

Her Majesty the Queen (applicant/appellant) v. Richard Gill (respondent/respondent)  
(C53886; 2012 ONCA 607)

**Indexed As: R. v. Gill (R.)**

Ontario Court of Appeal  
Doherty, Lang and Epstein, JJ.A.  
September 17, 2012.

**Summary:**

The accused, who had four prior drinking and driving related convictions, was charged with failing to provide a breath sample for analysis. Prior to plea, the prosecutor gave notice of intention to seek a greater penalty. The accused was convicted. At sentencing, the prosecutor chose to prove the prior notice such that the mandatory minimum penalties for multiple convictions became applicable. The trial judge reviewed the prosecutor's exercise of discretion on a reasonableness standard and determined that the Crown had acted unreasonably in seeking to prove notice. The trial judge therefore set aside the notice and sentenced the accused, taking into account his full criminal record (including the four prior drinking and driving offences), but without regard to the minimum penalties imposed by Parliament for second and subsequent drinking and driving related offences. The trial judge imposed an effective jail term of 50 days, 40 days less than the mandatory minimum (see 2008 ONCJ 502). The Crown appealed.

The Ontario Superior Court (summary conviction appeal court), in a decision reported [2011] O.T.C. Uned. 1145, agreed with the trial judge and dismissed the appeal. The Crown appealed again.

The Ontario Court of Appeal allowed the appeal. The prosecutor's exercise of discretion to prove notice could be reviewed for s. 7 Charter compliance, but that analysis did not involve an assessment of reasonableness of the prosecutor's decision. Here s. 7 was not offended. The mandatory minimum penalties applied.

**Civil Rights - Topic 646**

Liberty - Limitations on - Prisoners and imprisonment (incl. mandatory minimum sentences) - [See both **Criminal Law - Topic 5606**].

**Civil Rights - Topic 686**

Liberty - Principles of fundamental justice - Deprivation of - What constitutes - [See both **Criminal Law - Topic 5606**].

**Criminal Law - Topic 26**

General principles - Prosecution of crime - Prosecutorial discretion - [See both **Criminal Law - Topic 5606**].

**Criminal Law - Topic 5606**

Punishments (sentence) - Increased punishment for prior convictions - Reasonable notice of - At issue was whether a trial judge could review the reasonableness of a prosecutor's

decision to prove that an accused, charged with a drinking and driving related offence, had been given notice prior to plea of the prosecutor's intention to seek a greater penalty such that the mandatory minimum penalties for second and subsequent offences applied - The Ontario Court of Appeal held that a trial judge could review the prosecutor's exercise of discretion to determine whether it offended a principle of fundamental justice and violated the accused's s. 7 Charter rights - However, such a s. 7 review did not involve an assessment of the reasonableness of the prosecutor's exercise of discretion - The court listed the factors to be considered in the s. 7 analysis in this context - See paragraphs 1 to 9.

### **Criminal Law - Topic 5606**

Punishments (sentence) - Increased punishment for prior convictions - Reasonable notice of - The accused was charged with a fifth drinking and driving offence (i.e., refusal to provide breath sample) - Prior to plea, the prosecutor gave notice of intention ("the notice") to seek a greater penalty - The accused was convicted - At sentencing, the prosecutor chose to prove the prior notice giving rise to the application of mandatory minimum penalties - The trial judge set aside the notice as being unreasonable and sentenced the accused, without regard to minimum penalties - The Crown appealed - The Ontario Court of Appeal allowed the appeal - The trial judge was not entitled to review the prosecutor's exercise of discretion for reasonableness, but was entitled to determine whether it offended s. 7 of the Charter - After doing a s. 7 analysis, the appeal court concluded that the prosecutor's decision to prove the notice did not infringe the accused s. 7 rights - The mandatory minimum penalties applied - See paragraphs 35 to 84.

### **Criminal Law - Topic 5805**

Sentencing - General - Statutory range mandatory (incl. mandatory minimum sentence) - [See both **Criminal Law - Topic 5606**].

### **Criminal Law - Topic 5846.6**

Sentencing - Considerations on imposing sentence - Violation of accused's rights - [See both **Criminal Law - Topic 5606**].

### **Criminal Law - Topic 5887**

Sentence - Failure to provide a breath or blood sample - [See second **Criminal Law - Topic 5606**].

### **Cases Noticed:**

R. v. Demchuk (2003), 68 O.R.(3d) 17 (C.A.), reld to. [para. 2].

R. v. Wust (L.W.) et al., [2000] 1 S.C.R. 455; 252 N.R. 332; 134 B.C.A.C. 236; 219 W.A.C. 236; 2000 SCC 18, reld to. [para. 17].

R. v. Tabor (M.S.) (2004), 198 B.C.A.C. 148; 324 W.A.C. 148; 184 C.C.C.(3d) 262; 2004 BCCA 191, reld to. [para. 31].

R. v. Taylor, [1964] 1 C.C.C. 207 (B.C.C.A.), reld to. [para. 31].

R. v. Zaccaria (N.G.) (2005), 363 A.R. 343; 343 W.A.C. 343; 2005 ABCA 130, reld to. [para. 31].

R. v. Kumar (R.) (1993), 36 B.C.A.C. 81; 58 W.A.C. 81; 85 C.C.C.(3d) 417 (C.A.), reld

to. [para. 32].  
R. v. Cordero, [2003] O.J. No. 6246 (Sup. Ct.), reld to. [para. 33].  
R. v. Ferguson (M.E.), [2008] 1 S.C.R. 96; 371 N.R. 231; 425 A.R. 79; 418 W.A.C. 79; 2008 SCC 6, reld to. [para. 35].  
R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387; 88 N.R. 205; 71 Sask. R. 1, reld to. [para. 37].  
PHS Community Services Society et al. v. Canada (Attorney General), [2011] 3 S.C.R. 134; 421 N.R. 1; 310 B.C.A.C. 1; 526 W.A.C. 1; 2011 SCC 44, reld to. [para. 38].  
R. v. Nasogaluak (L.M.), [2010] 1 S.C.R. 206; 398 N.R. 107; 474 A.R. 88; 479 W.A.C. 88; 2010 SCC 6, reld to. [para. 45].  
R. v. Bolender (J.) (2010), 8 M.V.R.(6th) 290; 2010 ONCJ 622, reld to. [para. 48].  
R. v. Mohla (A.), [2012] O.T.C. Uned. 30; 26 M.V.R.(6th) 63; 2012 ONSC 30, reld to. [para. 50].  
Krieger et al. v. Law Society of Alberta, [2002] 3 S.C.R. 372; 293 N.R. 201; 312 A.R. 275; 281 W.A.C. 275; 2002 SCC 65, reld to. [para. 51].  
R. v. Nixon (O.), [2011] 2 S.C.R. 566; 417 N.R. 274; 502 A.R. 18; 517 W.A.C. 18; 2011 SCC 34, reld to. [para. 51].  
Kvello et al. v. Miazga et al., [2009] 3 S.C.R. 339; 395 N.R. 115; 337 Sask.R. 260; 464 W.A.C. 260; 2009 SCC 51, reld to. [para. 51].  
R. v. J.S.-R., [2012] O.A.C. TBEEd. SE.010; 2012 ONCA 568, reld to. [para. 51].  
Rodriguez v. British Columbia (Attorney General) et al., [1993] 3 S.C.R. 519; 158 N.R. 1; 34 B.C.A.C. 1; 56 W.A.C. 1, reld to. [para. 59].  
R. v. Albright, [1987] 2 S.C.R. 383; 79 N.R. 129; 37 C.C.C.(3d) 105, reld to. [para. 62].  
Bedford et al. v. Canada (Attorney General) (2012), 290 O.A.C. 236; 109 O.R.(3d) 1; 2012 ONCA 186, reld to. [para. 64].  
R. v. Malmo-Levine (D.) et al., [2003] 3 S.C.R. 571; 314 N.R. 1; 191 B.C.A.C. 1; 314 W.A.C. 1; 2003 SCC 74, reld to. [para. 72].  
R. v. Power (E.), [1994] 1 S.C.R. 601; 165 N.R. 241; 117 Nfld. & P.E.I.R. 269; 365 A.P.R. 269, reld to. [para. 75].

**Statutes Noticed:**

Criminal Code, R.S.C. 1985, c. C-46, sect. 255(1) [para. 26]; sect. 727(1) [para. 29].

**Authors and Works Noticed:**

Code, Michael, Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg (2009), 34 Queen's L.J. 863, pp. 883 to 885 [para. 75].

Rosenberg, Marc, The Attorney General and the Administration of Criminal Justice (2009), 34 Queen's L.J. 813, generally [para. 38].

**Counsel:**

Philip Perlmutter, for the appellant;  
Susan Pennypacker, for the respondent.

This appeal was heard on March 15, 2012, before Doherty, Lang and Epstein, J.J.A., of the Ontario Court of Appeal. The following decision was released for the court by Doherty, J.A.,

on September 17, 2012.

Appeal allowed.

Editor: Elizabeth M.A. Turgeon

### **Civil Rights - Topic 646**

Liberty - Limitations on - Prisoners and imprisonment (incl. mandatory minimum sentences) - At issue was whether a trial judge could review the reasonableness of a prosecutor's decision to prove that an accused, charged with a drinking and driving related offence, had been given notice prior to plea of the prosecutor's intention to seek a greater penalty such that the mandatory minimum penalties for second and subsequent offences applied - The Ontario Court of Appeal held that a trial judge could review the prosecutor's exercise of discretion to determine whether it offended a principle of fundamental justice and violated the accused's s. 7 Charter rights - However, such a s. 7 review did not involve an assessment of the reasonableness of the prosecutor's exercise of discretion - The court listed the factors to be considered in the s. 7 analysis in this context - See paragraphs 1 to 9.

