Date: 2014 07 11
Docket: S-1-CR-2012 000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

PATRICK NADLI

Ruling on constitutional challenge of Subsection 719(3.1) of the *Criminal Code*.

Heard at Yellowknife, NT, on May 27 and June 6, 2014.

Reasons filed: July 11, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Crown: Susanne Boucher and Jennifer Bond

Counsel for the Defence: Peter Harte

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REASONS FOR JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] On July 11, 2014, I sentenced Patrick Nadli for a charge of sexual assault causing bodily harm that occurred on June 28, 2012. I concluded that, but for the time he has spent on remand, a fit sentence for that offence would be five years. Taking into account the time Mr. Nadli spent on remand, and having given him credit for that time, I sentenced him to a further term of imprisonment of two years.

[2] There was no issue that Mr. Nadli should receive some credit for his remand time. But there was an issue as to how much credit he could receive. Specifically, there was an issue as to whether he could be given credit on an enhanced basis for the full period of his remand, or only for a part of that period.

[3] In delivering my oral Reasons for Sentence, I indicated that my conclusion was that I did have discretion to give Mr. Nadli credit on an enhanced basis for the entire period of time he has spent on remand. The purpose of these written Reasons is to set out why I have reached this conclusion.

[4] I will refer to the background and procedural history of this case only to set out the context in which the issues regarding the treatment of the remand time arise.

[5] Mr. Nadli was taken into custody for this matter on June 28, 2012. He remained in custody until his sentence, a total period of 744 days.

[6] After he was charged, Mr. Nadli appeared before the Territorial Court of the Northwest Territories on a number of occasions. He elected to have a jury trial and to have a preliminary hearing. That preliminary hearing proceeded on September 12, 2012. Mr. Nadli was committed to stand trial.

[7] Mr. Nadli had not, at that point, exercised his right to have a bail hearing. He did not seek to have a bail hearing at the conclusion of his preliminary hearing either.

[8] On October 23, 2012, the Crown filed an Indictment which contained the three counts for which Mr. Nadli had been committed to stand trial: a count of break and enter and commit sexual assault causing bodily harm, a count of sexual assault causing bodily harm, and a count of assault causing bodily harm. All three counts stemmed from the same allegations. The Crown simply chose to set out, in the Indictment, two included offenses already captured by the count of break and enter and commit sexual assault causing bodily harm.

[9] By operation of section 525 of the *Criminal Code*, Mr. Nadli became entitled to have his detention reviewed by this Court. In accordance with the usual practice in this jurisdiction, a date was set to have him appear before this Court to speak to this review. Mr. Nadli indicated he would be seeking release. The hearing was scheduled to proceed on November 15, 2012.

[10] On that date, Mr. Nadli appeared before this Court for the bail review. His release plan was outlined in affidavit materials. *Viva voce* evidence was also called. The transcript of the hearing shows that although the hearing was triggered by the operation of section 525, for all intents and purposes, it was treated as a bail hearing in the first instance. For example, the matter proceeded on the basis that the Crown had the onus to show cause why Mr. Nadli's detention was justified, whereas in a section 525 review, the onus is on the accused to show cause for release. Moreover, issues about delay in the proceedings and changes in circumstances, which are often an important consideration in s. 525 reviews, were not referred to at the hearing. Instead, the focus was what it ordinarily is at a regular bail hearing: the nature and seriousness of the allegations, Mr. Nadli's criminal record, and the strength of the release plan.

[11] At the conclusion of the hearing, the Court found that the Crown had met its onus and ordered Mr. Nadli's detention. The Court delivered its reasons orally, and made reference to Mr. Nadli's criminal record:

> As can be seen by the criminal record that was tendered, the number of convictions for non compliance alone is overwhelming and that is a very good indicator, in my mind, that there is a substantial likelihood that he would commit

> further offenses while awaiting trial.
>
> *Transcript of bail review held November 15, 2012*, p.26, lines 11-17.

[12] The Court also confirmed that the warrant of committal should be endorsed to reflect that Mr. Nadli's detention was being ordered primarily because of his criminal record. *Transcript of bail review held November 15, 2012*, p.28, lines 5-9.

[13] As time went by, and again by the operation of section 525 of the *Criminal Code*, Mr. Nadli's bail status was reviewed again. He sought release at a hearing that proceeded on July 22, 2013. His application for release was again dismissed.

[14] Mr. Nadli's jury trial commenced on November 25, 2013. On November 28, the jury returned a verdict of not guilty on the count of break and enter and commit sexual assault causing bodily harm and guilty on the count of assault causing bodily harm. The jury was unable to reach a verdict on the count of sexual assault causing bodily harm. A mistrial was declared on that count.

[15] The matter was adjourned so that the Crown could decide whether it would proceed to a retrial, and to determine the best course of action as far as the sentencing hearing for the count on which Mr. Nadli had been found guilty.

[16] A few weeks later the Crown confirmed it would proceed to a retrial, and asked that sentencing on the other count be adjourned to proceed after the completion of the trial on the sexual assault causing bodily harm charge. Mr. Nadli then brought another application for bail. That application was dismissed on December 19, 2013. The retrial was scheduled to proceed commencing October 14, 2014.

[17] Early in 2014, Mr. Nadli indicated an intention to change his plea on the count of sexual assault causing bodily harm. His former counsel was granted leave to be removed from the record and new counsel took over. On March 24, 2014, Mr. Nadli re-elected to be tried by a judge of this Court sitting alone. The matter was adjourned for plea to May 27, 2014.

[18] On May 27, 2014, Mr. Nadli entered a guilty plea to the charge of sexual assault causing bodily harm. He admitted the facts underlying the offence and a conviction was entered on that charge. Crown and Defence agreed that in light of this, a judicial stay should be entered on the count of assault causing bodily harm in application of the principles set out in *Kineapple* v. *The Queen*, [1975] 1 S.C.R. 729.

