

# **In the Court of Appeal for the Northwest Territories**

**Citation: R v Simpson, 2017 NWTCA 6**

**Date:** 20170711

**Docket:** A-1-AP-2016-000010

**Registry:** Yellowknife, N.W.T.

**Between:**

**Her Majesty the Queen**

Appellant

- and -

**Tamara Ann Simpson**

Respondent

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**The Court:**

**The Honourable Mr. Justice Jack Watson  
The Honourable Mr. Justice Frans Slatter  
The Honourable Madam Justice Shannon Smallwood**

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## **Memorandum of Judgment**

Appeal from the Sentence by  
The Honourable Judge Gorin  
Dated the 13th day of May, 2016  
(2016 NWTTC 11, Docket: T-1-CR-2015-001706)

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## Memorandum of Judgment

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### The Court:

#### I Introduction

[1] This Crown appeal from a sentence of 10 months imprisonment imposed on the respondent on her guilty plea to trafficking in cocaine does not really concern the quantum of the sentence. Rather, it concerns a deduction from that head sentence for a breach of *Charter* rights. The Crown does not suggest that this Court alter the head sentence. The Crown's position, therefore, invites the Court to give the head sentence deference under *R v Lacasse*, 2015 SCC 64 at paras 3 to 6, [2015] 3 SCR 1089.

[2] The respondent spent two periods of time in pre-sentence custody: first, after she was arrested on October 28 until she was released on bail on November 2, 2015. On that date, she entered a guilty plea to one count of trafficking contrary to s 5(1) of the *Controlled Drugs and Substances Act*. Sentencing was put over until December 15, 2015. On that day, the respondent failed to appear resulting in a warrant being issued for her arrest. The warrant was executed on February 29, 2016, in Yellowknife. She was then held in custody until March 11, 2016. Only the second period of time is relevant to this appeal as the sentencing judge's reasons suggest that he concluded that no remedy was necessary for that first period in custody.

[3] The Fort Smith Correctional Complex – Women's Unit is the only correctional centre for women in the Northwest Territories. It houses both serving prisoners and remand prisoners. The Women's Unit has capacity for 20 prisoners, but its average population is six to eight. Female inmates at Fort Smith are held in a townhouse, complete with bedrooms, bathrooms, kitchen and living room facilities. Prisoners have access to an exercise room. Meals and snacks are prepared in the main building kitchen and are served in the dining room. Female inmates can also access canteen and hygiene items on certain days from local stores.

[4] The respondent was, however, held in the RCMP holding cells in Yellowknife between February 29 and March 11, 2016. The first four days (February 29 through March 3) were the result of a Crown adjournment. The remaining eight (March 4 through March 11) were the result of a defence adjournment. The Court raised with counsel the fact that the respondent was being held in custody in RCMP cells on at least two occasions during this time.

[5] The respondent thus spent 12 days in the RCMP holding cells. The cell is a windowless, concrete room with a cement bench along two of the four walls. It includes a stainless steel toilet and sink. The cell measures 11 feet seven inches by eight feet six inches. The respondent slept on a foam mattress that is three inches thick. Prisoners do not have scheduled exercise or yard time, though the respondent was taken out for cigarette breaks by guards on several occasions.

[6] The Crown's submission on appeal is that the two-phased deduction from that head sentence given by the sentencing judge for what he characterized as the gender-grounded inequality of the *effect* of 12 days of pre-sentence custody of the respondent was incorrect in law: see 2016 NWTTC 11 at paras 55 to 69, [2016] 11 WWR 357. The Crown does not actually ask this Court to make a disposition of the appeal which has a real impact on the respondent. The Crown's appeal seeks to correct errors of law, not the sentence outcome. Counsel for the respondent conceded the appeal.

[7] The first deduction calculated by the sentencing judge was 1.5 to 1 credit for 12 days spent in pre-sentence custody, which was a calculation credit consistent with s 719(3.1) of the *Criminal Code* and was consistent with Parliament's approach to proportionality as well as to "truth in sentencing": see *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 70 to 71, [2016] 1 SCR 180. The sentencing judge, however, went on to deduct a further two months from the head sentence as a form of compensation for the *character* of the 12 days of pre-sentence custody. In other words, the effective total deduction by the sentencing judge might be fairly described as 6.5 days of credit per one day in custody. The sentencing judge rationalized this inflation of the pre-sentence custody credit by invocation of *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

## II Discussion

[8] The Crown questions the accuracy of the sentencing judge's approach to *Nasogaluak* and challenges the effective undermining of s 719(3.1) of the *Criminal Code* contained in that approach. Although there is some force to those submissions, we find it unnecessary to address those submissions directly because *the foundation* for the sentencing judge's reasoning in that regard was flawed in principle and in procedure. Correction of those latter errors is sufficiently dispositive in this appeal.

