COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gowdy, 2016 ONCA 989
DATE: 20161229
DOCKET: C59875 & C60460

Watt, Epstein and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Appellant (C59875)/
Respondent (C60460)

and

Kris Gowdy[1]

Appellant (C60460)/
Respondent (C59875)

John McInnes and Katherine Beaudoin, for the appellant/respondent Crown

Russell Silverstein and Anna Cooper, for the respondent/appellant Kris Gowdy

Frank Addario and Megan Savard, for the intervener Criminal Lawyers' Association

Christine Mainville and Benjamin Snow, for the intervener Canadian Civil Liberties Association

Joseph Di Luca and Khalid Janmohamed, for the interveners Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario

Heard: March 22-23, 2016

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[1] This appeal was heard together with *R. v. Donnelly*, 2016 ONCA 988, for which reasons are issued concurrently.

On an appeal from the conviction entered on July 7, 2014, with reasons reported at 2014 ONCJ 592, and the sentence imposed on December 19, 2014, with reasons reported at 2014 ONCJ 696, 325 C.R.R. (2d) 1, by Justice Michael Block of the Ontario Court of Justice.

Watt J.A.:

[1] Kris Gowdy was a youth pastor. One day, he posted an ad in the personals section of Craigslist.

[2] Kris Gowdy's ad attracted some attention. Some unwanted attention. From a police officer.

[3] The police officer responded to Kris Gowdy's ad. But he did not tell Kris Gowdy that he was a police officer.

[4] A short time later, police arrested Kris Gowdy on a charge of internet luring of a person believed to be under sixteen years old.

[5] The day after Kris Gowdy's arrest, the Durham Regional Police Service (DRPS) issued a media release about Kris Gowdy and his arrest. The release contained some information about Kris Gowdy, including information about his medical condition police had learned when they searched Gowdy's car incident to his arrest.

[6] At trial, Kris Gowdy asked the judge to stay proceedings against him because the media release about his medical condition violated his right to security of the person under s. 7 of the *Charter*.

[7] The judge agreed that the media release infringed Kris Gowdy's right to security of the person, but disagreed with the remedy Gowdy sought for this infringement. Gowdy appeals from the refusal of the trial judge to enter a stay of proceedings.

[8] The trial judge considered that an appropriate and just remedy for the infringement of Gowdy's s. 7 right to security of the person was to impose a sentence outside the statutory limits prescribed by the *Criminal Code*. The Crown appeals from the sentence imposed – a conditional sentence of imprisonment of two years less one day, followed by probation for three years.

[9] These reasons explain why I would dismiss Gowdy's appeal from conviction, but would grant leave to appeal sentence, allow the appeal and substitute a sentence of imprisonment for one year, but stay its enforcement.

THE BACKGROUND FACTS

[10] A helpful point of departure for a consideration of both appeals is a brief sketch of the circumstances of the offence and the issue of the media release, followed by a snapshot of the proceedings at trial.

The Offence

[11] Using a fake username, Kris Gowdy posted an ad in the personals section of Craigslist. He sought “guys” who were interested in receiving fellatio. The target group included “under 35, jocks, college guys, skaters young married guy”.

[12] A police officer was monitoring the website on which Gowdy had posted his ad. The words “young”, “skaters” and “under 35” raised the officer’s concern about the potential involvement of underage responders.

[13] The officer decided to reply to Gowdy’s ad. He posed as “Brad”, a sexually inexperienced 15 year old. “Brad” and Gowdy exchanged queries and responses. Gowdy’s responses showed the user name “Sean Smith” at an email account for “collegetoy 2003”. Despite his awareness of the implications of “Brad’s” age, Gowdy offered to go to “Brad’s” home and perform fellatio on “Brad” and his 15 year old friend.

The Arrest and Search

[14] Five minutes after their last electronic exchange, Gowdy arrived at “Brad’s” home. He was arrested immediately.

[15] Police searched Gowdy's vehicle incident to his arrest. In it they found documents that disclosed that Gowdy was HIV positive. Police found no condoms during their search of Gowdy or his vehicle.

[16] Kris Gowdy was charged with one count of child luring by telecommunication and one count of attempted aggravated sexual assault. The latter count was later withdrawn by the Crown.

The Post-arrest Interview

[17] Investigators conducted a lengthy videotaped interview of Kris Gowdy the day of his arrest. A substantial part of the interview was taken up by inquiries from the officers about whether Gowdy had exposed others to the risk of HIV during sexual encounters with them.

[18] Kris Gowdy acknowledged that he had been diagnosed as HIV positive in 2009. During his interview he did not admit having had sexual contact with anyone who was unaware of his HIV status, or of having engaged in activities that carried the risk of transmission of the HIV virus. Investigators pressed him for names of persons potentially at risk on the basis of their expressed concern that Gowdy may have exposed those partners to the risk of transmission of the HIV virus. He provided some partial names and his email password so that officers could access his email contacts list. The lead investigator did not match

the names to individuals in Gowdy's phone and did not recall seeing any evidence of those names when he later reviewed the phone examination results.

[19] At trial, no evidence was given about any internal procedure of the DRPS relating to media releases, in particular, pre-release approval by senior officers or issuance of the releases under their aegis. Nor was there any evidence about prior or subsequent media releases of this nature by the DRPS.

[20] There was no evidence indicating that the investigators had any information at the time of the interview or sought out any information afterwards addressing the likelihood that HIV could be transmitted by performing fellatio on an unprotected partner, or to confirm Gowdy's assertion that he believed that medication had diminished his viral load to such an extent that he was no longer a serious transmission risk.

The Media Release

[21] After the interview with Gowdy, the lead investigator requested that the police media relations department issue a media release. A media release announcing Gowdy's arrest, which disclosed that he was HIV positive, was issued the day after his arrest, August 10, 2012, by the DRPS. The release identified Gowdy by name, and listed his residential address, occupation and

church affiliation. Gowdy was described as a person who had travelled extensively and had an extensive social media presence.

[22] In the media release, the police expressed concern about further victims who had not yet been identified. The release solicited contact from anyone with new information to the investigation.

