force on Christmas day this year does, for the first time, make specific reference to the role of the Police. The purpose of that amendment and what the Police are entitled to do by virtue of their inclusion as eligible people is a different matter to which I will return. So there has been a significant variation. The Police now specifically adambrated as persons entitled to receive the jury list. Now, Your Honours will know that the principle of random selection is manifest throughout the Act. It is seen for example in section 9(3) and it veritably oozes from the pores of this Act as well as the issue of confidentiality. This is made clear, for example, at section 12. You will see the cross-heading Access To and Confidentiality of Jury Lists. Now the jury list is the larger document

from which the jury panel is drawn and confidentiality is spelt out indeed in almost every one of the subsections and imposes strict confidentiality obligations. Now part of my learned friend's argument is, as I apprehend it, although he accepts as he must, that confidentiality is expressly required in terms of the greater the jury list, he says it does not follow that it applies to the jury panel list which is the lesser drawn from the greater. I say that that cannot be right and I will develop that argument in due course.

If one then turns please to section 14 which is the critical section under the current formulation. My learned friend, Mr Solicitor, places his case entirely on section 14 for the lawfulness of jury vetting. Your Honours it's significant nay important, that he does not attempt to cling to the common law or indeed any residual third power in relation to the rights of the Police in this regard. He puts his case on section 14.

Turning to section 14, what it does in subsection 1 is provide that at a date some not earlier than five days before the commencement of the week of the trial any party to the proceedings or any person acting on behalf of such party, may request the Registrar to make available a copy of the panel for inspection and copying by, or on behalf of that party and the Registrar shall comply with that request. It is self evident that the legislature determined that in both civil and criminal proceedings the immediate parties to the criminal litigation were entitled to know who might be sitting in judgment as the sole triers of fact in relation to them. What is critical is the complete absence as I said earlier of any reference to the Police in section 14(1) but it goes further. There is a complimentary provision in subsection 2 because it does allow the Court to permit any other person other than the party to inspect and copy the panel during the time period referred to. No application is ever made by the Police under section 14(2) the Police have invariably taken their strength from section 14(1), the argument running that on some form of functional analysis the position between the Police and the Crown is such that either one is agent for the other, or that there is a necessary relationship between them so that party, whilst it has to mean an indictable offence the Queen, actually extends to the Police. That would subvert the structural and operational separation mandated between the Police and the Crown made very clear by the Policing Act 2008 which came into force on 1 October this year. A copy of that can be tendered to Your Honours in due course.

For the first time now, in New Zealand, the old Police Act 1958 having gone, there is now the clearest possible separation, constitutionally, structurally and operationally between the Crown and the Police.

Elias CJ Do you say it was inherent before, it didn't need spelling out in the Police Act?

McCoy Precisely.

Elias CJ Yes.

McCoy In my submission this is a notion of the common law and indeed of the prerogative which goes back to the very point of the rule of law. If it were otherwise there would be by definition a Police state.

Subsection (3) is also significant in section 14. If Your Honours would look at that please. What one sees there, is that no copy of the jury panel that is made available to any person under the section shall disclose the date of birth of any of the persons whose names are on the panel. This has great significance as well because what it means is that the Police are unable, intentionally unable, in our submission to ever make a data bank match-up between the person desired to be investigated for their antecedence and the person themselves. Your Honours may know that the standard provision of information only gives the name, address and occupation of the juror on the jury panel. Without a date of birth, the risk of error is manifest, and indeed that is the express experience of the English Courts, see *Mason's* case and the article by the Honourable Justice of Appeal John Basting in Australia as to the experience. When one looks then at the interleaving structure of the three subsections and the content of section 14, it is indeed an utterly barren source of law to generate something as significant as jury vetting. It is devoid of any of the indecia that one would naturally expect to authorise the Police to make the necessary inquiries on behalf of the prosecutor.

Tipping J Mr McCoy is it perhaps because of subsection (3) that conventionally, as you have said, the panel doesn't contain the dates of birth because obviously if it did you would have a problem – you'd have to black it out or something like that.

McCoy Absolutely.

Tipping J It must be the rationale one would assume?

McCoy The panel is not to provide the date of birth.

Tipping J Yes.

McCoy That is to protect the privacy of the individual juror and it has further the consequence that the Police are unable to make an accurate linkage between that person described only by name, address and/or occupation and data bases.

Tipping J But the point – sorry

McGrath J I was going to say that that's only on your argument, Mr McCoy a consequence? It's not the purpose of the provision to prevent data matching?

McCoy Correct.

Tipping J Yes that was what I was going to

McCoy Yes. Then I agree with both of Your Honours in relation to that.

Elias CJ So what is the purpose of the provision?

McCoy The purpose of section 14, subsection (3), is to protect the privacy of the individual as much as possible. It was, it must have been taken by Parliament that this was an intrusion too far because it is possible if one systematically made a match up from the Electoral Roll to identify all of this information, it is possible to achieve that if you had the resources the inclination and indeed the information. There is some obscurity as to what is behind subsection (3) but in my submission a consequence is it precludes a match up.

Elias CJ It's not part of your submission though to say that subsection (3) is a pointer to the fact that information about jurors is effectively confined to their name and occupation only is it?

McCoy It's not a direct purpose, but the consequence is it fits in nicely with the thrust of our argument that subsection (1) does not by its language and purpose authorise what we have called jury vetting. But jury vetting is actually made utterly impracticable without having the information which subsection (3) prohibits being made available.

Tipping J How long has it been there Mr McCoy this subsection (3)? Has it been there for a long time, or is it of recent origin or – are you able to say off the cuff?

McCoy I cannot immediately answer that. There is an excellent article by Michelle Poules in the Victoria University of Wellington Law Review which reviews the history of juries in New Zealand and that may contain the answer. It deals with many of the minutiae and the historical exiguous and development of the various concepts that are currently found.

Wilson J Mr McCoy as from Christmas day your section 14(3) is repealed is it not?

McCoy 14(3) has now gone.

Wilson J Yes.

McCoy By the 2008 Act.
Wilson J Yes.

McCoy Oh yes Your Honour by Christmas day it will have gone.

Wilson J Yes.

McCoy Subsection (2) remains, subsection (1) is significantly modified and I intend to come to that.

Wilson J To come to that no doubt.

McCoy Yes, yes.

Blanchard J So jury vetting will be practical from Christmas day?

McCoy If authorised, correct Your Honour. If authorised. Subsection (3) simply introduced a hazard into jury vetting if it was authorised from the 1981 Act and if it wasn't authorised it's another reason or consequence why jury vetting was not permitted by subsection (1).

Blanchard J Why do you think they removed subsection (3)?

McCoy Quite possibly because the information as to the date of birth is ascertainable from the Electoral Rolls.

Blanchard J Why would they want it?

McCoy Why would the – sorry.

Blanchard J Why is that useful information?

McCoy Its a reason, maybe, simply the change in our approach to privacy. That, whereas in the past, age was carefully guarded as a secret it's no longer necessary under the current environment to give it that special prominence. But one of the flowing consequences is, if you are able to have that characteristic, namely the age of the person disclosed, it does ensure greater efficiency in terms of being able to match up data. There's no doubt that that's plainly significant.

Blanchard J What data matching will be going on other than jury vetting?

McCoy None I suspect Your Honour, but without having a date of birth you fall into – the Police are unable to eliminate the risk that they are providing information about the wrong person.

Blanchard J Doesn't that argument suggest that it's been removed in order to assist jury vetting by the Police?

McCoy The new 2008 Act expressly, for the first time, provides that the Police now have a role. The question that is significant and remains to be answered is, what is the role that the 2008 Act has given them? Does it give them the role that has been supposed to exist under the 1981 Act or, does it simply permit the Police to investigate whether a person is a disqualified person who was not eligible to sit on the jury at all.

Blanchard J I take it that that hasn't been spelled out in the amendment?

McCoy Absolutely. In fact my learned friend and I are ad idem on this. This whole issue was simply not even debated by the legislature for the purposes of the 2008 Act. The best that my learned friend can do is reach back to a Law Commission report to suggest that variations were needed to the pre-existing New Zealand law. The only time the underlying idealogy of jury vetting has been considered was in the 1981 legislation.

Tipping J If it was simply designed to, directed to disqualify jurors, it would have been presumably intended as a kind of back up to the Registrar's

McCoy Exactly. In fact – forgive

Tipping J Function.

McCoy Forgive me, I didn't intend to cut across Your Honour. Exactly Your Honour. The evidence in the materials

Tipping J I'm not necessarily saying that's the answer. But I mean, presumably if that was in their minds they must have thought that the system through the Registrar wasn't robust enough if you like. It's notorious that it didn't always catch people.

McCoy Correct. In fact the evidence filed in this case shows that unhappily there has been a significant tendency for genuinely disqualified persons to sit on juries unless there is a way that that can be prevented in a sense it is a most unattractive scenario. It does nothing to invalidate the verdict because it is specifically saved by section 33 of the Juries Act, but it is probably a criminal offence for a person who is disqualified to knowingly sit on a jury. There is contravening section 107 of the Crimes Act, Contravention of Statute. The Police there

McGrath J But there's no specific provision that penalises jurors, disqualified jurors who sit is there?

McCoy Correct. There is not.

McGrath J And when you contemplate that these people are summonsed and wouldn't have any knowledge of it, it rather suggests of the lack of any specific provision, it means that Parliament didn't want to penalise disqualified jurors – it didn't want to bring the criminal law to bear on them as a means of achieving its end.

McCoy Even if it did not intend to criminalise the conduct of a disqualified person sitting, it would plainly wish to preclude that happening.

McGrath J Yes.

McCoy Because the very fact that a line has been drawn in the sand Parliament expects that to be honoured. Our submission is that that would be genuinely a law enforcement purpose because I intend to come to this theme. What is critical for New Zealand law is that since 1993 with the Privacy Act and indeed with the very modern Policing Act of 2008 the new touchstone is law enforcement. Our submissions deny the fact that jury vetting is any form of law enforcement. Law enforcement means seeking to enforce the law; seeking to ensure obedience or compliance with the law. That very much looks at the issue of disqualification. A person who is disqualified ought to be stopped by the process of law from being able to participate as a sworn juror. One can easily understand the desire of Parliament to give some teeth to their prohibition but when one analyses what jury vetting is, conscious of this inappropriate appellation which I continue to use,

Blanchard J I'm sorry, I'm helping lead you into it. I find it easier just to call it jury vetting.

Elias CJ I'm happy to use it just with the – because it is a convenient label but just with the caveat

McCoy Yes.

Elias CJ That really what we are talking about is provision of information.

McCoy Thank you. Yes, I mean earlier it would have been seen pejoratively as jury packing and I'm avoiding

Elias CJ Yes.

McCoy That more strident critical comment. I see it as the provision of information. It's the lawfulness of that process which is in issue.

Elias CJ Can I just ask you the summons to jurors,

McCoy Yes.

Elias CJ I should know this but it's the sort of thing you don't look at, does it notify those summonsed that they are disqualified if they fit within one of the criteria?

McCoy I believe it does not.

Elias CJ No.

McCoy And one is surprised

Elias CJ Yes.

McCoy To find that it doesn't

Tipping J Don't they get as well as the summons they get a little sort of package of information don't they?

McCoy There is an introductory video which albeit not prescribed by law

Tipping J No, no they

McCoy That probably provide certain information to jurors.

Tipping J But they get a booklet as well.

McCoy Yes.

Tipping J Because my wife got one the other day.

Wilson J So did mine.

Tipping J I didn't read it so my mind is its normal blank self.

McCoy Well I'm going to help you fill in the dots soon Your Honour you can be sure of that.

Blanchard J When do they get the video?

McCoy The Registrar plays that to the jurors

Blanchard J Right, that I am familiar with, yes.

McCoy Yes, as a settling in process prior to the empanelling Your Honours, so in terms of disqualification we need to turn in due course to the 2008 Act, but as I said there is now a systematic theme in New Zealand jurisprudence. The Police are given law enforcement powers. This is the language of the Privacy Act and it is now the language of the Policing Act. With that critical thread identifying the power of the Police, the vital question necessarily must be when the Juries Act 2008, or the Juries Act 1981, is read against that combined power, is it a lawful function of law enforcement for Police Officers to provision a Crown Prosecutor with that information? Now as I understand my learned friend's argument, and I hope I do him no injustice by this, he puts perhaps an issue even whether the empanelment of the jury is a phase of the trial. Now this plainly must be a phase of the trial. The fair trial processes ordained by the Bill of Rights Act necessarily apply at least from the arraignment, because the arraignment and the plea of not guilty generates the need for a trial. At least from the point of arraignment everything thereafter must be a phase of the trial and the authority of the Privy Council from *Gibraltar* expressly stating that the empanelment phase is as aspect of the trial and indeed the Supreme Court of Canada have said the same, and this hardly seems heterodox.

The issue then is on the assumption that Your Honours ultimately find that this is an aspect of the trial and the fair trial procedures with the Human Rights leavening necessarily applies to this, is whether it is intrinsically unfair for the Police to provision one party with information in order that the Crown can de-select jurors whom it considers unfavourable for its purposes. My submission asks the Court to go back in a sense to Justice Tipping's judgment of *Greening* in 1990 decided albeit five days before the Bill of Rights Act came into force, in which Your Honour

Tipping J I'm sure that was very prominent in my mind at the time Mr McCoy.

McCoy Well it only adds to the lustre of your judgment.

Elias CJ Well you could go back to Lord Denning I suppose if you wanted someone more lustrous.

McCoy I don't want to take the shine off His Honour but

Elias CJ No, very wise.

McCoy But I certainly intend to attach myself to Lord Denning's approach where he said in terms that jury vetting is unconstitutional, and indeed Lord Justice Shaw and Lord Justice Brandon each in turn, and for slightly different reasons, were to the same effect. But if I could simply point out that His Honour presciently in 1990 identified today's occasion because he said that jury vetting was questionable in itself because of the appearance of injustice it may cause at page 114. Likewise it's not without significance that the learned President in the Court below at para.145 also accepted that there is no need, no demonstrable need for jury vetting in New Zealand. We say it is inherently objectionable and is simply the modern but more subtle version of jury packing practised by the Crown for centuries.

McGrath J I suppose it is however a fundamental question in the case as to whether peremptory challenges are used to create a jury that's more favourable for the Crown or whether it's in fact used to create an unbiased jury. I mean I think there is a fundamental issue that you will have to grapple with before you latch on to the side you favour.

McCoy I certainly intend to alight and indeed tarry on that issue because as has been pointed out by a number of distinguished commentators, while the Crown may be very properly motivated to secure an impartial jury, the result is that by de-selecting they actually create one perceived by them to be favourable to their cause. It is

Blanchard J Or not unfavourable.

McCoy Or not unfavourable. I'm perfectly happy

Elias CJ Well you said not unfavourable surely is legitimate if the purpose is an impartial panel.

McCoy No I respectfully disagree. There is in fact a separation here and it's been identified as being one peculiarly difficult to draw, because whilst I can fully accept proper motivation by the Crown in seeking an impartial jury, they have no monopolistic entitlement to that. It is a right that the defence must have. The defence is plainly disadvantaged, indeed is at a positive liability, for example if the defence do not know, and I conjure up an example, that three of the people on the jury panel have say most unfortunately been themselves victims of rape offences in a sexual assault, it's utterly obvious is it not that the defence have to be entitled to know that. The prosecution already have that information available to them through the victim's register database which they keep and can access.

Elias CJ You walk something of a tightrope don't you, because this is a submission in favour of jury vetting?

McCoy No Your Honour with respect, at one extreme yes it is, the other is there should be none at all, and my submission is first of all that the New Zealand law properly understood even in the 2008 Amendment, does not authorise jury vetting at all. All it authorises is for the Police to enquire whether there are disqualified persons about to sit on the jury, and that is a lawful law enforcement function. What is not lawful, and I will come to this point and identify the sub-parts to the argument, is for the Police to have a role in the administration of justice. The constitutive phase, the composition of the jury takes place under the auspices of the Court. The Court is currently powerless to ensure that the Crown exercise their peremptory challenges for a lawful purpose. Indeed as I see it, my learned friend's argument goes, and indeed the amicus makes the same point, that there are no constraints it is argued on how a peremptory challenge may be exercised. My submission is that this is fundamentally incorrect. The Crown is constrained by the purposes of the New Zealand Bill of Rights Act. It's also constrained by the purposes of the Juries Act, which puts a premium on randomness of selection and puts a further premium on there being a representative cross-section of the community. These two essential attributes which are constitutionally entrenched in my submission are tinkered with, albeit for proper purposes, I can accept that. I make no rash allegation of bad faith, but this has been tinkered with. Parliament has carefully set out in terms of the interstitial provisions of the Juries Act that for a jury to be impartial it must be impartially selected; it must be random in its composition; and it must bear a genuine cross-section community approach.

Wilson J Mr McCoy this seems to be an argument against any use of challenges including by the defence.

McCoy No, no. I fully accept that Parliament has also made a minor modification to the principle of randomness plainly by the provision of the peremptory challenge. My learned friend

Elias CJ It's hardly minor though. Don't you have to unpackage the argument a bit because it seems to me that some of your argument is directed at the use of information by the prosecution rather than provision of information by the Police?

McCoy There are. I intend to desegregate the argument and identify the structural difficulties that my learned friend has and I'm pleased to do that at your behest immediately. The first point is as Your Honour correctly observes, if s.14 limits the provision of the jury panel to the parties, and in an indictable offence the parties are the Queen and the accused, what one needs to find for jury vetting which is capable of having a significant impact in terms of the composition of the deciders of fact, is to ensure a level playing field. That's the language of Justice McHugh in *Katsuno*. He said that that is critical to the approach to the composition of a jury panel. If the Crown are entitled to the panel, as plainly they are, the reason why they're entitled to it is one so that they may make their own subjective and intuitive assessment of the jurors based on what they can glean from the information provided – name, address and occupation. They are also permitted to ask of their witnesses whether the witnesses know any of the people so as to prevent or preclude a mistrial because of a relationship being exposed in due course. Those are two perfectly proper and utterly lawful purposes. The same purposes identically exist in the accused. So to that point there can be no difficulty whatsoever and the law ordains that.

Elias CJ Sorry, just pause a moment. I'm just interested in what you're saying about the Police ascertaining whether witnesses know members of the panel. Wouldn't that entail disclosure to witnesses of who's on the panel?

McCoy Your Honour I said the Crown, and I say the Crown are not entitled to give the document to the Police at all, but in terms of the obligation to prevent a possible mistrial because of knowledge of a juror I say it's a lawful purpose implicit in the scheme that the Crown as much as the defence have a duty to reprise any witness of the list of prospective jurors in order that the trial is not in due course aborted when a relationship is exposed.

Elias CJ Does that happen?

McCoy Oh yes it happens, it absolutely happens.

Tipping J But is it inherent in the submission that the Crown are not entitled to engage the Police in that exercise

McCoy Exactly

Tipping J So they've got to have some Law Clerk in their Crown Solicitor's office as opposed to the Officer in Charge, is that the

McCoy What I'm instructed is that the Crown Prosecutors commonly interview witnesses themselves and that's the opportunity in which that takes place. And that is the same for the defence. Those are the two lawful activities.