[19] Mr. Nadli's total remand time amounts to 744 days. That period can be broken down in two broad categories: from June 28 2012 until November 15 2012 (141 days), he was on remand by consent; from November 15, 2012 until July 11,

2014 (603 days) he was on remand as a result of his bail application having been denied primarily because of his criminal record.

B) OVERVIEW OF THE ISSUES

[20] Section 719 of the *Criminal Code* sets out the parameters that govern how much credit can be given for remand time at the time of sentencing. In summary, the legislative scheme operates as follows:

(a) Courts have discretion to give credit for remand time, but are to do so on a ratio of one day of credit for each day spent on remand (a 1:1 ratio)

(b) If circumstances justify it, courts may give credit for remand time on an enhanced basis, but at a ratio no greater than one and a half day of credit for each day spent on remand (a 1.5:1 ratio).

(c) Under certain circumstances, courts have no discretion to give credit for remand time on an enhanced basis. If credit is granted, it can only be granted on a ratio of 1:1. One of these circumstances is when an accused has been ordered detained primarily because of a previous conviction.

[21] This stems from Subsections 515(9.1), 719(3) and 719(3.1), of the *Criminal Code*:

> 515. (…)
>
> (9.1) if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.
>
> (...)
>
> 719. (…)
>
> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).
>
> (…)

[22] During submissions, counsel referred to the portion of Subsection 719(3.1) that limits credit that can be given for remand time to a ratio of 1:1 as "the cap". For simplicity's sake, in these Reasons, I will use that same expression.

[23] In light of the procedural history and provisions referred to above, the cap applies to Mr. Nadli from November 15, 2012 onward. There is discretion to give him enhanced credit on a ratio of 1.5:1 for his remand between June 28, 2012 and November 15, 2012, but not for his time on remand after November 15, 2012.

[24] Mr. Nadli argues that he nonetheless should be eligible for enhanced credit for the full period of time he has spent on remand. He argues, first, that Subsection 719(3.1) does not apply to his case. His position is that on a bail review held pursuant to section 525, a court does not have the power to make a written entry into the record pursuant to Subsection 515(9.1). He asks that the endorsement on the warrant of committal issued on November 15, 2012 be treated as a nullity and disregarded for sentencing purposes.

[25] In the alternative, Mr. Nadli argues that the portion of Subsection 719(3.1) that limits the discretion to grant him enhanced credit is of no force or effect because it contravenes, in several ways, the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[26] The Crown's response is that the Court did have the power to make the written entry into the record at the conclusion of the s. 525 bail review held November 15, 2012. Irrespective of that, the Crown also says that since the written entry was made, it must be given effect and cannot be set aside at this stage of the proceedings. As for the constitutional challenge, the Crown argues that subsection 719(3.1) does not contravene any *Charter* - protected right and that if it does, it is saved by section 1.

C) THE STATUTORY INTERPRETATION ISSUE

[27] Mr. Nadli's position is that Subsection 515(9.1) is not incorporated by reference in section 525 and as a result, a judge of this Court who presides over a bail review held pursuant to that provision has no power to make the endorsement that triggers the cap. This issue was not raised before the judge who heard the November 2012 bail review.

[28] The Crown argues that Mr. Nadli's interpretation of the relevant provisions is not correct. The Crown says that on a plain reading of the provisions, a judge holding a s. 525 bail review does have the power to make the impugned written entry into the record when it orders detention. The Crown also argues that even if Mr. Nadli's position is found to have merit, it cannot be given effect as part of this

sentencing hearing because it is not open to me to set aside a decision made by another judge of this Court.

[29] I agree with the Crown that the statutory interpretation issue cannot be properly addressed at this stage, as part of Mr. Nadli's sentencing hearing. In effect, Mr. Nadli is asking me to declare that what another judge of this Court did at an earlier stage of the proceedings is a nullity. This I cannot do. It is an argument that must be dealt with by the appellate court.

[30] Mr. Nadli has attempted to characterize the impugned entry into the record as only an "endorsement", as opposed to an "order", to justify why it would be open to me to set it aside. With respect, I do not think that it matters which label is used to describe the written entry into the record. One way or another, the fundamental fact remains that Mr. Nadli is asking this Court to disregard, or declare void *ab initio*, something that was done by this same Court at an earlier stage of these proceedings.

[31] The impugned entry, no matter what it is called, is not a merely a technical or clerical matter: it reflects the Court's reasons for ordering detention, something that can only be treated as a substantive matter, especially considering the significant consequences that it has at the sentencing stage. If that decision was made without jurisdiction, as Mr. Nadli asserts, then that is an error that can only be corrected by the Court of Appeal.

[32] That leaves Mr. Nadli's second line of argument to be considered. That is, the contention that the portion of subsection 719(3.1) that, in this case, triggers the cap, offends the *Charter* and is of no force and effect.

D) THE *CHARTER* ISSUES

[33] Mr. Nadli argues that the cap breaches several of his *Charter* protected rights: his right not to be denied reasonable bail without just cause under paragraph 11(e); his right not to be punished twice for the same offence under paragraph 11(h); his right not to be subjected to cruel and unusual punishment under section 12; and his right not to be deprived of his liberty except in accordance with the principles of natural justice under section 7. Mr. Nadli argues that none of these violations can be justified under section 1.

[34] Similar issues have been raised in other cases and disposed of by trial courts in various parts of the country. One of these cases is from this jurisdiction (*R.* v. *Shayne Arthur Beck*, 2014 NWTTC 09), and is currently under appeal before the Court of Appeal of the Northwest Territories (file #AP-2014-000004). Others are under appellate review in the Yukon (*R.* v. *Chambers* , 2013 YKTC 77) and in Ontario (*R.* v. *Safarzadeh-Markhali*, 2012 ONCJ 494). At the time of filing these

Reasons, no appellate decision has been issued on the constitutional validity of Subsection 719(3.1).

