Citation: *R.* v. *Chambers,* 2013 YKTC 77

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Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

DAVID FREDRICK CHAMBERS

Appearances:
Eric Marcoux — Counsel for the Crown
Brook Land-Murphy and Karen Wenckeback — Counsel for the Defence

REASONS FOR SENTENCING

[1] David Chambers has entered guilty pleas to offences of break, enter and commit assault, common assault and uttering threats. The facts relating to all three offences have been set out in detail in the Agreed Statement of Facts filed as Exhibit 1.

[2] To summarize, on July 28, 2011, Mr. Chambers kicked open the door to Allan Faulds' residence. He made attempts to drag Freda Brown, his common law partner, out of the residence. Mr. Faulds and Patrick Boucher intervened. During the altercation, Mr. Faulds was assaulted by Mr. Chambers and suffered some minor injuries about the face and neck area. Mr. Chambers took Ms. Brown back to their

home, where, she advises, he hit her twice in the face. Mr. Chambers was arrested shortly thereafter without incident.

[3] At the time of the offences, Mr. Chambers was subject to a peace bond pursuant to s. 810 of the *Criminal Code* requiring that he have no contact with Ms. Brown when under the influence of alcohol. Upon arrest, he provided a sample of his breath which registered at 163 milligrams in 100 ml of blood.

[4] In September of 2012, Mr. Chambers sent numerous threatening text messages to his cousin, Bonny Chambers, accusing her of having stolen money from him. Ms. Chambers has provided a victim impact statement indicating that the incident was extremely upsetting for her and her family. She would like an apology from Mr. Chambers, and for Mr. Chambers to get the help he needs to stay clean and sober. Through his counsel, Mr. Chambers has provided a written letter of apology filed as Exhibit 6.

Background:

[5] Mr. Chambers has a criminal record which includes convictions for a prior spousal assault in 2006 along with two other convictions for offences of violence; an assault causing bodily harm in 2002 and a common assault in 2008. In addition, he has a number of convictions for process offences. He has a history of both substance abuse and mental health concerns. These led to his admission into the Yukon Community Wellness Court. As a result, two reports are before the court, setting out in detail Mr. Chambers' background and circumstances: the Community Wellness Plan and the Community Wellness Summary.

[6] Mr. Chambers is a 31-year-old member of the Champagne Aishihik First Nation. He has a supportive family, including his parents and older sister. Although there is no indication of violence in the home during Mr. Chambers' childhood, there was nonetheless early exposure to alcohol and substance abuse. His parents are described as functioning alcoholics. Mr. Chambers had his first drink at age 9; was using regularly by age 13; and was a self-described alcoholic by age 17.

[7] Also at age 17, Mr. Chambers dropped out of school. He went on to complete a heavy equipment operator's course at Yukon College. He has held numerous employment positions, primarily in the construction industry, but his abuse of substances has hampered his ability to sustain employment beyond the short term.

[8] In addition to alcohol, Mr. Chambers has an extensive history of abusing drugs, including cocaine, crack cocaine, methamphetamine, ecstasy, heroin, synthetic heroin, and LSD. His considerable addiction issues have led, not just to loss of employment, but also to the majority of his criminal convictions, periods of homelessness, and mental health issues.

[9] Mr. Chambers has suffered periods of depression, including suicidal ideation culminating in one suicide attempt in 2003. He has also experienced drug induced paranoia and hallucinations leading to hospitalization in 2010. He has been prescribed a number of different medications including anti-psychotics. It is indicated that, at the time of the July 2011 offences, he was not taking his medication as prescribed.

Wellness Court:

[10] As noted, Mr. Chambers' difficulties with substance abuse and his mental health concerns made him eligible to participate in the Yukon Community Wellness Court (CWC). Between October 3, 2011 and March 2, 2012, Mr. Chambers performed exceptionally well in the program.

[11] While residing at the Adult Resource Centre (ARC) under strict conditions, he was able to maintain sobriety and take several positive steps towards managing his substance abuse problem. He attended and completed the Addictions Awareness Program, the Substance Abuse Management Program and Alcohol and Drug Services' Residential Treatment Program. He is described as having been an engaged and active participant.

[12] With respect to his mental health issues, Mr. Chambers participated in a psychological assessment. He was referred to Mental Health Services, but placed on a waitlist.

[13] In March of 2012, Mr. Chambers was given permission to leave the ARC and reside with his sister. It is at this point that things began to fall apart. He performed satisfactorily for a couple of months, but his attendance at both relapse prevention programming and the Respectful Relationships Program he began in May of 2012 are described as somewhat inconsistent.

[14] Ultimately, he failed to attend court on both May 7th and June 25th, following which his bail supervisor suggested a transition back to residency at the ARC. Mr.

Chambers fell out of contact with his treatment team shortly thereafter and disappeared, until his arrest in September of 2012.

[15] While in custody on remand, Mr. Chambers continued his efforts towards rehabilitation, voluntarily attending AA meetings and successfully completing the Violence Prevention Program.

Positions of the parties:

[16] Crown takes the position that a sentence of three to four years less credit for remand would be appropriate. Defence argues that a sentence of time served would be sufficient, in all of the circumstances.

[17] In addition to determining the appropriate disposition, at issue is the calculation of credit for time spent in pre-trial custody. Mr. Chambers, through his counsel, has filed an application challenging the constitutionality of s. 719(3.1) on the basis it violates ss. 7 and 15 of the *Charter*. In addition, he argues that the restriction to 1-to-1 credit following a s. 524 order does not apply as the order was limited to the revocation of process. As Mr. Chambers declined to show cause, he has remained on consent remand. No detention order was ever made.

Appropriate sentence:

[18] Counsel have filed a number of cases denoting a broad sentencing range, with a low of six months and a high of eight years. As is not unusual, none of the cases provided is directly on point, though they do provide some helpful guidance.

[19] The majority of these cases focus on the operation of s. 348.1 which mandates that the court consider an entry into a dwelling house where the house is known to be occupied and using violence or threats of violence against the occupants therein to be an aggravating circumstance on a break and enter. Such offences are often referred to as home invasions, a term made popular in media reports concerning violent attacks on individuals in their own homes to facilitate a robbery. While the circumstances of this case may not fall within what is commonly considered to be a home invasion as popularized in the media, there is little doubt that Mr. Chambers forced his way into Mr. Faulds home, knowing it to be occupied and that he used violence. Section 348.1 clearly applies.

[20] Pursuant to s. 718.2(a)(ii), Mr. Chambers' use of violence against his spouse is also a statutorily aggravating factor.