The Trial Proceedings

[23] At trial, Gowdy conceded that the luring offence had been proven, but sought a stay of proceedings on two grounds:

i. entrapment; or

ii. breach of his s. 7 security of the person interest.

[24] The trial judge found no evidence of entrapment. However, he did find that issuance of the media release infringed Gowdy's right to security of his person under s. 7 of the *Charter*. However, the trial judge declined to enter a stay of proceedings. Instead, the judge invoked s. 24(1) of the *Charter* and imposed a sentence outside statutory limits[2] as an appropriate and just remedy for the infringement.

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[2] Section 172.1(2) of the *Criminal Code* mandates a mandatory minimum punishment of imprisonment for a term of one year for the offence of luring a child pursuant to s. 172.1(1). Section 742.1(b) provides that a conditional sentence is not available if the offence is punishable by a minimum term of imprisonment.

THE APPEALS

[25] There are two appeals.

[26] Gowdy appeals the dismissal of his application to stay proceedings on the basis of infringement of his *Charter* rights through disclosure of personal medical information through the media release by police.

[27] The Crown appeals the sentence imposed – a sentence of imprisonment for two years less a day, to be served in the community, followed by probation for a term of three years. The Crown submits that the trial judge erred not only in finding a s. 7 *Charter* infringement but also in overriding the statutory bar to a conditional sentence as an appropriate and just s. 24(1) remedy.

[28] There are three interveners. The Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario take the position that police press releases that include an individual's HIV status engage an individual's "security of the person" interests under s. 7 of the *Charter* and raise the potential of physical violence, stigmatization, mental anguish and distress for persons living with HIV in the community or in custody and constitute an unlawful breach of s. 8 of the *Charter*. They also take the position that disclosure of an individual's HIV status in circumstances like the case at bar is not authorized by the provincial privacy legislation relied upon by the Crown.

[29] The Canadian Civil Liberties Association (CCLA) and the Criminal Lawyers' Association (CLA) are interveners in this appeal and the related appeal in *Donnelly* and take the same position in both appeals. Their positions are set out more fully in the *Donnelly* decision, at paras. 138-144, but in essence both argue that s. 24(1) sentence reductions, even where the remedy is "below" a mandatory minimum, should be available as a just and appropriate remedy for *Charter* breaches.

THE APPEAL FROM CONVICTION

[30] On the appeal from conviction, Gowdy does not contend that the Crown failed to prove some essential element of the offence. Nor does he say that the trial judge erred in law or reached an unreasonable conclusion in finding him guilty. Rather his complaint is that the trial judge erred in failing to stay proceedings under s. 24(1) of the *Charter.*

[31] Nothing further need be said about the content of the media release, but something should be added about the motivation behind it, its impact on Gowdy and the findings of the trial judge about the nature and extent of the *Charter* infringement occasioned by the release.

The Additional Background

[32] Gowdy takes no issue with the police having lawfully obtained documents that disclosed his HIV positive status as a result of the search of his vehicle incident to his arrest.

[33] The investigating officer who requested the media release be issued was motivated by a concern for public safety and a desire to investigate further any contact Gowdy may have had with sexual partners who were unaware of his HIV positive status and thus at risk of infection.

[34] The lead investigator testified that he did not consider whether the release was authorized or prohibited by any provincial legislation. He notified his immediate supervisors after the interview that he was getting in touch with the media relations team to do a media release. However, there is no evidence that he obtained the permission of the chief of police or any superior officers, nor that he sought legal advice about the authority to issue or the advisability of issuing the media release. Similarly, there is no evidence that he made any inquiry of medical professionals about the likelihood of transmission of the virus associated with the sexual activities in question or Gowdy's HIV viral load.

[35] The lead investigator testified that, to his knowledge, he had never before investigated someone with HIV in his 23 years of policing.

[36] The investigating officer acknowledged he did not consider the *Charter* rights of Kris Gowdy before requesting the media release.

The Findings of the Trial Judge

[37] The trial judge considered first whether any provincial legislation authorized or permitted release of Gowdy's private medical information. He examined both the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., 1990 c. M.56 (*MFIPPA*) and the *Police Services Act*, R.S.O. 1990, c. P.15 (*PSA*) and Regulations passed under it. According to the trial judge, the media release was unlawful because it was not authorized nor permitted by either *MFIPPA*, a statute of general application, or the *PSA* and its Regulations, which the trial judge felt provided a complete regime for the public disclosure of personal medical information by a police service.

[38] The trial judge then considered whether the release infringed the *Charter*. He concluded that both ss. 7 and 8 protected privacy of information, including personal medical information which attracted a high level of protection. The judge expressed his conclusion on the infringement issue in these terms:

> The inherent reasonable expectation of privacy in medical information is taken for granted in the vast volume of authorities that consider the rights of complainants in sexual assault matters. It is also commonly accepted that the seizure of medical data as evidence in a criminal prosecution requires prior judicial

> authorization. In the case before me the information was not seized in a manner impugned by the defence. But where personal medical information falls into the hands of the police without any unlawful conduct on their part, the suspect still retains a right that any subsequent use by the police conform to *Charter* principles. Privacy of personal medical information cannot be restricted to cases where Section 8 infringements are pled. The concept of "security of the person" is engaged anytime police violate a reasonable expectation of privacy by unlawfully circulating private medical data.
>
> I rule that the unlawful and unreasonable public disclosure of Mr. Gowdy's personal medical information violated Section 7 of the *Charter*.

[39] The trial judge then assessed the impact of the infringement on the *Charter* protected interests of Kris Gowdy. The trial judge noted that Gowdy had testified that privacy of medical information was very important to him. Disclosure of Gowdy's HIV positive status would likely have required him to step down from his church position and face discipline, as well as cause discord within his family and friendships. However, the trial judge was unable to distinguish the effect disclosure of Gowdy's HIV positive status would have had on his employment independent of the charge of child luring and the resultant disclosure of his sexual orientation. In the result, the trial judge was unable to find any evidence to support a conclusion that police disclosure of Gowdy's positive status aggravated the consequences that would ensue for him, a clergyman with a conservative religious organization, from the mere fact that he was charged with the same sex internet luring of an underage person.