1. Overview of changes in the law bearing on the treatment of remand time at sentencing hearings

[35] The impugned provision was enacted as part of the *Truth in Sentencing Act*, S.C. 2009, c. 29. At Paragraph 20, I referred in very general terms to how the legislative scheme operates, but to put the constitutional issues raised in this case in a broader context, it is useful to summarize how remand time was dealt with prior to the enactment of the *Truth in Sentencing Act*, and underscore the main changes resulting from that legislation.

[36] Prior to the enactment of the *Truth in Sentencing Act*, section 719 of the *Criminal Code* stated that remand time could be taken into account at sentencing. The provision did not set out specific factors to be considered. It also did not place any limit on how much credit could be given.

[37] As a matter of course, courts routinely gave offenders credit for remand time on an enhanced basis. Often times this was done using a ratio of 2:1, and sometimes, an even greater one. There were also circumstances where credit was granted on a ratio lower than 2:1, or not at all.

[38] The rationale for enhanced credit being given for remand time included qualitative considerations (such as harsher detention conditions faced by remand prisoners compared to serving prisoners and lack of access to programs). It also included quantitative considerations (the fact that the time spent on remand is not time for which individuals can earn remission, unlike the time spent in custody as a serving prisoner).

[39] The Supreme Court had occasion to examine this practice in *R.* v. *Wust*, 2000 SCC 18. The case arose in the context of deciding what impact remand time should have on sentencing when the *Criminal Code* provides that a minimum jail term must be imposed for an offence. In examining that issue the Court reviewed the existing practices of sentencing courts in dealing with remand time. It expressed general approval of the practice of granting credit at a 2:1 ratio, and of the underlying rationale for doing so. The Court also took care to note that this was not a matter than should be approached on the basis of a rigid formula. *R.* v. *Wust*, *supra*, at para. 45.

[40] In summary, before the *Truth in Sentencing Act* came into effect, courts had a broad discretion to decide how much credit, if any, should be given to offenders for time spent in custody before sentencing. The general practice was, absent unusual circumstances, to grant credit on a ratio of 2:1. Remand time was treated as one of the many factors to be weighed by sentencing judges in arriving at their

decision. There was no requirement for sentencing courts to spell out exactly how much credit was being given for the remand time.

[41] The enactment of the *Truth in Sentencing Act* altered the legal landscape in a number of ways. First, it created a limit to how much credit could be given for remand time: courts can still give credit on an enhanced basis but cannot go beyond a ratio of 1.5:1. This in itself is a significant change.

[42] Another important change is that under the new regime, courts are required to be very specific as to how much credit is being given for the remand time. A sentencing judge must state what he or she has decided is a fit sentence; how much credit is being given for the remand time; and what further period of imprisonment is being imposed, if any. All this must be reflected on the warrant of committal. *Criminal Code*, subsection 719(3.3).

[43] The final change, and the one at issue here, is that, as mentioned previously, there are circumstances where sentencing judges do not have any discretion to grant enhanced credit for the remand time. The aspect of the legislation that is challenged here, more specifically, is the portion of subsection 719(3.1) that removes this discretion when the detention was ordered because of an offender's criminal record.

[44] The effect of the change, in Mr. Nadli's case, is this: under the law as it was before the enactment of the *Truth in Sentencing Act*, he would have had a reasonable chance of being given credit for his remand time on a ratio of 2:1. This would mean a credit of 1488 days (approximately 4 years).

[45] Under the law now in force, Mr. Nadli may be granted credit for his remand time on a ratio of 1.5:1 for the 141 days he was on remand between his arrest and November 15, 2012; this would represents credit for 211 days. For the balance of his remand time (603 days), by operation of the cap, he can receive credit on a 1:1 ratio. As a result, the maximum total credit he can receive for his remand time is 814 days.

[46] If the cap is found to be of no force and effect because it infringes the *Charter*, Mr. Nadli could be granted enhanced credit, at a ratio of 1.5:1, for the full period of time he has been on remand. The maximum credit he could receive for his remand time would then be 1116 days. So practically speaking, for him, the the cap could make a difference of as much as 302 days in custody.

[47] I now turn to the specific *Charter* breaches that Mr. Nadli says result from the cap.

2. The right to bail

[48] Paragraph 11(e) of the *Charter* states:

> 11. Any person charged with an offence has the right
>
> (…)
>
> (e) not to be denied reasonable bail without just cause;
>
> (…)

[49] The Supreme Court of Canada has defined the scope of this provision, concluding that the protection it affords relates to two areas: the right not to be denied bail without just cause, and the right not to be denied reasonable bail. The first component has to do with the reasons for which bail can be denied. The second component has to do with the reasonableness of the terms imposed as part of bail. *R.* v. *Pearson*, [1992] 3 S.C.R., 665, p.689.

[50] Mr. Nadli argues that the cap breaches the right to bail of accused who have criminal records because it creates a strong disincentive for them to apply for bail. Such accused, he argues, are dissuaded from availing themselves of their right to seek bail because one of the potential consequences, should bail be denied primarily because of the criminal record, is that they will be foreclosed from seeking enhanced credit for their remand time.

[51] The Crown argues that this alleged breach of paragraph 11(e) is well outside the scope of the right as it was defined in *Pearson*. Crown argues that it is not for trial courts to broaden the scope of a *Charter* protection once its parameters have been defined by the Supreme Court of Canada.

[52] The Crown does acknowledge that lower courts have expanded somewhat upon the scope of the right as defined in *Pearson*. Specifically, courts have recognized that the right to have a bail hearing within a reasonable time frame is part of what Paragraph 11(e) protects. *R.* v. *Zarinchang*, 2010 ONCA 286, at paras 39-44; *R.* v. *Jevons*, 2008 ONCJ 559, pages 17-19. The Crown argues that this type of expansion is justified because the timing of a bail hearing is closely related to the overall reasonableness of the process whereby bail can be sought. The Crown says the same is not true for what Mr. Nadli asserts should now be added to the scope of this *Charter* protection.