[9] The sentencing judge purported to give the additional deduction beyond the statutory pre-sentence custody credit as a remedy under s 24(1) of the *Canadian Charter of Rights and Freedoms*. This deduction was found by him to be a just and appropriate remedy for what he found to be breach by the state, here the Northwest Territories Government, of the right of the respondent to equal treatment under the law as enshrined in s 15 of the *Charter*. In our view, the asserted s 15 *Charter* breach was not made out in the circumstances of this case, and accordingly no remedy was required. We need not expand our conclusion to address "reasonable hypotheticals" beyond this case, and since the respondent has not sought to defend the result for herself personally we consider it inappropriate to do so. Nevertheless, some general observations about the law are required to resolve this appeal.

[10] The sentencing judge summarized the s 15 breach that he found as being "the government's failure to establish a female remand facility in or reasonably close to Yellowknife": para 44 of his reasons. In addition to the fact that this finding was very abstract – it did not actually define what would be a "female remand facility" nor, what would be "reasonably close to Yellowknife" – there was simply no basis to find that there was unequal treatment of the

respondent within the meaning of s 15 of the *Charter* arising from state conduct. Clearly, on the facts found, there was a form of state sponsored “remand facility” available to hold the respondent, namely the RCMP holding cells.

[11] Further, the sentencing judge did not find that the circumstances of the respondent’s detention in the RCMP holding cells violated the right of the respondent under s 12 of the *Charter* – conclusions which have support in the evidence. The sentencing judge did assert that the circumstances of her detention were “excessively harsh” as they were comparable to solitary confinement in a regular prison. During the 12 days she was there, she appeared in court six times. She was by herself in a windowless cell measuring 11 feet 7 inches by 8 feet 6 inches. Nonetheless, “she was afforded with some means of entertainment. She was given the occasional opportunity to smoke a cigarette.”: para 23 of his reasons. She was provided with three meals a day plus an afternoon snack and plus coffee, tea or juice throughout the day. There is always light on, but the lights can be toggled between day and night time settings at the prisoner’s request. Her laundry would be done for her at her request although sometimes the next day.

[12] In that light, the *Charter* breach impliedly found by the sentencing judge amounted to the sentencing judge’s perception of some unspecified discrepancies between how the respondent was housed in the RCMP cells and what would be a “female remand facility” of a better quality. For example, he expressed concern that the “Video appearances and audio appearances” from the Fort Smith women’s facility were “far from ideal”: see para 40 of his reasons. On the other hand, the sentencing judge appears to have regarded holding a prisoner in the RCMP cells as not intrinsically unacceptable or unequal, because he found such cells are “not suitable places for a period of *more than a few days*”: para 12 of his reasons.

[13] Where a court purports to find a form of s 15 *Charter* breach in the administration of state resources in a specific case, the Court should be as precise as possible about what actually constitutes the breach in that case. This is not merely a deficiency of reasons issue which might be addressed deferentially on fact findings. This type of defect goes foundationally to the accountability and intelligibility of the decision made on a crucial and important question of law. For reviewability purposes as well, it is essential to know whether the breach is “real” in the sense of having an evidential basis: compare *Stewart v Elk Valley Coal Corporation*, 2017 SCC 30 at paras 23 to 24, [2017] SCJ No 30 (QL).

[14] Moreover, the government would have a reasonable expectation that the Court’s decision would make it possible for the government to visualize what it might do to address the breach for future cases. To adjudicate otherwise is, amongst other things, not to provide a just and appropriate remedy within the meaning of s 24(1) of the *Charter*: compare *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 at paras 33, 74, 95, 147, 171 to 174, 593 AR 180, leave denied [2015] SCCA No 95 (QL) (SCC No 36338).

[15] The *Charter* breach finding by the sentencing judge here effectively set aside the fact that the respondent had, by her own decision or by that of her counsel, chosen not to appear by CCTV

from the existing facility for detained women at Fort Smith under s 650 of the *Criminal Code*. The sentencing judge expressed no criticism of the Fort Smith facility.

[16] By comparison, the North Slave Correctional Centre in Yellowknife was used for male inmates on remand or serving. Meals are prepared in a central kitchen but served to prisoners in their cells. The inmates have access to exercise and yard facilities and to laundry and showers on a daily schedule.

[17] Further, the appellant was represented by counsel and counsel may well have had jurisdiction to make interim appearances on her behalf in her complete absence under s 650.01 of the *Criminal Code*. Indeed, even counsel may appear technologically: s 650.02 of the *Code*. In other words, the respondent's arrival and detention in the RCMP cells for the period in question, was, practically speaking, largely a consequence of choice except, of course, to the extent that the sentencing judge ordered her detention before sentencing.