Tipping J So the Crown are not entitled to engage the assistance of the Police for any legitimate purpose that the Crown may have?

McCoy To answer Your Honour's question requires a slightly wider angle. One of the points which has been advanced by my learned friend is that the Police have a right to assist the prosecution in indictable offences, and in a simple sentence that is probably correct and non-contentious, but the content in parameters of that right are in issue and when I take you to the Policing Act 2008 you will see that no such purpose exists in the New Zealand Police, albeit I wish to caution, against an embarrassing advance of submission, the definition which now particularises the powers of the Police is described as being an inclusive one

McGrath J Well absolutely, I mean the whole scheme of New Zealand legislation has never been to define a legislation of Police powers comprehensively.

McCoy Absolutely, and there is a distinct heartening back in reference to the common law powers of Constables still existing, so that has not been removed.

Tipping J So what's troubling me Mr McCoy is this, that the Crown surely must be entitled in order properly to exercise its peremptory challenges to inform itself by some means of the antecedence of jurors, otherwise the peremptory challenges would be wholly arbitrary like I don't like this person because they've got red hair, or got a squint or look a bit crooked.

Elias CJ Or only occupation or name.

Tipping J Yes. Surely the Crown in order responsibly whatever the parameters may be of what that responsibility is must be entitled somehow to inform themselves the antecedence. There's nothing wrong with the defence making inquiries about the antecedence of jurors.

McCoy Yes there is.

Tipping J You say there is?

McCoy I do.

Tipping J It has to go that far doesn't it?

McCoy I say there is and to answer Your Honour, your question presupposes that the Crown are entitled to the assistance of the Police in that regard

Tipping J No, forget the Police at the moment. Do you deny that the Crown are entitled somehow to get information about prospective jurors to assist in responsibly exercising peremptory challenges?

McCoy If the Crown are aware of the background of a person on the jury panel they may legitimately take that into account as long as they do not exercise their peremptory challenge for a reason which is inconsistent with the New Zealand Bill of Rights Act or the Juries Act.

Tipping J Yes but how are they going to become aware?

McCoy This is the essential quidity of the jury system. It's randomness. It is a subjective, intuitive assessment. It is not one based on technological advance. It's not one based on having rafts of information, because the moment one says that one party can have that information there is an inequality of arms unless the other party is provided with the same information.

Tipping J Well that's the second question.

McCoy It is and I'm trying to, sorry, I'm trying to deal with Your Honour's first point but a

Tipping J With respect do you mean that the Crown Prosecutor has simply got to sit there unarmed and say I don't like the look of this person? Is that the sophistication that attends peremptory challenges?

McCoy The sophistication that attends peremptory challenges is that the Crown should not exercise a challenge unless it has a valid reason at all. It is not a valid reason if it's based on for example race, religion, ethnicity, matters of that nature. That is not a lawful approach.

Tipping J Say it's a burglary charge and up steps a known but not disqualified burglar, would that be a sufficient reason for the Crown to peremptory challenge that person, assuming the Crown Prosecutor, because he's not allowed to make enquiries, happens to know this because he prosecuted him five years ago?

Elias CJ And failed.

Tipping J And failed, yes, or got him, it doesn't matter.

McCoy Well no Your Honour with respect on my argument it does matter and I want to deal with that. First of all can I deal with the acquittal, giving the Chief Justice deference, and then I'll come to Your Honour's point.

Tipping J Of course, I'm very used to that.

Elias CJ Nobody does.

McCoy Well I'm going to do it in any event.

Elias CJ Thank you Mr McCoy.

McCoy One of the conceptual difficulties with a prosecutor taking into account an outcome of criminal litigation adverse to the Crown an acquittal, and bear in mind that this could be an acquittal in which this Court itself allows an appeal and orders no retrial, or it can be an acquittal in the District Court, is that the Crown if they are informing themselves to make a peremptory challenge based on an outcome contrary to the Police's expectations, are actually at a right angle violating the spirit of raised judicature. What they are doing is not honouring the acquittal. If they hold the acquittal against the prospective juror, this is an utterly illegitimate thing to do.

Elias CJ But isn't that an object to holding the information. That's why I'm concerned about the unpackaging gear

McCoy I say by way of respectful submission it can never be a lawful purpose, never be a lawful purpose for a prosecutor to take into account as the basis for a peremptory challenge, the fact that a person has previously been acquitted by a Court of competent jurisdiction. All that does is rub salt into the eyes of the judicial system and it's intolerable for the administration of justice that the Police are able to advise an honourable prosecutor to make a decision because the Police are discontent with the outcome of a case in which they were the witnesses and/or if it was a summary case, the actual party. I say acquittals raise a particular position under New Zealand law and should never be countenanced in any event as being relevant information. Having an acquittal held against you when you have a constitutional duty to serve as a juror is in fact a striking thing. Coming back

Wilson J Mr McCoy, in a civil jury trial in which the Crown is not a party, are the legal advisers to the parties permitted to make informal inquiries about the members of the panel?

McCoy The plaintiff or the defendant in a civil case where the Police are not a party are entitled to use their own knowledge to decide whether they wish to object to a person. What is most undesirable, and the classic situation was seen in the *Bjelke Petersen* which of course was a criminal case, most undesirable is for either party to make systematic inquiries of the actual jurors or of persons known to the jurors so as to

be able to compile a dossier of information to detect whether there is plaintiff sentiment or anti-defendant sentiment. I submit that that is thoroughly reprehensible and wrong and not countenance by the law. To answer Your Honour even further, in the trial of the Premier of Queensland, which led to the Queensland Parliament completely abolishing the provision of jury panel lists to anyone, the defence had made protracted and systematic inquiries of the nature that I've described. Equally in the Arthur Allan Thomas retrial, the report in the Royal Commission shows that the Police spent up to 11 whole days making inquiries of the prospective jurors so they would be able to ascertain whether there was anti-Police sentiment amongst the members. To answer Your Honours directly I submit it's not proper under New Zealand law for anyone to make inquiries beyond the knowledge that they currently have. Once the hare is out it can't be stopped and in terms of the extreme positions that are capable in terms of the arguments today, it's either going to be this is it not, the Court concludes that jury vetting is read down to only disqualified persons. If the Court however says we find

Elias CJ Well are you talking there about use? You see I really do think that there are different issues here and I think we need to be very careful about what you're addressing. Are you talking about use of information to subvert the disqualification provisions in the Act? Are you talking about misuse of information that the Police have access to and the information is used for a different purpose other than policing purposes, or are you talking about making inquiries as you seem to be developing here, because the great problem you have if you're looking at the inquiries is that there's no symmetry and the informed person, the knowledgeable person, is going to be well ahead of the uninformed person.

McCoy And the lack of symmetry is particularly evident when there's reliance upon database information which in a most technical sense every accused, had they the time and the resources, might be able to access the outcomes of every criminal litigation in New Zealand, whereas the Police plainly already have that information.

Elias CJ But I think that may well be an issue about the use of that databank rather than the jury vetting consequence.

McCoy Your Honour to agitate the point you are correct. One needs to desegregate this case conceptually into first of all entitlement; secondly, limits and protocols and the use of the information, and finally an examination of what the law authorises, and it needs to be examined first of all in the rounds so we can see the points of fracture so the initial incisions can be made. I wish to ask the Court, and I'm conscious of making progress within the time available, to first of all bear in mind when you see s.14 of the Juries Act, the Court will need to find if it's against me that that section as drawn its content and its purpose authorises the provision by the Police of information to the

Crown Prosecutor. I fully accept it's not an issue that at common law the Police have a duty to assist the Crown in the prosecution of indictable offences. The issue that arises is whether that duty authorises the Police transmitting information acquired from their databases to the Crown for the purposes of exercising the peremptory challenge. The Police have rights which are trammelled by the Privacy Act by the Criminal Records Clean Slate Act and also by the modern Policing Act of 2008, and in combination our submission is that they dis-entitle the Police to transmit the information to the prosecutor at all, which means to answer eventually Justice Tipping's enquiry of me, the Police as much as the defence consonant with the randomness of jury selection make the best they can - it is pot luck – that is what the Act ordains.

McGrath J So the quality of their decision can never get beyond the intuitive, that's your view of the statutory scheme? There's no

McCoy In terms of peremptory challenges

McGrath J Yes.

McCoy Yes Your Honour, that's right, that is my respectful submission.

McGrath J What about the general Police knowledge that comes out when the Officer in Charge asks well we've got some affidavits giving us a bit of insight as to what goes on here?

McCoy Now allow me to deal with that, and I suspect this is part of what Justice Tipping was urging me towards. I've indicated what I say of the limitations on the Crown Prosecutor. There are two. One, to make an intuitive assessment and two, to deal with witnesses to avoid mistrials. On our argument the Police Officers do not ever get to see the jury panel because they're not authorised by s.14. However, when a Police Officer is in Court and the jury is being empaneled there is absolutely nothing to stop that Police Officer on hearing the name of a juror being called, passing a note or communicating with the prosecutor a view as to that person. That is

Tipping J They'd have to be pretty quick.

McCoy Your Honour that's life and until they're sworn you have the right to do it.

Tipping J Well my golly in my experience you know you have to have this Officer in Charge sitting alongside the Crown Prosecutor. I mean it doesn't take very long to get from the front row to the first seat in the jury box. I mean some of them actually hesitate hoping like made they're going to be challenged, but it's until they sit yes.

McCoy You only have to say 'challenge', that's how it works.

Blanchard J Well the prosecutor has to say it. The cop can't say it and you'd have a very strange spectacle of the Police Officer racing forward in order to beat the juror for the seat as it were.

McCoy I'm not suggesting a photo-finish is required.

Blanchard J Well it is actually.

McCoy No, no

Tipping J I once had to rule Mr McCoy whether the person had sat.

McCoy No Your Honour this argument is not with respect demeaned by that scenario. It is entirely appropriate for a Police Officer, the Officer in Charge of the case, to sit close to counsel and indicate a view which counsel may or may not

Tipping J By golly I wouldn't have the Officer in Charge sitting alongside the Crown Prosecutor unless there was some overwhelmingly good reason to come within the bar.

Blanchard J And how would you in your argument control the Police Officer from using the information inappropriately when he wouldn't have time to have a conversation with the prosecutor so the prosecutor could detect that that was going on?

McCoy Your Honour one of the risks is that notwithstanding the force of law, and it's the same point that would apply to decisions made by a Crown Prosecutor in exercising a peremptory challenge, because if the Crown insists it need not ascribe a reason, which is true. It need not ascribe a public reason but it still must have a good and honourable reason, one that is consistent with the Bill of Rights Act, before it can exercise its peremptory challenge. It is not an unconstrained discretion by the person who has the devolved power of the Crown. It must be exercised for manifestly good and proper reason consistent with the Bill of Rights Act.

McGrath J I have difficulty in lining that up with your acceptance that the approach can be purely intuitive. I mean it seems to me that that really takes any notion of quality out of the necessary elements of the decision.

McCoy Your Honour the possibilities are, are they not, one, an utterly intuitive assessment based on immediate stereotypical analysis, but not an analysis that violates the high normative values of human rights such as race, gender or disproportionately challenging Maori from jury - matters of that nature. That would be utterly unlawful if that was the motivation for the challenge. The prosecutor, just like the defence, who currently are unencumbered with the information that the

prosecutor has, have to do the best they can. It is 'let nature take its course'. That is view number one. The alternative view is if one wants to develop a more sophisticated model of the entitlement is that the Police may as they are now, inform the prosecutor in advance by annotating the jury panel with comments and observations as to suitability, previous convictions, or the fact that the person is suspected but never proved to have committed an offence, or has been acquitted twice - unhappily - matters of that nature.

Tipping J Well this comes back to I think the very important point the Chief Justice has raised with you that there is a conceptual difference between the supply of the information and how that information is used, and you seem to be focusing at the moment more on how the information is used by the prosecutor, and frankly I think you're saying there is very limited use they could make of it even if it was supplied. Is that a fair

McCoy Indeed

Tipping J Yes.

McCoy Indeed. My submission is

Tipping J Do you therefore say that because of that limited use that limited use is permissible, it's a bit of a waste of time to have all this going on and you're better just to leave it to the sort of hit and miss

McCoy I say that randomness is actually the feature of the jury system. That there ought not to be orchestrated posturing as to who's selected and not. Each party should be mutually ignorant of the antecedents

Tipping J I think the difficulty is that we have these peremptory challenges

McCoy Yes.

Tipping J And I like my brother McGrath, am not attracted to the idea that you do it intuitively as opposed to intelligently.

Elias CJ Well particularly as the intelligence may be partial. It's random in that respect too because you've acknowledged that you might have a knowledgeable Officer hissing instructions or suggestions to prosecuting counsel, so he may know the information which could be gleaned from reviewing the database. You would still say I think on your argument that the use of that would be wrong but there you're up against the peremptory challenges.

McCoy The peremptory challenges do allow the Crown and the defence to modify what is otherwise a wholly random situation which is the point that Justice Wilson raised with me earlier. It's a lawful position, but it needs to be used in a lawful way and the argument is it is an intuitive

assessment from the times of *Blackstone* that has been the case subjective - you take people as you see them. The Crown ought not to be exercising peremptory challenges unless they have a positively good reason. If that reason is one that is occasioned by information supplied, the issue is can they receive the information, and to turn to that I ask the Court to first of all note the provisions of what is called the Criminal Records Clean Slate Act 2004. Now my learned friend, Mr Solicitor, made a concession in the Court of Appeal, albeit not recorded in the judgment, that henceforth offences which were covered by the provisions of this Act would not be used by prosecutors for the purposes of exercising peremptory challenges. Now that however is an imperfect gift in this sense because my learned friend

Tipping J I was just admiring your use of the equitable phrase of an imperfect gift Mr McCoy. Sorry I've wholly distracted you.

McCoy No, in fact I can go down that channel for a long time Your Honour. In fact my learned friend was on his last legs so I would actually say it was donatio mortis causa.

Tipping J Very clever.

McCoy Your Honours the point to be made here is that in 2004 the New Zealand Parliament passed rehabilitative legislation that removed the stigma of persons who had a number or one minor conviction, and my learned friend's concession and the reason why I inelegantly described it as an imperfect gift, the reason for that is he made a concession but he did not explain why and I say that that is as good as an unaccepted repudiation. It's a thing written in water. Even a concession by the learned and distinguished Solicitor General needs to be explained.

Tipping J Well if it's an imperfect gift it's unenforceable.

McCoy And that is the position this Court finds itself in because you will have to decide to what extent I submit this Act cuts across the provisions of jury vetting.

Tipping J I've got a far more fundamental worry Mr McCoy and I have to come back to it is if as the Chief Justice elegantly put it, you can have some hissing between the Officer in Charge and the Crown Prosecutor, why can't we do the same exercise on a more sort of principled and straightforward basis. Once it's accepted that the Police can convey some information by this method or any other method, why do we stop it doing it in a sort of more structured manner.

McCoy The attraction of course of having recourse to a scientific database with empirical information is obvious, but it depends on the lawfulness of accessing that database, whereas what I have countenanced as being perfectly acceptable and still consonant with the underpinning randomness of jury selection, is for the Officer in Charge of the case to

make his own informed assessment and it may be one based on actual knowledge of the prospect of juror in communicating that to the Crown.

Tipping J Are you actually now saying that the reason why this is not to be permitted is that the Police may not lawfully access the database from which this information is derived, is that the key point?

McCoy Exactly.

Tipping J So it really turns on that point does it?

McCoy It turns on that because I have no difficulty whatsoever with a Police Officer in furtherance of the common law right to assist the Crown in prosecution of indictable offences informing the prosecutor of the Police view of suitability

Wilson J Would that right extend to the Officer in Charge consulting his or her comments at the Police Station about the jury?

McCoy No it can't happen Your Honour for the very obvious reason that if on my case the jury panel cannot be provided to anyone except the Crown and the accused. The Officer has no way of knowing who is on the panel until the name is called out in Court. He then just like defence counsel has to make an informed assessment as much as the Crown in the time available.

Wilson J But what about when the new s.14 is in force?

McCoy I will turn to that

Wilson J If you prefer come to it later.

McCoy I shall certainly come to that.

McGrath J Mr McCoy before we go to the new legislation can I just ask you this, what in your view is the purpose of giving the Crown a peremptory challenge? I'm not quite so concerned about the defence. I think I understand why that's the case, but why does the Crown get peremptory challenges given that it is contrary as you've pointed out to us to the principle of randomness?

McCoy The New Zealand Law Commission recommended the retention of peremptory challenges and it appears to have included the Crown within that. It's right to observe that a number of other common law jurisdictions have taken them away from the Crown entirely, but at the same time there generally has been other modifications, so one has the removal of peremptory challenges; the removal of the old stand-by provision; but the introduction of majority verdicts, so that the rogue juror situation is dealt with that way. Why the Crown needs a

peremptory challenge is in fact a matter on which there can be much debate and certainly many of the academics, the various articles placed before the Court, have shown that there is no need for it whatsoever and it is contrary to the fundamental purposes of randomness.

McGrath J Well that's circling it very nicely but in the end there is a power and we need to know what the purpose is for which the power is given if we are to assess its lawful exercise.

McCoy Yes. The purpose is that the Crown may de-select persons on the same intuitive basis as the defence as long as it's not exercised for a purpose that violates the norms of the Bill of Rights Act.

McGrath J I would suggest that some of the literature anyway says that the reason the defence have a peremptory challenge is really so that in the interests of the appearance of fairness an accused person who fears someone or feels uncomfortable about someone can remove them from the jury - that's very much a defence perspective thing. What I don't immediately see is why the Crown has peremptory challenge.

McCoy I equally cannot understand it but as the legislature has provided it, I can only attack it on a philosophical ideological level. It's not at all clear why the Crown should have such a right.

McGrath J But if you look at cases such as that one you've cited from Lord Justice Lawton you start fairly soon to get into the suggestion that there are people who it's not appropriate to have sit on the jury because of particular circumstances – gamekeepers and poachers are mentioned and things like that I think. Now that starts to lead you into factors of suitability that are falling short of disqualification.

McCoy Correct.

McGrath J Now if that's the purpose, that really goes against your argument doesn't it?

McCoy Parliament has drawn carefully delimited situations of disqualification. The fact that a peremptory challenge has been given to the Crown plainly means the Crown can exercise it for a purpose as long as the purpose is a lawful purpose, so any purpose that is not a lawful purpose means they can exercise it, but the Crown ought not to be exercising it to manicure the composition of the jury because the moment the Crown takes the view that a particular juror is unsuitable or impartial, the Crown is actually exercising a stereotypical approach that people cannot reform. The fact that somebody may have a conviction for the same type of offence, albeit many years ago, would be simply an assumption by the Crown that once a criminal always a criminal, and that is undone by criminal justice thinking and indeed on all sorts of levels. One of the reasons that the defence was given a peremptory challenge actually arises historically from the fact that if you made a

challenge for cause and came second you needed to still be able to get the person off the jury and *Blackstone* makes that very point. The peremptory challenge for the defence was in fact a fallback so that if you sought the Judge to disqualify the juror and you had your s.25 process and the Judge said not satisfied the person is not indifferent, you would still very much plainly want to get him off the jury.