[53] I agree with the Crown to this extent: giving effect to Mr. Nadli's position represents an extension of the scope of the right as delineated in *Pearson*. But that is, more often than not, how the scope and reach of *Charter* protections evolve. The scope of the right to counsel, of the right not to be subjected to unreasonable

search and seizure, to name only two, have evolved considerably over the years as new situations emerged, or new arguments were presented to, and dealt with by, trial courts. That is how the law evolves.

[54] An expansion of the scope of this right may be necessary when the statutory framework changes as significantly as it has with the enactment of the *Truth in Sentencing Act*. The combined effects of subsections 515(9.1) and 719(3.1) leads to an unprecedented link in our criminal justice process: now, a decision made at the bail stage of the proceedings has a direct and potentially significant impact at the sentencing stage. In effect, the decision made by the bail court removes discretion that the sentencing judge would otherwise have. That gives the bail provisions, and the bail process, a reach that goes far beyond what it was at the time *Pearson* was decided.

[55] The Crown has argued that subsection 719(3.1) is a sentencing provision that has nothing to do with bail, and therefore cannot possibly engage paragraph 11(e). The problem with that submission is that while subsection 719(3.1) is a sentencing provision, it is, by its very wording, linked unequivocally to the bail process. That being so, it is somewhat artificial to suggest that it has nothing to do with bail.

[56] An accused will not know, at the time of making the decision to seek bail or not, how many more days of imprisonment could result from a failed bail application resulting in a detention order based on the criminal record. But that accused will certainly know the risk: a denial of bail based on the criminal record will mean that credit for remand time will be limited to a 1:1 ratio instead of being limited to 1.5:1, a difference of 50%. The prospect of spending 50% more time in custody when all is said and done, is not insignificant. It is hard to see how it would not act as a deterrent to apply for bail.

[57] Is this deterrent enough to constitute a breach of paragraph 11(e)? In my view, it is. I am, in this regard, in substantial agreement with the reasons set out by Malakoe J. in *R.* v. *Beck*, *supra*, at paras 53 to 62.

[58] As Malakoe J. notes in *Beck,* there are other areas where the law recognizes that for *Charter* rights to be meaningful, people have to be free to exercise them without fear of being later punished or disadvantaged for having done so. The exercise of the right to remain silent cannot be used against the accused to undermine their credibility or suggest likely guilt. *R.* v. *Turcotte*, 2005 SCC 50; *R.* v. *Chambers,* [1990] 2 S.C.R. 1293; *R.* v. *Lafferty* 2012, NWTCA 11. Agents of the state are not permitted to attempt to dissuade a person from exercising their right to counsel or undermine the advice given by counsel. *R.* v. *Burlingham*, [1995] 2 S.C.R. 206. *Charter* protections are intended to be a shield. That shield cannot be turned into a sword against those they are intended to protect.

[59] The Crown argues that the difference between those examples from other areas of the law and the case at bar is that in those other examples, what is at issue is the fairness of the trial process itself. Admittedly, that is a difference. But the similarity – which, in my view, is where the focus of the analysis should be - is in the existence of a deterrent to exercising one's *Charter* right.

[60] If the goal is to ensure that *Charter* rights are not undermined by dissuading people from exercising them, the effect of the impugned provision is comparable to the other examples referred to above. To use the right to silence as an example, if an accused knows that remaining silent is something that can later be used by the Crown to undermine their credibility at trial, or to suggest that if they remained silent, they must be guilty, then that accused may be very hesitant to exercise that right. That accused would, in a sense, have to engage in a "cost-benefit" or "risk assessment" analysis with respect to the exercise of his or her rights. Similarly, if an accused person knows that one of the potential costs of having applied for bail is an automatic reduction in the credit that he or she might be able to receive for the remand time, that accused must engage in the same "cost-benefit", risk assessment exercise.

[61] This is especially so in light of the Supreme Court of Canada's decision in *R.* v. *Summers*, 2014 SCC 26, and its interpretation of what circumstances can, under subsection 719(3.1) justify enhanced credit. The Court found that there is no need for the offender to establish exceptional circumstances before he or she can seek enhanced credit. The Court has also found that in itself, the inability to earn remission is a sufficient basis for courts to grant credit on a ratio of 1.5:1. *R.* v. *Summers*, *supra*, at para. 71.

[62] In light of this decision, the reality is that a majority of offenders can reasonably expect to be granted credit for remand time at a 1.5:1 ratio. Taking the risk of applying for bail, being unsuccessful, and losing the ability to get enhanced credit then becomes a meaningful deterrent to seeking bail.

[63] The Crown points out that this prospect did not deter Mr. Nadli from seeking bail. That is true but it does not assist the Crown because it does not establish that the provision is not a meaningful deterrent to others. Those who simply choose to remain on remand by consent rather than take the risk will not challenge the legislation. Mr. Nadli's case is a proxy for the cases of all those who are choosing to forego their right to seek bail rather than risk being subjected to the effect of the impugned provision.

[64] The Crown also notes that there is no constitutional right to be given enhanced credit for remand time. Again, that is true. But the question is not whether an accused has the *right* to enhanced credit. The question is whether an accused has the right to make the decision to seek or not seek bail without having

to be concerned about being subjected to negative consequences if and when the case reaches the sentencing stage.

[65] The Crown is correct: in law, there is no guarantee that an accused will in fact be granted enhanced credit if that accused has not sought bail. But what is certain is that an accused who does apply for bail and fails because of a criminal record is foreclosed from seeking enhanced credit. That accused is foreclosed from seeking something that would be available but for the bail application being made. Whether one has a constitutional right to enhanced credit for remand time is not the point. The point is that those captured by the impugned provision suffer a significant disadvantage for having exercised their constitutional right.