[21] Turning to the cases filed, at the upper end of the range is the B.C. Court of Appeal decision in *R. v. Moore*, 2008 BCCA 129, a case involving two assailants who broke into a private residence, demanding money. They proceeded to assault the owners and two of the couple's three children, before stealing some jewelry. The assaultive behaviour included punching, kicking, threats to kill, and an attempt to suffocate one of the residents with a pillow. The eight year sentence was upheld on appeal.

[22] Factually, the *Moore* decision is significantly more serious, but it stands as a reminder of the importance and paramountcy of the principles of denunciation and deterrence in home invasion cases, noting at paragraph 13:

> This Court has said that the sentencing principles of denunciation and deterrence must be given preferred attention with respect to these offences committed in circumstances involving violent entry into residential premises. Most recently, Frankel J. in *R. v. Vickers* [2007] B.C.J. No. 2471, 2007 BCCA 554, at para. 12, put it this way:
>
> > [12] This Court has repeatedly stated that deterrence and denunciation are the primary factors in sentencing violent crimes, particularly when these crimes violate the safety and security of a person's home. As Madam Justice Saunders recently stated in *R. v. Meigs*, [2007] B.C.J. No. 1659, 2007 BCCA 394 at para. 25, "it is a grave offence to enter another person's home without permission, and graver to enter the home and violate the occupant. The courts must and do impose stern sanctions for such crimes."

[23] The Yukon case of *R. v. Sidney*, 2008 YKTC 40, bears some similarities to the *Moore* case. It too involved a break and enter with an underlying offence of robbery. Two assailants attacked an 83-year-old man in his home, by spraying him in the face with pepper spray before assaulting and throwing him to the ground where he was held by the male assailant while Ms. Sidney ransacked the house looking for money. After being convicted at trial, Ms. Sidney was sentenced to five years. The extremely vulnerable victim and use of a weapon make this objectively more serious than the case at bar.

[24] Similarly, the facts in *R. v. Surge*, 2010 YKTC 123, are, in my view, also more serious. Mr. Surge entered pleas of guilty to offences including a break, enter and commit assault with a weapon. The facts indicate that Mr. Surge entered the home of his ex-girlfriend. He used rope to tie the front doorknob to a vehicle and used a china cabinet to barricade the back door to prevent escape. An axe was used in a threatening manner. There were three children in the home at the time of the offence. Mr. Surge was sentenced to 44 months in custody.

[25] In *R. v. Henry*, 2002 YKTC 62, the female complainant had observed an altercation involving the accused. When she returned to her residence to call the police, the accused followed her, kicked in her door and attacked her, striking her with fists and boots, causing serious injuries including a fractured nose and chipped tooth. Upon entering pleas of guilty, Mr. Henry received a sentence of three and a half years.

[26] In *R. v. Brace and Stewart*, 2008 YKTC 41, two assailants broke into a home, assaulted two occupants, and attempted to assault a third. Serious injuries were caused to the mouth of one victim, requiring several stitches. Upon being convicted at trial, the accused were sentenced to three years.

[27] Although not filed, reference was also made to my decision in *R. v. Rutley*, 2013 YKTC 19, in which I sentenced Mr. Rutley, after conviction at trial, to serve a jail term of four years. However, I would note in the *Rutley* case the offence underlying the break and enter was one of aggravated assault, with the attack resulting in extremely serious injuries including the loss of three teeth and a broken arm requiring surgical intervention.

[28] Again, I view the level of violence and injuries caused in the *Henry*, *Brace/Stewart* and *Rutley* cases to be objectively more serious than the case at bar. I would note that each involved the more serious underlying offences of either assault causing bodily harm or aggravated assault. In addition, there was no acceptance of responsibility in either the *Brace/Stewart* or *Rutley* cases.

[29] Defence has filed three cases reflecting the lower end of the sentencing range for cases in which s. 348.1 is a factor. Of these, I find the *R. v. Knezacek*, 2007 SKCA 116,

decision out of the Saskatchewan Court of Appeal to be of little to no assistance as the facts are not outlined in sufficient detail to allow for a meaningful comparison.

[30] In *R. v. Omilgoituk*, 2011 NLCA 77, the complainant went to the accused's residence to see if he required assistance. He left after being assaulted by the accused, but was followed home by the accused who threatened to killed the complainant. The accused then kicked his way into the home where he punched the complainant in the face a few times. Mr. Omilgoituk entered an early guilty plea to a break, enter and commit common assault and was sentenced to 12 months. The Newfoundland and Labrador Court of Appeal upheld the sentence on appeal, although characterized it as being on the very low end of the range.

[31] In the *R. v. Silverfox*, 2009 YKTC 96, the accused was on release in relation to an allegation of spousal assault. Terms of his release included no contact with his spouse and that he not attend their shared residence. In contravention of his conditions, Mr. Silverfox dragged his spouse into his vehicle against her express wishes. He drove to the family home, damaging the exterior stairs with his vehicle. His spouse was able to get in the house and lock the door. Mr. Silverfox kicked at the door, demanding entry. When that proved unsuccessful, he climbed into the house through the wood chute. Once inside, he punched his spouse in the head then struck her with the phone. Mr. Silverfox was sentenced globally to time served with credit for 6 months in pre-trial custody; however, I noted in my decision that the appropriate sentence was one of 12 months. The ensuing reduction in sentence was to ensure appropriate credit to reflect Mr. Silverfox's successful completion of the Domestic Violence Treatment Option Program.

[32] Factually, I am of the view that Mr. Chambers' actions place him closer in the range to the *Silverfox* and *Omilgoituk* cases. In so concluding, I am not in any way suggesting that Mr. Chambers' behaviour was not serious and deserving of sanction; merely that his behaviour is factually more similar to that seen in *Silverfox* and *Omilgoituk*. The offence underlying the break and enter for each is, as in Mr. Chambers' case, a common assault rather than the more serious offences of violence seen in the majority of the remaining cases filed. There are also similarities in the nature of the assaultive behaviour seen in *Silverfox*, *Omilgoituk* and the case at bar, namely punches resulting in minor to no injuries. All three cases have a domestic backdrop, and Mr. Silverfox, like Mr. Chambers, was subject to a no contact provision.

[33] However there are also differences between the three cases, which, in my view, warrant placing Mr. Chambers in a somewhat higher range. These include the fact that Mr. Chambers has a prior related record with three prior convictions for violent offences including a prior conviction for spousal assault. In addition, Mr. Chambers assaulted more than one individual. When I consider these factors, I am satisfied that the appropriate starting point for Mr. Chambers would be a sentence of 18 months.

[34] I must next consider the impact of Mr. Chambers' participation in Community Wellness Court. While it is true that he did not successfully complete the program in its entirety, he, nonetheless, spent a not insignificant period of time in the program, and for at least five months of that time, he performed exceptionally well.

