

2018 ONCJ 231  
Ontario Court of Justice

R. v. Livingston

2018 CarswellOnt 5544, 2018 ONCJ 231

HER MAJESTY THE QUEEN and DAVID LIVINGSTON

Timothy R. Lipson J.

Judgment: April 11, 2018  
Docket: None given.

Counsel: T. Lemon, S. Egan, I. Bell, for Crown  
B. Gover, F. Schumann, P. Hrick, for David Livingston

Subject: Criminal; Property

Headnote  
Criminal law

*Timothy R. Lipson J.:*

1 Following a trial, Mr. Livingston was found guilty of one count of Attempt to Commit Mischief to Data, contrary to s. 430(5)(a) of the *Criminal Code*, and one count of Unauthorized Use of a Computer, contrary to s. 342.1.

2 These two offences arise from the same acts and constitute a single wrong or delict. In their submissions on sentence, both parties contend that the rule against multiple convictions requires that a conditional stay be entered on the less serious count of Attempt to Commit Mischief to Data. I agree. A conditional stay is entered on that count.

3 On the remaining count of Unauthorized Use of a Computer, the Crown seeks a term of imprisonment in the six to twelve month range, while the defence submits that a conditional discharge is the fit and appropriate sentence.

Circumstances of the Offence and the Offender

4 Between May 2012 and February 2013, Mr. Livingston was Chief of Staff in the Office of the Premier of Ontario (OPO). The evidence established beyond a reasonable doubt that he and his Deputy Chief of Staff, Laura Miller, enlisted and directed Peter Faist, Ms. Miller's partner, to wipe data from twenty computers in the Office of the Premier.<sup>1</sup> Mr. Livingston's purpose was to ensure that no records remained on those computers that were responsive to either a *Freedom of Information and Protection of Privacy Act* (FOI) request or a future Production Order of a Standing Committee of the Legislature inquiring into the gas plant controversy.

5 The hard drives and the data on them pertaining to government business were the property of the government of Ontario. The wiping done by Mr. Faist was indiscriminate. Any files existing on those hard drives would have been eliminated without regard to content or record-keeping obligations. There was no evidence led as to what records, if any, were wiped from those hard drives.

6 I found that Mr. Livingston deceived the Secretary of Cabinet, Peter Wallace, into granting him administrative access to the computers in the OPO. The defendant misled Mr. Wallace by telling him that he wanted to delete only personal information. Mr. Livingston's true plan was to eliminate sensitive and confidential work-related data. Using Mr. Faist, a non-Ontario Public Service IT consultant, he attempted to destroy data on the hard drives of other colleagues who could have saved copies of e-mails or attachments on their computers. At that time *FOI* requests in relation to gas plant documents were outstanding and a Standing Committee Production Order was clearly foreseeable.

7 The wiping of the hard drives was not only unauthorized, but undertaken with the intent to destroy retainable records the defendant believed to exist on the hard drives. His purpose was to prevent lawful access to such records in order to thwart the fundamental objectives of both access to information legislation and the legislative committee process.

8 Mr. Livingston is a 65-year-old first offender who resides in Toronto with his wife of 40 years. He has two adult children and two grandchildren. He has an exceptional employment history. He worked at a major bank for twenty-nine years and rose through several senior positions before taking early retirement in 2005. He then took on the role of President and Chief Executive Officer of Infrastructure Ontario, where he remained for seven years before accepting a secondment in 2012 to become Chief of Staff to Premier McGuinty. He held that position for approximately nine months.

9 Following his departure from the Office of the Premier, Mr. Livingston was employed as a consultant at a large Canadian law firm for about one year. He lost that job when the police investigation into his conduct became public. Since 2017, Mr. Livingston has spent his weekdays being a caregiver to his granddaughter.

10 The court received a very positive presentence report, filed as Exhibit 1. The writer noted: "Pertaining to the subject's character, collateral sources responded very similarly in portraying the subject as generous, trustworthy, honest, reliable, supportive, loyal, caring, and a true role model."

11 At the sentencing hearing, a book of twenty-seven character reference letters was filed as Exhibit 2. Many of the authors of these letters read them aloud in court. Some of the witnesses attested to the contributions Mr. Livingston made to the public good as the first CEO of Infrastructure Ontario. Several witnesses spoke of his public service outside of work. He has volunteered or served as a director for numerous charities, including the United Way of Toronto, the Children's Aid Foundation and

Children's Aid Society of Toronto, the Ovarian Cancer Society of Canada and the Special Olympics. I would characterize Mr. Livingston's overall community service in a variety of spheres as exceptional. He is also described by his family members as an "outstanding" and "devoted" father and husband.