[66] The Crown argues that the disadvantage in question stems from the reason why detention was ordered, and not from the fact of having sought bail. With respect, that is a distinction without a difference, from a practical point of view. The risk of being faced with the consequence only arises if the accused applies for bail.

[67] I conclude that the impugned provision does breach paragraph 11(e) of the *Charter*. I recognize that this constitutes an extension of the scope of the provision as defined in *Pearson*, but I find it is a justified expansion given the changes in the legal landscape since that case was decided. To be meaningful, *Charter* rights must be interpreted in a way that prevents the state from implementing measures that dissuade citizens from exercising those rights.

3. The right not to be punished twice for the same offence

[68] Paragraph 11(h) of the Charter reads as follows:

> 11. Any person charged with an offence has the right
>
> (…)
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried and punished for it again;
>
> (…)

[69] As mentioned already, by operation of the cap, the further term of imprisonment imposed on Mr. Nadli at this sentencing could be as much as 302 days longer than if he receives credit on a 1.5:1 ratio for the totality of his remand time. He argues that this infringes his right not to being punished twice for the same offenses.

[70] The first issue to be addressed is whether paragraph 11(h) is even engaged. The Crown says that it is not because remand time is not part of the punishment imposed for an offence.

[71] The Supreme Court of Canada has commented on what might constitutes a "punishment" for the purposes of paragraph 11(h):

> In its ordinary sense, "punishment" refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence (…)
>
> This does not mean, however, that "punishment" under ss. 11(h) and 11(i) necessarily encompasses every potential consequence of being convicted of a criminal offence, whether that consequence occurs at the time of sentencing or not. A number of orders can be made by a sentencing court, for example an order for forfeiture, a firearm prohibition, a driving prohibition, or an order for restitution. It is beyond the purview of this appeal to determine whether or not any of these consequences will constitute a punishment. As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principle of sentencing.
>
> *R.* v. *Rodgers*, [2006] 1 R.C.S. 554, at paras 62-63.

[72] The Crown points to the jurisprudence of the Supreme Court of Canada that has examined the nature of remand time in other contexts, and argues that with very few exceptions, that court has consistently held that the time spent on remand does not form part of the sentence. Therefore, the Crown says, remand time does not constitute "punishment" and cannot engage paragraph 11(h).

[73] There is little doubt that when imprisonment is imposed for an offence, that constitutes "punishment". But that does not assist in deciding how remand time, which is imprisonment that arises in a different context and for other reasons, should be characterized for the purposes of this provision.

[74] The Crown argues that remand time cannot engage paragraph 11(h) because it is not generally considered to be part of an offender's sentence. There is support for that position in *R.* v. *Matthieu*, [2008] 1 R.C.S. 723, at paras 17-19.

[75] There are reasons why, as evoked in *R.* v. *Mathieu*, that approach makes sense. First, the *Criminal Code* provides that a sentence commences on the day it is imposed. That would, on its face, appear to exclude remand time. Second, pre-trial custody serves a purpose that is different from imprisonment imposed at sentencing. Pre-trial custody is preventive, not punitive. In addition, conceptually, it is difficult to consider pre-trial custody as part of the punishment for an offence since it is time that the accused spends in custody while still presumed innocent.

All this suggests that remand time is not part of the sentence, but rather, is a factor to be taken into account in determining the sentence.

[76] Despite this, there have been situations where remand time has been deemed to be part of the sentence. In *R.* v. *Wust*, *supra*, the Supreme Court of Canada concluded that it should be taken into account and deducted from what would otherwise be the mandatory minimum sentence imposed for an offence. The Court outlined the rationale for this as follows:

> (…) while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by operation of s. 719(3). The effect of deeming such detention punishment is not unlike the determination, discussed earlier in these reasons, that time spent lawfully at large while on parole is considered nonetheless a continuation of the offender's sentence of incarceration.
>
> *R.* v. *Wust*, *supra*, at para. 41.

[77] *R.* v. *Fice*, [2005] 1 S.C.R. 742 provides another example of remand time being considered, effectively, as part of the total punishment imposed for an offence. The issue in that case was whether a conditional sentence was an available option to the sentencing court. At the time, one of the conditions for such a sentence to be available was that "the court impose a sentence of imprisonment of less than two years". The sentencing judge had concluded that but for the remand time, a sentence of imprisonment in the penitentiary range would have been appropriate, but once the remand time was taken into account, the further jail term imposed should be under two years. The sentencing judge decided that the further jail term imposed could be served as a conditional sentence.

[78] The Supreme Court of Canada concluded that for the purposes of determining the availability of a conditional sentence, the credit given for the remand time must be taken into account. In other words, the availability of a conditional sentence depends on whether the sentence would be less than two years *before* any credit is given for the remand time:

> Applying the reasoning in Wust, to the issue of this case, I conclude that the time credited to an offender for time served before sentence ought to be considered part of his or her total punishment rather than a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence. If the credit for time served awarded by the sentencing judge in this case is considered part of the respondent's total punishment, it is clear that this global sum of 50 months' imprisonment (three years pre-sentence plus 14 months post-sentence) is in the penitentiary range, this rendering a conditional sentence an impossibility. Treating pre-sentence custody as part of the total punishment imposed also accords with the fact that, for the purposes of precedent, the respondent's "sentence" for the offence she committed will generally be

> understood to be the global sum of 50 months, rather than the 14 months actually imposed by the sentencing judge.
>
> *R.* v. *Fice*, *supra*, para. 21.