[35] The Community Wellness Court was established in 2007 to offer a therapeutic alternative to offenders for whom an addiction to drugs or alcohol, a mental health

problem, and/or a cognitive or intellectual impairment such as Fetal Alcohol Spectrum Disorder are significant contributing factors in their offending behaviour. To participate in the program, offenders must accept responsibility and agree to abide by strict conditions under close supervision. An individualized Wellness Plan is developed for each participant combining treatment and programming resources along with appropriate supports intended to maximize the likelihood of success. Sentencing is deferred until completion of the Wellness Plan, with ongoing check-ins with the court to assess performance and compliance.

[36] Community Wellness Court demands much of its participants. In return, offenders who participate will see a significant reduction in their ultimate sentence, reflecting their progress and participation in the program. While jail is possible, community dispositions are the norm for offenders who successfully complete the program.

[37] In this case, Mr. Chambers did not successfully complete his Wellness Plan; however, he is entitled to credit for partial completion in recognition of his efforts towards his rehabilitation and the time spent under close scrutiny subject to strict conditions. Clearly, Mr. Chambers' partial completion of Wellness Court does not move him into the range of a community-based disposition. Rather, a reduction of his jail term would, in my view, serve as appropriate recognition of his efforts in Wellness Court. With credit for partial completion, I am satisfied that a global sentence of 15 months is appropriate in all of the circumstances to be followed by a term of probation of 12 months to allow Mr. Chambers to continue his efforts towards his rehabilitation.

Remand credit:

[38] This effective sentence of 15 months must in turn be reduced to reflect credit for time spent in pretrial custody. It is this determination of appropriate credit for remand pursuant to ss. 719(3) and (3.1) that is the crux of this decision.

[39] Mr. Chambers has spent two distinct periods of time in custody. The availability of enhanced remand credit for the first period of 64 days, from July 29, 2011 to September 29, 2011, is not contentious. However, Mr. Chambers was re-arrested on September 24, 2012 in respect of new charges under s. 264.1(1) and 145(3). His earlier process was revoked pursuant to s. 524(8) of the *Code*, and he consented to his remand until released on May 17, 2013, pending this decision. This amounts to an additional 236 days spent in pre-trial custody, for a total of 300 days.

[40] Crown takes the position that remand credit for the second period of 236 days is limited to 1:1 by operation of s. 719(3) and (3.1).

[41] Defence takes the position that Mr. Chambers should be entitled to enhanced credit of 1.5:1 for this second period of pre-trial custody, arguing, firstly, that as there was a revocation but no detention order made pursuant to s. 524(8), the court is not limited to 1:1 credit by virtue of s. 719(3.1). In the alternative, defence has brought a multi-pronged *Charter* challenge seeking to strike down the portion of s. 719(3.1) which limits credit to 1:1 where either s. 515(9.1) or 524 are engaged.

Amendments to s. 719 by the *Truth in Sentencing Act*:

[42] The relevant provisions of s. 719 are a result of the *Truth in Sentencing Act,* S.C. 2009, c. 29 which was passed in late 2009 and came into force on February 22, 2010.

Its chief impact is in placing statutory limits on the credit courts are able to give offenders for time spent in custody before sentencing, by setting a hard ceiling of 1.5:1 days credit for each day spent in custody and stipulating that, absent justifying circumstances and in certain prescribed situations, credit should be calculated at a ratio of 1:1.

[43] Sections 719(3) and (3.1) read:

> 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 to be 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).

[44] The limits on pre-sentence custody imposed by sections 719(3) and (3.1) have been the subject of significant judicial scrutiny, including, recently, by the Courts of Appeal of Nova Scotia (*R. v. Carvery,* 2012 NSCA 107, currently under appeal to the Supreme Court*)*, Manitoba (*R. v. Stonefish,* 2012 MBCA 116*)*, Ontario (*R. v. Summers,* 2013 ONCA 147, also under appeal to the Supreme Court), Alberta *(R. v. Johnson*, 2013 ABCA 190) and British Columbia (*R. v. Bradbury*, 2013 BCCA 280, leave to appeal to the Supreme Court being sought). With the exception of the British Columbia Court of Appeal, these courts have affirmed the approach set out in this jurisdiction by Cozens C.J. in *R. v. Vittrekwa,* 2011 YKTC 64, and found that 'circumstances' justifying enhanced credit include the loss of an inmate's opportunity to earn statutory remission. In the Yukon, at least, this has had the result that time spent in pre-trial custody is

credited at 1.5:1 for most offenders. In *Bradbury,* while agreeing that s. 719(3.1) does not require "exceptional" circumstances, a majority of the court held that circumstances justifying enhanced credit do not include "commonly held circumstances" universal to the majority of offenders, including loss of remission. Rather, enhanced credit requires "individual qualitative circumstances".

[45] The impact of the *Bradbury* decision on the Yukon practice was considered by the Yukon Supreme Court on a summary conviction appeal in *R. v. Mulholland*, 2013 YKSC 77 (currently under further appeal to the Yukon Court of Appeal). At the Crown's urging, Gower J. issued preliminary reasons, to be followed by more comprehensive written reasons, finding that he preferred the reasoning in *Carvery*, *Stonefish*, *Summers* and *Johnson* to that in *Bradbury*. In so concluding he noted at para 7:

> First, the loss of remission or parole eligibility does have an aspect of being an "individual qualitative circumstance", simply by virtue of the fact that it is not automatic and must be earned by each offender. While it may be correct to say that the vast majority of offenders earn such remission, the result is nevertheless not an automatic outcome. Second, with great respect, I find it difficult to distinguish between a circumstance which must be "outside of the common experience of most offenders in remand custody" and an "exceptional" circumstance, which the majority agreed is not required.

[46] Pursuant to *Mulholland*, therefore, the *Vittrekwa* approach remains the applicable approach for calculating remand credit in the Yukon.

[47] As noted in *Vittrekwa*:

> [70] This does not mean that I find the presumptive 1:1 credit ratio set out in s. 719(3) should be replaced by a presumptive 1.5:1 credit ratio. The presumption remains at 1:1, unless circumstances justifying enhanced remand credit are brought to the court's attention. In order to receive enhanced credit, an offender must establish on a balance of probabilities

> that he or she has suffered the loss of their opportunity to earn statutory remission, and that, had this opportunity existed, he or she would have, in all likelihood, received this statutory remission.

[48] Evidence before the court in *Vittrekwa* confirmed that the determination of earned remission at the Whitehorse Correctional Centre looks at three categories of offender conduct while in custody: behaviour, participation in programming, and participation in employment.

[49] I have been provided with two reports prepared by the Whitehorse Correctional Centre in relation to Mr. Chambers' conduct while on remand, located at tabs D1 and D2 of the Book of Authorities and Documents of the Defendant, Volume II. By all accounts, he appears to have been a model inmate. He is described as polite and well-behaved with no incident reports, and noted to have participated, at his own request, in both employment and programming opportunities. I have little difficulty concluding that Mr. Chambers would, indeed, have earned statutory remission had the time spent in custody been spent as a serving rather than a remand prisoner.

