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— Milligan's Criminal Law Advisor—*By Jeffrey Milligan* (Formerly The David Rose Criminal Law Advisor, and Neuberger Rose Criminal Law Advisor)

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1. — A judge of the summary conviction appeal court in Ontario recently allows an appeal from conviction for the offence of "over 80 mgs" because the time of driving was not satisfactorily established

Section 258(1)(c)(ii) provides that the when the first breath sample is taken "not later than two hours after . . . " the time when the offence was alleged to have been committed, the analyses of the breath samples is "conclusive proof" of the accused's blood-alcohol concentration at the time when the offence was alleged to have been committed. Appellate courts have held that where there is not adequate proof that the first breath test was taken within two hours of the time of the alleged offence, the accused is entitled to an acquittal. See, for example, *R. v. Robertson*, 2003 CarswellOnt 1368 (Ont. S.C.J.).

In a recent appeal, an Ontario Provincial Police officer was dispatched at 12:34 a.m. on Sunday, 14 September 2014, for a "personal injury accident" on the collector lanes of Highway 401 near Avenue Road in Toronto.

The officer did not see the accident and did not know what time it occurred, but guessed that it happened close to 12:34 a.m. based on the volume of the traffic at the location of the accident.

He arrived there at 12:45 a.m. and saw ambulance personnel take the appellant to their vehicle to check her. Her vehicle was on the shoulder of the highway with the rear wedged into a guardrail. It could not be driven owing to extensive damage to the car.

After she failed an approved screening device test, she was taken to a police station for intoxilyzer tests, the first of which took place at 2:06 a.m. Both the analyses were well above the legal limit.

The trial judge held that an inference could be drawn that the appellant had been driving within two hours of the first intoxilyzer test. Heavy traffic around midnight on an early late summer Sunday morning and the "conspicuous nature of the accident" led the trial judge " . . . to inexorably infer that there would have been a very prompt response of passersby to 911 . . . " and the dispatch " . . . .would have quickly followed". Thus, the trial judge found that the accident must have occurred shortly before the time the officer was dispatched to attend at the scene of the accident.

Justice Then, sitting as a judge of the summary conviction appeal court, held, at para. 13, that because the accident would *probably* have been reported to the police promptly and that the dispatch of the officer would *probably* have followed directly thereafter " . . . do not establish that the two hour requirement of s. 258(1)(c)(ii) was satisfied".

Proof the time of the offence is a condition precedent if the Crown is to rely on the certificate as conclusive proof of the blood-alcohol concentration of the accused. As Then J. put it, at para. 14, "That obligation is not in my view satisfied by proof of the probable time of the offence even if based on reasonable expectations or assumptions . . . " "A guess", he wrote at para. 14, "is still a guess no matter how reasonably based" and thus "the certificate . . . should not have been admitted".

Thus, the appeal from conviction was allowed and an acquittal was entered.

R. v. DeCastro, 2016 CarswellOnt 20568, 2016 ONSC 8114

2. — The Ontario Court of Appeal holds that an accused's statement should not have been admitted because there had been a change in jeopardy warranting another consultation with counsel

The appellant was convicted by a jury of dangerous driving causing bodily harm and of assault with a weapon, namely a motor vehicle.

The charges arose out of a road rage incident involving the appellant a driver of a van. Following a verbal altercation, the van driver cut off the appellant's vehicle near a stop sign. The van driver then got out of his vehicle and approached the appellant. He reversed and then drove forward, striking the van driver and injuring him. The appellant's position was that he was scared, tried to avoid hitting the van driver but lost control of his vehicle.

Following his arrest for dangerous driving causing bodily harm, the appellant was able to contact and then speak to duty counsel.

The officer who was going to conduct a formal interview of the appellant then told him that, in addition to the charge of dangerous driving causing bodily harm, he would also be charged with assault with a weapon. The appellant asked to be able to speak to his own lawyer. The interviewing officer tried to contact the two lawyers named by the appellant, but while waiting for one of the lawyers to call back, the arresting officer told the interviewing officer that the appellant had spoken to duty counsel after his arrest. Upon hearing this, the interviewing officer concluded that the appellant had had an adequate opportunity to consult with counsel and, instead of waiting for the lawyer to call back, he proceeded with the interview.

The appellate authorities suggest that an accused is generally permitted only one consultation with counsel if he or she invokes his or her right to counsel. Put another way, an accused in custody generally does not have the right to repeated conversations with counsel. There are exceptions to this principle, one of which is when there has been a material change in circumstances such as a change in the jeopardy that the accused is facing.