[79] *Wust* and *Fice* arose before the enactment of the *Truth in Sentencing Act*, but in my view, the reasoning from those cases still applies. If anything, the fact that there is now a requirement for sentencing judges to spell out in detail, and record on the warrant of committal, what the sentence would have been but for the remand time, how much credit is being given for the remand time, and what the further term of imprisonment is, bolsters the notion that, in the words of Arbour J. in *Wust*, pre-trial detention, while originally imposed for preventive reasons, "is, in effect, deemed part of the punishment following the offender's conviction".

[80] I conclude that remand time, for the purposes of the application of section 719, should be considered part of the overall punishment given to an offender and that for that reason, paragraph 11(h) of the *Charter* is engaged.

[81] The Crown argues that prior convictions have long been recognized to be properly taken into account as an aggravating factor on sentencing, and that this has not been found to offend the rule against double punishment. This, the Crown suggests, supports the notion that depriving an offender of enhanced credit for remand time based on his or her criminal record also does not constitute double punishment.

[82] As noted by the Crown, the law in this jurisdiction, even before section 719 was amended, was to the effect that sentencing courts should be cautious, in taking criminal records into account at a sentencing, not to use them both as an aggravating factor and as a reason to give less credit for the time the offender spent on remand. *R.* v. *Sabourin*, 2009 NWTCA 6.

[83] There is no doubt that a criminal record is one of the factors that is relevant to the very individualized sentencing process, and that it is proper to take it into account in deciding what a fit sentence is. That does not offend paragraph 11(h). *R.* v. *Angelillo*, 2006 SCC 55. But to have the criminal record automatically result in the further term of imprisonment imposed on an offender being 50% longer than what it would have been but for the criminal record, is, in my view, quite different.

[84] In *R.* v. *Chambers*, *supra,* Ruddy J. concluded that subsection 719(3.1) did not offend paragraph 11(h) of the *Charter*. But the portion of the provision that was at issue in that case was the one that removes discretion to grant enhanced credit for remand time when someone was detained following an alleged breach of a release condition, or the alleged commission of a further offence while on bail. That situation engages different considerations because in that type of situation, the

detention is not based on prior convictions, something for which the offender has already been punished.

[85] In *R.* v. *Safarzadeh-Markhali*, *supra*, the Court concluded that section 719(3.1) contravenes paragraph 11(h), because the criminal record is both an aggravating factor on sentencing and something that limits the amount of credit that can be given for the remand time:

> Binding appellate authority requires me to find his record to be a significant aggravating feature on sentence. The operation of section 719(3.1) as presently worded, together with the s. 515(9.1) endorsement, require that I restrict Mr. Safarzadeh-Markhali to 1:1 credit for his pre-sentence incarceration. The combined operation of the common law and the impugned portion of the statute require me to penalize the applicant twice for his previous criminal convictions.
>
> *R.* v. *Safarzadeh-Markhali*, *supra*, at Paragraph 26.

[86] This suggests that the double punishment arises because the criminal record is having both the effect of increasing the sentence imposed, and of limiting the credit that is available to the offender for the remand time. I agree that the provision gives rise to double punishment, but for a different reason.

[87] Paragraph 11(h) of the *Charter* states that a person who has been found guilty and punished for an offence has the right not to be punished for that offence again. The offender has already been punished for the offenses that appear on his or her criminal record. Then, if detained because of that record on a new offence, that offender automatically and in all cases gets less credit for remand time. That offender is automatically imprisoned longer only because his previous convictions. He is punished a second time for those convictions. The way I see it, that is where the breach of paragraph 11(h) arises.

[88] This case offers a good illustration. Mr. Nadli was convicted and sentenced for each of the offenses that appear on his criminal record. That record includes numerous breaches of court orders, for which he received various sentences, including jail terms. The record, and in particular the large number of breach convictions, was at the root of the Court's conclusion, in November 2012, that Mr. Nadli could not be released on bail. Today, by operation of subsection 719(3.1), he stands to spend as many as 302 more days is custody solely because of the impact that his earlier convictions had at the bail stage. He is being punished again for those breaches. In my view, this is where double punishment arises and this is why the provision contravenes paragraph 11(h).

4. Sections 7 and 12 of the *Charter*

[89] Mr. Nadli argues that the impugned provision also offends sections 12 and 7 of the *Charter*. Section 12 provides that everyone has the right not to be subjected

to any cruel and unusual treatment or punishment. Section 7 protects everyone's right to not to be deprived of liberty except in accordance with the principles of fundamental justice.

[90] The essence of the protection afforded by section 12 is proportionality in punishment. Proportionality is the fundamental sentencing principle and has been recognized by the Supreme Court of Canada as a principle of fundamental justice. *R.* v. *Ipeelee*, [2012] 1 S.C.R. 433, at para. 36; *R.* v. *Anderson*, 2014 SCC 41, at para. 21. As a result, there is a certain overlap between the protections afforded by these provisions.

[91] In *R.* v. *Malmo-Levine*, [2003] 3 R.C.S. 571, the Supreme Court of Canada was asked to examine, among other issues, the constitutional validity of imprisonment as punishment for simple possession of marijuana. The Court confirmed that the standard to be applied in determining the constitutional validity of punishment is gross disproportionality. The Court rejected the idea that section 7 might give rise to a separate constitutional remedy against punishment based on a standard of mere disproportionality. *R.* v. *Malmo-Levine*, *supra*, at para. 160.

[92] I agree with the Crown, therefore, that the standard to be applied in examining the issue of proportionality as guaranteed by the *Charter* is the standard of gross disproportionality, whether the issue is examined under the purview of section 12 or under the purview of section 7.