[50] In addition, the recent decision of the Yukon Court of Appeal in *R. v. Cardinal,* 2013 YKCA 14, provides support for the proposition that other factors, including delay in sentencing, positive rehabilitative prospects and *Gladue* factors may also be considered as circumstances justifying enhanced credit (see para. 18 – 26).

[51] In the case at bar, although released in May of 2013, Mr. Chambers was required to spend additional time in custody on remand between the commencement of the sentencing hearing in February and his release date in May to allow for counsel on both sides to prepare their arguments and materials in relation to these important issues and

for me to prepare this decision. In addition, his partial completion of the CWC Program and his ongoing efforts at rehabilitation while in custody demonstrate positive prospects for his rehabilitation. Finally, pursuant to *Cardinal*, Mr. Chambers' Aboriginal background is yet another relevant factor in assessing whether the circumstances justify enhanced credit.

[52] On balance, the cumulative effect of these factors, along with the loss of remission, more than justify the granting of enhanced credit of 1.5:1 in this case where such credit can, in fact, be granted. There is no issue that Mr. Chambers is eligible for, and, based on my findings, entitled to enhanced credit for the first period of 64 days spent in pre-trial custody for total credit of 96 days. However, a determination of his eligibility to enhanced credit for the second remand period of 236 days requires a finding in relation to defence's statutory interpretation argument about the interplay between s. 719(3.1) and s. 524(8) and their constitutional challenge attacking the validity of the limiting provision in s. 719(3.1).

Statutory Interpretation Argument:

[53] On its face, a detention order under s. 524(8) appears to be a two stage process. In the first stage, the justice determines, on a balance of probabilities, whether the accused has contravened or had been about to contravene his release order, or if there are reasonable grounds to believe that he has committed an indictable offence while on release. An affirmative finding leads to the mandatory revocation of the underlying process. This, in turn, leads to the second stage of the 524 process, which is effectively a reverse-onus show cause hearing on all charges before the court. If the accused, having been given a reasonable opportunity to do so, does not show cause why his

detention is not justified within the meaning of s. 515(10), there will be a detention order. If cause is shown, there will be a new release.

[54] Here, it appears that Mr. Chambers never proceeded through the second stage of the s. 524(8) process, as he never commenced his bail hearing. As noted on the information, his detention between court dates has been via consent remand. There was never a formal detention order made pursuant to stage two of the s. 524(8) process. This raises the obvious question about whether Mr. Chambers was "detained in custody under subsection 524(4) or (8)" as opposed to remanded in custody under s. 516. If the latter is true, it is arguable that he would be eligible for remand credit at 1.5:1 on the basis he was not "detained in custody under subsection 524(4) or (8)" as required by the limiting clause in s. 719(3.1).

[55] While defence counsel raised this issue, it was not strenuously argued; nor was any compelling authority provided. It is nonetheless an important issue.

[56] In opposing defence's argument on this point, Crown relies on the case of *R. v. Atkinson* (2003), 170 O.A.C. 117 out of the Ontario Court of Appeal. At issue in that case was the interpretation of the phrase "on the making of an order to detain the offender in custody under subsection 515(6)" contained in s. 742.6 in relation to the procedure on breach of a conditional sentence order. Concern was raised regarding the time period between an offender's arrest upon breach of a CSO and the order for detention where there was a delay between arrest and the bail hearing. Rosenberg, J. found as follows on this point:

> [20] In my view, for the purpose of s. 742.6 it does not matter whether there has been a formal show cause hearing. I do not find it helpful to distinguish between the order made detaining the offender pending his attempt, if any, to show cause why he should be released and the "formal" detention order made after the show cause hearing. In either case, the justice makes an order detaining the offender in custody. The main purpose of the reference to s. 515(6), in my view, is a procedural one, to place the burden on the offender to show cause for his release. Whether he is detained in custody while he is given an opportunity to do so or whether he is detained after he has been given the opportunity, he can fairly be said to be detained under s. 515(6).

[57] Crown asserts that the issue in *Atkinson* is analogous to the question before me in relation to the interplay between s. 524 and the limiting provision in s. 719(3.1). However, it should be noted that the court in *Atkinson* was concerned with whether the time spent in custody between arrest and the bail hearing could be applied against the offender's conditional sentence. The contrary finding, i.e. that the offender was not detained under s. 515(6) until formally detained at the bail hearing, would have resulted in the offender serving time in custody which could not be applied against his sentence. Clearly, this interpretation would have been unfair to the offender. It is well established that penal statues must, where there is ambiguity, be interpreted in favour of the accused.

[58] The situation before me is actually the reverse of, rather than analogous to, that of *Atkinson*. If I were to apply the reasoning in *Atkinson* and find that Mr. Chambers was "detained" pursuant to s. 524 notwithstanding the fact that he never proceeded to show cause and was never formally detained, the effect would be adverse to his interests as it would limit his remand credit eligibility to 1:1 pursuant to s. 719(3.1).

[59] In *Atkinson*, the court's ruling resulted in the offender serving less time in custody. The equivalent ruling in the case at bar would result in Mr. Chambers serving more time in custody.

[60] Furthermore, in *Atkinson*, Rosenberg J. concluded that the purpose of the reference to s. 515(6) was "procedural" in nature, intended to make clear the burden at show cause. The same cannot be said here. Neither the purpose nor the impact of the limiting provision in s. 719(3.1) can be described as procedural in nature. Rather they have a quantitative effect on an offender's ultimate sentence.

[61] For these reasons, it would neither be fair nor appropriate, in my view, to apply the reasoning in *Atkinson* to the question of whether Mr. Chambers was "detained" pursuant to s. 524(8).

[62] As noted, s. 524(8) sets out a two-stage process. Upon the justice being satisfied the accused has or had been about to contravene his release order, or there are reasonable grounds to believe that he has committed an indictable offence while on release, the revocation of process is mandatory. The same cannot be said of the detention order. The accused must be given a reasonable opportunity to show cause why he should not be detained. The practice in the Yukon has been for accused persons, who are not ready to proceed with their bail hearing at the time of the s. 524 revocation of process, to consent to their remand until such time as they are ready to proceed to show cause or the matter is resolved. Mr. Chambers chose to avail himself of this well-established practice.

[63] It must be remembered that the right to bail as enshrined in s. 11(e) of the *Charter* is the right of the accused. The notion of affording the accused a "reasonable opportunity" to show cause must be understood within this constitutional framework. Recent decisions out of the Ontario Superior Court of Justice have considered the question of whether an accused can be forced on to a bail hearing.