McGrath J But that's just an instance I think of the general principle that it was there so that the accused in the interest of the appearance of fairness can be rid of someone on the jury who he fears or who in some way thinks may be inclined against him.

McCoy It's instinctive and intuitive and the Crown need not be resourced with that right.

McGrath J I'm just wondering whether the Crown's position is that it's there for a different purpose for the Crown, but maybe it's just there because if the defence gets it you've got to give it to the Crown.

Elias CJ Equality

Tipping J Well the simple fact is that the Crown has got this right. I don't know with great respect why we're sort of wondering about why it's got it, it's got it. The sole question has to be if it arises at all, is what are the proper parameters of the use of the right?

McCoy And as the Chief Justice has wittily observed, it is the fact that it's now four after Christmas, I have to have four as well. Whether they're used up, the Crown I say has to be motivated differently.

Tipping J But I can't see why the Crown can't be armed with whatever the Police see as relevant information and the Crown Prosecutor then has to make the call as to whether it is proper or tactically-wise or whatever to make use of that information. Once you've got the peremptory challenge – I know I'm a bit like a cracked record Mr McCoy – but I have difficulty with the idea that you do it intuitively rather than intelligently.

McCoy Let us assume henceforth that you're against me on the initial proposition - that it's a purely intuitive and subjective assessment. I will assume that Your Honours

Tipping J Well I haven't made up my mind but yes

McCoy No, I'll assume Your Honour singular is against me for that purpose – for the purposes of further discussion. Now that means the real issue is how can the Police if at all communicate the information to the Crown?

Tipping J I'm much more interested in the proposition that the Police can't lawfully access the databank for the purpose of giving the information to the Crown Prosecutor. Now if you can sustain that proposition I would have thought you were well home.

McCoy Now first of all can I ask you to look at the first of the three Acts that impinge on this. It's the Criminal Records Clean Slate Act and I'm afraid you were given only impoverished versions. I think every second page of this particular Act was removed by some gremlin, but even with half of this Act you'll still be better off, but we still have the full copy. Could that be handed out please?

Elias CJ Yes please, thank you.

McCoy Now Your Honours this is the Act that my learned friend made his intuitive concession to the Court of Appeal, and he was right but the reasons he gives for it are not at all obvious and if you would be kind enough to turn to the appellant's case in this regard you will see that we set out in our document the reason why we say this particular Act is significant, and it commences at para.43 of the appellant's case. And I'll deal with this Act quite quickly, but it is significant. Criminal Records Clean Slate Act. If one turns one sees that s.3 is an overview the Act establishes a clean slate scheme. To limit the effect of an individual's convictions, in most circumstances, subject to certain exceptions set out in s.19, if the individual satisfies the relevant eligibility criteria. (2), if an individual satisfies the relevant eligibility criteria he or she is deemed to have no criminal record for the purposes of any question asked of him or her about his or her record and (b) he or she has the right to have his or her criminal record concealed by the Government departments and law enforcement agencies that hold or have access to his or her criminal record. I'll avoid the wiring diagram, but if one then comes through to the definition of a law enforcement agency found in s.4, one sees that it's an agency that holds or has access to information described in Schedule 5 of the Privacy Act and the Department of Labour, Inland Revenue Department and the New Zealand Customs Service. So it doesn't include a Crown Prosecutor. It's very clear who it includes, and when I take you in due course to Schedule 5 of the Privacy Act you will see that that essentially means in context 'the Police'. If one then turns one sees that a number of offences are specified as exceptions, and I turn quickly across to s.6. Section 5 binds the Crown. Section 6 shows the purview of this rehabilitative legislation which deems it never to have existed. Eligibility in section 7. Moving further and quickly finally through to s.14 please. Here's the cross heading – effective clean slate scheme on eligible individual. s14(1), if an individual was an eligible individual, he or she is deemed to have no criminal record for the purposes of any question asked of him or her about his or her criminal record. An eligible individual may answer a question asked of him or her about his or her criminal record by stating that he or she has no criminal record, and nothing prevents an eligible

individual ... This is the introduction. Section 15 is significant because it imposes duties upon the Chief Executives of Government Departments, including the Secretary of Justice, to ensure that any offences covered by the clean slate legislation are removed and do not exist for governmental or law enforcement purposes. They have disappeared. Section 15 – putting an express responsibility on Government Departments to ensure policies and procedures so that these latent convictions do not resurface. Section 16 is the effect of the clean slate scheme on Government Departments, law enforcement agencies. Section 17 actually would make it an offence for a Police Officer to provide these former removed offences to the Crown Solicitor. It's actually a criminal offence to do so. And finally in this regard there is an exception in s.19.

Tipping J Well if this line that you're developing is sound what it means is that a conviction that's been cleaned away is no longer a conviction so they shouldn't be saying that this person was convicted. It doesn't relate more generally than that does it?

McCoy It has a number of effects. One is the one Your Honour's identified. Secondly of course the effect is that your deemed now to have been acquitted, so the thrust of the legislation is that acquittals cannot be used for any purpose either. They are deemed acquittals, and what it means is that contrary to the current Police practice, and Your Honours have seen the evidence in this case, what has happened is the Ministry of Justice records that have been printed out are actually in violation of this Act because they are including offences which are covered by it.

Tipping J These are sort of collateral niggles aren't they, they don't go to the central issue?

McCoy No but this Act trenches across whatever s.14 authorises. What it means is for New Zealand on our submission it is actually unlawful and indeed a criminal offence for a Police Officer to supply details of these expunged convictions to the Crown Prosecutor.

Tipping J So you want us to say in any decision that they must respect the Clean Slate Act.

McCoy Correct.

Tipping J It's as simple as that isn't it?

Elias CJ You don't need to say that, they have to observe it. It seems to me that this diminishes the vice that you're submitting to us in the jury vetting process, because these records will be expunged.

McCoy Those records are expunged and are not to be used for any purpose and what it means is if Police are doing it they are contravening the law. Now it also has a further significance Your Honour, and it's this. Not

even the defence can be given this information. It applies equally. The prohibition disallows the Police to transmit the information to the Crown Prosecutor or indeed to the defence, so it's an example of having to honour acquittals. Now I want to say a little more about it. The argument is set out in s. 43 through to s.49, but it's an instance where there has been a plain inroad into the right of such jury vetting as the Court may find s.14 of the 1981 Act permits. These offences cannot be used for any purpose, and my learned friend has made the refreshing concession, but the reasoning has not been explained.

Tipping J I would have thought the gift was wholly perfect.

McCoy No, with respect not.

Elias CJ Would you like to return to that after the adjournment? Is that a convenient time because you're going to respond to Justice Tipping's question?

McCoy Absolutely.

Elias CJ Yes thank you. We'll take the adjournment.

11.30am Court Adjourned
11.50am Court Resumed

McCoy The point that Justice Tipping raised with me – the difference between use and access falls pragmatically to be answered this way. If you can't access it then you can't use it, and by that I mean you can't lawfully access it then you can't use it, and I say that that is the essential point. We submit that the Police have no right to access the information for the purposes of jury vetting because jury vetting is not a law enforcement function.

Elias CJ But they can access it on your argument if they need to ascertain whether someone is dis-entitled.

McCoy I accept that that is an obligation which they're entitled to enforce, I do accept that and I say that explains the 2008 amendment – that is why they have it. But that is a proper and genuine law enforcement purpose. The argument goes this way. The Police have never been given at common law or by statute any right to access criminal information for a non-law enforcement purpose. Secondly, law enforcement means the enforcement of the law that is ensuring observance of the law, which is the point the Chief Justice made in terms of disqualification.

Blanchard J Which statute deals now with the Government computer and access to it?

McCoy The Privacy Act, and the critical terminology is law enforcement and this is reinforced by the Policing Act.

Blanchard J Has the Privacy Act replaced the Wanganui Computer Act?

McCoy Correct, yes. And perhaps I could ask Your Honours initially to turn to this new piece of legislation, to be fair to the Court of Appeal of course enacted well after the judgment in this case, rather like the Juries Amendment Act. I believe the Court taker has the Policing Act 2008. This Act came into force on the 1st October this year and is a continuation of the 1958 Act, and you will see in s.3 the purpose is to provide for policing services in New Zealand and to State functions and provide for the governance and administration of the New Zealand Police. If one turns the page, s.6, it binds the Crown. Section.8 identifies various principles, but it's to s.9 that I ask the Court to turn, because the functions of the Police are now set out in an inclusive formula – keeping the peace; maintaining public safety; law enforcement; crime prevention; community support and reassurance; national security; participation in policing activities outside New Zealand and emergency management, and to pick up Justice McGrath's earlier point, if one goes to the definition policing in s.4, we find that policing means the performance by the Police of any of its functions – that's s.9 – and includes the exercise by Police employees of powers they have because they are Constables or authorised Officers

Elias CJ Sorry, what section is this?

McCoy Section 4 Your Honour. It's the definition section and the critical word is 'policing'.

Elias CJ Yes, thank you.

McCoy And subsection (b) of Policing incorporates the pre-existing common law powers. So the analysis that needs to be investigated is a linkage between the Policing Act s.9 and the Privacy Act, and Your Honours will note in addition s.11, which now imposes the structural and constitutional separation very clearly between the Police in their operational aspects and the Crown which always had been the case but was simply at that stage really only described in text as opposed to statute. The 1958 Act was rather ante-diluvian in the way it dealt with the position in terms of the separation of powers.

Tipping J Is the significance there on the word 'particular'?

McCoy Yes I believe so Your Honour.

Tipping J Yes.

McCoy So with that would Your Honours now turn to the Privacy Act, and the reason why I'm linking these two together is we now turn to see what is the source of power that the Police have to access materials, and it follows from Justice Blanchard's observation about the predecessor and title legislation, the Wanganui Computer Act. If you turn to the Privacy Act which is found in volume 8, the legislation volume, at tab 3, the authorising section is s.111, an accessing agency, which includes the Police, may have access to law enforcement information held by a holder agency if such access is authorised by the provisions of Schedule 5 to this Act. And Your Honours will know that the structure of the Privacy Act was to heavily qualify access to protect privacy matters of relevant individuals. It was a significant piece of legislation of constitutional status protecting the privacy of relevant individuals. So the Police powers identified as a generic way in s.111 have to be found in Schedule 5.

Tipping J Are the Police an accessing agency?

McCoy They are, they certainly are.

Tipping J Yes.

McCoy And if one turns to Schedule 5 which follows immediately on and moves through the various amendments, you will see now the formulation of how the Police are entitled to access information. The structure is in terms of three columns – the subject, the description and the identification of who has access. And when it comes to matters for example such as details of hearings, page 142, bottom of the page, one sees that the Police do have access and the description is details of hearings of proceedings in respect of which an information has been laid, including convictions, sentences and all other matters ancillary and subsequent to a determination. Now by looking at that it's plain that what is envisaged is that the Police are entitled to get the track record of criminal litigation. Once an information has been laid conviction, sentence, Your Honours will see there is also reference to other matters ancillary and subsequent which must include one assumes on the Crown case at least reference to acquittals, because it's convictions and sentences and it would be a sad and retrograde matter if an acquittal was simply seen as an ancillary matter that would be too significantly degraded. On the face of it there is no right at all to obtain acquittals. There's no right to obtain informations withdrawn by leave.

Tipping J Well details of hearings etc including, so the head concept is details of hearings and I would have thought an acquittal was a detail of a hearing.

McCoy The colour of the legislation, conviction sentences and all other matters

Tipping J Including, so it's a real belt and braces job this one.

Blanchard J Sorry, which page are we on?

McCoy Page 142 Your Honour.

Blanchard J Thank you.

Tipping J And surely the information will be annotated whether electronically or otherwise nowadays with the result of the hearing, and the result will either be convicted in the sentence or information dismissed or whatever the way they put it nowadays.

McCoy Well going with the flow and accepting what Your Honour has said to me, the more important point is even if acquittals and other determinations such as a permanent stay or withdrawal by leave are actually available under the system, the question is whether what the Police are doing is a law enforcement purpose. Now this is the vital issue in this appeal

Tipping J Yes well that's a better point frankly.

McCoy I move with some alacrity once I recognise the limitation of what I had advanced. This critical point, and Your Honours have now seen s.9 of the Policing Act again talks about law enforcement. I don't want to mislead the Court. It's clearly an inclusive definition and it still permits there to be recourse to common law powers, but the common law power is to assist the prosecutor. Is that assistance still for a law enforcement purpose? Law enforcement purposes on our submission have as their exclusive perspective the rights and obligations in relation to the accused. That is law enforcement in relation to the accused. It would be law enforcement as the Chief Justice observed in terms of disqualification in relation to a prospective juror because the juror would otherwise be breaking the law, but how can it sensibly be argued that it is law enforcement for the Police to access information so as to be able to contrivedly fetter the composition of the jury? The jury is a constitutive phase of the trial. The fair trial obligations must be in place at that stage, and it is a matter of the administration of justice because Your Honours it's under the auspices of a Judge. The Judge is empowered in her or his Court when the empanelling takes place. No law enforcement issue whatsoever exists at that stage. What is being done is to misuse law enforcement and give it an out of shape context that it cannot bear. That on the Crown case it is law enforcement to retrieve the antecedent history of members of the prospective jury to see whether they suit the expectations of the optimum juror according to suitability criteria, not impartiality.

Tipping J A little earlier in the morning you made what appeared to me to be the distinction between law enforcement on the one hand and the administration of justice on the other. Are you suggesting that those

are two self-contained boxes and law enforcement can't overlap with administration of justice?

McCoy I do, I do Your Honour and I'm going to take you to the decision of the High Court of Australia which has made just that distinction, in turn going back to the House of Lords which have made just that distinction. They are quite separate matters. The overlay, if there is one, if they are partially concentric circles, it's in relation to disqualification because I do acknowledge and always have that that is a legitimate law enforcement purpose, but beyond that it is

Tipping J Because that is enforcing the law

McCoy Correct.

Tipping J In the Juries Act.

McCoy Exactly.

Tipping J With respect it's a fairly narrow connotation of law enforcement isn't it?

McCoy No, I submit it's a completely purposive one because what's not acceptable is for the Police to use a power which they have been given for one purpose, for a purpose which the law does not allow which is what they are doing.

Tipping J But assisting the Crown, surely that on any normal connotation would be law enforcement. You're bringing people to justice if that's what they deserve.

McCoy You are not bringing a juror to justice.

Tipping J No, no, but it's part of a process designed towards achieving that end could be a view expressed against you.

McCoy I submit that that is not the intention of Parliament and that simply is contradicted by the Juries Act, and again the theory of randomness which is essential to the composition of the jury. The administration of justice is the course of justice before a Court under the control and supervision of a judicial Officer. The empanelment and selection and composition of the jury, that constitutive phase can never amount to enforcement of the law because enforcement of the law means seeking observance of the law. What law is being observed? None is being broken. As none is being broken it cannot amount to enforcement of the law. What it is is a misuse of power for one lawful purpose to achieve a collateral and illegitimate purpose, and this is why the Court will seeing the 2008 amendment ultimately read it down to allow the Police to understandably sleuth to prevent disqualified persons being on the jury. I respectfully submit that the exclusive perspective of law

enforcement by Police Officers involves the authority of a Court over an accused person. It's in relation to the accused which is the perspective of law enforcement, not the perspective of a prospective juror. The Police are coming down the hypotenuse – they're on the wrong side. They have to have powers of detection and investigation and prosecution of persons who are suspected of committing an offence. That is all good law enforcement, but it stops at the point of interception when the matter moves beyond the province of the Police into the utterly separate world of the administration of justice which is prevailed upon and over by a Court, and the Police have got no right at that juncture. They are dis-entitled by law from at that point using the powers which are given for one proper purpose, disqualification, for a more general purpose of deselecting the jury to accord with their notions of the predictable outcomes of the trial. Even looking at it if one can from the case of this Court, *The Queen v Ngan* where Justice Blanchard delivered the judgment of the larger majority, I think that's not an inaccurate way of putting it, His Honour was careful to note that the common law powers of the Police did give additional powers beyond the common law but they had to be necessarily incidental, necessarily incidental. There was no necessity for this to occur.

Tipping J This depends on a very bright line being drawn doesn't it between law enforcement and administration of justice and it seems to be at least in part a temporal line, namely upon the commencement of the trial?

McCoy I have acknowledged it's a concentric partly overlapping concentric circles because of the disqualification feature

Tipping J But leave that subtlety aside

McCoy But putting that to one side, there is a temporal aspect, but much more significantly, and I'm not talking in terms of symbolism, is the essential feature that the Court that justice now is in the hands of the Court. The Police are not involved in justice, that is what the High Court of Australia have said, they are not involved in the administration of justice at all, they are involved in law enforcement which leads to a separate forum, that of a Court with a judicial Officer and the tribunal of fact is as we know now being decided upon by the Crown because the Police provide information as to the antecedents.

Tipping J When the Policeman takes a witness statement, I'm sorry, when the Policeman takes a witness statement from a witness is he not involved in law enforcement.

McCoy He is because he's taking it from a witness for the purposes of mounting an actual or potential case against an accused person and that is perfect law enforcement, but law enforcement ain't got a thing to do with members of the public exercising their constitutional duty to line up to become the deciders of fact in a criminal case being told you're off because I don't want you. That is not law enforcement at all.

Where is the observance of law I ask Your Honours? That is the essential feature of law enforcement. It has always been understood by the common law as detection, investigation and prosecution. I acknowledge a prosecution function and it would be adjunct in relation to the common law right of the Police to assist the Crown in indictable offences. That far, my learned friend and I, we breathe together. However where we part is he saying that it allows the Police to also access their databases for the purposes of the Crown being able to exercise its peremptory challenge. I submit a structural and conceptual line is clearly drawn beyond that. It cannot involve that right.

McGrath J Is a prosecutor undertaking a law enforcement function at the trial in presenting the case?

McCoy He is.

McGrath J Yes, including when he undertakes a peremptory challenge at the outset?

McCoy He is exercising a right given to him by statute for furthering the law enforcement position on behalf of the Crown.

McGrath J He's acting on behalf of the Crown in the process of bringing to account before Judge and jury and that must be law enforcement surely?

McCoy Yes, but Your Honour again the nomenclature here is quite significant. The law enforcement aspect that is engaged at that stage is actually subsumed under the administration of justice because it's in accord, so in one sense it is law enforcement because the prosecutor on behalf of the Queen progresses the prosecution and in that sense a prosecution is law enforcement. But the critical feature to answer you if I might is it's directed at the accused person. Prosecution equals the accused. What we have here is not the prosecutor acting against the accused, or is he, because if on jury vetting he's actually manipulating the composition of the jury to secure what is a more favourable outcome, then in a sense he's acting against the interests of the accused

McGrath J So what you're really saying is that a prosecutor is acting in a law enforcement capacity but only at certain stages of a trial, not in the jury selection stage?