12 Several of the character witnesses spoke of Mr. Livingston's honesty and integrity, both in his professional and personal lives. Their comments are set out in Exhibit 2, and well summarized in the written submissions provided by the defence. Several of the letters addressed Mr. Livingston's motivation in taking on the Infrastructure Ontario and Premier's Chief of Staff positions, as well as his lack of political partisanship. These letters stress that Mr. Livingston was driven to accept Premier McGuinty's invitation to become his Chief of Staff out of a sense of civic duty.

#### Positions of the Parties

##### *Position of the Crown*

13 The Crown submits that the paramount objectives of sentencing in this case are denunciation and general deterrence. In light of this, notwithstanding the defendant's impressive background, anything less than a period of imprisonment would fail to properly denounce his conduct and deter others in government from similar behaviour.

14 The Crown contends that Mr. Livingston was a sophisticated government actor in a position of trust, fully aware of his actions. Moreover, he was expressly cautioned about the government's obligations to produce information to the Legislature. The Crown submits that Mr. Livingston's actions violated the basic constitutional principle that governments and their agents must conduct themselves according to the rule of law.

15 After closing its case, the Crown abandoned the count of Breach of Trust by a Public Official, contrary to s. 122 of the *Criminal Code* on the basis that there was no reasonable prospect of conviction. That count was dismissed at the request of the prosecution.

16 However, even in the absence of a finding of guilt for the s. 122 offence, Crown counsel submits that the fact Mr. Livingston was in a position of trust when he committed the offence is a particularly aggravating factor. The Crown says that as Chief of Staff, he failed to act in the best interests of the public. It is submitted that Mr. Livingston abused his position of power by choosing to undertake criminal acts that protected the governing party at the expense of democratic accountability.

17 The Crown does not dispute that Mr. Livingston is otherwise a person of good character, but urges the court not to give this mitigating factor undue weight. It is submitted that no one but a person with the defendant's background and character could be appointed to the position of Chief of Staff to the Premier. The Crown contends that the circumstances of this offence dictate that it could only be committed by a person of good character who had reached this position of power. It is the use of this power for an unlawful purpose, the prosecution says, that dictates a significant sanction.

18 The Crown submits that the adverse publicity and media attention should not be considered a mitigating circumstance. Rather, it is argued that the negative media attention is the inevitable consequence of being prosecuted and sentenced for an

offence of this nature.

### *Position of the Defence*

19 The defence submits that Mr. Livingston is a man of otherwise exemplary character, a first offender who in both his professional career and personal life has made a strong contribution to the community. Counsel points to the negative impact of the intense media interest in this case on the previously stellar reputation of the defendant that was built over a lifetime of good works and so quickly destroyed. The public attention, he says, has been deeply humiliating for his client and his family and has taken a significant toll on all of them.

20 The defence submits that on the evidence, the court is not entitled to find as an aggravating factor under s. 718.2 that Mr. Livingston, in committing the offence, abused a position of trust or authority. Counsel contends that because the court acquitted the defendant on the Breach of Trust count, any such issue underlying that offence must be presumed to have been decided in the defendant's favour.

21 The defence also asks the court to consider the fact that the Crown failed to establish that the defendant's conduct caused actual harm, given the absence of evidence that any work-related documents were destroyed. Counsel submits, as well, that the offence was not committed over a period of several months as alleged by the prosecution. He points out that Mr. Livingston approached Cabinet Office for administrative rights on January 24, 2013 and the wiping of the hard drives was complete by February 8.

22 Counsel submits that a conditional discharge would not be contrary to the public interest. He says that taking into account that there was an acquittal on the Breach of Trust count and that the defendant's actions had no effect on government documents, the necessary level of both general deterrence and denunciation have already been achieved. In this regard, counsel suggests that the reasonable and informed member of the public now knows that the commission of this offence can result in criminal charges, a trial, a finding of guilt, an abnormal level of negative public attention, aggressive media scrutiny, the destruction of one's reputation and potential loss of one's ability to earn a living.