[64] In *R.* v. *Hudson*, 2011 ONSC 5176, Trotter J. stated the following:

> [18] …Part XVI was never designed to force an accused person into a hearing on such an important issue at an ill-advised or inopportune time. Section 516 places strict constitutionally guarded limitations on how long the Crown may seek to delay or postpone a bail hearing. But there is no corresponding limitation on how long an accused person may delay exercising his or her right to apply for bail. …

[65] After canvassing some of the legitimate reasons an accused may wish to postpone his or her bail hearing, he went on to conclude:

> [19] … For various reasons, an accused person may not wish to seek bail immediately, or even in the near future. And there is nothing wrong with this. There is no competing constitutional principle that requires the accused to seek release within a time frame set by the Crown. Similarly, and stemming from this, there is no justification for requiring an accused person to waive his or her rights under s. 11(e) of the Charter in order to suit the scheduling exigencies of the trial court. The same goals can be achieved in a different manner, one that better respects the right to bail.

[66] In *R. v. Reed*, 2013 ONSC 4247, Goodman J. adopted the reasoning in Hudson and confirmed:

> [21] The right to reasonable bail under the *Charter* confers a constitutional entitlement to an accused person. Thus an accused is not required in law to immediately pursue any or all of his or her rights at the behest of the Crown or for the general efficiency of the administration of justice. An accused is entitled to every reasonable opportunity to have a show cause hearing pursuant to Part XVI of the *Code*. I agree with Trotter J. and find that there is no legal or statutory compulsion upon the accused

> to either "run" a show cause hearing, waive bail or consent to detention if he or she does not wish to do so.

[67] I would adopt the reasoning in both *Hudson* and *Reed* as it relates to s. 524(8). Notwithstanding the use of the phrase "reasonable opportunity" to show cause, there is nothing in s. 524(8) to suggest that there is a time limitation under which the accused must proceed to show cause, and failing which he or she will be deemed to have been detained pursuant to s. 524(8). Such an interpretation would be contrary to s. 11(e) of the *Charter*, in my view. "Reasonable opportunity" must be interpreted as conferring the right to a full and fair hearing into the question of bail, and not as importing a time limitation on the right to seek bail.

[68] Mr. Chambers has chosen, as is his right, not to proceed to a bail hearing. He has, instead, consented to his remand. I find that he was never detained pursuant to s. 524(8). I further find that it would be improper for me to treat him as if he had been detained following a bail hearing either by applying the reasoning in *Atkinson* or on the basis he has somehow lost his "reasonable opportunity" to show cause by virtue of the passage of time.

[69] Having so concluded, I find that Mr. Chambers is not precluded from seeking enhanced credit for the second remand period by virtue of s. 719(3.1). While this would appear to resolve the issue of eligibility to enhanced credit, in the event that I may have erred in reaching my conclusion on this point, it is necessary for me to address the constitutional challenge which counsel have gone to such trouble to argue before me.

Constitutional Challenge:

[70] Because Mr. Chambers was the subject of s. 524 proceedings, the Crown argues he is excluded from being credited at anything higher than 1:1. Defence says this is unfair and, to the extent that would result in Mr. Chambers serving a greater amount of time in jail as a result of this exclusion, they argue that the limiting clause of s. 719(3.1) is inconsistent with both s. 7 and s. 15 of the *Charter* and ask for an order striking it down. Specifically, they say that in order to be *Charter*-compliant, I should make a declaration of invalidity such that s. 719(3.1) be amended to simply read:

> Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

[71] For ease of reference, I will refer to the balance of s. 719(3.1), namely the phrase "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)", throughout these reasons as 'the impugned portion of the provision'.

Section 7 Analysis:

[72] Section 7 of the *Charter* provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[73] An allegation of a s. 7 breach comprises two components to be established: (1) that the impugned legislation interferes with or limits the right to either life, liberty or security of the person; and (2) that the interference or limitation is contrary to a principle

of fundamental justice. The onus is on the applicant to establish both components on a balance of probabilities.

Affected Interest

[74] Defence asserts that the impugned portion of the provision interferes with or limits Mr. Chambers' liberty interest.

[75] The Crown takes the position that Mr. Chambers' liberty interest is not affected by the legislation in question such that s. 7 has no application; however, that position is, in my view, simply untenable. Given the largely positive reports filed about Mr. Chambers' behaviour and engagement with work and programming while in custody on remand, the obvious result of his being caught by the exclusion in s. 719(3.1) is that he will serve more time in jail than he would if he were not so caught.

[76] As previously stated, I am satisfied that a sentence of 15 months or 450 days is appropriate in this case. This, in turn, would be reduced in either case by credit of 96 days, representing the non-contentious first remand period of 64 days credited at 1.5:1, leaving a remanet of 354 days. If Mr. Chambers' situation had not been impacted by operation of s. 524, I would also have credited him at a rate of 1.5:1 for the second remand period of 236 days for an additional credit of 354 days, leaving no further time to be served. However, if credit for the second remand period is limited to 1:1 by operation of s. 524(8) in conjunction with the impugned portion of the provision, the remanet of 354 days would be reduced by 236 days, leaving 118 days still to be served.

[77] With a difference of approximately four months in custody, one can only conclude that the operation of the impugned portion of the provision infringes Mr. Chambers' right to liberty in a very real and very tangible sense.

[78] Mr. Chambers' situation is not unusual. This court has found that loss of earned remission is a circumstance justifying enhanced credit, and the vast majority of detained offenders being sentenced are receiving credit at something greater than 1:1. Although there is nothing before me on this point, I anticipate that the same can be said of offenders in Ontario, Nova Scotia, Manitoba and Alberta, following the appellate level decisions to the same effect in those provinces.

Principles of Fundamental Justice

[79] I am satisfied that s. 719(3.1) operates in such a manner as to deprive this offender of his right to liberty. The remaining question is whether the deprivation is in accordance with the principles of fundamental justice. The onus to show that it is not rests with the defence. They seek to demonstrate it on the following four grounds:

- The impugned portion of the provision subjects the applicant to double punishment;
- The impugned portion of the provision impermissibly lowers the burden of proof applicable to aggravating factors at sentencing hearings;
- The impugned portion of the provision offends the principles of proportionality and parity;
- The impugned portion of the provision is arbitrary and overbroad.

[80] I will address each of these separately. I recognize, however, that there is significant overlap between them, along with some uncertainty in the caselaw about

what level of deference to legislative choice each principle attracts and the analysis applicable to each. This was observed by a five-member panel of the Ontario Court of Appeal in *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, which is presently before the Supreme Court of Canada:

> [143] As we have already explained, three principles of fundamental justice are implicated in this case: arbitrariness, overbreadth and gross disproportionality. The application judge treated each of these principles as distinct concepts, as do we in the discussion that follows. However, we acknowledge that there is significant overlap among them. This has led to some confusion as to what level of deference the court should accord to legislative choice and what considerations govern at each step of the analysis.
>
> [144] For each principle of fundamental justice, the court must examine the relationship between the challenged provision and the legislative objective that the provision reflects. It does so using a different filter for each concept.