The trial judge held that the new charge did not constitute a change in jeopardy that justified a second opportunity to consult counsel pursuant to *R. v. Sinclair*, [2010] 2 S.C.R. 310, 2010 CarswellBC 2664. Both charges arose out of the same transaction; both carry the same maximum penalty; and, in fact, the assault with a weapon charge is a hybrid charge whereas dangerous driving causing bodily harm was a straight indictable offence. Even if there had been a breach of s. 10(b), the trial judge found that the statement should not be excluded — the interviewing officer acted in good faith, he found, and the appellant repeatedly said that he wanted to tell his side of the story to the police. Thus, he concluded that the appellant would have spoken to the police anyway, even if he had spoken to his own lawyer.

A unanimous panel of the Ontario Court of Appeal held that the trial judge erred and allowed the appeal.

The assault with a weapon charge, as the Court of Appeal put it at para. 10, " . . . significantly increased the appellant's moral blameworthiness" in that it required proof that he acted intentionally to strike the van driver; thus, it was going to be alleged that his driving was not merely a "marked departure from the norm". This, " . . . in turn, markedly increased the potential penalty that the appellant faced".

The Court of Appeal also rejected the Crown's argument that the trial judge was justified in finding that the appellant would have provided a statement to police regardless of any legal advice about the additional charge. As they put it at para. 11, " . . . it would be speculative to assume that the advice, and the accused's reaction to that advice, would necessarily have been the same". The new charge was "significantly different" and carried more serious potential consequences than did the charge of dangerous driving causing bodily harm. Moreover, the appellant *asked* to speak to his lawyer once he was advised of the new, potentially more serious charge.

The trial judge erred in finding no breach of s. 10(b) and the Court of Appeal held that the statement should have been excluded under s. 24(2) of the *Charter*. The seriousness of the breach warranted exclusion. Interestingly, the Court of Appeal held that third "*Grant*" factor — society's interest in having criminal charges decided on their merits — did not strongly militate against excluding the statement because excluding the statement did not undermine the Crown's ability to proceed (unlike, for example, excluding the results of breath tests in "over 80 mgs" prosecution).

A new trial was ordered.

R. v. Moore, 2016 ONCA 964, 2016 CarswellOnt 19828

3. — The Ontario Court of Appeal holds that a trial judge improperly admitted unsworn statements of two child witnesses as an exception to the rule against hearsay

The appellant was convicted in a judge alone trial of sexual offences against two young girls whom he looked after at his day care centre.

They did not testify at the trial, but unsworn statements of theirs to police were admitted by the trial judge as an exception to the rule against hearsay. The appellant testified at his trial and denied the allegations. The trial judge believed the complainants' evidence and disbelieved the accused and convicted him of the offences.

The Ontario Court of Appeal allowed the appeal and ordered a new trial because they found that the trial judge committed several reversible errors, some of which are discussed below.

The trial judge erred in his reliance on the tactics of trial counsel to find that the appellant was unworthy of belief. The appellant never alleged *animus* on the part of the parents of the children. In fact, he said that he had no problem with the complainants or their parents and never suggested that they harboured *animus* towards him. His lawyer, however, raised the possibility of *animus* of one of the parents during a *voir dire* and in closing

submissions. The trial judge held that this counted against the appellant. To quote from his reasons, quoted at para. 6 of the Court of Appeal judgment, "The fact that the [appellant] would use this as part of his defence when *animus* clearly did not exist makes his evidence sound unbelievable and does provide a reason to find it unworthy of belief."

The Ontario Court of Appeal, at para. 10, characterized this as "patently improper".

The appellate court also found that the trial judge erred in admitting the unsworn evidence pursuant to the exception to the rule against hearsay.

The trial judge found that the criterion of necessity was met when in fact that finding should not have been made.

He found that it was unlikely that the complainants could have presented a coherent and comprehensive account of what happened due a lack of present recollection because testifying in court would cause undue trauma. This finding was based on evidence from their parents and from a video recording of a brief police interview shortly before the trial. The police interview was conducted about a year after the initial disclosure. There was no evidence before the trial judge from any expert who had assessed the children and concluded that testifying would cause psychological trauma.