[40] Turning his attention to the remedy sought for the infringement – a stay of proceedings – the trial judge took as the governing standard the residual category of abuse of process as articulated in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309. He considered that the police conduct demonstrated a profound ignorance of the legal strictures on police disclosure of the private medical information of arrested persons and reflected an assumed danger of HIV transmission without any medical or other inquiries. The disclosure also revealed an indifference to Gowdy's privacy interests and their constitutional status.

[41] Despite his findings about police ignorance of the legal requirements for disclosure and indifference towards an arrested persons *Charter* rights, the trial judge found that the police conduct was neither brutal nor dishonest. He also considered that the conduct was well-intentioned, albeit deeply flawed. He found no evidence to support a conclusion that such indiscriminate and unlawful disclosure was an ongoing institutional problem with the DRPS.

[42] The trial judge pointed out the high onus on an applicant who seeks a stay of proceedings for abuse of process. On balance, the trial judge was satisfied that the continuation of the proceedings would *not* compromise the integrity of the judicial system, and that a response short of a stay could provide a meaningful remedy. The principal impact on Gowdy was not from the media release or the continuation of the proceedings, but rather the nature of the

charge that Gowdy faced. The judge declined to enter a stay of proceedings, choosing as an “appropriate and just remedy” a strong judicial rebuke of the police conduct and a reduction of the sentence otherwise fit for the offence and the offender.

The Grounds of Appeal

[43] Gowdy contends that the trial judge erred in failing to enter a stay of proceedings as an appropriate and just remedy for the breach of his right to security of the person. He says that the error was the result of a combination of missteps by the trial judge who:

i. understated or undervalued the impact of the *Charter* breach on the *Charter*-protected interests of Gowdy;

ii. failed to properly appreciate the seriousness of the breach;

iii. failed to find that the state interest in prosecuting Gowdy was not pressing; and

iv. erred in concluding that a remedy less than a stay was appropriate and just.

Ground #1: Failure to Stay Proceedings

[44] In earlier paragraphs I have endeavoured to capture the evidence adduced, the findings of fact made and the conclusion reached by the trial judge on Gowdy's motion stay proceedings on account of *Charter* infringement. Nothing will be gained by their repetition here.

The Arguments on Appeal

[45] Kris Gowdy acknowledges that to succeed on this ground of appeal he must satisfy the three requirements of the test for a stay of proceedings as reiterated in *Babos*, at paras. 31-32. He also recognizes that it is only on rare occasions – the clearest of cases – that a stay of proceedings for an abuse of process will be warranted.

[46] Gowdy says that the trial judge's conclusion rejecting a stay is flawed by legal misdirection and reviewable errors of fact and is so clearly wrong that it amounts to an injustice.

[47] According to Gowdy, the trial judge gravely underestimated the impact of the *Charter* infringement on his protected interests. The judge also misapprehended the evidence in terms of Gowdy's awareness of potential police disclosure of his HIV status when the trial judge found that it had not come up during the interview since the officers actually made numerous comments in that

regard. Gowdy asserts that the trial judge should have taken judicial notice that persons infected with HIV remain subject to great prejudice and stigma in the community. The extensive media reportage of Gowdy's arrest and medical condition demonstrates this. The trial judge also erred in comparing the impact of the breach with other hardships, such as what followed from the fact and nature of the charge.

[48] Further, Gowdy continues, the trial judge erred in his appreciation of the seriousness of the *Charter* breach. He was wrong to find good faith in light of his findings that the police conduct was deliberate, in willful ignorance of provincial law and a casual disregard of the *Charter*. Breaches based on ignorance and indifference to the protections afforded by the supreme law of Canada cannot be legitimized by the application of a thin veneer of good faith.

[49] In addition, Gowdy says, the trial judge's findings about the seriousness of the breach varied as between the stay application and the reasons for sentence. On the stay application, the trial judge found that there was no evidence that the police conduct at issue was ongoing, yet he reached a contrary conclusion in his reasons on sentence when he found that the DRPS had not taken any steps to protect against future breaches. Similarly, in his reasons for sentence, the trial judge found that the investigators had committed a serious breach of s. 10(b) of the *Charter* by failing to clear up an apparent misunderstanding of the

informational component of the right to counsel at the outset of the interview and later in failing to facilitate contact with counsel when Gowdy asserted that right. Neither these individual breaches, nor the fact that, combined with that of s. 7, they revealed a pattern of constitutional disobedience, were taken into account on the stay application.

[50] Finally, Gowdy urges, society has no pressing interest in prosecuting him for a victimless inchoate crime. A properly informed assessment of all the circumstances should have resulted in a stay of proceedings in the "clearest of cases" paradigm. The availability of a sentence reduction played a critical role in the trial judge's balancing of the *Babos* factors.

[51] The Crown offers two responses. The first contests the trial judge's finding that the media release infringed Gowdy's s. 7 right to security of the person. The second supports the trial judge's conclusion that Gowdy had not made out a case for entry of a stay of proceedings.

[52] The Crown says that the trial judge erred in finding that the media release offended provincial privacy legislation. While the *PSA* did not provide specific authority for the DRPS to disclose in these circumstances, as it only applied to someone already convicted of a criminal offence who posed a significant risk of harm in circumstances where disclosure would reduce that risk, it did not prohibit

it either. The correct conclusion is that the disclosure was authorized by an exception – the "consistent purpose" exception in s. 32(c) of *MFIPPA* – thus, not in breach of the general prohibition found by the trial judge.

[53] Second, the Crown argues, the trial judge erred in holding that "security of the person" within s. 7 of the *Charter* was engaged whenever police violate an individual's reasonable expectation of privacy by circulating private medical data about that individual. In reaching this conclusion, the trial judge failed to apply the proper test in determining whether the "security of the person" right protected by s. 7 was engaged. Further, the trial judge erred in finding a breach of s. 7 in light of his finding of fact that the media disclosure that no psychological impact on Gowdy beyond what had resulted from the fact and nature of the charge – internet luring of an underage same sex youth.

[54] The Crown contends that the police originally obtained the information about Gowdy's HIV positive status lawfully by a reasonable search of his motor vehicle incident to his lawful arrest for internet luring. The subsequent disclosure did not amount to a search or a seizure thus did not re-engage s. 8 of the *Charter*. In any event, police had common law authority to share the fruits of their investigation for law enforcement purposes as was done here.