[81] Following a review of the different tests or filters applicable to each of principles, the Court acknowledged the following debate:

> [150] The fluidity of these concepts, particularly as they were described by the Supreme Court in *Clay*, has led some to question whether there is now only one principle of fundamental justice - gross disproportionality - or whether arbitrariness and overbreadth remain independent principles. …

The Court concluded that they do remain distinct, relying on the case of *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44, in which the Supreme Court considered each principle separately in the context of whether a safe injection site should be exempted from the application of federal drug laws. Hence, I will deal with each separately for the purposes of this decision.

1. Double punishment

[82] This principle of fundamental justice, often referred to as the prohibition against double jeopardy, is captured in s. 11(h) of the *Charter* and most often argued under that provision, which reads:

> 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 or punished again;

[83] The Crown raises an objection to this argument being made under s. 7 rather than under s. 11(h). However, I note that there is precedent for a double punishment argument under s. 7: see for example *R. v. Dobson* (1987), 22 O.A.C. 119 (C.A.); *R. v. Taylor*, 2005 YKTC 15.

[84] While I accept that an argument such as this one may be more frequently made pursuant to s. 11(h), I do not accept that the argument cannot also be made pursuant to s. 7. As with the overlap between s. 7 and s. 12, which will be discussed in the analysis with respect to gross disproportionality found below, section 7 is recognized as having the potential to be broader in scope than other provisions in the *Charter,* and there may be strategic reasons for choosing one provision over the other. I note as well that I do not understand the Crown to have suffered any prejudice by the fact that s. 7 was advanced rather than s. 11(h). Counsel received clear notice of the applicant's position and was able to respond to it without difficulty. In these circumstances, it is more appropriate, in my view, to deal with the argument on its merits.

[85] In asserting that the impugned portion of the provision violates the prohibition against double punishment, the applicant relies predominantly on *Whaling v. Canada (Attorney General),* 2012 BCCA 435. In *Whaling*, the offender became subject to the *Abolition of Early Parole Act* partway through serving his federal penitentiary sentence with the result that he was suddenly no longer eligible for accelerated day parole after serving one-sixth of his sentence. The Court found that the retrospective application of this legislation did breach Whaling's s. 11(h) right, as delayed parole eligibility has been recognized as a punishment and it was a sanction imposed after sentencing. The constitutionality of the prospective application of the legislation was not questioned.

[86] In reply, the Crown has filed *R. v. Angelillo*, 2006 SCC 55. Here, the Supreme Court considered whether an unproven allegation of criminal conduct that resulted in a charge but not in a conviction could be considered in a sentencing hearing for a subsequent offence. The Court explicitly notes that a past conviction can be considered in a sentencing hearing and that this does not violate the guarantee in s. 11(h), provided that the sentence for the predicate offence remains proportionate.

[87] The defence argument with respect to this ground is that Mr. Chambers is, in effect, being punished twice for the uttering threats offence that triggered the application of s. 524 and to which he has pleaded guilty and will be sentenced to some jail time.

[88] Neither *Whaling* nor *Angelillo* exactly capture this situation.

[89] Unlike in *Whaling,* the issue of retrospective application of legislation does not arise in this case. At the time Mr. Chambers was arrested for uttering threats and breaching his bail, the amendments to s. 719 had already been in force for some time.

This is not a situation where Mr. Chambers was sentenced for an offence and then partway through that sentence was advised that his custody would be extended or would be qualitatively different. As well, it must be noted that there is a level of judicial discretion exercised at the time a s. 524 application is heard by a judicial officer presumably fully knowledgeable of the implications of a s. 524 detention order on the ultimate calculation of credit for time spent in pre-trial custody.

[90] Nor does *Angelillo* provide a complete answer to the issue. It is clearly arguable that under s. 719(3.1), an historic and unrelated charge or conviction is considered as more than simply an aggravating factor on sentence and attracts a mandatory and discrete penal sanction.

[91] I am satisfied that time spent in custody prior to sentencing is 'punishment' when the accused is ultimately convicted of the offence charged. Indeed, this seems to underpin the decision of the Supreme Court in *R. v. Wust*, 2000 SCC 18, which decided that pre-sentence custody is properly credited towards a mandatory minimum sentence. However, it must be noted that the impugned portion of the provision does not prevent pre-trial custody from forming a part of the ultimate sentence; it only constrains the calculation of credit given for it.

[92] As discussed in *R. v. Dixon*, 2013 BCCA 41, while it is an error in principle for a judge not to consider what credit should be awarded for pre-trial custody, and credit should not be denied without good reason, there is no rule or principle that says credit must always be given or that it must be credited at a certain ratio.

[93] Per *Dixon*, it has always been open to a judge in exercising his or her discretion to limit credit to 1:1 or even, with good reason, to deny credit for time spent in pre-trial custody. Such a determination has never, to my knowledge, been considered contrary to the prohibition against double punishment. While the impugned portion of the provision does have the effect of removing a judge's discretion to credit at a ratio beyond 1:1 where there is a s. 524 detention order, I am hard pressed to conclude that its impact amounts to double punishment when it has always been open to a judge to do the very same thing.

[94] Furthermore, in practical terms, I would note that in this case, as will be the same for the vast majority of cases, we are not dealing with a situation in which Mr. Chambers has already been punished for the offences which triggered the application of s. 524. Rather, those offences will be dealt with as part of these proceedings and included in the overall sentence. In such circumstances, a judge can ensure that the overall effect of the impugned portion of the provision does not amount to double punishment by considering its impact within the totality of sentence.

[95] In the result, on the facts of this case, I am not persuaded that the operation of the impugned portion of the provision amounts to impermissible double punishment warranting constitutional protection.

2. Burden of Proof

[96] The applicant argues that the impugned portion of the provision offends the presumption of innocence by lowering the standard of proof to be applied with respect to aggravating factors on sentence. In so arguing, the defence relies primarily on *R. v.*

Pearson, [1992] 3 S.C.R. 665, for the propositions, firstly, that the presumption of innocence is a fundamental principle of justice, and, secondly, that disputed aggravating factors must be established beyond a reasonable doubt at sentencing (see para. 36-37).

[97] The applicant asserts that as a s. 524 detention order flows from findings made at a bail hearing on a balance of probabilities standard, the impugned portion of the provision has the effect of lowering the burden of proof on factors which will later prove to be aggravating on sentencing.