In *R. v. Robinson* (2004), 24 C.R. (6th) 185, 2004 CarswellOnt 3965 (Ont. C.A.), Justice Doherty wrote, at para. 45, that unless the trial judge has the opportunity to see the child's reaction to questioning in the courtroom " . . . it will be a rare case . . . where the Crown can establish necessity based on the potential of psychological trauma without a proper assessment of the child by a qualified expert". The evidence of the parents, to quote the Court of Appeal at para. 20, "was simply not sufficient to displace the need for a proper assessment by a qualified expert".

The judge's finding that the children had no present recollection of the incidents that led to the charges was founded principally on the videotaped interview with the police a year after the allegations were first made. The interview was brief and, as the Court of Appeal put it at para. 21, "did not probe the complainants' recollection or ability to speak about the incidents".

In the absence of proper evidence of psychological trauma, the complainants' ability to communicate the evidence, including their recollection of the incidents, should have been addressed in a *voir dire*.

The judge erred in finding that is was "necessary" for the unsworn statements to be adduced at the trial for the proof of their contents. A new trial was ordered.

R. v. Wills, 2016 ONCA 965, 2016 CarswellOnt 19996

4. — The Ontario Court of Appeal allows a sentence appeal to permit the appellant a right of appeal against a deportation order

As we have seen in prior issues of "The Milligan Criminal Advisor", appellate courts may intervene to reduce a sentence to one that falls within the range of fit sentences if the sentencing judge did not take into account that the sentence could result in adverse immigration consequences for the offender (such, as for example, deportation). But, as the Supreme Court of Canada pointed out in *R. v. Pham*, [2013] 1 S.C.R. 739, 2013 CarswellAlta 296 the sentence imposed must still be proportionate to the gravity of the offence and to the degree of responsibility of the offender.

The Ontario Court of Appeal recently allowed an appeal and varied a sentence that had already been served to relieve against immigration consequences of the sentence that were highly detrimental to the appellant.

The appellant came to Canada from Ireland when he was nine years old and had been a permanent resident in Canada for some 50 years.

In February of 2013, he pleaded guilty to break and enter and to breach of probation and the judge gave effect to a joint submission for eight months jail. The trial judge noted that the joint submission was lenient in view of the appellant's criminal record.

The appellant later asked the Court of Appeal to reduce the sentence, which he had served, to 5 1/2 months because of an unexpected amendment to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which came into force some months after his conviction.

The amendment, which applied retrospectively, provides that where a person is sentenced to a term of six months or more in jail, he or she may be found inadmissible to Canada for serious criminality and deported with no right of appeal. The person's only recourse is to appeal the sentence and have it reduced to below six months.

The appellant broke into his old apartment to retrieve some property he had left there. He also ate some food that belonged to another person when he was inside the apartment. He was enjoined from attending the apartment by a term of a probation order.

The Ontario Court of Appeal held that the sentence requested was proportionate to the gravity of the offence and to the degree of responsibility of the appellant.

The appellant had no connection to Ireland and close ties to Canada, including a son and friends who live here. He was supported here by them and by an addiction recovery programme. If the sentence was reduced to the sentence proposed by the appellant, these facts could be considered in an appeal of his deportation order.

The Court of Appeal allowed the appeal against sentence and imposed a sentence of 5 1/2 months.

R. v. Carlisle, 2016 CarswellOnt 19844, 2016 ONCA 950

***5. — The Court of Appeal holds in two related appeals that judges may not reduce sentences below statutory limits even if they find violations of the* Charter**

Where there has been a finding of a *Charter* violation, one of the remedies a judge may grant to redress the harm caused by the breach is to reduce the accused's sentence.

But how far can judges go in reducing sentences as a remedy for a breach of the *Charter*? Does s. 24(1) of the *Charter* permit judges to impose sentences that fall outside the statutory limits?

In the Supreme Court of Canada case of *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, 2010 CarswellAlta 268, the appellant was charged with impaired driving and flight from police. When he was apprehended after a high-speed chase, he resisted being handcuffed and the police punched him repeatedly in the head and in the back, breaking his ribs and puncturing his lung that required emergency surgery.

The appellant pleaded guilty at his trial. The trial judge found a breach of s. 7 in view of the excessive force the police used in arresting him and reduced his sentences to conditional discharges, which was below the statutory minimum for the impaired driving offence.