[55] In the alternative, the Crown continues, the trial judge did not err in failing to stay proceedings. An accused who seeks a stay of proceedings must satisfy a very demanding standard. Stays are only available in the clearest of cases. Neither the underlying findings of fact nor the statement and application of the test reflect legal error or palpable and overriding error in the fact-finding process. Appellate intervention is not warranted.

The Governing Principles

[56] It is common ground that if the disclosure of Gowdy's medical condition offended his s. 7 right to security of his person, a stay of proceedings would only be warranted if the underlying conduct – the media release – risked undermining the integrity of the judicial process. In other words, the impugned conduct implicates the residual category of the abuse of process analysis.

[57] Cases necessitating a stay of proceedings for an abuse of process generally fall into two categories. The "main" category is where state conduct compromises the fairness of an accused's trial. The "residual" category captures where there is no threat to trial fairness but the state conduct risks undermining the integrity of the judicial process: *Babos*, at para. 31. There is no issue here that the media release had any impact upon trial fairness.

[58] In *R. v. O'Connor*, [1995] 4 S.C.R. 411, a majority of the Supreme Court of Canada had recognized that the abuse of process doctrine has essentially been subsumed within *Charter* breach analysis. Principles of fundamental justice both reflect and accommodate the common law doctrine of abuse of process such that there is no utility in maintaining two distinct analytic regimes: *O'Connor*, at paras. 70-71.

[59] The standard according to which courts are to determine whether to stay proceedings has three requirements:

i. prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial or its outcome;

ii. no alternative remedy capable of addressing the prejudice; and

iii. where uncertainty persists after requirements i. and ii. have been considered, whether the interests in favour of granting a stay prevail over society's interests in having a final decision on the merits.

See *Babos*, at para. 32; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 54, 57.

[60] The first requirement recognizes that there are limits on the type of state conduct society will tolerate in the prosecution of offences. Sometimes, state conduct will be so disturbing that having a trial, even a fair trial, will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. The question that requires answer in connection with the first requirement is whether proceeding to trial in light of the state conduct would do further harm to the integrity of the justice system: *Babos*, at paras. 35, 38.

[61] For the second requirement, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Since the prejudice with which we are concerned in the residual category is prejudice to the integrity of the justice system, remedies must be directed towards that harm. In this category, we do not furnish redress to an accused for a past wrong done to him or her. Rather, we focus on whether an alternate remedy, short of a stay, will adequately disassociate the justice system from the impugned state conduct going forward: *Babos*, at para. 39.

[62] The third requirement – a balancing of interests – is of great significance in the residual category. Balancing is only required when uncertainty remains after consideration of the first two requirements. What the court is asked to decide is

which of two options – staying proceedings or holding a trial – better protects the integrity of the justice system. Relevant factors include but are not limited to:

i. the nature and seriousness of the impugned conduct;

ii. the isolated or systemic and ongoing nature of the conduct;

iii. the circumstances of the accused;

iv. the charges faced by the accused; and

v. the interests of society in having the charges determined on their merits.

See *Babos*, at para. 41.

[63] In the residual category, it must appear that the state misconduct is likely to continue into the future, or that pursuit of the prosecution will offend society's sense of justice: *Babos*, at para. 36; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R 391, at para. 91.

[64] An accused who seeks a stay of proceedings under the residual category faces an onerous burden on account of the "clearest of cases" threshold and the balancing of societal interests that forms an integral part of the analysis undertaken by the trial judge. In the residual category, cases warranting a stay of

proceedings are “exceptional” and “very rare”: *Babos*, at para. 44; *Tobiass*, at para. 91. See also *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667.

[65] A final point has to do with the standard of review. Appellate review of a remedy ordered, and I would add, refused, under s. 24(1) of the *Charter* is warranted only where a trial judge misdirects her or himself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice”: *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, at paras. 17-19; *Babos*, at para. 48; *Regan*, at paras. 117-118; and *Tobiass*, at para. 87.

The Principles Applied

[66] As I will explain, I would not give effect to this ground of appeal, essentially for two reasons. The first has to do with the trial judge’s threshold finding that the media release infringed Gowdy’s right to security of his person under s. 7 of the *Charter*. The second, which assumes the threshold finding of *Charter* infringement is correct, relates to the capacity of the infringement to satisfy the requirements for entry of a stay of proceedings.

[67] Whether issuance of the media release infringed Gowdy’s security of the person interest under s. 7 of the *Charter* is also put in issue by the Crown in its appeal of the sentence imposed by the trial judge. It is there where I have

decided to deal with that issue and have concluded that the trial judge erred in deciding that distribution of the media release infringed s. 7.

[68] However, for the purpose of Gowdy's appeal, I will treat the infringement finding as correct and assess whether it establishes what is required for entry of a stay of proceedings. For several reasons, I am satisfied that the burden imposed on Gowdy well exceeds the grasp of the infringement upon which he relies.

[69] First, Gowdy's claim for a stay of proceedings invokes the standard that must be met for the residual category of abuse of process. Gowdy must establish that the infringement caused prejudice to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of even a fair trial or its outcome because the statue conduct at issue is so offensive to societal notions of fair play and decency.

[70] Moreover, a stay of proceedings is a prospective remedy. It does not, as Gowdy would appear to suggest, at least implicitly, redress a wrong that has already been done. Rather, the stay aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community in the future. Just because the state has treated a person shabbily in the past does *not*, without more, entitle that person to a stay of proceedings. The evidence must

also make it appear that the state misconduct is likely to continue in the future, or that carrying forward with a prosecution will offend society's sense of justice.

[71] At bottom, what happened here, and what must meet the burden for the stay, was distribution of a media release that included reference to Gowdy's HIV positive status. For the most part, the release recited information that was a matter of public record. The identity of a person charged with a crime. The nature of the crime. Solicitation of further information from the public should they have any relevant information about the person charged. Did the inclusion of HIV status in the media release, in the specific circumstances of this case and in relation to the prosecution of a serious offence aimed at preventing sexual predation upon children, tip the otherwise routine disclosure into an ongoing affront to the integrity of the justice system that could not be remedied by other means?