[98] The applicant further relies on the decision of *R. v. Safarzadeh-Markhali*, 2012 ONCJ 494, as support for the proposition the impugned portion of the provision operates to reduce the burden on the Crown to prove aggravating factors on sentence beyond a reasonable doubt (see para. 27). It should be noted that the argument advanced in the *Safarzadeh-Markhali* case related to the constitutionality of removing sentencing discretion from the trial judge.

[99] In further support of this argument, the applicant proffers the hypothetical that a person may be limited to credit at 1:1 as a result of a s. 524 detention order triggered by charges which later result in an acquittal such that the accused is ‘punished’ by operation of the impugned portion of the provision in relation to facts established on a balance of probabilities which same facts later fall short of establishing the offence beyond a reasonable doubt.

[100] However, as Crown quite fairly points out, while *Pearson* does reference the requirement that aggravating factors on sentence be proven beyond a reasonable

doubt, the ratio of the case concerns the constitutionality of the bail process notwithstanding the reversal of onus and the reduced burden of proof applicable at the bail stage.

[101] While there is no doubt that aggravating factors must be established beyond a reasonable doubt at sentencing, it should be noted that Mr. Chambers has entered a guilty plea with respect to the s. 264.1 offence which triggered the application of s. 524. He has admitted the facts in relation to that offence thereby conceding proof beyond a reasonable doubt. In practical terms, Mr. Chambers' guilty plea has rendered the question of burden of proof moot in this case.

[102] In any event, I have difficulty with the characterization that the impugned portion of the provision operates to reduce the burden of proof in relation to an aggravating factor on sentencing. The *Truth in Sentencing Act* amendments affect the manner in which credit for time spent in pre-trial custody is calculated. In my view, remand credit is not a factor which aggravates or mitigates sentence. Rather, per *Wust*, time spent in pre-trial custody forms part of the ultimate sentence.

[103] While there may indeed be an arguable issue in relation to whether the impugned portion of the provision operates such that decisions by a justice at the bail stage improperly fetter the discretion of the sentencing judge in relation to remand credit, that argument has not been advanced before me. On the argument that has been advanced, I am not satisfied that the impugned portion of the provision improperly reduces the burden of proof on sentencing.

3. Proportionality and parity

[104] Proportionality is incorporated into the *Code* at s. 718.1 under the heading 'Fundamental Principle'. It is indisputably a principle of fundamental justice. As put by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13:

> [36] … The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. As this Court has previously indicated, this principle was not borne out of the 1996 amendments to the Code but, instead, has long been a central tenet of the sentencing process (see e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.), and, more recently, *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 40-42). It also has a constitutional dimension, in that s. 12 of the Canadian Charter of Rights and Freedoms forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the Charter.
>
> [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. …

[105] It is basic to any theory of punishment that the sentence imposed bears some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

[106] Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[107] The principle of parity is one of the 'Other Sentencing Principles' included in s. 718.2 of the *Code*:

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[108] While not a principle of fundamental justice in and of itself, the principle of parity is important in informing the determination of what a proportionate and just sentence is for a particular offender and a particular offence.

[109] The constitutional standard for proportionality in the criminal law context is that a law cannot stand if it is 'grossly disproportionate'. This standard has largely been developed in the context of s. 12 *Charter* jurisprudence about cruel and unusual punishment, however the majority of the Supreme Court in *R. v. Malmo-Levine*, 2003 SCC 74, makes it clear that the same constitutional standard applies when an argument is made under s. 7:

> [160] Is there a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

[110] Defence says that the impugned portion of the provision is unconstitutional because it has a grossly disproportionate effect on similarly placed offenders who, but for the application of s. 524 or 515(9.1) in conjunction with s. 719(3.1), would receive similar sentences.

[111] As a real illustration of this, they point to *R. v. Crompton*, 2012 YKTC 50. In that case, three offenders were being sentenced for an aggravated assault. The Crown and defence presented a joint submission, applicable to each of them, for two years less a day, less credit for the fourteen months each had spent in pre-sentence custody. Prison records were presented and two of the three offenders received credit at 1.4:1, with the result that they were credited approximately 597 days. The third offender, Mr. Anderson, had been on bail at the time of the offences and was made the subject of a s. 524 detention order. His two co-accused were simply detained at first instance without a s. 524 application. Accordingly, 719(3.1) limited Anderson's credit to the 426 days actually served, despite the fact that his conduct in jail had been better than that of either of his co-accused. In the result, Mr. Anderson left court with an additional 303 days to serve on his sentence, while his co-accused had a remanet of 132 days. This is close to a six month difference. Even if all of them earned full statutory remission under the *Corrections Act,* S.Y. 2009, c. 3, Mr. Anderson still would have spent an additional 114 days, or close to four months, confined in the WCC.

[112] It is difficult not to conclude that the impact of the impugned portion of the provision had a disproportionate impact on Mr. Anderson in that case. However, the Crown says that nothing in Mr. Chambers' situation, the *Crompton* case, or any reasonable hypothetical situation can lead to a finding of gross disproportionality.

[113] The consideration of a reasonable hypothetical situation is part of the analysis under a s. 12 argument against cruel and unusual punishment, which proceeds in two stages. In the first, the trial judge considers whether the sentence constituted cruel and unusual punishment based on the case before the court. If not, the judge goes on to consider whether the sentence would be cruel and unusual in light of reasonable hypothetical circumstances that might arise (see, generally, *R. v. Smickle,* 2012 ONSC 602, *R. v. Nur,* 2011 ONSC 4874). In *Nur,* Code J. observes that real cases generally form the starting point for the creation of a reasonable hypothetical, and that, where a real situation exists, it can automatically attract consideration.

[114] The test for gross disproportionality relied on by the Crown is taken from *R. v. Morrisey,* 2000 SCC 39. In effect, this test requires that the punishment be 'so excessive as to outrage society's sense of decency' and such that Canadians would find it 'abhorrent' or 'intolerable'. This is a stringent and demanding test, and a finding of gross disproportionality will only arise on 'rare and unique occasions' (*Steele v. Mountain Institution,* [1990] 2 S.C.R 1385). These phrases make it obvious that it will only be in very rare cases that this threshold will be met, however they offer little in terms of guidance in actually applying the test.