The Alberta Court of Appeal held that the trial judge was justified in finding that the police used excessive force and upheld the decision to reduce the sentence under s. 24(1). They held, however, that judges had no discretion under s. 24(1) of the *Charter* to impose a sentence below a statutorily mandated minimum sentence and they

varied the sentence for impaired driving to a minimum fine under s. 255(1) of the *Code*.

The Supreme Court of Canada dismissed his appeal and the cross-appeal.

They held that a judge may properly take state misconduct into account in determining a fit sentence, without having to resort to s. 24(1) of the *Charter*. Indeed, they went on to point out that judges may reduce sentences owing to unconstitutional acts committed by police or state agents without recourse to the *Charter*. It is, they held, neither necessary nor desirable to invoke s. 24(1) to effect a reduction of sentence to account for harm flowing from unconstitutional acts of state agents consequent to the offence charged. The broad discretion of the judge must, however, be exercised within the parameters Parliament established in the *Code*. The sentence must respect statutory minimums and other provisions which prohibit certain forms of sentence available in the case of specific offences. The Supreme Court, however, noted, at para. 64:

> I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reductions outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender.

This sentence has inspired defence counsel to seek sentences *outside* statutory limits where their clients have been detrimentally affected by breaches of the *Charter*.

The Ontario Court of Appeal recently decided two related sentence appeals in which trial judges imposed sentences that fell outside of statutory limits, owing to breaches of the *Charter* that they found. In both cases, the appellate court found that the trial judges erred in finding violations of the *Charter* — because the standard for establishing violations of s. 7 is very high — and they held that, in any event, judges are not entitled to impose sentences that fall outside statutory limits even where they find violations of the *Charter*.

Mr Donnelly was a film editor for Azov films. He was charged with making child pornography for the purpose of publication. That is an offence punishable by a minimum sentence of one year in jail. He pleaded guilty to the offence, but received a conditional sentence of imprisonment which is statute-barred by s. 742.1 (b) of the *Code*.

Many films that he edited showed naked pre-teen and adolescent boys engaged in sexualized "play". It was admitted that the films were made for a sexual purpose and were sold to men who were attracted sexually to boys. Mr Donnelly edited 74 films that were child pornography and which were sold over the internet.

Police executed search warrants at the office of Azov films and at the home and vehicle of its owner. Mr Donnelly was arrested at his parents' home where he lived. His father told police that he needed Prozac daily for an obsessive compulsive disorder and anxiety. Mr Donnelly took some pills just before he left home with the police.

According to Mr Donnelly, his rights under s. 7 were breached in that he suffered mistreatment and abuse while in custody from the police, court officers and correctional officers. There was a delay in getting his medication from the authorities in the detention centre; he was called derogatory names when in custody; he was tripped when put in a holding cell and struck in the head by a guard at the detention centre; he was left partly unclad in his cell and was kept in a cell without running water. The trial judge found that much of this took place and based his conclusion on the evidence of the accused which was, the judge suggested, consistent with "experience".

His s. 9 rights were also infringed, he argued, because his bail hearing was improperly adjourned for three days at the Crown's request. The basis for their request was, the trial judge found, "fundamentally flawed". The server had been disconnected from the internet, but police needed to ensure that evidence was not destroyed by individuals who had remote access to Azov's computer. The trial judge found as a fact that it would have been impossible for

an individual to remotely manipulate or destroy the files with the computer disconnected from the internet. As a consequence, he found, the accused "lost three days of liberty". This, the trial judge concluded, was a breach of his rights under s. 9 and was made worse by his obsessive compulsive disorder.

It is perhaps noteworthy that initially the Crown was going to seek his detention on the secondary and tertiary grounds, but when he came back to court after the three-day remand, they consented to his release.

Mr Donnelly pleaded guilty. The Crown sought a sentence of seven years and the defence asked for a conditional sentence of two years less a day. The *Code* required a minimum sentence of one year imprisonment for the offence. Section 742.1 (b) prohibited conditional sentences of imprisonment for those convicted of offences for which there is a minimum sentence of imprisonment.

The trial judge found that a fit sentence, without considering the *Charter* breaches, was 21 months. He held that this was "one of those exceptional case" that permitted the accused to serve his sentence in the community to redress the *Charter* violations. He held, as the Court of Appeal quoted at para. 126 of its reasons for judgment, that to reduce his sentence of incarceration would provide him with "no remedy at all". He imposed a conditional sentence of 21 months.

The Ontario Court of Appeal held that the trial judge erred in finding breaches of the *Charter* and in imposing the sentence that he did (even if the findings of *Charter* breaches were unquestioned).