### Analysis

23 In *R. v. Hamilton*<sup>2</sup>, Justice Doherty describes the judge's task of imposing a fit sentence with this observation:

Sentencing is a very human process. Most attempts to describe the proper judicial approach to sentencing are as close to the actual process as a paint-by-numbers landscape is to the real thing ... The fixing of a fit sentence is the product of the combined effects of the circumstances of the specific offence and unique attributes of the specific offender.

24 Sentencing is not an exact science. The case law is clear that trial judges must retain the flexibility needed to do justice in individual cases. Each case must be conducted as an individualized exercise.<sup>3</sup> Sentencing is probably the most difficult judicial responsibility. The imposition of a fit sentence is particularly difficult here because Mr. Livingston is an otherwise decent, contributing and law-abiding person who has committed a serious offence.

25 Section 718 of the *Criminal Code* describes the fundamental purpose of sentencing. That purpose is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions on offenders.

26 Any sentence imposed by a court must promote one or more of the objectives identified in s. 718:

- to denounce unlawful conduct;
- to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or to the community; and
- to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

27 The fundamental principle of sentencing is the proportionality requirement found in s. 718.1: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This is achieved by examining the aggravating and mitigating factors and the circumstances relevant to the offence and the offender, bearing in mind the established principles of sentencing. The sentencing objectives are met by selecting and identifying sentencing goals. Keeping in mind the requirement to exercise restraint in the case of a first offender, such as this defendant, a sentence must be fit in achieving those objectives and must be similar to sentences imposed in similar cases.

#### *Aggravating factors*

28 Aggravating factors must be proven by the Crown beyond a reasonable doubt. In this case, they include the following:

1. *Mr. Livingston attempted to interfere with parliamentary democracy and the public's access to information*

29 Mr. Livingston's attempt to interfere with the proper functioning of parliamentary democracy is, in my view, the most serious aggravating factor in this case. I agree with the following observations made in the Crown's written submissions: "In directing the wiping of the hard drives, Livingston's aim was to deprive the public of access to information it was entitled to have through legislation (*Freedom of Information and Protection of Privacy Act*) and through the legislative committee process. Accountability is fundamental to the functioning of the democratic process. Further, depriving a legislative committee of information it is entitled to, directly interferes with the parliamentary process."

30 As the evidence established, Mr. Livingston had been expressly cautioned about the government's obligations to produce information to the Legislature through its standing committees, which he chose to defy.

31 The defendant's attempt to interfere with the public's right to access information was nothing less than an attempt to interfere with the democratic process.

## *2. Mr. Livingston abused a position of trust and authority*

32 Where an offender abuses a position of trust or authority to commit an offence, it is an aggravating factor by virtue of s. 718.2. The abuse of "a position of trust or authority in relation to the victim" must be in "committing the offence". The Crown alleges that in committing the offence, Mr. Livingston abused his "public office" and "the public trust".

33 In my view, the evidence does not establish beyond a reasonable doubt that the position of Chief of Staff is *per se* a "public office" or a "position of public trust". Secretary of Cabinet Wallace testified that members of the OPO are not public servants. In the parlance of government, they are classified as "exempt staff". Mr. Wallace explained that the role of the OPO was to "undertake the political work of the Premier". While Mr. Livingston's salary was paid by the government of Ontario through Cabinet Office, he and his staff were not under the control of Cabinet Office.

34 Counsel agree that there is no legislation that either creates the position of Chief of Staff or defines its duties and responsibilities. Of significance, Mr. Livingston was never required to take an oath of office. There is also no evidence that he was appointed by the Premier to discharge any "public duty" or occupy a position of "public trust". Rather, the defendant simply accepted an offer from the Premier to be his most senior unelected advisor and to be in charge of the OPO. The evidence is that his role as advisor was to act in the partisan political interests of the Premier and the governing party. Of course, he was also expected to conduct himself in accordance with the law.

35 Nevertheless, there can be no doubt that in his role as Chief of Staff, Mr. Livingston wielded significant power and influence. This became apparent in his dealings with the Secretary of Cabinet over access to OPO computers.