### **Civil Rights - Topic 646**

Liberty - Limitations on - Prisoners and imprisonment (incl. mandatory minimum sentences) - The accused was charged with a fifth drinking and driving offence (i.e., refusal to provide breath sample) - Prior to plea, the prosecutor gave notice of intention ("the notice") to seek a greater penalty - The accused was convicted - At sentencing, the prosecutor chose to prove the prior notice giving rise to the application of mandatory minimum penalties - The trial judge set aside the notice as being unreasonable and sentenced the accused, without regard to minimum penalties - The Crown appealed - The Ontario Court of Appeal allowed the appeal - The trial judge was not entitled to review the prosecutor's exercise of discretion for reasonableness, but was entitled to determine whether it offended s. 7 of the Charter - After doing a s. 7 analysis, the appeal court concluded that the prosecutor's decision to prove the notice did not infringe the accused s. 7 rights - The mandatory minimum penalties applied - See paragraphs 35 to 84.

### **Civil Rights - Topic 686**

Liberty - Principles of fundamental justice - Deprivation of - What constitutes - At issue was whether a trial judge could review the reasonableness of a prosecutor's decision to prove that an accused, charged with a drinking and driving related offence, had been given notice prior to plea of the prosecutor's intention to seek a greater penalty such that the mandatory minimum penalties for second and subsequent offences applied - The Ontario Court of Appeal held that a trial judge could review the prosecutor's exercise of discretion to determine whether it offended a principle of fundamental justice and violated the accused's s. 7 Charter rights - However, such a s. 7 review did not involve an assessment of the reasonableness of the prosecutor's exercise of discretion - The court listed the factors to be considered in the s. 7 analysis in this context - See paragraphs 1 to 9.

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### **Criminal Law - Topic 26**

General principles - Prosecution of crime - Prosecutorial discretion - At issue was whether a trial judge could review the reasonableness of a prosecutor's decision to prove that an accused, charged with a drinking and driving related offence, had been given notice prior to plea of the prosecutor's intention to seek a greater penalty such that the mandatory minimum penalties for second and subsequent offences applied - The Ontario Court of Appeal held that a trial judge could review the prosecutor's exercise of discretion to determine whether it offended a principle of fundamental justice and violated the accused's s. 7 Charter rights - However, such a s. 7 review did not involve an assessment of the reasonableness of the prosecutor's exercise of discretion - The court listed the factors to be considered in the s. 7 analysis in this context - See paragraphs 1 to 9.

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Sentencing - General - Statutory range mandatory (incl. mandatory minimum sentence) - At issue was whether a trial judge could review the reasonableness of a prosecutor's decision to prove that an accused, charged with a drinking and driving related offence,

had been given notice prior to plea of the prosecutor's intention to seek a greater penalty such that the mandatory minimum penalties for second and subsequent offences applied - The Ontario Court of Appeal held that a trial judge could review the prosecutor's exercise of discretion to determine whether it offended a principle of fundamental justice and violated the accused's s. 7 Charter rights - However, such a s. 7 review did not involve an assessment of the reasonableness of the prosecutor's exercise of discretion - The court listed the factors to be considered in the s. 7 analysis in this context - See paragraphs 1 to 9.

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### **Criminal Law - Topic 5846.6**

Sentencing - Considerations on imposing sentence - Violation of accused's rights - At issue was whether a trial judge could review the reasonableness of a prosecutor's decision to prove that an accused, charged with a drinking and driving related offence, had been given notice prior to plea of the prosecutor's intention to seek a greater penalty such that the mandatory minimum penalties for second and subsequent offences applied - The Ontario Court of Appeal held that a trial judge could review the prosecutor's exercise of discretion to determine whether it offended a principle of fundamental justice and violated the accused's s. 7 Charter rights - However, such a s. 7 review did not involve an assessment of the reasonableness of the prosecutor's exercise of discretion - The court listed the factors to be considered in the s. 7 analysis in this context - See paragraphs 1 to 9.

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**Criminal Law - Topic 5887**

Sentence - Failure to provide a breath or blood sample - The accused was charged with a fifth drinking and driving offence (i.e., refusal to provide breath sample) - Prior to plea, the prosecutor gave notice of intention ("the notice") to seek a greater penalty - The accused was convicted - At sentencing, the prosecutor chose to prove the prior notice giving rise to the application of mandatory minimum penalties - The trial judge set aside the notice as being unreasonable and sentenced the accused, without regard to minimum penalties - The Crown appealed - The Ontario Court of Appeal allowed the appeal - The trial judge was not entitled to review the prosecutor's exercise of discretion for reasonableness, but was entitled to determine whether it offended s. 7 of the Charter - After doing a s. 7 analysis, the appeal court concluded that the prosecutor's decision to prove the notice did not infringe the accused s. 7 rights - The mandatory minimum penalties applied - See paragraphs 35 to 84.