[72] The trial judge concluded that an alternate remedy was adequate to disassociate the justice system from the impugned conduct going forward. A judicial rebuke and reduction in sentence were adequate. A stay was not warranted. His remedial choice, unless cumbered by legal error, a reviewable error of fact or a decision that is so clearly wrong as to amount to an injustice, is entitled to deference in this court. In my view, the trial judge's conclusion

demonstrates no legal error, is well supported on this record, and appellate intervention is not warranted.

[73] In this case it is critical not to lose sight of the circumstances of the alleged misconduct. There was no issue that the information disclosed in the media release was found in Gowdy's car during a search incident to arrest the lawfulness of which was not called into question. It was included in a media release composed primarily of information about Gowdy's arrest that was lawfully in the public domain. It solicited responses from others who may have had consensual sexual contact with Gowdy, unaware of his HIV status at the time of that contact. In addition to the obvious potential health risk associated with consensual unprotected sexual activity, the release was issued before the Supreme Court of Canada clarified the relevance of non-disclosure of HIV positive status to the issue of consent in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584. The record does *not* establish that releases of this nature were frequent or reflected a systemic and ongoing problem with constitutional infringements by the DRPS. In addition, Gowdy was facing a serious charge, an offence that society rightly expects would proceed to trial.

[74] Where, as here, prejudice to the integrity of the judicial system is the allegation advanced (for there can be no claim that the disclosure affected the fairness of Gowdy's trial), a judge is required to decide which of the available

options – a stay or continuing the trial despite the infringement – better protects the integrity of the justice system. This inquiry necessarily involves the balancing of myriad factors. It inevitably follows that the conclusion reached in this balancing process is entitled to deference in this court. In my view, no case has been made out for its disturbance here.

[75] Finally, as the authorities repeatedly emphasize in connection with both the main and residual category of abuse of process, stays of proceedings are rare, reserved for the "clearest of cases". In the residual category, stays are "exceptional" and "very rare": *Tobiass,* at para. 91. A stay is warranted only in cases in which the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases. Bluntly put, that is not this case. I would dismiss the appeal from conviction.

THE APPEAL FROM SENTENCE

[76] The Crown seeks leave to appeal sentence, asserting error not only in the trial judge's invocation of s. 24(1) of the *Charter* to impose a sentence that is outside statutory limits, but also with the finding of constitutional infringement that provided access to the remedial authority of s. 24(1).

Issue #1: The Infringement

[77] Since the circumstances of the alleged infringement have been set out above, a thumbnail sketch of the trial judge's reasons in relation to the *Charter* breaches will provide the necessary platform for consideration of the discussion that follows.

The Reasons of the Trial Judge on the Alleged *Charter* Breach

[78] The trial judge found that the right to privacy of medical information was protected by provincial legislation that governed the release of information about "the identity of persons with communicable diseases". He then referred to both the *PSA* and *MFIPPA*. The trial judge concluded that the *PSA* created a complete regime for disclosure of this information by the chief of police and his or her designate provided certain conditions were met. None of these conditions were satisfied in this case. As a result, publication of the media release was unlawful.

[79] The trial judge noted that two *Charter* rights were implicated by disclosure of Gowdy's medical condition. Section 7 protected Gowdy's right to security of his person, including his right to keep personal medical data private, and his right to be free from state-imposed psychological stress that was serious in nature.

Section 8 protected informational privacy, including privacy of medical information which is particularly sensitive.

[80] The trial judge expressed his conclusion about the nature and extent of the *Charter* infringement occasioned by the media release in terms that bear repeating:

> The inherent reasonable expectation of privacy in medical information is taken for granted in the vast volume of authorities that consider the rights of complainants in sexual assault matters. It is also commonly accepted that the seizure of medical data as evidence in a criminal prosecution requires prior judicial authorization. In the case before me the information was not seized in a manner impugned by the defence. But where personal medical information falls into the hands of the police without any unlawful conduct on their part, the suspect still retains a right that any subsequent use by the police conform to *Charter* principles. Privacy of personal medical information cannot be restricted to cases where Section 8 infringements are pled. The concept of "security of the person" is engaged anytime police violate a reasonable expectation of privacy by unlawfully circulating private medical data.
>
> I rule that the unlawful and unreasonable public disclosure of Mr. Gowdy's personal medical information violated Section 7 of the *Charter*.

The Arguments on Appeal

[81] Preliminary to an examination of the arguments on appeal, it is helpful to clear away the uncontroversial.

[82] Kris Gowdy does not contest the lawfulness of his arrest on a charge of underage internet luring. He concedes that the search of his vehicle, which he drove to “Brad’s” house, was a valid search incident to his lawful arrest. The search was carried out in a reasonable manner and the documents disclosing his HIV positive status were lawfully seized from the vehicle.

[83] In addition, Kris Gowdy appears not to gainsay the authority of the DRPS to issue a media release describing his arrest; the nature of the charge on which he was arrested; and his basic biographical details of name, address, age and occupation. Nor does he quarrel with the authority of the police to investigate further and to solicit members of the public to advance or expand their original investigation.

[84] The target of Kris Gowdy’s complaint is disclosure in the media release of his HIV positive status. Dissemination of this inherently private medical information, he says, infringed his right to security of the person guaranteed by s. 7 of the *Charter*.

[85] On appeal, the Crown contends that the trial judge erred in holding that “any time police violate a reasonable expectation of privacy by voluntarily circulating private medical data”, the security of the person component of s. 7 is engaged.

[86] The Crown says the "security of the person" component in s. 7 relates exclusively to state conduct that interferes with the physical and psychological integrity of a person. No interference with physical integrity occurred here. The effect of state conduct on the psychological integrity of a person is to be assessed objectively, the standard applied, the psychological integrity of a person of reasonable sensibility. The trial judge's own finding, that the disclosure of Gowdy's HIV positive status had no impact on his psychological integrity beyond that caused by the fact and nature of the charge – internet luring of a same sex minor – negates any prospect of a s. 7 *Charter* breach.

[87] The Crown considers next whether the trial judge inadvertently mislabelled a breach of s. 8 as a breach of s. 7. But any mislabelling is of no moment because, the Crown says, no s. 8 breach has been made out here.