[93] The threshold for establishing gross disproportionality is a high one. The analysis requires an examination of the penalty in the circumstances of the specific case. It may also require examining hypothetical situations:

> There are two aspects to the analysis of invalidity under s.12. One aspect involves the assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence and the personal characteristics of the offender. If it is concluded that the challenged provision provides for and would actually involve a sanction so excessive or grossly disproportionate as to outrage decency in those real and particular circumstances, then it will amount to a *prima facie* violation of s. 12 and will be examined for justifiability under s.1 of the Charter.
>
> (…)
>
> If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a Charter challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases.
>
> *R.* v. *Goltz*, [1991] 3 S.C.R., pp.505-506.

[94] The standard itself has been described as punishment that Canadians would find abhorrent or intolerable. *R.* v. *Morrissey*, [2000] 2 S.C.R. 90, at para. 26.

[95] The Crown argues that the effect of subsection 719(3.1), at most, is to result in an offender spending 50% more time in custody than if the cap did not apply. The Crown says this is not a difference that Canadians would find abhorrent or intolerable.

[96] In my view, the analysis is more complex than simply comparing the applicable ratios of credit that can be given with or without the cap. The examination of issues that have to do with proportionality in sentencing, including gross disproportionality, is informed by the overall legal framework that governs sentencing. All those principles are aimed at achieving the cardinal objective of proportionality. The more a rule has the effect of encroaching those principles, the more likely it is to lead to grossly disproportionate results.

[97] An important sentencing principle is the principle of parity: similar offenders who commit similar offenses in similar circumstances should receive similar sentences. *Criminal Code*, Paragraph 718.2(b). That sentencing principle is essentially obliterated by the cap.

[98] Suppose, for example, that two people rob a bank together. They are equally involved in the commission of the offence. They have very similar criminal records. After they are charged, the first one applies for bail and his ordered detained primarily because of his record. The second one, (perhaps because he is aware of the outcome of his accomplice's bail hearing) consents to detention. They are detained in the same remand center, and subjected to the same conditions. Their behaviour while on remand is unremarkable, and such that they would both have been entitled to remission had they been serving prisoners. The matter proceeds to trial a year later and they are both found guilty.

[99] Apart from whatever differences in their personal circumstances that may justify differences in their sentences, the first offender will get credit for 1 year for his remand time, while the other will get credit for 18 months. This means one will be in custody for six more months longer than the other. That offends the principle of parity. It does so because the reason one offender will spend more time in custody than the other is not because of a worse criminal record, a higher level of blameworthiness, or because of anything else about his personal circumstances or the circumstances of the offence. The basis of the difference is *only* that one had a bail hearing and the other did not. That reason is entirely disconnected from any of the factors that are properly taken into account in assessing what a fit sentence is.

[100] Quite apart from this, the cap applies to people detained primarily because of their record, irrespective of what type of convictions appear on the record, and irrespective of the impact that those convictions had on the bail court in assessing the various grounds for detention set out at section 515 of the *Criminal Code*. A criminal record may be very relevant to bail but marginally relevant to determining what a fit sentence is. Yet, once the detention is based on the record, the effect on sentencing is the same for all.

[101] For example, an offender may have a criminal record for failing to appear in court, and be detained on the primary ground based on that record. The cap will have exactly the same impact on that offender as it will on an offender who has an extensive record for crimes of violence and is detained for public safety reasons. There are multiple possible scenarios but no room for nuance or distinction between those scenarios when the cap is triggered. This, it seems to me, makes it impossible for the sentencing judge to give effect to the principles of sentencing in crafting a fit sentence.

[102] Gross disproportionality, as opposed to simple disproportionality, is a question of degree. Drawing the distinction between the two is not an exact science. For my part, I find that a provision that deprives someone of their liberty for 50% longer than would have otherwise been the case, based on something that has no relevance whatsoever to the objectives of sentencing and is at odds with fundamental sentencing principles, has a grossly disproportionate effect. That being so, it offends both section 12 and section 7 of the *Charter*.

[103] As I alluded to previously, there are other aspects of how the legislative scheme operates that may give rise to breaches of section 7. Given my conclusions about gross disproportionality, I do not need to decide the issue, but some aspects are worthy of mention.

[104] The first potential problem relates to the lack of availability of a review mechanism in the event that the operation of the cap is found to lead to a merely disproportionate sentence, as opposed to a grossly disproportionate one. As noted in *R.* v. *Malmo-Levine*, ordinarily, the remedy available to offenders against sentences that are unfit or disproportionate is an appeal. This is why, among other reasons, the Supreme Court of Canada decided that only the higher standard of gross disproportionality engaged the safeguards included in section 12:

> The test for review under s. 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal

> process the task of reviewing the fitness of a sentence.
>
> *R.* v. *Smith* , [1987] 1 S.C.R. 1045, at p. 1072.

[105] The offender who has been sentenced on a case where the cap applies has no remedy on appeal to correct any disproportionality that might arise from the application of that cap. Going back to my earlier example, the armed robber who was detained at his bail hearing and is sentenced to a further term of imprisonment that is 6 months longer than his accomplice's, has no remedy.

[106] The Crown argues that the remedy does exist, in that it is possible to have the written entry into the record made pursuant to subsection 515(9.1) reviewed. But the availability of such a review is far from clear on the face of the provisions. There is also something awkward about the concept of reviewing the endorsement, which reflects the *reasons* for the decision to detain, as opposed to the decision itself.

[107] But even assuming, without deciding, that as part of a bail review process, a court could confirm detention but remove the s. 515(9.1) endorsement, that does not amount to having a remedy, on appeal, against a sentence that is disproportionate. There are many reasons why a person may not avail themselves of the review mechanisms at the bail stage. Decisions made at the bail stage should not have the effect of depriving offenders of the right to be sentenced in accordance with the fundamental principle of proportionality, and of the right to have a disproportionate sentence reviewed on appeal.

[108] If a review of the endorsement is not be available, then even more problems arise. The absence of a review mechanism for something that has such consequences on a person's freedom is at odds with overarching precepts of our law. Decisions made by justices of the peace at a bail hearing would irrevocably bind courts of a higher level. That is at odds with the respective powers and jurisdiction of those levels of court.