36 Mr. Wallace testified that one of his responsibilities as the province's most senior civil servant who headed up the non-partisan Cabinet Office, was to "provide administrative support for the Office of the Premier". In his testimony, the Secretary was clear that he was obliged to seriously consider and, if possible, accommodate Mr. Livingston's "extraordinary" request for administrative rights to OPO computers. Despite serious misgivings, he granted Mr. Livingston's request. In granting the authorization sought, Mr. Wallace relied on the defendant's misrepresentations, as well as inaccurate information received from others in government.

37 The ultimate result was that the Secretary entrusted Mr. Livingston with the authority to access every computer in the Office of the Premier. In doing so, Mr. Wallace put the defendant in a position of trust and authority with regard to those computers. Mr. Livingston chose to exploit the Secretary's trust, as well as the authority given him when he directed the indiscriminate wiping of the hard drives in order to eliminate sensitive and retainable work-related data. In this regard, the defendant abused a position of trust and authority in committing the offence. This constitutes an aggravating factor in the

determination of a fit sentence.

38 That Mr. Livingston abused the trust and authority given to him simply reflects the factual findings this court made in its reasons for judgment. I do wish to be clear that Mr. Livingston should not and will not be sentenced as if he had been found guilty of Breach of Trust by a Public Officer. That is a far more serious offence than the one for which he was found guilty, and would require a far more severe sentence than I intend to impose.

### *3. The offence involved planning and deliberation*

39 The evidence established that Mr. Livingston engaged in sophisticated and careful planning to eliminate retainable work records shortly after he became Chief of Staff. It was in August 2012 that the defendant instructed his deputy chiefs of staff to permanently delete e-mails that were potentially responsive to *FOI* requests or which could be business records required to be retained under the *Premier's Office Records Schedule*.

40 By early 2013, *FOI* requests existed and were directed to the OPO for gas plant records. However, instead of ensuring careful searches of OPO computers be done for any responsive records, Mr. Livingston was arranging for the indiscriminate wiping of OPO computer hard drives that potentially contained such records. At that time, Mr. Livingston was also aware of the likelihood of a Standing Committee Production Order for gas plant records being made in the next session of the Legislature. He also knew that he would very likely be called as a witness at a future Standing Committee hearing on the gas plant controversy.

41 Subsequently, in order to eliminate retainable records, Mr. Livingston deceived the Secretary of Cabinet into granting him administrative rights to OPO computers. He also involved Ms. Miller and another Deputy Chief of Staff in recruiting and paying Mr. Faist to wipe the hard drives. The obvious planning and deliberation involved in the commission of the offence constitutes an aggravating factor in the determination of a fit sentence.

### *Mitigating Factors*

#### *1. Previous Good Character*

42 I am satisfied on the evidence that the offence is out of character for the defendant. Mr. Livingston's previous good character and his exceptional contributions to the community must be taken into account in mitigation of sentence.

43 While good character should be and likely is a prerequisite to become the Chief of Staff, it cannot be said that Mr. Livingston "traded" on his good character to obtain administrative rights from Mr. Wallace, as alleged by the Crown. What the defendant did was trade on the power of his position to influence the Secretary of Cabinet. I note, as well, that there is no evidence that Mr. Livingston derived any personal gain from the commission of the offence.

44 The evidence of Mr. Livingston's prior good character should be given significant weight in crafting an appropriate sentence.

## 2. *Stigma*

45 The court was advised that when the first Information to Obtain was made public, as a result of an application by the media to unseal, Mr. Livingston lost his job as a consultant with a major Toronto law firm. Undoubtedly, this case has significantly undermined Mr. Livingston's ability to earn a living in the areas in which his skills lie.

46 There has also been intense media and public interest in this case. I do not doubt that the public attention focused on Mr. Livingston throughout the trial process has been extremely difficult for him and his family. There is no evidence that Mr. Livingston conducted himself as a public figure who sought publicity during his tenure as Chief of Staff. I accept that Mr. Livingston has suffered greatly prior to sentence. Very often, the publicity attached to the mere laying of charges, and even more so, to the fact of trial and conviction can be devastating for a person of previous good character such as the defendant. The stigma resulting from adverse publicity can be a mitigating factor when it serves a denunciatory function. I find that to be the case here.

## 3. *Travel consequences*

47 I also take into consideration that any disposition greater than an absolute discharge will lead to mandatory inadmissibility to the United States. Mr. Livingston would not be able to travel to the U.S. for business or personal reasons. The court was advised that the defendant and his family have a second home in Florida, which is important to them. It is possible they will have to sell it. This is, of course, not a major mitigating factor in assessing penalty, but is a noteworthy consequence of a criminal conviction.