[88] According to the Crown, nothing in the *PSA* authorized or prohibited disclosure of information about Gowdy's HIV positive status. The only provision that enjoins disclosure of "personal information" in the custody or control of a municipal institution, such as the DRPS, is s. 32 of *MFIPPA*. But just as s. 32 enacts a prohibition, it also creates exemptions. The "consistent purpose" exemption of s. 32(c) of *MFIPPA* authorized the media release here. The personal information was obtained from Gowdy's vehicle during a lawful search incident to arrest. The purpose of a search incident to arrest is to ensure the

safety of the police and the public; to protect evidence from destruction; and to discover evidence related to the reasons for the arrest. The disclosure here was for a consistent purpose, to advance the investigation by encouraging consensual sexual partners of Gowdy, unaware of his HIV positive status, to contact police to determine whether Gowdy had committed further offences. It follows that the disclosure was lawful and no breach of s. 8 occurred.

[89] In addition, the Crown continues, the subsequent disclosure in the media release, which followed the lawful search incident to arrest, was not itself a search or seizure, thus did not on its own engage s. 8 of the *Charter*. Admittedly, Gowdy retained a residual privacy interest in the contents of the documents seized incident to arrest. Despite that residual interest, however, police were entitled to use that information for the purposes of law enforcement. Their conduct in doing so did not offend s. 8.

[90] Gowdy resists any claim of error on the part of the trial judge. Both ss. 7 and 8 of the *Charter* protected his reasonable expectation of privacy in his medical information. Gowdy says that information about a person's medical condition, such as his HIV status, is part of the biographical core of personal information individuals in a free and democratic society would wish to maintain and control free from dissemination by the state. Despite lawful acquisition of these documents by the state, Gowdy retained a continuing reasonable

expectation of privacy in the information contained in them, a residual interest worthy of protection under s. 7 of the *Charter.*

[91] Gowdy says that the disclosure in the media release was unlawful, an unconstitutional compromise of his residual expectation of privacy. The trial judge made no error in finding constitutional infringement.

[92] Gowdy contends that police disclosure in the media release of his HIV status was unlawful because it was prohibited under the governing provincial statute – the *PSA* – as well as under the statute of general application – the *MFIPPA* – and the common law. The media release was not for a "legitimate law enforcement purpose".

[93] In Gowdy's submission, the *PSA* and its accompanying regulations form a complete regime governing public disclosure by the police of the identity of a persons with communicable diseases. Granted, the *PSA* enacts no express prohibition. But the prohibition arises by necessary implication from the presence of several exceptions. And none of those exceptions authorized the media release here. The disclosure was not made by the chief of police or by his designate. Gowdy had only been charged with, not convicted or found guilty of an offence. And there was no basis upon which the chief could reasonably

believe that Gowdy posed a significant risk of harm to others and that disclosure of his HIV status would reduce that risk.

[94] In addition, Gowdy says, if *MFIPPA* were applicable, not only does it not authorize, but also it expressly prohibits the disclosure that occurred here. Section 32 of *MFIPPA* enacts a general prohibition. The "consistent purpose" exception in s. 32(c) cannot apply because its application would render the law enforcement disclosure exception in s. 32(f) redundant. Even if recourse to the "consistent purpose" exception in s. 32(c) were permissible, the information collected directly from Gowdy was not released for a consistent purpose as that phrase is defined under s. 33, since Gowdy would not reasonably have expected its release at the time it was collected.

[95] Gowdy acknowledges that police can look to the common law as a source of authority for a legitimate law enforcement purpose to use the fruits of a lawful search. But they should not be permitted to do so on the basis of reasonable suspicion of the commission of other crimes in which Gowdy's HIV status would matter. The standard should be reasonable and probable grounds and there was no basis for such a conclusion here.

The Governing Principles

[96] Security of the person is one of three interests afforded protection under s. 7 of the *Charter*. But the protection is not absolute. An individual may be deprived of security of the person, as well as of life and liberty, provided the deprivation accords with the principles of fundamental justice.

[97] In common with a deprivation of liberty, s. 7 does not protect a person against any and all deprivations of or intrusions upon personal security. The deprivation must be sufficiently serious to warrant *Charter* protection: *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 151. To require that *any* intrusion upon security of the person must accord with the principles of fundamental justice would tend to trivialize the protections afforded by the *Charter*: *Cunningham*, at p. 151.

[98] The right to security of the person protects the physical and psychological integrity of the individual: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, para. 58; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 173.

[99] To mark out the boundaries that protect an individual's psychological integrity from state interference is an inexact science. There is a qualitative aspect to the type of conduct that would ascend to the level of an infringement of

this right. To be clear, the right does not protect an individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer from government action. If this were so, we would trivialize what it means for a right to be constitutionally protected: *G. (J.)*, at para. 59.

[100] To establish a restriction of security of the person, an applicant must demonstrate, on a balance of probabilities, that the state conduct in issue had a serious and profound effect on the applicant's psychological integrity. The effects of the state interference are to be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. The effects need not rise to the level of nervous shock or psychiatric illness, but must extend beyond ordinary stresses or anxiety: *G. (J.)*, at paras. 58-60.

[101] The phrase "serious state-imposed psychological stress" fixes two requirements that must be satisfied for the right to security of the person to become engaged. The psychological harm must result from the conduct of the state. In other words, there must be a causal link between the impugned state conduct and the *Charter* violation claimed. And the psychological prejudice or harm must be serious: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 57, 60.

[102] Prominent in the reasons of the trial judge and the submissions of counsel on appeal are two provincial statutes – the *PSA* and the *MFIPPA*. Each has provisions governing disclosure of certain types of information.

[103] The *PSA* contains no express prohibition against disclosure of personal information. However, such a prohibition would seem to arise by necessary implication from s. 41(1.1), which authorizes the chief of police or anyone the chief designates for the purpose of the subsection to disclose personal information about an individual, provided the disclosure is in accordance with regulations passed under the *PSA*. The exception or exemption in s. 41(1.1) applies despite any other Act and is deemed to be compliant with s. 32(e) of *MFIPPA* and s. 42(1)(e) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

[104] Disclosure under s. 41(1.1) of the *PSA* may be made for the purpose of protecting the public or victims of crime, amongst other purposes, when it is reasonably believed an individual poses a significant risk of harm to other persons: *PSA*, s. 41(1.2); O. Reg. 265/98, s. 2.