McCoy The jury selection stage is a matter which does not involve the accused's perspective. By that I mean he is not acting against the accused at that stage, and it comes back to your questions early to me this morning, what's the purpose of a peremptory challenge for the Crown? There is in theory no good one because the Crown ought not to have a legitimate purpose at that stage contra the accused, because the moment the Crown seeks to take advantage of their statutory discretion given by peremptory challenge to exercise that right to get a

result which is good for them, the Crown, it may well be necessarily not good for the accused.

McGrath J Staying with the point in hand Mr McCoy, is it fair to put to you that to the extent that the Crown Prosecutor is undertaking a law enforcement function during a trial, any assistance given by the Police to the Crown Prosecutor must be of the same character?

McCoy The Police Officer can only give the assistance to the Crown if authorised to do so. The Crown Prosecutor is exercising in a limited sense a law enforcement function but not in terms of the selection of the jury.

McGrath J To the extent that the function is one of law enforcement, that's the Crown Solicitor's function, any assistance must be of the same character isn't it, I mean you then have to decide what's on your argument I think which part is a law enforcement function?

McCoy That is correct.

McGrath J Yes.

McCoy It must be of the same character. There must be a relationship for the same purpose.

McGrath J So the analysis really requires us to determine what the character of what the Crown Solicitor is doing at the particular time, is it law enforcement, but if it is the Police can come in and help?

McCoy I submit at the risk of repetition that the hallmark of law enforcement is a direct nexus against the accused. When it comes to the exercise of the peremptory challenge the prosecutor is not involved in a relationship against the accused because it is the administration of justice.

Elias CJ But this can't be right. I mean the Courts must have access to this information. The Courts are in law enforcement when they conduct criminal trials are they not?

McCoy The Court is involved in the administration of justice and superintends

Elias CJ But that's just a label.

McCoy Yes it is a label, so one needs to strip it back to its essential core elements and I submit that the critical and differential element looking for a bright line is is there a direct relationship contra to the accused?

Elias CJ But why is there a bright line? It just occurs to me that the Courts must also have access to information under the Privacy Act.

McCoy No the Courts do not themselves have such a role. The Court adjudicate upon the materials provided by the parties.

Elias CJ But I thought your definition of law enforcement was carrying out the law.

McCoy Mandating compliance with the law.

Elias CJ Well I just thought that was essentially what the Courts do.

McCoy The Courts are deciding in a criminal case I would submit whether the law has been broken or not.

Elias CJ So are the Police when they investigate crime.

McCoy Yes but they are doing that when they investigate crime but when they are investigating the antecedents of a juror they are not involved in a genuine or proper law enforcement at that stage. What they are doing is collating information in order that the Crown can make an informed deselection of prospective jurors, and I submit that that which falls within the trial phase is actually a pure matter of the administration of justice and the Crown counsel owes an obligation to the Court and is not in a relationship against the accused. Now I want to take Your Honours to Canadian law which suggests that is the case.

Elias CJ Yes, you may need to do that. I'm just conscious of the time because I want to ensure both the Solicitor General and Mr Boldt have an opportunity to address us because Mr Boldt is effectively carrying the burden of that part of the argument. Can you just give us an indication – you are going to come on to the new legislation also aren't you?

McCoy Yes I am.

Elias CJ Can you just explain where you're heading now with your submission? You want to take us to some of the case law do you?

McCoy I certainly wish to do that.

Elias CJ Yes.

McCoy I'm unclear obviously how familiar Your Honours may be with some of the materials and I'm also conscious that the wing of time is flapping at my back.

Elias CJ Well it hasn't helped that we've flapped from this end too, but press on but I think we have had an opportunity to read, or we've certainly read your submission with attention, and speaking for myself I've been to some of the authorities although others may not have.

Tipping J Well I've been to some of them but what you see as the absolute key ones would be helpful to be reminded of.

McCoy Well I will exercise discrimination and take you to a number of them with some speed if I can. Can I first of all ask you to go to *Katsuno*, which is case No. 1 in volume 1, and this was the authority that influenced Justice Fogarty's decision. The Court of Appeal said that the structure of the New Zealand provisions was different and the case was in a sense unhelpful. Would you please come to page 56 of the judgment. This is the judgment of Justices Gaudron, Cummow and Callinan. At para.19 'positive legislative statements will often be capable of giving rise to negative implications'. The argument here Your Honours is that s.14(1) which empowers the parties necessarily precludes anyone beyond that.

Blanchard J Well that's not what it says now is it? I mean you're dodging the new legislation.

McCoy No, I'm systematically advancing towards it. I'm talking about

Blanchard J Well rather slowly.

McCoy Well Your Honour I must do it with a sense of patience but I'm also conscious of what you have just said. The point I'm making is the 1981 Act, that is how it should be interpreted, positive statement gives rise to a negative implication, and you will see in para.20 if you would that the principles are applicable to this case. The structure of the Act with its emphasis upon confidentiality and the sole and express reference to the Sheriff as the recipient of the report gives rise here to a negative implication that no one else is to receive the report. And the principle in para.24 from *Johns v The Australian Securities Commission* by Justice Brennan – 'a statute which confers a power to obtain information for a purpose defines expressly or impliedly the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose', and there's more to the same effect. The features that I would ask you to note in particular if you would turn to Justice McHugh's concurring judgment is first of all para.57 where His Honour says towards the end 'it's a necessary corollary of preventing a person on the panel from sitting on a jury that another person from the panel will take his or her place'. That points to the true reality of jury vetting. By deselecting you are influencing the future composition of the jury and the immediate composition of the jury. Paragraph 59 examines the conclusions that had been advanced by the Crown in Australia, 'that a particular juror's prior convictions may mean that he or she has a propensity to return a not guilty verdict was described as a matter of speculation. It appears to be a conclusion not shared by the legislature of Victoria', and I can say of New Zealand either, because they have limited disqualification. 'The Act allows persons with

convictions like those of the challenged juror to sit on juries. The conclusion is also based on the assumption that persons who have no prior convictions are less likely to return a verdict of not guilty than persons who have prior convictions. Obviously the Crown authorities are of the opinion that the Crown is more likely to get a conviction when persons with prior convictions are prevented from sitting on the jury. The opinion may or may not be correct. But one point is beyond doubt. By obtaining and acting on unlawful information the Crown has subverted the legislative scheme for selecting an impartial jury'. I would also commend paras. 60 and 63 and

Tipping J Well there's no doubt that the conclusion is correct and the premise is that it's unlawful

McCoy It must be.

Tipping J I mean with great respect to the Judge, it does not assist us much in this context, we've got to determine whether it's unlawful. Of course if it's unlawful the consequence follows.

McCoy And I would ask you to also note paras.114 to 118 of Justice Kirby's judgment where he sets out with some specificity the objections and identifies the disadvantage that the accused is under. Could I now move quickly to case No. 22 in the next volume? The first case in the next volume which is the judgment of the Privy Council. A relatively recent judgment of the Privy Council. This is *Rojas v Berllaque*, an appeal from Gibraltar and the Gibraltarian legislation provided essentially that it was very difficult indeed for women to be on any jury. If you turn please to para.10 and Lord Nichols delivering the speech of Their Lordships

Elias CJ Sorry could you just explain why is this case which is directed at discrimination, why is it relevant here?

McCoy It's relevant because the Court says particularly in para.11, the last sentence. 'If the form is jury trial, the method by which the jury is selected must be a method which will accord citizens a fair trial' and it identifies that that falls within the constitutional requirements of a fair trial, so the selection process is unutterably within the fair trial purview of the New Zealand Bill of Rights Act. And para.14 identifies the cross-section principle which we submit is violated by jury vetting. If you would come to the next judgment in that bundle which is *Rogerson* of the High Court of Australia, there is in the judgment of Chief Justice Mason, and it needs to be said that this was a case which was looking at whether or not investigations by Police Officers are part of the course of justice. That was the issue. Are the investigations by Police Officers part of the course of justice for the purposes of a common law offence concerned with perverting the course of justice, and the High Court held unanimously that it was not, that investigation is not part of the course of justice and if you come to page 276 one finds the point

that I'd eluded to earlier. Last paragraph at 276, three lines from the bottom. 'In no relevant sense do the Police administer justice, notwithstanding that they investigate crime, institute proceedings where appropriate, and assist in bringing prosecutions. As Lord Blackburn pointed out in *Coomber v Justices of Berkshire*, the administration of justice, both civil and criminal, and the preservation of order and prevention of crime by means of what is now called Police are separate functions and not one single function'. It went on to say that dicta of the New Zealand and Northern Irish Court of Appeal was not found persuasive in relation to of course the statutory offences which exist in New Zealand. The High Court of Australia was dealing with a common law approach. If you would come to item 25 please. This is a practice note issued by the English Queen's Bench in 1973 by the Lord Chief Justice and in the last few lines Your Honours will see 'that a prospective juror may be excused at the discretion of the Judge on grounds of personal hardship or conscientious objection to jury service. It is contrary to established practice for jurors to be excused on more general grounds such as race, religion or political beliefs or occupation', and I understand that the Solicitor General of New Zealand in 1994 essentially replicated that in a direction to Crown Prosecutors how they should exercise their peremptory challenges because of the disproportionately small number of Maori and other minorities who were finding themselves successfully selected onto the jury. No. 26 is *Brownlow*, and Your Honours may be familiar with it where Lord Denning at page 453 states that jury vetting is in his view unconstitutional and its violative of substantive rights to fair play. Lord Justice Shaw at the bottom of page 455 speaks of the process of natural selection devised by the Juries Act and says it should not be supplemented by a process of artificial selection derived from special knowledge available to prosecuting authorities. And Lord Justice Brandon, the last three lines on page 456, 'if jury vetting is to be permitted to the prosecution in certain categories of cases, however and by whomsoever those categories may be defined, it hardly seems just that it should not be permitted to the defence in any categories of cases at all'. Now there is one further case I would wish to take you to before turning quickly to the quality of arms cases and I trouble you to go back please to No. 19, and I regret that I omitted to take you to this in sequence, it's in volume 1. I apologise if there's occupational overuse syndrome because of that. This is a relatively recent judgment of the Ontario Court of Appeal delivered by Justice of Appeal Sharpe, a noted author, The Law of Habeas Corpus, and at para.56 through to 64 he discusses the particular responsibility on Crown counsel when exercising peremptory challenges, and you will see this Your Honours particularly at paras.61 and 62, stating that the Crown must exercise its peremptory challenges in a manner that is in keeping with its quasi-judicial role and in sense a belated answer to Justice McGrath's inquiry as to the purpose at the top of page 17 of the judgment – that's the concluding part of para.62, there's a reference to the case of *Sherratt* where Madam Justice L'Heureux-Dube had said 'one of the justifications for peremptory challenges is that they may be used by the

Crown in the exercise of its responsibility to ensure that the accused is given a fair trial. The accused may for example not have sufficient information to challenge or cause a member of the panel who should be excluded'. So one of the purposes for the Crown is to actually in terms of its role as Minister of Justice to safeguard the interest of the accused in terms of the exercise of challenges. They should not be exercised aggressively by the Crown or strategically but they are there essentially as a safety long-stop on behalf of the accused, and the powers constraining the discretionary exercise are set out particularly at paragraph 64. Moving through to now the quality of arms jurisprudence. It's been set out in our case. We say it is a constituent aspect of the right to a fair trial. The parts that are implicated by jury vetting are (1) the right to a fair trial, and (2) the right to be able to genuinely and equally be able to influence the composition of the jury, because the jury has to be an independent and impartial tribunal. That impartiality is underdone is one party alone has access to a bevy of information which means the other party is disadvantaged. Now there is a particular case that I would like to take Your Honours to. It is referred to. It is referred to en passant by the Court of Appeal below. It's the judgment called *Bain* found in volume 3, case 43. It's a judgment of the Supreme Court of Canada, and if you would turn please to page 152 in *Bain* which is tab 43. This is the judgment of Justice Stevenson and he again looks at the rationale for peremptory challenges and he sets out the extract from Blackstone, pointing out that it was given to the accused out of tenderness and humanity and dealing secondly with the fact that if you fail in your challenge because you do want to still have the right to eliminate the juror. At page 153 Your Honours will see that the Supreme Court of Canada has said that the basis of the peremptory challenge is 'purely subjective'. What you see is what you get – randomness - you just have to exercise pot luck.

Tipping J Whereabouts on that page is that?

McCoy Between (d) and (e). The basis of the peremptory challenge is purely subjective. There's a reference to *Mason* which is the judgment of Lord Justice Lawton, and if you move with me please to 154, after a reference from Professor East's article in the Modern Law Review about jury picking, you come Your Honours to (d), (c) to (d), a reference to the Roskill Committee in England pointing out that the challenge and stand by may both be used for partisan reasons and this was the conclusion. And there was a recommendation which condemned manipulation and recommended abolition of both the peremptory challenge and the stand by provision because it can be used for partisan reasons. If you turn again please, and there is two aspects on the next page 155, and I respectfully submit this judgment repays careful reading, 155, between (c) and (d). 'In the absence of some control however the observer of the process is bound to conclude that the Crown possesses a substantial advantage and by its uncontrolled exercise may influence the makeup of that jury under partisan conditions'. May, that will do, that is sufficient for there to be a real

issue which violates substantive justice, and the next paragraph adopts what Professor Mewett said in the Criminal Law Quarterly, quote 'but the dividing line between the Crown's legitimate interest in ensuring an impartial jury and any illegitimate interest it may have in packing the jury, if not with favourable jurors then at least with no unfavourable jurors, is not an easy one to draw and even less easy to enforce. In *Cloutier* this Court noted that peremptory challenges were intended to give each party the right to remove individuals whom he did not believe to be impartial'. That was seen as another purpose. And at the bottom of page 155, top of 156, 'it's not unreasonable to think that there are times when the Crown's challenges are motivated by an anxiety to secure a conviction rather than a strictly quasi-judicial interest in the fairness of the trial'. And again if there were any doubt I only ask Your Honours to note 160, 161 where there's a reference to a case of *Barrow*, a judgment of the Supreme Court of Canada where at 161(c) Chief Justice Dickson states exactly that the jury selection process should be considered part of the trial for the purposes of the section, because of the public perception of fairness of the proceedings being crucial (f) to (g). It's indubitably part of the trial. Moving quickly to tab 47 – I've set extracts of this judgment out in our appellant's case. This is the important case of *Glasser v The United States* where the American Supreme Court made a clear and affirmative linkage between the constitutional right to jury and the critical importance that there be an impartially selected and randomly selected jury. The two are inseparable and go together and in particular one would find in our submission the dicta set out at page 472 to be significant. It's left-hand column, 472, about eight lines from the bottom. 'Tendencies, no matter how slight, to the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties'. And that is exactly the potential consequences of unbridled jury vetting

McGrath J But that's directed isn't it of challenging that goes to excluding members of a group, I think in that case women, from juries.

McCoy That is the context in which the remark was made. I say it's directly and analogously applicable. You're right Your Honour, in that case there was a significant proportion of the population removed from it and it was a challenge to the array in a sense

McGrath J Yes.

McCoy Whereas I submit however jury vetting, taken its non-pejorative terms, has at least the implications of undermining randomness and undermining cross-representation if persons of a particular social group

ethnicity or class are being systematically removed by tactical peremptory challenges that would be inconsistent with the Bill of Rights.

McGrath J I'm wondering how much this line of argument applies in the Bill of Rights concepts apply when the challenges are rather directed to individual suitability because of some particular factor or other that the Police know.

McCoy As I said, one can understand the Police having the wish to challenge to obtain a jury that they think will return an impartial verdict, but s.25 of the Juries Act, which is the challenge the cause provision, specifically deals with people who are not indifferent between the parties. That is where the challenge should be made. What is happening is the Crown has been reluctant to make a challenge for cause on the basis of non-indifference are actually now, bearing in mind that they have lost the right of standby, which was unaccountable in its exercise, are now using the general peremptory challenge to actually remove people for cause.

McGrath J Well I understand Mr McCoy your concern about that, but just the overseas cases, particularly in America, do seem to be concerned more with issues of systematic exclusion of people by reference to race or gender, and there's no case really that deals with this sort of situation is there?

McCoy Well the answer is *Katsuno* is the closest in one sense

McGrath J *Katsuno* is your closest, okay.

McCoy The other one that is close is *Bain*, where the Supreme Court held that the standby provision was unconstitutional. Now if I could quickly look at the two English cases, or the three actually to be even more accurate. You've got *Mason*, you've got *Brownlow* and you have *McCann*. Now my learned friend, and indeed the learned President in his judgment, makes something of the fact that it must be therefore a lawful system that the English Courts have upheld it. Well on a true analysis you had Lord Denning's Court finding it unconstitutional; Lord Justice Lawton three months later stating the opposite, and stating that it was a lawful arrangement, and then you had much later on the case of *McCann*. But in England the point's a dead point because all peremptory challenges were removed in 1988, so the point cannot resurface in England so there is no decision of a final Court in England as to whether in fact Lord Denning was correct or Lord Justice Lawton was correct. When Lord Justice Beldam in *McCann* was looking at it he was looking at the standby provision, because although the British Government has removed all peremptory challenges, it still gives the prosecutor in England and Wales the right of standby, so the point cannot get to a higher Court in England, so Your Honours have as my learned friend says, when he selects comparable jurisprudence which

supports the policy he urges for New Zealand, the best he can do is this. The uneven decisions in England. Secondly he points to Western Australia. It's significant to note that the Solicitor General for Western Australia actually appeared as an intervener in *Katsuno* and obviously doesn't consider himself bound by the judgment of the High Court of Australia, and my learned friend finally points to the only other party jurisdiction as Tasmania, which is not always seen as the vanguard of significant social issues. So once one is contrasting the case, the derived benefit from international common law means that this is an open question. Your Honours of course have to navigate through this inter-meshing combination of sections to find out what our law requires. If it does permit the Police to provide the information then what follows is a significant issue, does everyone get the same? And that raises issues addressed by the learned Amicus and indeed by my learned friend. He and I agree for slightly different reasons that the learned President delivering the majority judgment was erroneous. We agree I believe that it fundamentally strikes at an imbalance which the Courts simply can't countenance that one party can have the right to, by tactical decision-making no matter how well motivated, fundamentally alter the composition of the decision-maker whilst keeping the other party completely ignorant, and it's obvious in our submission that the equality of arms provision means, and this raises significant downstream issues, either that the accused is given the identical information that the Police have given the Crown, and if there is any difference between that information, the accused would be at a palpable disadvantage, and the equality of arms provision would still fail, so one of the consequences is, and I'll be extremely blunt Your Honours, is this. If you find that s.14 of the 1981 Act, and I'm almost going to get to the 2008 Act, that did permit jury vetting, then the question is does there have to equalisation in the provision of the information which is obtained from the Police databases, and I stress one of the critical points for defence counsel is to know whether a juror has themselves been a victim of a similar or cognate offence, and this will apply in every single case, and the attempt by the learned President to circumscribe eligibility is one that we say like my learned friend is unworkable, uncertain, and does not give full plenitude to the rights to which we are entitled. The alternative is that looking at the 2008 amendment that all the Police can do is equalise the position by giving nothing to both the prosecutor and the defence, except the Police now do have an accepted right to monitor the jury panels for compliance with the disqualification prohibition.

Tipping J Putting it very simply Mr McCoy, you're inviting us to read the 2008 Act as authorising only a disqualification filter and nothing wider?

McCoy Correct Your Honour.

Tipping J Is there anything within the Act that supports that or

McCoy The Act itself, the content of the Act doesn't throw any answer up one way or the other. My learned friend Mr Solicitor has helpfully provisioned you with certain limited background material showing what possibly

Tipping J So the answer is no, but then you go out into wider material do you?

McCoy Correct, correct. The answer is no, and of course one of the difficulties one has is because of the injunction in s.5 of the Interpretation Act to look at text and consider purpose. Should one be looking at materials extrinsic to the legislation in any event? I'm aware of ever since *Marac Finance* the Court of Appeal inculcated a willingness to do that, but when it comes to the Interpretation Act the statute actually provides the limited floor lighting for the Court, and it doesn't on our submission permit the Court to reach to extrinsic purposes if those purposes are to be used to draw an inference or a judgment from them. So to assist Your Honour there is nothing in the Act which one way or the other provides an answer. It is fair I think and a safe summation to say there was no legislative discourse whatsoever about these provisions in the 2008 Act. The last time the philosophy was debated was 1981.

Tipping J So literally no reference to, forgive me, the jury vetting question at all?

McCoy I believe that is the case.

Tipping J Well there's going to be nothing helpful anyway is there whatever the technicalities of how far you can look?

McCoy I believe that is the case Your Honour and I say it ought to be satisfactorily read down the provisions of the 2008 Act to limit it to disqualification. That would mean that would equipperate the parties. There would be total equalisation. Each would be simply unable to access the information for the purposes of jury vetting, bearing in mind now that what probably may have motivated the Parliamentarians of the 1981 era, was the prospect that the Crown had to secure a unanimous verdict in every case. That's no longer after Christmas Day going to be the law.

Elias CJ So victims of similar offending, tough, they come on because nobody is going to know about it?

McCoy And, sorry, I'm advocating the possibilities. The defence are plainly desperately interested in finding whether, and I give only an example, whether a victim of an offence is of one of the prospective jurors. We say that we have to be given that information, but the other extreme is we are given nothing and the Crown Prosecutor too is given nothing. Otherwise the moment one departs from the extremes and tries to find some medium course it still does nothing to deal with the injustice which is the background of the equality of arms. Either the defence are

given the same information so they can make an informed genuine selection via the peremptory challenge on the identical materials that the prosecution has, and if it's anything less then it violates the equality of arms provision which is the sub-facet of the right to a fair trial. And as I say what could be really much more important than the constitutive phase of the composition of the jury who will decide the case between the parties as to where the facts lay.

McGrath J The principal way in which you're saying this impacts on the right to a fair trial, the principal indication you've given from the defence perspective relates to victims.

McCoy It is one of them. Unlike the learned President who took to the argument by indicating the defence would be desperate to find out the previous convictions so they could positively ensure that people with convictions were on the jury, I say that's with respect not the proper perspective at all. The correct perspective is so that the defence can get people off the jury by a proper deselection process, and you cannot deselect unless you are informed in a genuinely balanced way by given the information which the Police undoubtedly have and which they will undoubtedly give the prosecutor who will be exercising that discretion on that information.

McGrath J I'm just interested in following up the victims' issue because it is the principle factor that's been perhaps emphasised more today than it was in written submissions, but are you saying that that information will come from what criminal histories or Police general knowledge

McCoy Oh no, no, the Police have a criminal database of all victims. It's referred to even in the Privacy Act. They have a database. One can understand why, so that if somebody comes along and complains for the fourth time of rape, the Police are able to investigate it in a different way from somebody who comes for the first time. Victims of offences have got specific rights by legislation now in terms of Parole Board hearings. All of these things are distinctly relevant, so the defence need to know whether somebody has been the victim of a crime.

Tipping J What intrigues me Mr McCoy is that if Parliament had meant the use to be put to the material that now they've authorised the Police to access, to be circumscribed in some way, it's such a **…….** to disqualification, I would have thought it would have been probable that they would have said so.

McCoy And Your Honour I would have thought it was probable if they intended jury vetting they would have said so in s.14(1) in language that was explicit, rather than the flaccid approach which has to be seen in the existing legislation.

Tipping J Well the legislation was passed against a background that was perhaps not all that secure but at least there was some judgments that said jury

vetting was lawful, so ideally of course they would have dealt with both expressly, but when one's trying to work out what they must have had in mind when allowing the Police to be in there as an extra recipient of the panel

McCoy Dealing extremely quickly. Whatever happened between 81 and 90 is now of no consequence in many ways, but upon the passing of the Bill of Rights of course this complete change of higher normative values in terms of the approach and the balancing issues has taken place, so now the right's kicked in, and the kick in the absolute level the right to a fair trial, now the subsequent legislation will be conscious of the Bill of Rights and needs to be read consistently and sympathetically with it to promote those rights and I submit one is fully alive and the learned Amicus has explicated the difficulties that can arise, and there may be no happy course. If there is to be jury vetting, and that is provided for by the legislation, then the accused must get the same information as the prosecution. That is my submission.

Tipping J Of course that's your second point. I was more addressed to the first point as to what was Parliament driving at when it added the Police into this list of authorised recipients.

McCoy I'm unable to assist you further save that I say that the Court will answer the Bill of Rights implications by saying it's to be read down doing a *Hansen* 564 choreography to mean disqualification, because that obviates the entire difficulty.

Tipping J Read it down consistently with s.6 of the Bill of Rights?

McCoy That's right. And that obviates the entire difficulty one just simply does not get in to the privacy issues which are expansively opened by the Pandora's box of providing information that the Police are currently given. Once it has to be given to the accused – if the Court decides as a threshold point it's systematically unfair, or might be, then it has to be provided, but it doesn't have to be provided if in fact on the proper construction of the 2008 Act ... Now I suspect I've outworn my welcome. There were many more things that I wanted to say but I suspect that I'm to be seated by the re-commencement, that's the legitimate expectation I'm deriving from looking at Your Honour.

Elias CJ That would be extremely helpful. If you have a burning thought that occurs that you want to unburden yourself of when we start at 2.15pm that will be fine.

McCoy I suspect it's preferable that I'm incandescent in reply.

Elias CJ Thank you. We'll take the adjournment now.

1.01pm Court Adjourned

2.17pm Court Resumed

Elias CJ Thank you.

McCoy Your Honour contrary to indications I just wish to modify one response I made to Justice McGrath. I was insufficiently adroit to deal with the spin of his question at the time. I want to make three quick statements of principle. First of all I submit that the Police are never involved in the administration of justice. Secondly, that the Crown are never involved in law enforcement. That is a corollary of the first statement. And finally that law enforcement stops at the Court door; the administration of justice starts at the Court door, so I humbly recant my earlier indifferent contribution.

McGrath J No overlap?

McCoy No overlap, hermetically sealed and separate. Thank you Your Honour.

Elias CJ Thank you. Yes Mr Solicitor.

Collins Thank you very much Your Honours. I have put in front of Your Honours a one page synopsis which sets out the submissions which I'd like to address and you will see that there are five key points which I wish to make, and in addressing those five key points I hope that I will be able to traverse all of the points that have arisen as a result of this morning's hearing. The first point concerns the fact that Parliament has clearly endorsed the practice of what I will continue to call jury vetting with the qualification that Your Honour the Chief Justice placed upon the use of that language. In 1981 Parliament consciously decided that the Police should be able to continue assessing criminal record databases in order to provide Crown Solicitors with any criminal histories of those on the jury panel list. Parliament also consciously decided in 1981 that Crown Solicitors should be able to continue using that information when deciding whether or not to challenge potential jurors. As we know this year Parliament passed the Juries Act and that amendment was significant. That Act was passed in the knowledge that the Court of Appeal had determined that the practice of jury vetting was lawful. Parliament did not reverse the Court of Appeal's interpretation of the Juries Act but instead Parliament passed amendments to the Juries Act which reaffirmed the Court of Appeal's interpretation by ensuring that the practice of jury vetting could continue and by removing any lingering doubts about the lawfulness of the Police accessing jury lists for vetting purposes. Parliament's wishes are clear as I hope to demonstrate in a few moments, and should be respected. The third question posed for this Court is less straightforward than the first two and raise issues in respect of which reasonable people could respectfully disagree. But the Crown's position in relation to the third question is born from a desire to reduce

the imbalance that exists between prosecution and defence forces in a criminal trial. The Crown believes that the genuine concerns that exist about privacy issues associated with the names of those who are on jury lists are manageable and do not outweigh the need for the criminal justice system to endeavour to treat parties evenly. Can I deal firstly with Parliament's endorsement of jury vetting? Two key events preceded the Juries Act 1981. The first event was the 1978 Royal Commission of Enquiry into the Courts conducted by Sir David Beattie, which as Your Honours appreciate, recommended a series of structural changes to our Court system, including the introduction of jury trials in the District Court, and that heralded the overhaul of the Juries Act of previously 1908. The second event was the report of the Commission of Enquiry into the Conviction of Arthur Allan Thomas which examined amongst other things the process of jury vetting which had taken place in his trials. When the Juries Bill was introduced in 1980 it was accompanied by a report from the Department of Justice which contained two recommendations relating to inspection and vetting of jury panels. The first, and I will take you to the authorities because it's all recorded in Hansard, the first was that the party should be able to inspect the jury panel five working days prior to the week that the trial was scheduled to commence, and that recommendation was unanimously accepted and incorporated into s.14 of the Juries Act, and the second recommendation from the Department was that the Police should not be able to use the Wanganui Computer to vet jury panels. Now this second recommendation from the Department of Justice provoked considerable debate in both the committee stages and in the House, and the opposition's position was very eloquently and forcibly expressed by the Hon. Mr Geoffrey Palmer as he then was, and the Hon. FDO Finn QC, and I'll take you to the debates because it is extremely informative. The position of the opposition was that the Police should not be able to use criminal records to vet prospective jurors, and in fact Mr Palmer moved an amendment to the Bill to try and give effect to his wishes and the opposition's wishes and also to the Department's recommendations. That failed. Now if Your Honours would be kind enough to go to the Crown's bundle of authorities and turn particularly to tab 31. I'm not going to take you to the whole of the debate and could I indicate Your Honours that I anticipate I'll be about 45 minutes in my submissions. I am very conscious of the need to finish to give other counsel an opportunity, but can I just commend the following. The third reading is under tab 31 and page 3043 of the Hansard debate you will see that Mr Palmer, in just about every single paragraph on those two pages, gives a very erudite and detailed explanation as to why from a policy perspective the Police should not be able to vet jury lists and why Crown Prosecutors should not be able to access that information. The Government of the day's position was completely contrary to that and the reasons for the Government of the day taking a completely contrary view were articulated by amongst others Mr East, and his summary of the Government's position is found on page 3045, and the Hon Mr McLay, Minister of Justice at the time, and his summary of the

Government's position can be found on page 3046 and under tabs 32 and 33 are the debates from the second reading and from the committee stages, and you will see that a number of lawyers in the House made contributions. In fact the only two members of Parliament that I could see who weren't lawyers who debated this particular issue were the Hon. Gerry Wall and Mr Faulkner, but all other speakers were lawyers and I think it's fair to say that all had actually enjoyed quite a few years of practice. The debate I would respectfully submit is quite unusual for the following reasons. It is extremely informed. It's detailed and it articulates the issues for and against the Police being able to access jury lists and the Police providing the information from criminal databases to Crown Solicitors for the purposes of enabling Crown Solicitors to exercise peremptory challenges in relation to persons who had relevant criminal convictions. Now this will come as absolutely no surprise to the appellant because I took the Court of Appeal to all of these debates and it is for that reason that the Court of Appeal made note of the fact that the legislative history leaves absolutely no room for doubt that in 1981 Parliament carefully considered the very issues raised by the first two questions that are before this Court and reached the conclusion that jury vetting, as we are calling it, should be able to continue in New Zealand. Indeed I made the submission in the Court of Appeal and I make it again now that I can't recall another occasion in which Hansard debates have been so relevant to an issue of statutory interpretation and where the very issue which the Court has been called upon to provide an analysis and answer has actually been very very carefully considered and actually directly addressed by Parliament in the way in which these two questions have been addressed and answered by Parliament in 1981.

Elias CJ There is of course a bit of an issue as to what one can make of that because the statute must always apply to circumstances as they arise and there's been a developing context. I don't think one could cavil at the submission you make that at the time that it was enacted Parliament did consider the matter carefully, but it's not necessarily determinative is it, particularly given the enactment of the Bill of Rights Act and developing notions of fairness in trial?

Collins I accept what Your Honour is saying but I do wish to elaborate that further enactments and in particular the 2008 enactments of the Juries Act reinforced the interpretation that the Court of Appeal placed upon the 1981 Act.

Elias CJ Well you'll need to, and I'm sure you will, address the use that is properly paid to that can be made of the subsequent statute in interpreting the earlier one.

Collins Yes, indeed, yes. But before I get onto that of course in just finishing off the 1981 Act we have s.14 which is headed Inspection of Jury Panels. It specifically permitted the parties to be able to inspect and copy the panels. For present purposes it's sufficient to emphasise that

s.14 reflected Parliament's clear intent in 1981 that jury panels would be released, copied and inspected and that there would be sufficient time to enable jury vetting to occur. The debate just leaves absolutely no room for doubt that that was Parliament's intention of 1981. Now can I deal with the 2008 Act?

Elias CJ Oh sorry, just before you turn away from the Hansard report, did you want to highlight anything in particular in it? It's just that there is some reference to the fact that only the Department of Justice is going to access these records from the computer.

Collins No Your Honour, I think you'll find that what the substance of the debate was, was Mr Palmer's proposed amendment to prohibit the Police being able to access the Wanganui computer data and providing it to the Crown Solicitors for the purposes of enabling them to make peremptory challenges using that information in their decision-making process. That's what the essence of the debate really was all about.

Tipping J I suppose it could be said Mr Solicitor that if they do nothing more or aren't allowed to do anything more, the debates do show us the practice as a matter of fact that was current at that time.

Collins The debates certainly do that and another source of information about the practice at the time was the Royal Commission Report into the Arthur Allan Thomas case and I can give you the reference and volumes of my friend's authorities. That's another source. But there is also cases including *Greening No.1* which was decided in 1958 or 59 or thereabouts as well.

Tipping J Oh there's another *Greening* is there?

Collins There was.

Elias CJ I didn't think you'd been around that long.

Tipping J Seems like it at times.

Elias CJ It seems like it.

Collins I think it was from memory Justice Gresson and which he talked about in quite glowing terms the practice of standing aside and the way in which the Crown exercised that right in New Zealand compared to the interrogation of potential jurors as occurred in the United States. I can take Your Honours to that.

Tipping J Well if it's important.

Collins So can I just focus on the 2008 Act? The first point to be made is that that 2008 Act was passed against the background of Parliament knowing that the Court of Appeal had endorsed the practice of jury

vetting in this very case earlier this year, and the submission can be made that if Parliament had any reservations whatsoever about the Court of Appeal's interpretation of the Juries Act, or any concerns at all about jury vetting, then one would have thought the opportunity was there for Parliament to say and do something about it. Instead Parliament actually took steps to enhance the ability of the Police and Crown Solicitors to undertake the process of jury vetting. The Juries Amendment Act, as Your Honours will appreciate, emerged from the Criminal Procedure Bill and the Criminal Procedure Bill had noted that the changes that would have been suggested in relation to the Juries Act were a response to the recommendation of the Law Commission in its report Juries and Criminal Trials, and that can be found under tab 29, page 1, that's the explanatory note to the Criminal Procedure Bill, tab 29, page.

Wilson J Does your argument about the legislative endorsement of the Court of Appeal approach apply to question 3 and if not why not?

Collins Could I come to that when I deal with question 3 Your Honour.

Wilson J Yes.

Collins Now the Law Commission in its report gave careful consideration to recommending restrictions on the practice of jury vetting, however ultimately the Commission concluded that there should be no change to the status quo, and the Commission's report can be found at tab 27, page 96 of that same bundle. Thus the Criminal Procedure Bill reflected the Law Commission's careful conclusions that there should be no additional restrictions placed on the practice of jury vetting. Of even more importance are the three key changes that were made to the Juries Act which further facilitate the practice of jury vetting. The first as we noted this morning is the fact that there was the amendment to persons who are entitled to receive jury panels so as to expressly include the Police. Now although that amendment doesn't take effect for another three weeks, it really does completely decimate the foundation arguments in the appellant's written submissions in which she placed so much reliance on her proposition that the Police are not entitled to access jury panel lists. Plainly Parliament has decided that that position is untenable. The 2008 Act clearly recognises the practice of jury vetting by the Police. The suggestion that the only reason why the Police are included now is persons who are entitled to jury panels so as to act as an extra screen to ensure disqualified persons are not on the jury list has two fundamental flaws. Those flaws are theirs. Unlike the position in the United Kingdom, New Zealand has not made it a criminal offence for a person who is disqualified from serving on a jury to serve on a jury. In the United Kingdom it's a legitimate law enforcement for the Police to actually check jury lists to ensure that disqualified persons are excluded because it's a criminal offence for them to be included. The second point, and again this distinguishes New Zealand from the United Kingdom, is that the responsibility for

ensuring that only qualified persons are on jury lists rests with the Registrar of the relevant Court. And if there were any concerns, and I fully understand that there is anecdotal evidence that sometimes disqualified persons have mysteriously appeared on jury panel lists, but if there were any genuine deep held concerns about those rare occurring then it would have been appropriate for Parliament to have enhanced or in some way re-affirmed the powers of the Registrars to make sure that jury panels contain the names only of persons who are qualified statutorily to sit as members of a jury. The second point I wish to make about the Juries Amendment Act is that s.91 actually extends the time for inspection. So we've gone from five working days before the commencement of the week that the trial is scheduled to commence to seven working days which has the practical effect of meaning that up to 14 days before a trial, if a trial had to start on a Friday, which I accept is an unusual occurrence, but if a trial did start on a Friday, the jury panel would be copied, available for inspection, and could be vetted for up to a fortnight prior to that actual trial starting. Actually it's 15 days. I've just done that maths again. Thus New Zealands Parliament has quite consciously extended the opportunity for jury vetting by expanding the time that jury panels can be inspected. Now the position in New Zealand contrasts quite markedly with the position which was taken by the State Parliaments of Victoria, New South Wales and Queensland, to name three examples. In Victoria, as you will have noted from *Katsuno*, the jury panels are only made available to parties the morning of the trial, just before the empanelling starts. There is simply no statutory opportunity whatsoever for inspection let alone vetting. And the third point which was also noted by members of the Court this morning. The third change to the Juries Act is the abandonment of the prohibition against jury list containing the date of birth of jurors. Now that change again facilitates the process of jury vetting because it enables a data matching more easily to take place between the jury panel lists and the criminal databases. So the legislative history, particularly the 1981 legislative history, supplemented by the changes that have been made this year, when looked at dispassionately leave absolutely no room for doubt that in 1981 when the principal Act was passed Parliament plainly intended that the practice of jury vetting would be able to continue in New Zealand and the changes that were made in 2008 against the background of the Court of Appeal's judgment merely enhanced the opportunity for that practice to continue. Now this was all I wanted to say specifically about the interpretation of the Juries Act 1981 and 2008.

Tipping J Did the preliminary statements in the Bill, the Criminal Procedure Bill, actually refer to that age factor consideration, or is there anything when you say what the purpose of it was facilitating jury vetting by data matching, is that something that's just your inference there?

Collins That is my inference Your Honour.

Tipping J Yes, thank you.

Collins Now the second key point I wanted to make was to re-emphasise the validity of Parliament's intentions. In view of the submission that it was Parliament's clear intention that jury vetting be able to continue in New Zealand from 1981 onwards, it's not necessary to delve into the policy reasons as to whether or not one agrees or disagrees with what Parliament's intention was. However because of some of the ways in which the appellant's case is being presented I do wish to take advantage of a small opportunity to set the record straight. The first point I wish to make is this, that Crown Solicitors in this country recognise their duties to the Court and the community and they that as Ministers of Justice their overriding responsibility is to ensure that an accused received a fair trial, and part of their responsibilities include maintaining public confidence in the jury's verdict and in the role of juries within our criminal justice system, and jury vetting is carried out with those objectives in mind. Now public confidence in jury verdicts and in the criminal justice system is prone to being undermined if persons with particular criminal antecedents are permitted to sit on juries. Now I wish to emphasise that the Crown has no desire whatsoever to ban all persons with criminal convictions from sitting on juries.

Elias CJ Well then how do they determine Parliament having identified those who are disqualified, what judgement are the Police exercising?

Collins It's the Crown Prosecutor who has to exercise the judgement

Elias CJ Right.

Collins And he has to exercise the judgement

Elias CJ And using the information.

Collins And using the information received and making an assessment as to what is in the best interests of the maintenance of justice in a particular case and so I'll just give three examples. I would endorse what the English Court of Appeal said in *Mason* that persons who have convictions for burglary should not automatically be eligible to sit on a jury that is required to determine the guilt or innocence of a person charged with burglary. It's going to be a question of judgement in each case, but just because they have a conviction for burglary which doesn't disqualify them from sitting as a member of a jury, doesn't automatically mean that they ought to be able to sit in all cases and in particular I would suggest cases involving charges of burglary.

Elias CJ Yes, I'm just bothered by the fact that those who are disqualified have been specifically identified by Parliament.

Collins Yes, and as the English Court of Appeal said in *Mason* and followed it up in *McCann*, and I would respectfully suggest that they have got it absolutely right, being disqualified totally does not mean that you are eligible to always sit as a member of a jury.

Elias CJ Well that might be so if a discretion was specifically conferred that then it could be exercised to fit the context as long as it didn't exclude in all circumstances, but that's not what we've got here.

Collins We don't have an exclusion in all circumstances Your Honour

Elias CJ No, no, I understand that, I'm talking about a discretionary exclusion in all circumstances, but we don't have a power, we don't have a discretion that is explicitly conferred.

Collins No, it's implicitly conferred through the peremptory challenge process, and that's what Parliament understood in 1981 when it passed the Juries Act, and that's why I took Your Honours to that detailed debate.

Elias CJ Well it may not have been thinking about previous convictions at all.

Collins Oh they were

Elias CJ Oh, through the Hansard reports, yes.

Collins Absolutely, there's just no doubt there minds were focused on it and indeed aspects of the debate were not all that well-informed because one of the examples put up by the opposition was well if somebody has got a conviction for catching crayfish undersized, why would that preclude them from sitting on particular types of cases, and the Government's position was well it's a matter of discretion. I mean you wouldn't want them sitting perhaps on a case that involves an allegation of undersized crayfishing, but there's no reason why they couldn't sit on other types of cases, and this is the very point I wish to make.

Tipping J I don't think it follows with respect that just because someone – there may be a category of people who are absolutely disqualified, but the next category if you like are deemed absolutely fit to sit if you like. It's not excluding the possibility that there may be good reason why a peremptory challenge might be exercised against someone who is not absolutely disqualified but for a legitimate and logical reason is perceived not to be a suitable person to sit on this particular trial.

Collins That's the exact point I'm trying to make Your Honour. I may not have been making it very clearly but what I'm saying is there is a discretion, Parliament envisaged there would be a discretion exercised by the Crown in deciding whether or not somebody's criminal antecedents meant that they are probably not suitable to sit on a particular jury. Not that they are

Tipping J Parliament has said as a generality people above this level can't sit, but you've got to decide under the peremptory challenge procedure who shouldn't sit in this particular case.

Collins Precisely.

Tipping J I mean that's the argument isn't it?

Collins Exactly, exactly, yes.

Tipping J I'm not forecasting a concluded view on it but

Collins Yes, Your Honour's understanding is exactly the point that I'm trying to convey that merely because somebody is not statutorily disqualified does not mean that they are automatically appropriate to sit on particular types of cases, and it is a question of discretion which the Crown up till now has had to exercise using its judgement.

Elias CJ It's quite a sweeping discretion if one is looking at it from the entitlement of citizenship perspective.

Collins It is a wide discretion but it's far better with respect for it to be an informed discretion based upon information that is available and intelligently presented than an intuitive uninformed reaction. The point that I was really trying to make, perhaps not as clearly and as succinctly as I should have been, is that it is certainly not the Crown's position in New Zealand that we would want to see a practice such as that which occurred in *Katsuno*, because in *Katsuno*, Your Honours will appreciate from the judgment, the person who was challenged in that particular case, I think referred to as X or Z in the judgment, had a very ancient conviction as a teenager on a trivial charge of shop-breaking or something like that, and another charge of trespassing some 20 or 25 years previously, and gets challenged as a matter of policy by the Director of Public Prosecutions in Victoria in relation to sitting on a jury that is required to determine the guilt or innocence of somebody charged with importing a large quantity of heroin into Australia. Well I'd be amazed if any Crown Solicitor in New Zealand would challenge somebody with that background from sitting on such a trial. It should not happen.

McGrath J Do we really know though that that wouldn't happen? And when you say you're amazed, what's the test? I mean the Crown Solicitor's operating at a pretty wide discretion in the conduct of the operations.

Collins Yes, but they must maintain confidence in the criminal justice system, they must exercise their judgement fairly and squarely and I reiterate that I would be very very surprised, indeed I'd be amazed if a Crown Prosecutor in New Zealand challenged somebody with Mr X's

background from sitting on a charge involving the importation of heroin. I just do not believe for a moment that that is likely to happen.

Tipping J Even if there were some aberrant examples, it's a moot point as to whether that actually damages the thesis that this is the intended or applicable regime. I mean one can always postulate in any regime that's being discussed that from time to time people will be a bit naughty, but that won't necessarily damage the concept that this is what is or should be happening.

Collins Well can I just leave this point. I agree again with what Your Honour is saying, but my concern is this, that I think it would be fair to say that there is a real risk that public confidence in the criminal justice system risks being eroded if it comes to light that somebody with multiple non-disqualifying criminal convictions of say a sexual nature is found to have sat on a jury involving allegations of sexual violation for example. I think that the public if they learnt of such an occurrence would be quite perturbed.

Elias CJ Multiple, what did you say?

Collins Multiple non-disqualifying criminal convictions relating to

Elias CJ But such a person would be disqualified.

Collins Not necessarily, if the

Elias CJ It's only three years isn't it?

Collins Yes, but more than five years ago if their sentence was less than three years.

McGrath J That's really a policy argument for extending the range of disqualification.

Elias CJ Yes.

McGrath J Not just sort of leaving it up to happenchance in terms of what Crown Solicitors do.

Elias CJ And discretion to be implied.

Tipping J You can get all sorts of naughty and nasty people who don't get to three years.

Collins Yes, and again if the Crown is aware of it, and in my view if the accused or their counsel is aware of it, then in exercising their peremptory challenge they exclude such persons, then I think that the public confidence in the criminal justice system will not be eroded.

Can I deal now with the third key point, unless Your Honours want me to pursue any of those other matters further?

Elias CJ What's the point of Parliament enacting the disqualification without enacting a discretion in other cases? Simply you say that it's implicit in the retention of the peremptory challenges.

Collins And you gain considerable assistance from looking at what Parliament was discussing when it passed the legislation. In fact you get invaluable assistance.

Elias CJ Yes, but it's pre Bill of Rights Act. It's pre quite a lot of development and understanding about fair trial.

Collins Yes, it's certainly pre Bill of Rights. I don't know whether it can be said that it pre-dates concepts of a fair trial.

Elias CJ Well I said development and understanding, yes I understand the argument, yes thank you.

Collins Can I move on to the third key point which I wanted to make which involves Privacy Act considerations? Now there are two parts to the Privacy Act analysis which Your Honours focused upon this morning, and they involve two questions. Can Police access criminal databases for the purposes of jury vetting to assist the Crown, and secondly can Police disclose that information to the Crown to assist in their decisions to challenge prospective jurors? Now can I deal with those two propositions quite distinctly? First Police access to criminal record databases. Your Honours were taken to s.111, but when my friend focused upon s.111 he made the suggestion that s.111 enabled the Police to access criminal record databases for law enforcement purposes. In fact if Your Honours go to tab 4, page 15. If we just stick with the Crown's volume I think everything that I need to refer to is in the Crown's volume, page 15, the number is at the bottom right corner. When one actually looks at the wording of s.111 you realise instantly that my friend's interpretation was miscued. Section 111 doesn't talk about accessing information for law enforcement purposes at all. It talks about accessing law enforcement information.

Elias CJ Sorry, you said page 15

Collins Page 15 Your Honour.

Elias CJ 15?

Collins Yes, under tab 4 of the Crown's volume.

Elias CJ Oh I see, yes, yes, sorry.

Collins I'm sorry to have reproduced it.

Elias CJ No, no, that's fine.

Collins So if we look at s.111 it's not as my friend would have urged upon you for the purposes of law enforcement that the Police can access this information, what the Police have the ability to do is access law enforcement information.

Tipping J Surely they can only access it though for a legitimate purpose.

Collins Absolutely Your Honour, yes, not doubt about that.

Tipping J I think that's really what Mr McCoy was trying to – was saying. I won't say trying to say because that's essentially what he was saying and he used law enforcement as being what he perceived to be the legitimate purpose which this wasn't if you know what I mean.

Collins Yes I understand what you're saying Your Honour but I think to actually use the language of s.111 for the purposes of saying that you can only access it for law enforcement purposes is to misconstrue the language of Parliament.

Tipping J I'm not sure, I would have thought that the ability to access hereby given in the Privacy Act, must be constrained by the proper functions and powers and duties of the Police.

Collins Precisely, and that then begs the question as to what are the scope of the powers and duties of Police, and my submission, which I will elaborate upon is that rather than use the word 'law enforcement', I think that the debate is better enhanced by saying that the Police can only access this information for legitimate purposes. I think I've got a pretty good authority for saying that because that was the language that Your Honour used in *Greening*.

Tipping J Did I.

Collins Yes.

Tipping J It was good fortune on my part.

Blanchard J Even more prescient than we realised.

Elias CJ Mr Collins I'm a bit behind on these things, but looking at that Schedule 5 which I haven't really concentrated on, isn't the case that, and we keep talking about criminal antecedents, which makes me think of ancestors rather than convictions, but the information now held, and I guess this follows the case management system introduction, is vast, it's much more extensive than the information that was held am I right under the Wanganui computer system, just looking at some of this material that is law enforcement information?

Collins Well I don't know that I can answer that question Your Honour because I have not gone and checked to see what information was held under the Wanganui Computer legislation. I do know that s.111 replicates verbatim what was in the Wanganui Computer Act but I don't know about the wording of the Schedule, and the fact that it's been amended might suggest that there has been some changes made, but I just do not know.

Elias CJ Well it's just that in another context partly because the Judicature Act proceeds on the basis that all Court information, all information collected by Courts, is under the supervision of the Registrar which now gets translated as I think the submissions point out into the CEO

Collins Of Justice.

Elias CJ Yes, it's a much wider grab now. It's a much wider justice sector grab of information than the old I think, than under the old Wanganui computer system which was a Police database.

Collins Right. Well can I proceed on the assumption that Your Honour is entirely correct? I just don't know, but can I proceed on the assumption that you're correct

Elias CJ Yes.

Collins Because I think that raises quite an important point. I know that there is a dispute about whether or not the affidavits that were made available in the Court of Appeal but not admitted in the Court of Appeal can in fact be adduced in this Court. Can I put the issue of admissibility to one side and invite Your Honours to look at Mr Stone's affidavit and see what it is that the Crown Solicitor gets when they get a better jury list, because this is what I was particularly familiar with when prosecuting for the Crown. A large bundle of vetted criminal jury lists were attached to Mr Stone's affidavit.

Elias CJ This is the annotation though isn't it, so it's an editorial

Collins This is what a Crown Solicitor receives.

Elias CJ Yes.

Collins And if I can say from the bar, this is exactly what I used to receive when I was prosecuting for the Crown, and just like this which would have about, I estimated about 10% of the names on it identifying criminal convictions. What is important is that it identifies criminal convictions. Where there is any doubt because the date of birth of the person wasn't available you will see that there is a reference to it, date not ascertainable.

Elias CJ Needs DOB.

Collins Yes.

Elias CJ What are these numbers beside people?

Collins These would be the criminal record database numbers I suspect.

Tipping J Does he tell us what NT means? Because there's quite a lot of NT's aren't there? I'm just looking at the first one that's exhibited

Elias CJ Is not found

Tipping J NT. For example the second person on the list AL has got hand-written what appears to be NT alongside of them and there are quite a lot of those. I've seen some of these before professionally but I'm not familiar with NT.

Elias CJ I think it's NF, not found.

Tipping J Not found.

Elias CJ Because later they write it out in full, so I think it's an F not a T.

Tipping J What does not found mean? They found nothing on them.

Elias CJ There's no record.

Collins No record.

Tipping J But some of them are okay, so they are not found but goodies.

Elias CJ Well maybe it's suspicious if you're not found.

Collins Not there, not found. I won't speculate because I just don't remember.

Elias CJ Well OK, what are OK?

Tipping J Yes.

McGrath J What you would look for as a prosecutor Mr Collins would be the number and then you'd go over to the right and pick up the offence and then you'd make a decision.

Collins Indeed, exactly, yes.

Elias CJ Actually this is quite interesting because there is some assessment that's gone into this because there's not only the NF's which presumably means nothing really known, but there's the OK's. What are the OK's?

Tipping J Well I think I know what that means, but I think I'll keep my mouth shut.

Elias CJ Maybe the NF's mean you have to do your sniff test, but the OK's mean they're alright.

Collins Yes.

Tipping J Yes.

Elias CJ Well it's hardly reassuring is it?

Collins What I wanted to emphasise was that the information which is provided relates to convictions. It doesn't refer to acquittals

Elias CJ But we don't know, oh yes okay.

Collins And in each case the prosecuting counsel would exercise a judgement as to whether or not in the circumstances of a particular case the non-disqualifying conviction rendered the person suitable for that particular jury.

Elias CJ Do we know that these are convictions as opposed to charges faced?

Collins Only convictions Your Honour.

Elias CJ They're only convictions. Long, long list.

Tipping J Long, long, long list I think. It goes from one long to three longs.

Collins Pretty good chance that they might be challenged.

Tipping J This is the sort of formal whispering.

Collins Because my friend raised the question of other information, I wanted to find out if there was in fact information about victims that were provided to prosecutors because I've never had that information ever provided to me at any stage, and from what I can see Mr Zarifeh's affidavit does refer to some instances where a person might have been the subject of a domestic violence call out. But aside from that there appears to be no other information other than convictions that are provided and that domestic violence information appears only to have been provided in the Christchurch area because I've not seen it in relation to any other area. So can I come back to that question of interpretation? I accept that the Police can only access this information for a legitimate purpose and because Parliament has recognised the practice of jury vetting as it did in 1981, and considered it to be a legitimate function for the Police to continue to do, then jury vetting must be a legitimate function for the Police. Your Honour Justice

Tipping in *Greening* rejected the argument quite frankly that the Police were acting unlawfully when vetting a jury panel list in circumstances which are quite frankly identical to the issues that are before this Court, and the submission which I respectfully make is that because Parliament has sanctioned the practice of jury vetting, and because Parliament has recognised that the practice again in 2008 and not taken any steps to modify it in any way whatsoever, it is a recognised legitimate role for the Police to access jury panel lists for the purposes of jury vetting. And that submission is reinforced by the 2008 Act which now specifically permits the Police to access those panels and gives them even more time to inspect and vet those lists. So with respect to my friend there just cannot be any substance in the proposition that it is unlawful or illegal for the Police to access criminal data information for jury vetting purposes. Now the second part of the equation relates to the supply of that information to Crown Solicitors, and in the submission which the Crown made in the Court of Appeal and which at least Justice Robinson accepted is that once it's accepted that it's a legitimate role of the Police to assist Crown Prosecutors when asked, in the discharge of the Crown Prosecutor's role in the prosecution of crime, then it is quite legitimate for the Police to make that information available to the Crown Prosecutors. Even without the 2008 amendment there was a compelling argument that it was a legitimate role of the Police to access the criminal data information records for jury vetting purposes and handing that information on to the Police. The 2008 amendment must remove any lingering doubts about the lawfulness of that activity. Now the only aspect of *Greening* with which I respectfully take issue concerns the legal relationship between the Crown and the Police.

Tipping J I don't think you need trouble me with this, I think I got that wrong. I think if anything it's the other way around. But it may not be very helpful to talk in terms of agency at all here.

Collins Thank you for that indication

Tipping J I was seduced by Mr Garland's silver tongue.

Blanchard J It was a prescience probably.

Tipping J Yes.

Collins Yes, I don't think the Court requires any persuading that it would be quite unfortunate if the Crown was regarded as the agents of the Police.

Tipping J You needn't persuade me now. I don't think it's necessary to go into this question at all frankly on reflection. I mean I don't think there is any need to have an analysis like that. It doesn't really take you anywhere.

Collins No, no, once it's accepted that it was a legitimate role then regardless of the legal foundations for it

Tipping J Well it's either a facet of assisting the Crown Prosecutor or it isn't.

Collins Exactly.

Tipping J And the legal relation is incidental and really irrelevant.

Collins Yes.

Elias CJ Well if you're right on the statutory interpretation, it must be able to be used.