The trial judge, the Court of Appeal held, erred in finding breaches of s. 7 of the *Charter*.

The trial judge's finding of mistreatment was founded on flawed factual findings — such as his reliance on "experience" as confirming the accused's evidence of being abused. Setting that aside, the more serious error was the standard the trial judge applied to determine whether state misconduct amounts to a breach of s. 7. As Watt J.A., who wrote the reasons for a unanimous panel, put it at para. 106, "Not every qualification or compromise of a person's security comes within reach of s. 7 of the *Charter*". For there to be a breach of s. 7, the harm must amount to "serious state-imposed psychological stress". As he put it at para. 120, "The state conduct must have a serious and profound effect on a person's psychological integrity". These effects are to be evaluated objectively. The trial judge eschewed an objective assessment of the effects of the state conduct in favour of a consideration of the effects on *that accused* with enhanced susceptibility to stress in view of his obsessive compulsive disorder. Even if the factual findings of the trial judge were unassailable, those findings do not support a finding of an infringement of s. 7 when the proper standard is applied.

The Court of Appeal held that the three-day adjournment was not an arbitrary detention in breach of s. 9. The three-day adjournment was a valid order under s. 516(1) of the *Code*. That it was granted in part on the basis of inaccurate information does not render it arbitrary. There is, to quote Justice Watt at para. 79, no obligation to provide "error-free up-to-the-moment disclosure of the progress of the investigation to the prosecutor". Moreover, the judge's finding that, absent the concern for the destruction of evidence, the Crown would not have asked for a remand was in error. The primary reason given for the adjournment was "so that the police can continue their investigation" which encompassed the execution of search warrants, the delineation of Mr Donnelly's roles in the offences and the consideration of his suitability for release. Justice Watt pointed out at paras. 60 and 61 that in this investigation the police carried out the largest seizure of its kind in Canada.

The Court of Appeal also held that the trial judge erred in holding that s. 24(1) provided a basis to impose a sentence that was outside statutory limits even if his findings of *Charter* violations were not tainted by palpable and overriding errors.

While the words "appropriate and just in the circumstances" confer broad discretion on judges — indeed, as

Justice Watt put it at para. 146, "It is difficult to imagine language which could equip a court with wider and less fettered discretion" — the Supreme Court in *Nasogaluak*, *supra,* held that judges must exercise this discretion within the parameters of the *Code*, complying with statutory minimums and with other provisions that prohibit certain dispositions. Sentence reductions outside the statutory limits do not generally constitute an "appropriate" remedy, unless the constitutionality of the relevant statutory limit itself is challenged.

Even if *Nasogaluak*, *supra*, actually held, rather than left open the possibility, that s. 24(1) may authorize a sentence outside statutory limits, even in the absence of a successful constitutional challenge to that limit, the case for a conditional sentence for the appellant must fail. If the conduct in *Nasogaluak*, *supra* — "an amalgam of repeated assaults, significant bodily harm and official concealment", as Watt J.A. put it at para. 172 — did not meet the threshold, this case could not either. The alleged misconduct in Mr Donnelly's case, while unfortunate, was not "particularly egregious misconduct", as the Supreme Court contemplated in *Nasogaluak*, *supra*. Nor was it the "sole effective remedy" for the misconduct.

The Ontario Court of Appeal set aside the conditional sentence imposed by the trial judge and imposed a sentence of 21 months. Because no interest would be served in re-incarcerating the appellant, they stayed the operation of the sentence.

R. v. Donnelly, 2016 ONCA 988, 2016 CarswellOnt 20585

The other appeal that the Ontario Court of Appeal decided involved Mr Gowdy, a youth pastor who was convicted of internet luring of a person believed to be under the age of 16 years contrary to s. 172 of the *Criminal Code*.

The mandatory minimum sentence is one year in jail. Thus, a conditional sentence of imprisonment is not available for him either.

Justice Michael Block of the Ontario Court of Justice imposed a conditional sentence of two years less a day and three years of probation because, he found, the police committed a serious breach of his rights under s. 7 of the *Charter*.

A Durham Regional Police officer, posing as a sexually inexperienced 15-year-old, answered an advertisement that the accused placed on Craigslist. After some dialogue, the accused attended at what he was told was the home of the person with whom he was corresponding to perform fellatio on him and his 15-year-old friend. After the accused was arrested the police searched his vehicle and found documents that indicated he was HIV positive. They prepared and disseminated a media release, which set out his name, home address, occupation and church affiliation. It also indicated that he was HIV positive and the police expressed an interest in speaking to persons who might have information about victims who had not been identified. This led to considerable embarrassment for Mr Gowdy and the loss of his employment.