[109] Finally, the operation of the cap may in some cases come into direct conflict with the principle of restraint, enshrined in Paragraph 718.2(e) of the *Criminal Code*, and the special responsibilities that the Supreme Court of Canada has said sentencing courts have when dealing with aboriginal offenders. That issue was discussed at some length in *R.* v. *Chambers*, *supra*, and will likely be addressed when the Court of Appeal of the Yukon renders its decision in that case.

[110] I mention these additional issues because they were referred to in the submissions presented on this case. But given my conclusions about the other alleged breaches, I make no finding as to whether these additional breaches of

section 7 have been established. My conclusion that the impugned provision infringes section 7 of the *Charter* is based on my finding that it leads to grossly disproportionate results, as set out above at Paragraphs 96 to 102.

5. Are the breaches justified pursuant to section 1 of the *Charter*?

[111] The last issue to consider is whether the impugned portion of subsection 719(3.1) is saved by section 1 of the *Charter*. The analytical framework that applies to that analysis was elaborated in *R.* v. *Oakes*, [1986] 1 S.C.R. 103. To be justified under section 1, the limit to the protected right has to be prescribed by law, it has to be imposed for a purpose which is pressing and substantial, and the means by which that purpose is furthered must be proportionate. These elements must be established by the government on a balance of probabilities.

[112] *Oakes* was decided almost 30 years ago, but the legal framework it established remains applicable. The Supreme Court of Canada had occasion, more recently, to restate how it operates:

> Under section 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s.1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s.1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively.
>
> *Canada (Attorney General)* v. *Bedford*, [2013] S.C.J. No.72, at para.126.

[113] Here, there is no question that the limit is prescribed by law. The two other branches of the section 1 analysis are the ones really at issue here.

[114] I accept, based on the materials filed, that the *Truth in Sentencing Act* was enacted to address pressing and substantial concerns about the treatment of remand time. These concerns included, among others, the substantial increase in the number of accused held on remand, and of the time that accused persons spend on remand in proportion of the total time they spend in custody. On this issue, I am in substantial agreement with the conclusions reached by Malakoe J. in *R.* v. *Beck*, *supra*, at paras 118-125.

[115] However, I am not satisfied that the Crown has met its burden on the third branch of the *Oakes* test. I am not satisfied that the Crown has established, that, as

far as the impugned portion of subsection 719(3.1), the means chosen to further the objective is proportionate.

[116] This branch of the test requires the examination of three issues: whether the limit is rationally connected to the purpose; whether the limit minimally impairs the right; and whether the law is proportionate in its effect.

[117] The rational connection between the concerns identified by the Crown and some aspects of the *Truth in Sentencing Act* are clearly established. For example, concerns about transparency are clearly connected to the requirement for sentencing courts to be very specific as to their treatment of remand time and to provide reasons for granting credit. Similarly, the fact that credit cannot be given on a ratio higher than 1:1.5 is clearly connected to concerns about accused persons delaying matters to accumulate more remand time and substantially reduce the sentence they will ultimately receive. The incentive to delay matters is reduced if one cannot hope to get credit at a ratio higher than 1.5:1. This in turn can contribute to reducing the number of people held on remand.

[118] But it must be remembered that this case is not about a constitutional challenge of the whole of the *Truth in Sentencing Act*. It is limited to the portion of subsection 719(3.1) that prevents enhanced credit being given to a person who was detained primarily because of this criminal record. It is difficult to see any rational connection between that specific aspect of the legislation and the concerns it was intended to address.

[119] Even if one were to accept the notion that some people who have extensive criminal records need to be incarcerated longer (whether this is for purely punitive reasons, or whether it is to ensure that they are incarcerated for long enough periods to have access to adequate programming), the problem is that it is not the criminal record itself that triggers the cap. Rather, it is the outcome of a bail application. The effect desired by Parliament (that accused with criminal records not have access to enhanced credit and spend more time in custody) can easily be circumvented. All an accused with a bad criminal record needs to do is not seek bail, and thereby preserve the ability to seek enhanced credit.

[120] In that sense, the impugned provision could have the effect of increasing the number of people on remand, because fewer accused will seek bail in order to avoid the potential consequences of detention order based on their criminal record. From the point of view of the pressing concern related to the increased number of people on remand, the impugned provision may make the situation worse, not better.

[121] The impugned provision also does not survive scrutiny under the minimal impairment analysis. It does not draw any distinction between different types of

criminal records. It does not make any allowance for distinctions based on how the convictions may have impacted the analysis at bail, nor does it allow for distinctions based on the actual ground for detention. A criminal record may have led to an accused's detention because it included several convictions for failure to attend court, raising concerns that the accused may not attend Court in the future if released. That is markedly different from the situation of an accused who has an extensive record for violence and a poor record of compliance with bail terms, which raises concerns of public safety. I mentioned this earlier in these Reasons in the context of the analysis of gross disproportionality, but it is also relevant to the minimal impairment test. As Malakoe J. put it, "the mesh of the catch net is simply too fine". *R.* v. *Beck, supra,* at para.137.

[122] I conclude that the impugned portion of subsection 719(3.1) is not saved by section 1 of the *Charter*.

E) CONCLUSION

[123] The portion of subsection 719(3.1) that reads "unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) is contrary to sections 7, 12, and Paras 11(e) and (h) of the *Charter*, and is not saved by section 1. I therefore declare this portion of subsection 719(3.1) to be of no force of effect. That is why, in imposing sentence on Mr. Nadli, I have not given it any effect.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
11 day of July, 2014

Counsel for the Crown: Susanne Boucher and Jennifer Bond
Defence Counsel: Peter Harte

S-1-CR-2012000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

PATRICK NADLI

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU
