

## Criminal

# Beware of media, say lawyers after televised recording of breath test leads to acquittal

By **Terry Davidson**

(September 5, 2017, 8:42 AM EDT) -- Lawyers say defence counsel and their clients must always be aware of those watching and listening following the acquittal of a driver who had his failed roadside breath test and legal consultation recorded by a TV news station.

It was on Aug. 24 that Justice David Rose, in *R. v. Gautam* 2017 ONCJ 577, acquitted Kunal Gautam of driving over the legal limit after he found that his constitutional rights were violated at a York Regional Police spot check after Global News recorded his breath test and on-site phone call with a lawyer.

According to Rose's written decision, someone at York Regional Police had given Global News permission to report on the night's operation in Richmond Hill as a way of spreading awareness.

Rose said York Regional Police made a mistake in allowing Global unfettered access inside the truck in which Gautam took his official breath test and phoned duty counsel from a booth in the rear of the vehicle.



Bruce Daley, Daley, Byers

Toronto lawyer Bruce Daley, of Daley, Byers, said a lesson can be learned here.

"From now on, when I get called in the middle of the night, the first thing I'm going to ask my client is if there is any news media there doing a documentary or something," said Daley. "I think a key thing in ... [the] ruling is the absolute certainly [Justice Rose] gives that if you're in a situation that is completely controlled by police ... your Charter interests are definitely engaged because they have free run of the [situation], which is under control of the police authority."

According to the decision, it was the night of May 6, 2016, that the RIDE team set up on East Beaver Creek Road and Mural Street with both police cruisers and the breath-testing truck. A sergeant told the team a Global News TV crew would be on site to report on the night's operation.

Just before 11 p.m., Gautam was pulled over, with Global's cameras rolling. After failing his initial roadside breath test, Gautam was arrested and led to the RIDE truck for a second test by a breath technician. After Gautam claimed to not need a lawyer, the arresting officer suggested he call duty counsel from inside the truck.

A Global cameraman entered the vehicle along with Gautam and the arresting officer. The breath technician, already inside, was told by the sergeant to wear an audio pack and microphone clip for the TV crew.

Gautam asked that the TV crew be ordered to leave, but was told by the arresting officer Global had been given permission to be there. That officer later said in court he found it unusual for a TV crew to be inside the truck and that it was clearly making Gautam uncomfortable.

Inside the truck, the cameraman filmed as Gautam did two breath tests, first registering 152 in 100 millilitres of blood and 146 milligrams a short time later. Gautam testified in court that when he was speaking over the phone with duty counsel, the cameraman lifted a curtain on the outside of the booth and pointed the camera inside.

"[Gautam] testified that he wanted to ask questions to duty counsel but couldn't because he was being recorded," wrote Justice Rose, who found Gautam's "contact with duty counsel was impeded" and that he had at one point been "told that the phone booth ... was not completely soundproof." Justice Rose ruled Gautam's rights under s. 10(b) of the Charter, the right to private counsel consultation, had been violated, as were his rights under s. 8, in that he was subjected to unreasonable search and seizure when Global was permitted to film his breath test.

"That right to counsel, of all the Charter rights, it is one of the most sanctified rights in the Constitution because of solicitor-client privilege and your right to get legal advice ... when you are under arrest or [under] detention," said lawyer Calvin Barry, of Calvin Barry Professional Corporation. "The other [Charter breach] was unreasonable search and seizure [in that] he had a reasonable expectation of privacy and not have somebody have a camera in his face and be recording when he's trying to get some legal advice and providing the samples."

In the end, it remained a mystery as to who at York Regional Police ultimately gave Global the green light to film all aspects of that night's RIDE operation. "No police witnesses could answer that question, but their conjecture that it was someone well above the rank of police constable is entirely reasonable," stated Justice Rose.