### *Proportionality in this case*

48 As noted earlier in these reasons, the fundamental requirement of sentencing is that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the offender.

49 This offence is very serious because it involves an attempt by the defendant to thwart the core values of accountability and transparency that are essential to the proper functioning of parliamentary democracy. Mr. Livingston's plan was to deny the public its right to know about government decision-making with regard to the gas plant controversy.

50 Public access to information is a fundamental component of the democratic process. In emphasizing this principle, the Supreme Court has in past decisions made these relevant and important observations:

Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.<sup>4</sup>

Access to information in the hands of public institutions can increase transparency in government, contribute to an informed

public, and enhance an open and democratic society.<sup>5</sup>

Access to information legislation embodies values that are fundamental to our democracy and creates and safeguards certain values — transparency, accountability and governance — that are essential to making democracy workable.<sup>6</sup>

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.<sup>7</sup>

51 The seriousness of the offence is compounded by the fact that Mr. Livingston attempted to interfere not only with access to information legislation, but also future access to retainable records by a legislative standing committee. Depriving the legislative committee of information to which it was entitled constitutes a direct interference with the parliamentary process. In orchestrating the wiping of the hard drives in this context, the defendant's conduct was egregious and his degree of responsibility high.

52 I am not persuaded by counsel's submission that the defendant was in an "unfamiliar environment" when he committed the offence, having had no prior experience in politics or connection with a political party before becoming Chief of Staff. While Mr. Livingston may not have been immersed in the world of party politics prior to becoming Chief of Staff, he certainly had a great deal of knowledge of and experience with the workings of government in his years as head of Infrastructure Ontario, a major Crown Corporation. He was hardly a newcomer to the public sector when he became the Premier's chief political advisor. As well, the evidence establishes that senior government officials attempted to school Mr. Livingston early on in his tenure regarding the powers of the Standing Committee to compel production of relevant documents, as well as the obligation of the OPO to retain relevant records.

53 Mr. Livingston, however, developed his own ideas early on. He called the legal obligation to disclose "political bullshit". He thought the power of the Committee to compel production was "ridiculous".

54 When Mr. Livingston sought Mr. Wallace's authorization for administrative rights to OPO computers in late January 2013, the Secretary warned him not to eliminate retainable records, saying, "The only type of organization that doesn't keep records was a criminal organization". On January 31, Mr. Livingston was advised yet again, in writing and over the telephone, to preserve retainable records. Against that advice, the defendant deliberately directed the deletion of e-mails and wiping of OPO computer hard drives to ensure that records relating to the gas plant controversy were destroyed. Largely as a result of his powerful position, the defendant was able to influence the Secretary of Cabinet through dishonest means into granting him the authorization, without which the offence could not have been committed.

55 In my view, Mr. Livingston cannot now attribute his criminal conduct to his inexperience in the Premier's Office, or political naiveté. The evidence in this trial, particularly the e-mail trail, establishes that Mr. Livingston was a politically sophisticated government actor who committed this offence because of political expediency, rather than fulfilling his responsibility to conduct himself within the law.

*What is a fit sentence in this case?*

56 The Crown and defence are far apart in their respective positions. The prosecution seeks a sentence of imprisonment within

the six to twelve month range, while the defence urges the court to impose a conditional discharge.

57 The fundamental purpose of sentencing is to contribute to respect for the law. It is a troubling fact in this case that the defendant's expressed lack of respect for his legal obligations animated his criminal conduct. In relation to this behaviour, the principles of denunciation and deterrence are paramount. Mr. Livingston attempted to frustrate the operation of the mechanisms of government accountability. A denunciatory sentence is required to reaffirm society's legitimate expectation that those holding senior government positions conduct themselves with integrity and within the law. It was not for Mr. Livingston to unilaterally decide what the public should or should not know about the steps taken by government in its decision-making on the gas plant controversy.

58 The objective of general deterrence also plays an important role here to effectively discourage others from committing similar criminal acts.

59 There is no minimum penalty and a maximum of 10 years for the offence of Unauthorized Use of a Computer. Obviously there are a wide range of circumstances in which the offence can be committed. In determining a fit sentence, I must take into account the fact that the Crown was unable to establish what, if any, documents were destroyed and what, if any, harm was caused. While the aggravating circumstances are important, the court must also give effect to the principle of restraint. Mr. Livingston is a 65-year old first offender of previous good character, who in the course of his life has made an outstanding contribution to the community both professionally and in his private life.

60 Mr. Livingston's attempt to wipe the hard drives to eliminate information that the public, through its legislative bodies, had a right to have, strikes at the heart of the democratic process. His conduct was an affront to and an attack upon democratic institutions and values. It is this feature that makes the objective of denunciation so pressing. To borrow the language of Justice Laforest in *Dagg*, access to information "helps ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians remain accountable to the citizenry."

61 The facts of this case are unique and there is a dearth of case authorities that set out the appropriate range of sentence. However, there are two recent Ontario sentencing decisions which are helpful in this regard. These cases involve individuals who were convicted for interfering with the most fundamental of democratic institutions, the electoral process.

62 In *R. v. Sona*<sup>8</sup>, the defendant was convicted of an offence contrary to the *Canada Elections Act*. His crime became well-known in the media as the "robo-calls scandal". Mr. Sona's scheme involved sending over 7,000 automated telephone calls on the day of the federal election in 2011, telling voters that their polling station had been changed to a different location. His intent was to send voters to a false location to prevent or discourage them from voting. At trial, it was agreed that 150-200 voters attended the false polling stations as a result of the calls. Some of these voters tore up their voter information cards and walked away. Other voters chose not to vote because of the inconvenience of the false location. Mr. Sona was a youthful first-time adult offender with strong family and community support. The offence was characterized as "out of character". The trial judge referred to the strong values of Canadian democracy and the need to protect democratic institutions and processes from attack. He imposed a nine-month jail term, plus probation for twelve months. That sentence was upheld by the Court of Appeal.

63 In *R. v. Del Mastro*<sup>9</sup>, the defendant was an incumbent Member of Parliament who was convicted of offences contrary to

the *Canada Elections Act* for exceeding his election expense and personal contribution limits, as well as filing a false or misleading electoral campaign return. The sentencing judge imposed a global five-month sentence, including one month in jail and a four-month conditional sentence. The summary conviction appeal judge upheld the sentence and stated that the offences were serious, struck at the "heart of our democratic electoral process" and constituted "a serious affront to our democratic system and fairness of our election process." A further appeal against sentence was abandoned at the Court of Appeal.<sup>10</sup>

64 These decisions serve to reflect the duty of the judiciary to treat cases involving interference with the democratic process as extremely serious in order to maintain public confidence in the integrity of parliamentary institutions. Those institutions form the foundation of our free and democratic system and require the court's protection. This is particularly so in the sentencing of this defendant who abused a position of power and engaged in criminal conduct to promote the interests of the governing party at the expense of democratic accountability.

65 A conditional discharge, as proposed by counsel for the defendant, would be entirely disproportionate to the seriousness of Mr. Livingston's criminal conduct and his high degree of responsibility. Such a sentence would be utterly contrary to the public interest.

66 In view of the gravity of the offence and the moral blameworthiness of the defendant, I am of the view that anything less than a period of imprisonment would fall short of adequately denouncing Mr. Livingston's conduct and deterring similarly-minded individuals from taking part in the type of activity that occurred here.

67 I have carefully considered whether a conditional sentence is appropriate. Certainly the statutory prerequisites found in s. 742.1 are met in this case. The offence of Unauthorized Use of a Computer is not punishable by a minimum term of imprisonment. There is no dispute that a sentence of less than two years less a day is fit and appropriate. The safety of the community would not be endangered were the defendant to serve his sentence in the community. The Supreme Court of Canada has said that a conditional sentence may be reasonable, even where denunciation and deterrence are the predominant sentencing objectives.<sup>11</sup> It is also well settled that the prominence of these sentencing objectives does not, on its own, foreclose this manner of disposition as a sentencing alternative, since a properly crafted conditional sentence can fully address both objectives.<sup>12</sup>

68 The real issue, however, is whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

69 The Supreme Court of Canada has held that while conditional sentences can be appropriate in cases where deterrence is paramount, incarceration is ordinarily a harsher sanction and may provide more deterrence than a conditional sentence.<sup>13</sup> The appropriateness of incarceration in a given case will depend, in part, on "whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect."