The trial judge found the police breached his rights under s. 7 of the *Charter* in releasing his private medical information without considering whether it was authorized by provincial legislation.

The accused appealed the judge's failing to stay proceedings under s. 24(1) and the Crown cross-appealed the imposition of a sentence that fell outside the statutory limits delineated by Parliament.

The Ontario Court of Appeal dismissed the appeal arising from the trial judge's failure to stay proceedings for a breach of s. 7 and they allowed the cross-appeal.

The Court of Appeal held that the trial judge erred in deciding that there was a breach of s. 7. Thus, he did not err in failing to stay proceedings.

Even if there were a breach, it did not affect trial fairness and thus the appeal had to be decided on the basis of the principles for "residual" cases (where the breach was an affront to the integrity of the administration of justice but did not have an effect on trial fairness). Stays for the *Charter* breaches in the "residual category" were, as Watt J.A., who wrote for a unanimous Court of Appeal, observed at para. 75, "very rare" and "exceptional". The applicant had an "onerous burden" on account of the "clearest of cases" threshold.

The police, the Court of Appeal observed, were perfectly entitled to inform the public of the accused's name, the charge or charges he faced and to solicit assistance and information from the public. The trial judge could not distinguish the impact of the disclosure of the appellant's HIV status on his employment independent of the disclosure of the charge of child luring and the resultant disclosure of his sexual orientation. He could not find any evidence that police disclosure of his HIV status aggravated the consequences that would ensue for him, a clergyman with a conservative denomination, from the mere fact that he was charged with internet luring of a same-sex and under-aged person. Thus, as Justice Watt put it at para. 73, the release of the appellant's HIV status did not tip the press release from being unobjectionable to an "an ongoing affront to the integrity of the justice system that could not be remedied by other means".

The Court of Appeal allowed the sentence appeal brought by the Crown.

The trial judge, they held, as noted above, erred in law in finding a breach of s. 7 of the *Charter*. He erred in deciding that the police disclosure of the respondent's HIV status engaged and infringed his s. 7 rights.

The right to security of the person protects the physical and psychological integrity of an individual. To establish a breach, as Justice Watt put it at para. 91, "an applicant must demonstrate, on a balance of probabilities, that the state conduct . . . had a serious and profound effect on the applicant's psychological integrity." This must be assessed objectively, taking into account "the impact on the psychological integrity of a person of reasonable sensibility". The harm must transcend "ordinary stress and anxiety" but need not reach the threshold of "nervous shock or psychiatric illness": para. 110. This same point was made in the *Donnelly* reasons.

One reason for this finding that the judge erred in finding a breach is that the judge could not distinguish between the effect of disclosure of the charge of same-sex internet luring on his employment from the effect of the disclosure of his HIV status.

The trial judge held that dissemination of the accused's personal medical information was a breach of the *Charter* in it was prohibited by provincial legislation. While, as Justice Watt put it at para. 112, "statutory authorization or prohibition can certainly inform the analysis . . . " it is not "necessarily determinative". As the trial judge found, the police prepared the media release out of a concern for public safety and out of a desire to find sexual partners who were unaware that they might have contracted HIV from contact with the accused. The Court of Appeal held, at para. 116, that disclosure of the accused's HIV positive status in the context of the media release "was not so disconnected from law enforcement concerns over the existence of potential victims that it rendered it an unreasonable violation of Gowdy's security of the person or informational privacy".

As the Court of Appeal explained more fully in *R. v. Donnelly*, *supra*, neither s. 24(1) nor the provisions of the *Criminal Code* support the imposition of a sentence outside the statutory parameters.

Even assuming the *Charter* findings were correct, the judge's invocation of the principles enunciated in *Nasogaluak*, *supra*, were misplaced. The state misconduct was not so grave that is warranted a reduction of sentence outside statutory limits.

The Court of Appeal set aside the conditional sentence imposed by Justice Block and imposed a jail sentence of one year but stayed the application of the sentence, as they did in *Donnelly*, *supra*, because the accused had

completed his conditional sentence.

R. v. Gowdy, 2016 CarswellOnt 20589, 2016 ONCA 989