[18] A crucial flaw in the approach of the sentencing judge lies in the premise that the manner in which female and male prisoners are held in custody while awaiting court disposition must always be identical for the genders -- albeit subject to the ambiguity of any boundaries to be inferred from what the sentencing judge said about this. Assuming without deciding that the treatment of prisoners is a service generally offered to a category of persons in Canada, the test for equality under s 15 of the *Charter* should be as explained in the line of authority from *Kapp v Canada*, 2008 SCC 41, [2008] 2 SCR 483 to *Withler v Canada*, 2011 SCC 12, [2011] 1 SCR 396, to *Quebec v A*, 2013 SCC 5, [2013] 1 SCR 61 to *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 16 to 21, [2015] 2 SCR 548 where it was written:

16 The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": para. 331 (emphasis added).

17 This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.

18 The focus of s. 15 is therefore on laws that draw discriminatory distinctions -- that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.

19 The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "*The Equality Rights*" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.

20 The second part of the analysis focuses on arbitrary -- or discriminatory -- disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

21 To establish a prima facie violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

[19] The position thus expressed in *Taypotat* is not taken to mean that a discriminatory intent is required to be shown, nor that a discriminatory effect only exists if the distinction is arbitrary or based on *intentional* stereotyping: see *Elk Valley Coal* at para 45. The paras of *Taypotat* and *Elk Valley Coal* show that the focus of the test on arbitrariness and on the effect of reinforcement, perpetuation or exacerbation of stereotypical disadvantages exists to distinguish situations of discrimination from situations of mere differences in treatment.

[20] Here the sentencing judge made a finding that the treatment of the respondent by the various officials involved was in good faith. As noted above, the only identified distinction in her treatment was in the absence of whatever the differences there may be between a conceivable female remand facility in Yellowknife and the circumstances of the RCMP cells. Such an hypothetical female remand facility in Yellowknife could presumably be similar to the male prison in Yellowknife without being distinct for the purposes of s 15, regardless of what the Fort Smith facility has by way of different qualities, for example as to cell sizes. It does appear that in actuality the female facility in Fort Smith is more accommodating than the North Slave Centre for males.

[21] Further, there was no indication that the RCMP cells would only be used for female prisoners. As the Crown points out, the conditions are Spartan but they are not “a special indignity reserved only for female prisoners”. The evidence shows resort to temporary accommodation in the cells is a “logistical necessity”.

[22] The Crown says that the reality is also that there is only a small predictable population of female inmates and that the very small cohort of persons have a better accommodation at Fort Smith than any of the male inmates in the Northwest Territories. The record supports this submission. Moreover, having regard to the fact that there are limited public resources is a legitimate consideration. Given the small population of the Northwest Territories, and the very small number of female accused remanded there, it is impractical to suggest that the Government of the Northwest Territories must maintain a female remand centre in Yellowknife as well.

[23] The Court must always be wary of conflating arguments as to equality with arguments as to accommodation. But in this instance we are satisfied that it simply was not proven that this respondent suffered a breach of s 15 of the *Charter*.

[24] Before closing, there is the additional point of the procedure used by the sentencing judge which, in our respectful view, was also erroneous. The sentencing judge initiated the debate about whether there was a *Charter* breach in the pre-sentence custody circumstances of the respondent. The respondent did not raise this complaint on her own. Courts generally should be chary about introducing arguments that neither party has chosen to advance: *R v Mian*, 2014 SCC 54 at paras 41-42, [2014] 2 SCR 689. Section 24(1) of the *Charter* speaks to remedies sought by persons claiming a breach of a guaranteed right or freedom under the *Charter*. This does not connote a form of judicial initiative. Further, in this case the sentencing judge admitted having held a personal opinion about the subject matter for some time. Judges are not disentitled from having regard to legal opinions they have developed through experience, but judges are not expected to

translate those into litigation: *Alberta (Attorney General) v. Alberta (Provincial Court)*, 2016 ABCA 396, 344 CCC (3d) 420. This was also reversible error on the part of the sentencing judge.

### III Conclusion

[25] The appeal should be allowed and the judgment of the sentencing judge is set aside insofar as it provides for a two month additional deduction by reason of pre-sentencing custody. However, as it is not the intention of the Court to require the respondent to serve any more time in relation to this matter we will state our reasons in a declaratory manner as above, but dismiss the Crown appeal.

Appeal heard on June 13, 2017

Memorandum filed at Yellowknife, N.W.T.  
this day of July, 2017

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Watson J.A.

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Slatter J.A.

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Smallwood J.A.



**Appearances:**

B. Green  
for the Appellant

E. McIntyre as agent for P.J. Harte  
for the Respondent

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FOR THE NORTHWEST TERRITORIES

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MEMORANDUM OF JUDGMENT

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