Collins Yes, yes indeed. Can I just very rapidly deal with one or two other issues before getting onto the third question and in particular Justice Wilson's question to me earlier this afternoon? I did want to address the question of *Katsuno* because it was relied upon so heavily by Justice Fogarty, and also by my friends, not only in their written submissions but also in their oral submissions today. *Katsuno* was against a legislative background which is conversely different from the New Zealand scene. Legislature in Victoria had specifically decided that parties would not be able to inspect let alone copy or vet jury panels. In Victoria the parties get it on the morning of the trial, just before the jury is empaneled – completely different from the scene in New Zealand. Furthermore it was a criminal offence under the Victoria legislation for the Chief Commissioner to unilaterally provide a vetted jury list to the Director of Public Prosecutions. There is no such criminal offence in New Zealand in the Juries Act. The Commissioner of Police could only notify the Sheriff or the Registrar of the names of persons with criminal convictions, and only those who were statutorily disqualified – that's all he could do, and so when the Commissioner of Police got into the habit of providing a vetted list to the Director of Public Prosecutions, he was completely and utterly breaching the Juries Act of 1967. Now those three key provisions in the Victoria legislation were never replicated in New Zealand and are not part of the law of New Zealand, and as was emphasised in *Katsuno* by the then Chief Justice, different jurisdictions have taken different approaches to the issue of jury vetting and whether it is lawful in any particular jurisdiction has to be assessed by reference to the legislation which provides the foundation for the practice or prohibits the practice. In Victoria, New South Wales and Queensland there is a clear prohibition against the practice. Western Australia, Tasmania, and a number of the Canadian provinces permit the inspection and the vetting of jury lists, and the fact that those jurisdictions permit it emphasises the point made by all members of the Court of Appeal that there is actually nothing inherently objectionable to the practice. Can I come on to deal with question 3, unless Your Honours wish me to traverse any other aspect of the points that I've been making.

Elias CJ No thank you.

Collins I'll try and succinctly summarise the key points which I wish to make. It's acknowledged that the Crown usually has greater resources than an accused in a criminal trial and the Crown's position is that providing an accused with the same criminal record information about a prospective juror as the Crown has, will rectify the imbalance in resources between the Crown and the accused.

Elias CJ Sorry, the what?

Collins Will assist in rectifying, sorry, providing to an accused the same criminal record information that is contained in the vetted list that I showed you next to Mr Stone's affidavit, will assist in rectifying the imbalance between the Crown and an accused in criminal jury trials. Having said that so it shouldn't be lost to the fact that a well-resourced accused can today find out quite a lot about prospective jurors. There is in fact a small consultancy service which vets jury panel lists and a well-resourced accused can make access to that and that service identifies the names and occupations of all persons who live in the prospective jurors address and that information is obtained from electoral rolls. And accused can google other publicly available information about a prospective juror, including published criminal convictions, and defence counsel, particularly those with reasonably well-resourced clients will do that. However, the Crown believes that it is for an accused and for their counsel to decide which prospective jurors with criminal convictions ought to be excluded from a particular jury. There will often be instances when an accused will be very keen to ensure that persons with criminal convictions do not sit in judgement on them; a point again you've noted in your judgment in *Greening* Your Honour Justice Tipping. And again speaking perhaps inappropriately but personally from a number of years of having defended usually reasonably well-resourced accused, they were often extremely concerned to make sure that persons without criminal convictions were the ones who ended up sitting on the jury. Can I emphasise the

Elias CJ You had a high class of criminal client obviously.

Collins Well resourced.

Elias CJ Does the Legal Services Board resource counsel to do jury vets do you know?

Collins I'm pretty confident it does not.

Tipping J It doesn't sound like one.

Elias CJ No I wouldn't have thought so either.

Collins I was reflecting on the last time that I defended somebody on a long complicated criminal matter and it was about four years ago, and I was quite surprised at how much information this consultancy firm could come up with in relation to the jury panel list. It is quite revealing.

Blanchard J The proportion of criminal defendants who could afford that sort of service, even if it was available, would be minuscule.

Collins Yes, look I accept, and that's why I emphasised right from the outset that the Crown is usually going to be far better resourced than an accused. Now the difficulties with the majority's compromised position, if I can respectively describe it as that, is that it introduces what is effectively an unenforceable obligation on a prosecutor. How will the accused know whether or not the prosecutor had in front of him the names of a person who with criminal convictions that might have been relevant to the accused's perspective of whether or not that person should be challenged, and it introduces considerable subjectivity and latitude for judgement which I think ought not to have to be imposed upon the prosecutor. There is a simplicity and a fairness about the Crown's approach which I would urge upon the Court. It's easily understood. It ensures that so far as is practicable an accused is placed in the same position as the prosecutor and the way in which it would work is to follow the system which I was in the practice of doing when I prosecuted. Before a trial would start, 15, 20 minutes beforehand I would offer to an accused and/or their counsel the vetted list that I had on the basis that it would be returned to me as soon as the jury was empanelled. I never once encountered any difficulties whatsoever. Now some of the issues which my friend Mr Boldt raises I think overstate the problems. One of his concerns is that there is a risk of compromising the safety or the security of the jury members if information about criminal convictions is made available to an accused representing themselves. Well you've seen from the list, I mean if an accused has that list 15, 20 minutes before a trial starts, they are highly unlikely to be able to remember the names, the addresses of anyone on that list, let alone persons with specific criminal convictions. Now if that list is made available to them

Tipping J If there is someone there though to whom their attention is directed by dint of the fact that they have a previous conviction, or something about them that lifts them above the common herd so to speak, I'm not sure that that isn't something that an accused person might easily remember Mr Solicitor. I must say this whole question of the privacy interest of jurors does trouble me and there may be some defects if you like in the majority's approach, but at least it enables a case by case assessment. It may have to be elaborated on a bit. I can understand the difficulties you've adverted to for the prosecutors, but if it was able to be enhanced a bit, say the Judge came in, or say the accused were to say well look I'm particularly anxious not to have people on my jury that have got whatever, and there's a perfectly valid reason for that. Can you tell me whether there's anyone on the jury of the ilk? That

seems to me to be at least a quite good attempt to balance fair trial considerations with juror privacy which I have to say as I said in *Greening*, I feel quite a significant issue, and it's not so much the reality, it's the perception for jurors as much as the reality that you know if they are going to have all sorts of things about them potentially spread about

Collins Yes, well as Your Honour noted you raised that concern in *Greening* and you've been entirely consistent today. I just repeat the point that I made earlier. I think the practical realty is 15 minutes before a jury trial starts the prospects of somebody going down that list and saying oh I must remember that that person's got a conviction for so and so, they live at that address and if I get off I might go and do something. I don't really think with respect think that that's a very realistic likelihood.

McGrath J So your point is that they can have the information half an hour before the trial?

Collins Yes, and then they hand it back and the only modification I would make is that they have to hand it to the Registrar so as it's consistent with the 2008 amendments, and hand it back once the jury's empanelled.

Elias CJ You could simply put out a directive couldn't you to Crown Solicitors that that is the approach that they have to adopt Mr Solicitor. I'm just thinking about inviting us to fill in perhaps some gaps in the statute to achieve best practice when really that's something that you can control.

Collins Yes I can. I always like to have the judiciary support

Elias CJ What about Mr Moore's plea?

Collins Yes I have taken that up with the Commissioner and I'm told that resources will be made available. I'm very very conscious of the time, incredibly conscious of the time and I don't want to delay matters any further. Can I just deal with that clean slate legislation? I thought I made it very clear in the Court of Appeal – sorry – the clean slate legislation.

Blanchard J Do we really need to?

Collins Okay, right.

Tipping J I view you as having made a perfect gift Mr Solicitor.

Collins Thank you very much.

Tipping J In spite of Mr McCoy's demurral to that proposition.

McCoy I have a subtle rebuttal.

Collins I will resume my seat now then, unless I can assist the Court

Wilson J And my question Mr Collins?

Elias CJ Could you repeat the question.

Wilson J Yes I asked the Solicitor whether his argument in the context of the first questions based on the legislative endorsement of the Court of Appeal judgment applies also to the third question and if not why?

Collins I think I can answer that point in the following two ways Your Honour. Firstly there was a change from 1981 as Her Honour the Chief Justice has emphasised, namely the introduction of the Bill of Rights, which underscores the obligation of the State to provide a fair trial. I would submit that that change provides support for the proposition that I had been advancing that a fair trial is more likely to be enhanced if there is, and I hate using catch phrases, if there is a relative equality of arms between the prosecution and an accused in relation to this information. The second point is that in relation to the 2008 amendment, whilst there was no specific challenge to the way in which the Court of Appeal had addressed the issue, I think it would be fair to say that Parliament had recognised that there must be some room for latitude and that room for latitude would involve either the Court, or as Her Honour has said, the Solicitor General providing for a method that ensures fair trial rights are enhanced through the practice of enabling an accused to have access to a criminal record list – vetted jury panel list identifying criminal convictions – that the accused could then decide whether or not they were relevant to challenging a prospective juror through way of peremptory challenge. I hope that answers the question.

Wilson J It answers the question. We'll reflect on the answer.

Collins Can I just pause for a second because Ms Brown has been scribbling me a note on that very point. Yes, I should have paused and listened to Ms Brown earlier. She makes the very valid point of course that in relation to the first point, namely whether or not the Police can access the jury lists, and I submit for the purposes of jury vetting, Parliament's intention is now more than crystal clear, abundantly clear, but Parliament has left open the question as to whether or not that information once provided to the Crown ought also to be provided to an accused, and that's a question which can be answered by this Court, or if the Court wishes me to answer it through a direction to Crown Solicitors then I'll do so.

Elias CJ Yes thank you Mr Collins. Yes Mr Boldt.

Boldt May it please Your Honours. If I could perhaps begin at the point where my learned friend the Solicitor General's submissions finish, and that was the response to Your Honour Justice Wilson's question about how this question of disclosure might have been impacted upon by the recent amendment. In addition to the matters that he has raised, it is also worth reflecting on the fact that this question was the subject of a recommendation by the Law Commission in 2001. Now that recommendation was well two-fold in this area. Firstly that the practice of jury vetting should be allowed to continue and secondly that there should be at least with respect to criminal convictions, the introduction of an obligation to share that information as between Crown and defence, and it is worth in that context making the observation that in spite of that recommendation and that report plainly informing much of the analysis that underpinned the new legislation, including for example provisions to enhance the security of jurors, this requirement that there be sharing of criminal histories was not adopted by the House and has not found its way into the new legislation. But turning more generally to the case that I have to present

Elias CJ You don't really though cavil at the suggestion that it could be dealt with administratively?

Boldt Well I do Ma'am to the extent that one of the questions that the Court of Appeal dealt with was whether it was in fact lawful for the Crown to disclose this information to the defence, and the way that the majority dealt with that was to say where there is a specific instance of relevance that can be identified, in that situation, and in particular where some prejudice may accrue to the defence if the information is not provided then of course the Privacy Act, and in particular Information Privacy Principle 11(e) would permit the sharing of information in that narrow instance. On the other hand the majority concluded that more generally there isn't any basis that it could identify whereby such information could be disclosed by the Crown as the holder of the information to an accused, and of course we're not only talking here about defence counsel but also to the accused in person, so to the extent that there is a concern about the very legality of the provision of such information, then yes, there would be a problem.

Elias CJ But do you run that? Do you contend that it would be unlawful?

Boldt I do, except in the situation that the majority has identified, and to that extent the majority in my respectful submission has outlined a very clear basis for a distinction between disclosure in the ordinary run of cases where it simply cannot be said to be necessary to advance the interests of the defence. It might be desirable particularly from a symbolic perspective, but it is certainly not on any analysis necessary

McGrath J Because there's no prejudice

Boldt Because there is no prejudice. The majority has distinguished that situation from the situation where there is an articuable and identifiable prejudice that might arise if information is not disclosed and it is said that information sharing would be lawful in that situation. And I do seek to support the majority's decision on that basis along with the other bases on which it reached its conclusions. So I turn to my submissions more generally. I do acknowledge at the outset that the majority's decision and its conclusion that the Crown should be entitled to information that the defence may not see is at first glance at least an unattractive and unappealing proposition. This was something that the majority was plainly aware of as well it noted that at the very least the appearance of fairness would be greatly enhanced if this information were shared. And I also acknowledge that there is indeed a genuine simplicity in the approach proposed by my learned friend the Solicitor General. That said, what the majority did in its analysis was not simply to focus on this question with regard to the interests of the Crown and the defence in any individual case, but to take a far broader analysis which also took account of the wider public interest and in particular the privacy interests of jurors and the concerns that may arise if information sharing were to be entrenched in every situation. And what the majority has sought to do in its approach is to preserve the status quo in the majority of cases where it cannot be said that there is any significant prejudice that can arise to the defence by virtue of not having access to this information, but to make provision in those few cases where genuine prejudice may arise for information to be shared, and in my respectful submission that was an appropriate balance to strike and in particular it avoided the serious concern about the privacy interests of jurors that might otherwise arise. In practical terms the majority was in my respectful submission correct to hold that there will really be significant detriment that the defence may suffer by virtue of not knowing who among the panellists has previous criminal convictions. By and large those with serious convictions may well be challenged by the Crown, but there is no basis for supposing that in general terms people with criminal convictions are likely to harbour particular hostilities to the defence. Now there are potentially situations, and the majority has cited a number of examples, where that assumption may not hold true and in my submissions the way that I've put it is that if there is a clearly identifiable concern that the defence can point to in any given situation then clearly disclosure would have to be considered with the trial Judge being the ultimate arbiter if there weren't agreement. Also of course there may be situations that arise where information falls into the hands of the prosecutor that the defence may be unaware of but which may indicate potential prejudice to the defence and if that arises also there would be an obligation on the part of the prosecutor at very least either to neutralise the situation him or herself by challenging the particular juror without notice to the defence, or alternatively to make that information available to the

Tipping J You've interpolated there Mr Boldt a significant point where you simply said with the trial Judge ultimate arbiter. That doesn't seem to

be at least expressly within the majority's formulation, but do you say that that's what they must have had in mind to resolve disputes?

Boldt Indeed, and it would become just another of those matters that would be dealt with in Chambers prior to trial if there were not agreement. I would find it difficult I must say to imagine that that situation would arise very often Sir because certainly in my experience the situations where this concern might arise are going to be relatively clear cut and there ought not to be any real defensiveness if it is a clear situation on the part of the Crown in making that information available. Or as I say

Tipping J I wouldn't be as sanguine as you. I don't see the Crown Prosecutors and certain defence counsel anyway easily resolving a matter of this kind.

Boldt Well if it is unable to be resolved Sir that's where recourse is to be had to the trial Judge, and as I've said in my written submissions

Tipping J It would have to be wouldn't it?

Boldt Yes.

Tipping J As a backstop.

Boldt If uncertainty were resolved in favour of disclosure, which I think would be appropriate, then this provides for these decisions to be made on a case by case basis with proper regard to the circumstances that are arising in the particular case. But it won't arise all that often, and you know you hesitate to harp back to your own experiences, but I must say my own experience as a prosecutor is that the defence was really interested in this information, and

McGrath J What do you say about Mr McCoy's suggestion that a defence counsel might want to know if a victim was on the panel? Now that seems to me to be a lot broader a concept and it would fit into the majority's approach.

Boldt I agree Sir and if somehow that information came into the possession of the prosecutor –I'm not quite sure how that would happen – but if such information were to come into the possession of the prosecutor

McGrath J Well we're told that there is a victims register.

Boldt We are indeed Sir but I am certainly not aware of it and I can say that I

McGrath J The Solicitor General doesn't seem to have heard of it either.

Boldt I have never in all the many trials that I have done, received such information.

Elias CJ That Schedule 5 though that I was looking at before does talk about victims, information about victims.

Boldt What I can say Ma'am is that that information is not obtained by the Police and passed to prosecution.

Elias CJ No, I think it's all collected by this case management system operated by the Ministry of Justice, that's what I think is the source.

Boldt Certainly information about victims is gathered somewhere and you know this because for example victims have a right to be notified say when their offender comes up for parole for example

Elias CJ Yes.

Boldt So there is plainly at least for certain purposes information gathered about who has been a victim of certain offences and I guess also if you were to scour the Police records for witnesses and complainants in historical cases, you could probably come up with that information by that method.

Elias CJ No, but you can get it - if I'm right and they pulled the information held by the law enforcement agencies, you get all that through the Court file.

Boldt Well Ma'am I don't know the answer to that, but what I can say is that I have never seen, either in my own experience, or indeed in any of the material that's been placed before this Court regarding the practices that prevail

Elias CJ But you see we haven't seen the information, we've only seen Schedule 5 which describes the information that's held on this databank. What we have is the Schedule of jurors which have been annotated by someone who's had access to the information.

Boldt I understand that but I'm not aware of any instance in which information about a person's status as victim has been obtained as part of a jury vetting exercise.

Elias CJ This is relatively recent.

Tipping J I would have thought that from a defence point of view, and this is intuitive rather than intelligent, that you'd be more interested in victims than you would be in people who have been convicted.

Boldt Indeed Sir and I think Your Honour that's both intuitive and intelligent and I agree entirely. And really as I was answering Your Honour Justice McGrath's question, my response would be if that information were to come into the possession of the prosecutor then plainly that

would fall into the category of information that ought to be disclosed to the defence.

Tipping J But a victim of a burglary might not necessarily have any great relevance it is was a sexual trial.

Boldt Again subject to relevance obviously Sir.

Tipping J Yes. It's that difficulty of assessing whether it's sufficiently relevant if you like is a rather awkward feature of the majority's approach which otherwise may have some quite attractive aspects to it.

Boldt Yes, and I guess all I can say Sir is that it is likely to work out well in the great majority of cases because it will be obvious where disclosure ought to occur. Those minority of cases where it doesn't work out we have the trial Judge there as the arbiter of those and it is less unattractive if you like Sir than the possibility simply of open slather about which I've expressed considerable concern in my written submission and which really is, at least for me in approaching this question, the greatest danger if there were an immediate move to complete sharing of this information. If all convictions had to be disclosed, including those that can have no possible relevance to the defence's exercise of its right to peremptory challenge, there would be no particular benefit associated with this, but a substantial potential detriment to those persons whose names are on the list. I've identified some examples of people with particular kinds of criminal convictions who would be particularly at risk or would have particular concern about their information becoming known to an accused. But you can also imagine that even people whose convictions aren't particularly of a sort that are likely to raise well-founded fears say of harm or blackmail, would be equally uncomfortable about the fact that they have lost control of this very personal information and that without their consent ever being sought or obtained it is being disclosed not merely to a State agency, which can be relied upon to keep it safe and confidential

Elias CJ Well not always. I mean we have had cases where State agencies have not maintained in confidence confidential information.