[105] Section 28(2) of *MFIPPA* generally prohibits anyone from *collecting* personal information on behalf of an institution unless the person has express authorization to do so or is collecting the information for a law enforcement use.

Section 32 of *MFIPPA* generally prohibits *disclosure* of personal information by an institution, but the prohibition is not absolute. Disclosure is permitted for the purpose for which the information was obtained "or for a consistent purpose": s. 32(c). It is also permitted, pursuant to s. 32(f), if it is by a law enforcement institution to another law enforcement agency in a foreign country under certain conditions or to another law enforcement agency in Canada.

The Principles Applied

[106] As I will explain, in my respectful view, the trial judge erred in holding that disclosure of Gowdy's HIV positive status in the media release engaged and infringed Gowdy's right to security of the person under s. 7 of the *Charter*.

[107] The reasoning of the trial judge, which led him to conclude that Gowdy's right to security of the person under s. 7 had been breached, proceeds through a series of steps:

i. where police obtain, by lawful means, personal medical information about a suspect, the suspect retains a right that any subsequent use of the material by the police will be *Charter*-compliant;

ii. privacy of personal medical information is not confined to cases in which s. 8 *Charter* infringements are alleged;

iii. the "concept of security of the person" is engaged whenever police violate a reasonable expectation of privacy by voluntarily circulating private medical data; and

iv. the unlawful and unreasonable public disclosure of Gowdy's personal medical information violated s. 7 of the *Charter*.

[108] Four reasons persuade me that the trial judge's finding of an infringement of the security of the person component of s. 7 cannot stand.

[109] First, the standard applied. The trial judge held that security of the person under s. 7 becomes engaged and, by necessary implication, is infringed anytime police violated an individual's reasonable expectation of privacy by unlawfully circulating the individual's private medical data. This does not reflect the controlling standard by which claims of this infringement are assessed.

[110] The right to security of the person protects both the physical and psychological integrity of an individual. No question of physical integrity arises here. Where state conduct is said to interfere with psychological integrity and thus to offend s. 7, the individual must demonstrate that the state conduct – issuance of the media release disclosing private medical information – had a serious and profound effect on the individual's psychological integrity. These effects of the state interference must be assessed objectively, with a view to their

impact on the psychological integrity of a person of a reasonable sensibility. And these effects must extend beyond ordinary stress or anxiety, albeit need not reach the threshold of nervous shock or psychiatric illness. If disclosure of an individual's HIV status is said to infringe s. 7, it must meet this standard to qualify as a breach. The trial judge assumed the infringement based on *any* disclosure of private medical information and in doing so failed to apply this standard.

[111] Second, even if the trial judge had applied the proper legal standard to determine whether there had been an infringement of the security of the person interest in s. 7, a finding of infringement could not stand because it would be fundamentally at odds with the trial judge's factual conclusion that he could not distinguish any effect that disclosure of Gowdy's HIV status would have on his career independent of the effect of the nature and effect of the charge of same-sex underage internet luring. What occurred in this case simply cannot ascend to the standard required to establish an infringement of security of the person under s. 7 in the absence of a serious and profound effect of the HIV disclosure upon Gowdy's psychological integrity separate and apart from the impact of the disclosure of the allegations in the media release.

[112] Third, it is not clear to me that the consideration of whether there was a *Charter* breach had to be founded, as submitted by the parties, on either the authorization or prohibition of the disclosure by statute. The real issue on this

appeal is not to validate the actions of the police in disclosing Gowdy's HIV status, which clearly in retrospect were not advisable, but to evaluate whether the release of the information met the threshold of serious and profound effect on Gowdy's psychological integrity sufficient to constitute a *Charter* breach. Statutory authorization or prohibition can certainly inform the analysis, and as a result will be considered below, particularly in light of the parties' submissions, but are not necessarily determinative.

[113] It is common ground that the *PSA* did not authorize disclosure of Gowdy's HIV positive status. The exemption in s. 41(1.1) of the *PSA* authorizes a chief of police, or his or her designate, to disclose personal information about an individual in accordance with regulations passed under the *PSA*. Section 41(1.2) adds a requirement that disclosure of personal information be for one or more of several listed purposes, including protection of the public and law enforcement. Sections 2 and 3 of O. Reg. 265/98 describe the substance of the personal information that a chief of police or designate may disclose. Nothing authorized the disclosure of the personal medical information in this case. There was no evidence that the chief of police or a designate authorized the release, nor that they reasonably believed Gowdy posed a significant risk of harm to others and that the disclosure would reduce the risk posed. Further, Gowdy was not yet

convicted of an offence and the information released went beyond what could be authorized in relation to a person charged: O.Reg. 265/98, s. 3.

[114] On the other hand, an exception to the prohibition of disclosure of personal information in s. 32(c) of *MFIPPA*, where disclosure is for the purpose for which the personal information was obtained "or for a consistent purpose", may render the disclosure here lawful. The personal information was obtained during an investigation of an alleged criminal offence. One of the purposes of the media release was to further the original investigation by inviting responses from other sexual partners of Gowdy who may be at risk of transmission of the HIV virus in the absence of his disclosure of his status and use of protection. The nature of the offence being investigated and the circumstances of the commission itself in this instance could be sufficient to give rise to a public safety and law enforcement concern for other victims.

[115] Finally, to recast the conclusion as an infringement of s. 8 of the *Charter*, the decision remains flawed. The original search and seizure was lawful. As a general rule, disclosure of the results of a search and seizure does not amount to a "search" for s. 8 purposes. After all, disclosure is simply a communication to another or others of information previously acquired. That said, sometimes s. 8 protections may attach to post search and seizure disclosure: *Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549, at para. 40.

[116] Ultimately, the disclosure of Gowdy's HIV positive status in the context of a media release about his arrest, was not so disconnected from law enforcement concerns over the existence of potential victims that it rendered the disclosure an unreasonable violation of Gowdy's security of the person or informational privacy. The police had reasonable suspicion; reasonable grounds to believe further offences had been committed was not required for the purpose of the media release.