70 I am of the view that a conditional sentence would not adequately meet the need of either denunciation or deterrence that are present in this case. An attempt to tamper with the democratic process requires a strong denunciatory response. The judicial system has a duty to protect the democratic process from attempts, such as occurred here, to undermine its proper functioning.

Mr. Livingston engaged in the type of conduct that tends to engender public cynicism in and diminished respect for our democratic institutions. The public rightly expects senior government officials to act with integrity and honour, and to operate within the law. It is important that the sentence here adequately express denunciation in order to effectively communicate society's repudiation of conduct that can damage its most valued institutions.

71 Each case must be considered individually. In this matter, the aggravating factors, identified earlier in these reasons, are so serious as to preclude a conditional sentence. It is my view of the evidence that the objectives of denunciation and deterrence are particularly pressing and that incarceration is necessary.

72 I take into account, as well, that this kind of offence is very difficult to detect. The facts here are illustrative. The Secretary of Cabinet trusted Mr. Livingston not to abuse the administrative rights he granted. It is of note that the defendant might have been successful in his attempt to destroy retainable records were it not for the secret decision made by Ms. Jackson and Mr. Bromm of Cabinet Office to "freeze" the e-mail accounts of departing OPO staff so that their contents were available for future searches.

73 The difficulties of detection and investigation constitute an important factor which, as in large-scale frauds, weighs in favour of incarceration as the appropriate sanction required to vindicate the objective of general deterrence.

74 A third sentencing objective in this case is that the defendant provide reparation for harm done to the community. While this objective is less prominent, it is, in my view, still significant. Mr. Livingston's sentence should include a probation order with community service as its main component.

75 In my view, it is not necessary to sentence Mr. Livingston to a period of incarceration in the range of six to twelve months. The Crown's suggested range does not adequately reflect the mitigating factors of Mr. Livingston's past contributions to the community, or the stigma he carries. While imprisonment is required, the court is obliged to exercise restraint in the length of sentence it imposes in a manner that reflects the gravity of the offence, that addresses appropriate sentencing objectives and that takes into account the defendant's unique personal circumstances.

### *Sentence*

76 Mr. Livingston will be sentenced to imprisonment for four months. This will be followed by a period of probation of twelve months. The terms of probation are these:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so.
3. Notify the court or the probation officer in advance of any change of name or address.
4. Notify the court or the probation officer of any change of employment or occupation

5. Report within 72 hours of your release from custody in person to a probation officer as directed and thereafter as required by your probation officer.

6. Perform 100 hours of community service to be completed within the first eleven months of this probation order and provide written proof to your probation officer.

Footnotes

- [1](#) Reasons for judgment, *R. v. Livingston and Miller*, [\[2018\] O.J. No. 254, 2018 ONCJ 25](#).
- [2](#) [2004 CanLII 5549 \(ONCA\)](#), [\[2004\] O.J. No.3252 \(C.A.\)](#) at para. 87
- [3](#) *R. v. Wright*, 2006 CanLII 40975 (ON CA), [\[2006\] O.J. No. 4870 at para.16 \(Ont. C.A.\)](#); *R. v. D (D)*. (2002), CanLII 44915 (ON CA), [163 C.C.C. \(3d\) 471](#) at para.33 (Ont. C.A.).
- [4](#) *John Doe v. Ontario (Finance)*, [2014] 2S.C.R. 3 at para.1
- [5](#) *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2S.C.R. 306 at paras 15 (per Charron J.), 78-80 (per LebelJ. Concurring).
- [6](#) *ibid* at paras 78-80
- [7](#) *Dagg v. Canada (Minister of Finance)*, [\[1997\] S.C.R. 403](#) at para. 61 (dissenting but not on this point). Lebel J.'s comments were adopted by the Ontario Court of Appeal in *City Of Toronto Economic Development Corporation v. Ontario Information and Privacy Commissioner*, [\[2008\] O.J. No. 1799, 2008 ONCA 366](#) at para.31
- [8](#) [2016 ONCA 452](#)
- [9](#) [2016 ONSC 2071](#)
- [10](#) [2017 ONCA 711](#)
- [11](#) *R. v. Proulx*, [\[2000\] 1 S.C.R. 61](#) at para 100
- [12](#) *R. v. Jacko*, [\[2010\] O.J. No. 2583](#) (C.A.) at para. 80
- [13](#) *Proulx*, *supra*, at 107