Boldt Granted Ma'am and subject to hopefully very rare exceptions of that nature, the information is safe in the hands of the Crown and the prosecutor. If the information could be disclosed only to defence counsel and not to the accused that would substantially mitigate the concern that I'm expressing, but as has been observed, both by the Law Commission, which devoted some time to whether names and addresses could be kept private from accused and determined that there was simply no way that that could happen and indeed in Your Honour Justice Tipping's decision in *Greening* Your Honour confirmed that there is really no mechanism by which such material can be kept confidential to counsel. So you have a situation where this information

would be provided in every case to the accused personally. Now my friend the Solicitor General suggests that this concern can be overcome firstly by showing the information to the accused only a very short time before trial and to that my answer is well, and I say this with the greatest of respect to my friend, who says it would only be 15 or 30 minutes prior to trial. What if defence counsel said listen my client has a right to this information; we have a right to consult extensively upon it, I want this three days before trial? And once it is identified as a right to which the defence has, my question would be is there any realistic basis upon which such a suggestion could be resisted? So the first suggestion is that they would only have that for a short time prior to trial. My response of that is identified as a right you would have real difficulty limiting it to such a short timeframe. And the second point that my friend makes with respect to this aspect of the case is that if the information is only given to the accused a short time before trial he probably won't remember it. Probably won't retain the detail of a particular conviction and associate that with a particular name. And this is something that I've addressed in my written submissions that really does rely on defendants having bad memories and the point about that is that there are going to be convictions of a particular kind which for certain people will be very memorable and I've used the example in the written submissions of say sexual offending or if any against children, and for a certain class of defendant that sort of offending is going to create an immediately memorable and highly hostile reaction and so you've got

Tipping J One of the things that I think is relevant here is that some trials take place in a big metropolitan area like Auckland where different considerations might apply than say in a small town like Timaru

Boldt Very much so Sir.

Tipping J And if we're going to have a what you might call a 'one size fits all' approach one would be more worried about the smaller location than the bigger location from the point of view of people knowing each other and the words spreading and all that sort of thing, so although there are attractions and simplicity in a 'one size fits all' I just wonder whether it really does respond to the diverse sort of circumstances that may attend all this sort of problem.

Boldt I agree completely Sir and I do think that the risk in a number of respects is going to be greater in a small community and I don't know if I'll get time to come on to what the majority described as the meets and bounds point, because the size of the community also has real implications there as well, but I agree entirely with what Your Honour says about that, but I also wouldn't minimise the risk in a large community. If an accused learns that so and so of this address has convictions for sexual offending against children and makes a mental note of this, and might be a gang member, we simply cannot be confident that that information is going to remain properly protected, or

that the juror is going to remain properly protected, and as I've mentioned in the written submissions, this is an area where Parliament actually sought to enhance the protection of jurors. The whole shift to ensuring that defendants are not allowed to retain copies of the jury panel itself was designed to minimise the risk to jurors associated with their serving. And so it meant that if you were an accused person you only receive the panel list for a relatively brief time and you had to hand it back. Well the concern is significantly greater with information of this sensitivity, and where there is genuine potential one might think for the juror's safety to be compromised, and it would be a step in the opposite direction to the one that Parliament has recently taken if there were to be an entitlement that the law recognised to such private and personal information.

Tipping J This Law Commission paper of 2001 where you point out quite rightly that there were the two recommendations, one with the other wasn't, is that the progenitor of the 2008 legislation or is it

Boldt It was there in the background. Now what I don't know and perhaps ought to have made greater inquiry about was the degree to which that became part of the Criminal Procedure Bill because of course that legislation that became the Juries Amendment Act 2008 was actually before the House for a long time as one compendious piece of legislation which only split off into its constituent pieces right at the end. The

McGrath J And the jury provisions presumably were a long time in getting before the House anyway.

Boldt Exactly Sir. The Law Commission Report arose from the juries research that was done in the late 90s by Dr Young and Neil Cameron and Yvette Tinsley. That work then ultimately fed into the Juries and Criminal Trials report of 2001. It also noted community concerns about aspects associated with serving on juries, one of which and which the Law Commission actually quoted, was the real grave concern that many people feel about the fact that their very name and address is going to become known to accused people in person, and that was something that the Law Commission at least spent some time agonising about at least before concluding that ultimately under our system there was no way that this information could be kept from jurors, but it certainly recognised even the provision of such bland information as that, as a matter of legitimate concern, and what the legislation has done is at least seeks to address that to the extent that's possible. So as I say it really would be a step in a quite different direction to say that we're going to give them your name and address and we're also going to tell them things that you've done.

Tipping J Would adopting the minority view in the Court of Appeal amount to doing something which on the face of it Parliament has decided not to do?

Boldt Well certainly that, I mean I do take my friend the Solicitor General's point that it doesn't appear that this matter was squarely debated and I have to agree

Tipping J But it's in here alongside the, I mean one can't be too literalistic about these sort of things, but it did presumably – part of it they decided to go with.

Blanchard J Did the author of the minority judgment on this point in the Court of Appeal have anything to do with the preparation of the Law Commission Report?

Boldt I don't know.

McGrath J I don't think so because Justice Baragwanath signed it off. I think Mr Brewer would have been one of the Commissioners almost certainly involved.

Boldt Commissioner Brewer certainly had a major hand in writing the report, but my friend the Solicitor General advises to Your Honour Justice Blanchard's question is no. But in any event that real privacy concern is something that, especially in light of the way the legislation has developed this year, is a very important point. And my friend has given me the front page of the report and His Honour Justice Baragwanath was the President of the Commission at that time, and His Honour Justice Robertson wasn't a Commissioner. But in any event that's the first concern. The second concern is this practical one that the majority talked about as the meets and bounds of the disclosure obligation. His Honour Justice Robertson in his dissenting judgment said 'I believe that it would be appropriate to share criminal convictions, but criminal convictions only', and that's on the basis that criminal convictions on at least on his analysis had at least a semi-public aspect to them. They are pronounced obviously in open Court but I do disagree respectfully with His Honour that they can be described as coming from a publicly available publication simply by virtue of having been pronounced in open Court and do adopt what the majority says in that regard. But as I've noted in my written submissions, His Honour had already described the distinction between formal information, namely convictions, and informal information, namely say Police advice about gang associations or suspected involvement in an unsolved crime or whatever else. He'd already described that as a distinction without a difference when commenting on His Honour Justice Fogarty's decision, yet that very same distinction without a difference would be preserved in my respectful submission if there were a rule that only criminal convictions should be disclosed, especially where it's borne in mind that there will be other information, informal information, that will be far more influential when it comes to exercising peremptory challenges than the mere fact that someone has a criminal history. So for example a gang association

that's not reflected in a criminal conviction is nonetheless likely to be very heavily relied upon by the Crown when making a decision about a challenge. Equally of course, let's say you have a member from one gang on trial and the prosecutor learns that a particular juror has associations with another gang, that's not the sort of information that you then want to march over to the defence and give to them, or to the accused, and give to him more specifically. There is going to be a great deal of information that falls into that informal category that is potentially inflammatory, potentially defamatory, because it may be incomplete or incorrect, but if it's fed informally to the prosecutor and the prosecutor can make of it what he or she will, first of all there should be no concern about that practice and nobody, including Justice Fogarty, suggested there was any concern about that, but secondly it would be in my respectful submission a serious problem if there were suddenly an obligation to hand that information over. It would be even worse in terms of compromising jurors' privacy and potentially placing them at risk than simply handing over criminal convictions. In my respectful submission there can't be any logical distinction drawn between the two kinds of information. As I put it in my submissions, logically really what ought to be disclosed should either be everything or nothing, and what the majority has concluded is that because drawing a line between these two categories of information is so difficult, by far the better course is to say that each party can make their own inquiries about jurors and are entitled to keep that information to themselves, consistent with the principle that when you exercise your right of challenge your reasons for doing so are entirely your own. So Your Honours it's on that basis, and cognisant of the time and no doubt my friend's desire to reply, that I will leave Your Honours unless there is anything that I can specifically assist with. My only final word is that this really was in my respectful submission, whilst initially an unappealing and unattractive formulation, an intensively practical one and one that has sought to balance the interests of the wider community and of jurors. With the parties in the case it is in my respectful submission a very good attempt to get there. As Your Honours have observed, it may require perhaps a little refinement to deal with practical concerns but in my submission they can generally be managed by the Court on a case by case basis and that that's an appropriate way that the matter should be left.

Elias CJ Yes, I wonder really whether the difficulties in coming up with a workable regime don't indicate that the legislation is not optimal and that the best outcome might be something that sets the whole matter out in full and suggests some further consideration? Because there's no very happy solution here is there?

Boldt I don't with respect Ma'am subscribe to the view that the majority's formulation is an unattractive one. What it has done is sought to preserve the interests of the accused where those are genuinely affected whilst at the same time preserving the privacy of jurors in every other situation. Now it is difficult in my respectful submission to articulate

the balance perhaps better than that and the practical difficulties that may or may not arise can be worked out with the assistance if necessary of the trial Judge, but hopefully by co-operation of the parties, and in my submission that statement of principle at very least is a good indication of how the law should balance all of these competing interests and it certainly ought not to be beyond the capacity of counsel on both sides and the Court to make sure that it actually works in individual cases.

Elias CJ Thank you Mr Boldt.

Boldt Thank you Your Honours.

Elias CJ Mr Solicitor, I wonder whether I can just ask you something? I'm bothered by the net now that I look at the scope of this Schedule 5 and there may be something additional that you would like to say to us now but it may be necessary to make some further inquiries. It just occurs to me that here is a substantial publicly maintained register of information, a lot of which is not put together for law enforcement purposes, not put together by the Police, to which the Police have access, and that's bothering me a little. We're not really just talking about convictions.

Collins Yes, the same thought was going through my mind during the course of my friend Mr Boldt's submissions to Your Honours and what I was proposing to do was to offer to make some further inquiries and prepare a report, obviously in consultation with my friends, as to exactly what information can be accessed. One has to bear in mind that this started off as a case stated in which the question asked related only to criminal record databases, and I've certainly proceeded on the basis that that's what the issue is, criminal record databases. But if the Court is concerned

Elias CJ Well it's just that there is no such thing now. There's a large database that is maintained by the Secretary for Justice you say which draws on all the material in the justice system.

Collins In the system.

Elias CJ It may be that because of the way the matter has come before the Court we're not concerned with that, we can proceed simply on the basis of accessing criminal convictions, but it was really this reference to victim information and the realisation that a lot of information like whether people have been charged at any stage is available on this database.

Collins Well I volunteer to make further inquiries and prepare a report for the Court if that would be of assistance which explains

Elias CJ Well perhaps we can put out a minute if we think that that will be required, but I'm just alerting you to that and wondered if you had anything further to say at this stage?

Collins I have to say that I just don't know enough about the way in which this computer system works and what's retained on it and how you access it to be able to provide you with any information.

Tipping J Well it seems to be subdivided doesn't this, into Ministry of Justice records, Police records, Land Transport records, Registrar of Motor Vehicles records, and Department of Corrections records. Now whether there are five separate boxes if you like or whether they've all been combined into one bigger box I don't

Collins I just do not know Your Honour so I'm offering to find out if you wish me to.

Elias CJ Thank you. Yes Mr McCoy.

McCoy Your Honour I shall deal with the points, or some of them, very quickly in reply. My learned friend said that the 2008 Act is proof that the 1981 Act included the Police. He's taken the Court to the proceedings in Parliament. I submit that whereas the Parliamentarians of 1981 may have gotten A for effort, they actually got an E for attainment. It's rather like a bad school report because there is nothing in s.14 that demonstrates the Police entitlement. The second point is my learned friend expressed almost unbridled confidence in Crown Solicitors and their underlings to perform the responsible tasks of jury vetting. However he very properly and gallantly did provide to us earlier a letter from the Deputy Solicitor General of 1994, Lowell Goddard QC as she then was, on behalf of the Solicitor General, pointing out half-way through the time of the Juries Act, and I'll just quote 'it is accepted that

Elias CJ A moment. What are we receiving here Mr McCoy?

McCoy It's a letter that the Solicitor General has written

Elias CJ Have you shown it to

McCoy He provided it to us.

Elias CJ I see. You're happy for us to hear from this?

Collins I'm not too sure. Can I just have a look and see

McCoy It was provided to us by the Crown Law.

Elias CJ Yes but I just really don't want bits of evidence floating in at this stage unless it's necessary for us to receive it. I don't know what's in it.

McCoy I understand.

Collins It refers to a different time and regime Your Honour.

McCoy Yes, my learned friend's entirely correct, but what it does show is between 1994 the then Solicitor General could say it is accepted that challenging jurors in a peremptory challenges system such as our is an imprecise art and is largely intuitive and personal. That was our submission all day. Nevertheless the selection is a highly visible process and it is simply not acceptable for Crown Prosecutors to be perceived as acting outside of the equality principles to which the Crown must be committed, and there was further commentary on the disproportionate numbers of Maori people who had been challenged which led to the need for the instruction to Crown Solicitors.

Elias CJ Well Mr Solicitor really acknowledged that sort of history, but

McCoy That's 1994 Your Honour, not 1980 when Arthur Allan Thomas was wrongly convicted, thirteen years through the period of the current legislation, but I won't dwell further on it. I accept entirely that the present regime is not responsible for what had happened in the past. Now an important issue has arisen because my learned friend helpfully took you to the affidavit of one of the deponents, but if you'd be kind, I can do this very quickly, to go to the affidavit of Mr Zarifeh who is the second in charge in the Crown Solicitor's office in Christchurch, and attached to his affidavit are, and it's exhibit A, first of all identifies a jury panel list with names, then you see for example the next document is from the Ministry of Justice and you'll see that the Ministry of Justice only records convictions and sentences, it doesn't keep records of acquittals, of stays and of discharges, and we're almost through that document. We come to the next document which is from the Police

Elias CJ But this is the printout of the Criminal and Traffic Convictions?

McCoy That is correct.

Elias CJ Yes, yes.

McCoy Now that is from the Ministry of Justice Your Honour, but the next document has a different provenience. It is from the Police and I won't name the individual, you will see his surname starts with the letters To and his Christian name Eli. Two or three lines from the bottom there is a piece of information that a lot of people might want to know if they were selecting a jury, that he's a former member of a particular organisation. But much more importantly for present purposes if you would just turn across about some four or five more pages you come to the Police history – maybe six or seven – of a woman whose surname commences with the letters Meag, and there you'll see

Elias CJ Sorry, where are we looking at?

McCoy It's a Police document Your Honour, and keep turning in the same direction we go past a man whose name starts with Du, through the criminal traffic history of the Ministry of Justice and its that next document.

Elias CJ I see, thank you.

McCoy Here is a Police document and you see that this lady has been the subject of 21 examples of family violence involvement. She is either the precipitator or the victim on the face of it of much family violence. It would be indispensable to a trial counsel to know this in the selection of a jury in case it involves men, violence or whatever, but I don't narrow it down to that narrow nexus, and there are more examples of this. Even the next individual is a man whose surname and Christian names both start with the letter L and you'll see after the records of criminal and traffic history by the Ministry, by contrast the Police records show he has ten instances of family violence involvement. Now the Crown Solicitor at Christchurch is plainly possessed of information given by the Police in terms of participation in matters of that nature, and if you just turn finally to the next page, this is a dossier view in relation to the same individual from the Police, and here is the critical contrast, whereas Ministry of Justice records show only convictions, the very first item is withdrawn by leave. Four or five down, no case to answer, and the ones after that, withdrawn by leave, withdrawn by leave, over the page, withdrawn by leave. It is plainly critical that a defence counsel be given not a partial and incomplete criminal antecedent history but the entire thing or the other alternative is that the prosecution cannot themselves rely upon it for the purposes of exercising their peremptory challenges. My learned friend Mr Cook tells me that Mr Zarifeh's affidavit, paras.10 and 11 sets out exactly this victim information and matters of that nature is put together. The next point I wish to make is that the proposal by my learned friend the Solicitor General is correct. It does have the virtues as he accurately described of simplicity and fairness and my learned friend was then able to deal with the question from Justice Wilson whose question said if Parliament in 1981 had put this to one side as a proposal, how was it now to be reconciled with what had happened. Well first answer must be s.6 of the Interpretation Act which means an ambulatory approach to interpretation, but the vital and overriding point has to be we are now in a constitutional ligure so that what was thought acceptable in 1981 when there was an arid balancing of private rights, now has to be seen as a human right and the fair trial right utterly clumps the privacy rights of jurors, and that is the way the law reconciles it. Nothing can derogate from the rights of a fair trial. Two more points before I conclude if I might? I won't ask Your Honours to turn about now, but case No.42 in our list *Stadukhin*, the judgment of the European Court of Human Rights, at para.28 vitally emphasises the importances of appearances in the criminal justice system and the anxiety and

perspective of the accused person and it talks of that in terms of the equality of arms provision. Now my learned friend the Amicus dealing with the privacy point first of all argued that some pre-conditions should be imposed on the defence. In my submission this is wholly unreal and simply unworkable. He then suggested perhaps that there should be only disclosure in 'the ordinary run of cases' or 'in a clear situation'. There is no such thing because the prosecution will not know in the many cases what the defence is or how the case is to be argued or fought. There is no such thing as the ordinary run of rights in terms of fundamental rights. It applies to every case by trial on indictment. There is no requirement to show pre-conditional prejudice. My learned friend then suggested that perhaps the trial Judge could become the arbiter of any disputes. This is simply going to introduce a new hazard into the efficiency of criminal litigation. There is no need to resort to a Judge having to become involved because the peremptory challenge as a matter of law belongs to the accused. He's entitled to exercise it based on all the information that the other side themselves took into account in formulating their challenge. My learned friend then correctly observed, contrary to the position of the Solicitor General, who was speaking perhaps of provision a short time before the commencement of the trial, but it must be correct that the accused is entitled to the earliest provision of the list of jurors and the informations so that the accused can make an informed and genuine attempt to exercise his rights, it being the right of the accused. Two more short points to conclude. There are no less than five Acts of the New Zealand Parliament which emphasise the rights of victims now. These Acts all have indices and indexes which all collate information. Those matter are plainly available to the State, to the Crown, which devolves its rights through the Crown Solicitor. Access is available to this information for all sorts of purposes. For just how far the Crown goes, at least in Canterbury and Westland, I draw your attention to paras.18 and 19 of Mr Zarifeh's affidavit who says there will be attempts made to detect anti-Police sentiment and all sorts of other matters which can't be qualitatively proven and which are taken into account in deciding whether challenges should be made. If that is going to be taken into account it must be fairly given to the accused as well. Second last point is in tab 26, I won't ask you to turn it up, it's the Attorney General's Guidelines of the United Kingdom, no correction, England and Wales, and it's the attachment to the all England report of the case of *Brownlow* decided by Lord Denning when he held it was unconstitutional. The Attorney General, after that judgment, issued guidelines and guideline No.10 even as far as 1978 in England was able to say that where possible the principle of equality of information should be observed and the matters which the Crown are going to take into account should be provided to the defence. The final point is the Chief Justice raised the issue of whether there was a happy solution possible. In my submission the only happy solution is that the rights of fair trial will prove to be the winner in this case and that can only be brought about by this Court either saying the Crown must not use any information for the purposes of exercising their peremptory

challenge which they won't give to the defence. In short if we can't have it the prosecution can't use it, and it may be the safest course is to require that each party lives in blissful ignorance and we get back to the days of the true subjective intuitive peremptory challenge. Those are our submissions in reply.

Elias CJ Thank you very much. Well thank you counsel and thank you for adhering to the time constraints we have. We'll take time to consider the very thorough submissions we've received, thank you, we'll retire.

4.19pm Court Adjourned