Issue #2: The Remedy

[117] The trial judge mobilized s. 24(1) of the *Charter* as the remedial source for the imposition of a sentence outside statutory limits. Critical to the availability of s. 24(1) as the source of the remedy granted was a threshold finding of a breach or infringement of an enumerated *Charter* right or freedom. That threshold finding was a breach of Gowdy's right to security of the person. As I have explained, the threshold finding that the media release infringed Gowdy's s. 7 right to security of his person or his s. 8 right to be secure against unreasonable search or seizure cannot stand. In the absence of those constitutional infringements, s. 24(1) cannot be of service to Gowdy to obtain a sentence outside statutory limits.

[118] However, in the event that I am wrong about the absence of an infringement of s. 7 or s. 8 and equally in error about the inapplicability of s. 24(1) as a remedial source, I will assume there were sufficient constitutional

infringements and examine whether the sentence imposed can be justified through the application of s. 24(1).

The Positions of the Parties at Trial

[119] At trial, Crown counsel (not Mr. McInnes) sought a sentence of 18 months in custody followed by "a significant probationary term". Defence counsel (not Mr. Silverstein) advocated for a conditional sentence or, in the alternative, a "modest" jail sentence in the range of 90 days.

The Reasons of the Trial Judge

[120] On the basis of his threshold finding that the media release breached Gowdy's security of the person right under s. 7 of the *Charter*, the trial judge turned to s. 24(1) to provide an effective remedy for the breach. He considered that imposition of the statutory minimum sentence – imprisonment for one year – would not provide an effective remedy in this case. Such a remedy would be ineffective, he said, because application of the operative objectives and principles of sentencing, together with the circumstances of the offence and the offender, would not warrant a sentence beyond the statutory minimum.

[121] And so it was that the trial judge invoked the decision in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, and several trial judgments which he considered authorized the imposition of a sentence outside statutory limits – a

conditional sentence of imprisonment of two years less one day, followed by a three year probationary term.

The Arguments on Appeal and The Governing Principles

[122] The arguments advanced on appeal and the governing principles that control the disposition of this issue are the same as advanced in the companion appeal in *R. v. Donnelly*, 2016 ONCA 988. Their substance appears in paras. 127-159 of that judgment and need not be repeated here.

The Principles Applied

[123] In this case, I am satisfied that neither s. 24(1) of the *Charter* nor Part XXIII of the *Criminal Code* can be conscripted in support of the imposition of a sentence outside statutory limits, particularly, the sentence imposed here.

[124] To take first, the source relied upon by the trial judge – s. 24(1) of the *Charter*. This issue I approach, of course, on the assumption that the threshold findings of *Charter* infringement were correct.

[125] In my view, the trial judge's invocation of *Nasogaluak* and s. 24(1) as the basis upon which he imposed a sentence outside statutory limits is flawed for at least three reasons.

[126] First, as the *Nasogaluak* court points out, s. 24(1) is not the exclusive source a trial judge may plumb to take into account *Charter* breaches relating to the circumstances of an offender in determining a fit sentence. An effective remedy for a proven wrong, which also happens to be a *Charter* breach, may be taken into account in determining a fit sentence under Part XXIII of the *Criminal Code*. First choice resort to s. 24(1) to reduce a sentence to account for any harm flowing from unconstitutional conduct does not comply with the general rule espoused in *Nasogaluak*, at para. 5.

[127] Second, the trial judge appears to have treated *Nasogaluak* as having determined, rather than generally foreclosed, a sentence reduction outside statutory limits as an appropriate remedy for *Charter* infringement. The general rule of *Nasogaluak* is that a sentence reduction outside statutory limits does *not* generally constitute an “appropriate” remedy under s. 24(1), unless the constitutionality of the statutory limit itself is challenged. No such challenge was advanced here. An outside statutory limits sentence was not generally available under *Nasogaluak*, which requires that sentences imposed under Part XXIII comply with statutory minimums and other provisions which prohibit certain forms of sentence in respect of the offence, such as the restrictions regarding conditional sentences set out in s. 742.1(b). Moreover, and as noted in *Donnelly*, the *Nasogaluak* court did not make clear how a sentence reduction outside

statutory limits should it be available, could be reconciled with its earlier decision in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96. *Ferguson* foreclosed the possibility of constitutional exemptions from mandatory minimum sentences as an appropriate s. 24(1) *Charter* remedy, in that case in relation to s. 12.

[128] Third, while the *Nasogaluak* court did not foreclose the possibility that a sentence reduction outside statutory limits may be the sole effective remedy for state misconduct, the court made it clear that such a remedy was limited to exceptional cases and particularly egregious conduct in relation to the offence and the offender. Simply put, as it was in *Nasogaluak* itself, this is not such a case.

CONCLUSION

[129] Even if breaches of s. 7, 8 & 10(b) were actually supported here, the state conduct, particularly when evaluated in light of the pre-*Mabior* state of the law that was in existence at the time, was not so exceptional as to warrant a reduction outside statutory limits.

[130] Ultimately, it follows from my conclusion that the trial judge erred in finding *Charter* infringement that could ground a s. 24(1) remedy that the sentence imposed at trial should be varied within the limits prescribed by law. No one on appeal suggests that the sentence warranted in this case should exceed the

statutory minimum – imprisonment for one year. Nor does anyone suggest that the minimum term of imprisonment should be followed by a period of probation.

[131] I would grant leave to appeal the sentence imposed at trial and vary the sentence to one of imprisonment for a term of one year without any period of probation.

[132] Kris Gowdy has completed the conditional sentence of imprisonment imposed by the trial judge. For two years, he has been subject to stringent conditions, including eight months of house arrest; electronic supervision for the full term of the sentence; and a curfew for the final sixteen months. In the circumstances, I am unable to divine any valid purpose that would be served by his re-incarceration. Accordingly, I would stay the application of the sentence and direct that no warrant issue for his arrest or committal.

Released: December 29, 2016 (“D.W.”)

“David Watt J.A.”
“I agree. G.J. Epstein J.A.”
“I agree. M. Tulloch J.A.”