[115] Malloy J. confronts this issue in *Smickle.* In that case, which dealt with the constitutionality of a mandatory minimum sentence for gun possession, she considered whether the grossly disproportionate test creates an objective standard or a subjective test based on community values. She concludes that the test is essentially objective, and sets out a number of factors that were distilled out of pre-*Charter* jurisprudence about cruel and unusual punishment. The criteria were identified in an academic article

by Professor Walter Tarnopolsky (as he then was) entitled “Just Desserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?” (1978) 10 Ottawa L. Rev. 1, and cited approvingly in the seminal Supreme Court of Canada case of *R. v. Smith*, [1987] 1 S.C.R. 1045. Summarized, the relevant criteria are:

1) Does the punishment go beyond what is necessary to achieve a legitimate penal aim?
2) Is it unnecessary because there are adequate alternatives?
3) Is it unacceptable to a large segment of the population?
4) Can it be applied upon a rational basis in accordance with ascertained or ascertainable standards?
5) Is it arbitrarily imposed?
6) Does it have a social purpose such as reformation, rehabilitation, deterrence or retribution?
7) Is it in accord with public standards of decency or propriety?
8) Is it of such a character as to shock general conscience or as to be intolerable in fundamental fairness?
9) Is it unusually severe and hence degrading to human dignity and worth?

[116] As noted by Lamer J. in *Smith,* none of the more objective factors are determinative, however they do help guide the necessary analysis.

[117] In *Smickle,* Malloy J. also considered how to reconcile a more objective approach with the community standards test that is more often referenced in the caselaw:

> [47] Notwithstanding these occasional references in the caselaw to community standards of decency and what would shock the public conscience, I remain of the view that the analysis of what constitutes cruel and unusual punishment is essentially an objective test. To the extent that community tolerance is part of that test, it can only be with reference to a community fully informed about the philosophy, principles and purposes of sentencing as set out in the *Criminal Code*, the rights enshrined in the *Charter*, and the particular circumstances of the case before the court. …

[118] I agree and think it is important to emphasize that the Canadian whose views are being considered here is one who is informed about the concept of earned remission,

the frequency with which it is awarded, and the disparities in terms of physical environment and programming that often exist between remand and sentenced inmates.

[119] The hypothetical Canadian community member is also one that is apprised of the backdrop against which Aboriginal people come before criminal courts, with an awareness of the history of colonialism, dislocation and residential schools that *R. v. Gladue,* [1999] 1 S.C.R. 688 and *Ipeelee, supra,* describe. This is important because, although the s. 12 *Charter* framework forms part of the s. 7 assessment, this case is not being argued under s. 12. While the constitutional standard is the same, section 7 attracts a broader application of the proportionality principle, as it allows the court to consider aspects of the situation that go beyond a consideration of the penal consequences. At para. 169 of *Malmo-Levine,* the Supreme Court wrote:

> … We agree that the proportionality principle of fundamental justice recognized in *Burns* and *Suresh* is not exhausted by its manifestation in s. 12. The content of s. 7 is not limited to the sum of ss. 8 to 14 of the *Charter.* See, for instance, *R. v. Herbert*, [1990] 2 S.C.R. 151; *Thomson Newspapers, supra.* We thus accept that the principle against gross disproportionality under s. 7 is broader than the requirements of s. 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless, the standard under s. 7, as under s. 12, remains one of *gross* disproportionality. In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter.*

[120] Framed concisely, the question I must answer is whether the effects of the impugned portion of the provision on the applicant (or a reasonable hypothetical offender) are grossly disproportionate given the offender and the offence. One such

effect that must be considered, in my view, is the impact of the impugned portion of the provision on Mr. Chambers as an Aboriginal offender.

[121] In the seminal cases of *R. v. Gladue* and *R. v. Ipeelee*, both cited above, the Supreme Court of Canada has, in powerful language, spoken at length about the experience of Aboriginal persons in Canada; how that history has negatively impacted on them resulting in a gross overrepresentation of Aboriginal offenders in the criminal justice system and in Canadian jails; and of the obligation of all judges to consider the systemic or background factors which may have brought an Aboriginal offender before the courts in giving real effect to s. 718.2(e) which reads:

[122] A court that imposes a sentence shall also take into consideration the following principles:

> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[123] In *Ipeelee*, the court noted:

> [60] … [C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course, higher levels of incarceration for Aboriginal peoples…

[124] The court went on at para. 67 to quote from an article by Professor Tim Quigley:

> Socioeconomic factors such as employment status, level of education, family situation, etc. appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline

> imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination. ("Some Issues in Sentencing of Aboriginal Offenders", in Richard Gosse, James Youngblood Henderson and Roger Carter, eds., *Continuing Poundmaker and Riel's Qeust: Presentations Made at a Conference on Aboriginal Peoples and Justice*. Saskatoon: Purich Publishing, 1994, 269)

[125] In the recent decision of *R. v. Magill*, I considered these passages from *Ipeelee* in the context of a bail hearing for an aboriginal offender. After concluding that the so-called *Gladue* factors apply equally at the bail stage, I made the following comments regarding the foregoing quotes from *Ipeelee*:

> [26] These socioeconomic factors play an equally, if not more important, role at the bail stage of a criminal charge. An accused with a poor employment record, substance abuse issues and an unstable family and community support network is more likely to be detained, even though these are the very results that flow from the Canadian history of colonialism, dislocation and residential schools. A judge has an obligation to evaluate the application of bail criteria to ensure that the result does not serve to perpetuate systemic racial discrimination.

[126] In my view, these comments bear repeating as an extension of the reasoning can only lead one to conclude that these very same factors will lead to a disproportionate number of Aboriginal offenders being captured by the limitation to 1:1 credit in s. 719(3.1). The very issues outlined in *Ipeelee* lead not only to an increased likelihood of Aboriginal offenders being denied bail, potentially engaging the limitation through s. 515(9.1), but also, in situations where bail is granted, a greater likelihood that Aboriginal offenders will be captured by the limitation through s. 524. These very same factors lead to increased difficulty in complying with conditions on bail despite the best of intentions, particularly when one considers the inevitable impact of substance abuse on

compliance rates. This, in turn, will lead to a disproportionate number of Aboriginal offenders being limited to 1:1 credit by operation of ss. 515(9.1), 524 and 719(3.1). The inescapable conclusion is that Aboriginal offenders will, on average, serve longer sentences in jail, a conclusion which flies in the very face of the *Gladue* and *Ipeelee* decisions.

[127] I would also note that, as discussed earlier in this decision, the recent Yukon Court of Appeal decision in *Cardinal* expressly provides that an offender's Aboriginal background is an appropriate consideration in determining remand credit and can be considered a "circumstance" justifying enhanced credit. However, the impugned portion of the provision effectively bars the consideration of *Gladue* factors in the calculation of remand credit for those Aboriginal offenders captured by the limitation as a result of s. 524 or of s. 515(9.1). This too flies in the face of the *Gladue* and *Ipeelee* decisions.

[128] In my view, penal legislation that disallows any consideration of an individual's Aboriginal status is constitutionally flawed, offends the principles of fundamental justice, and can only be considered to have a grossly disproportionate impact on Aboriginal offenders. As per *Ipeelee* at para. 87:

> The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality.

[129] I am supported in this conclusion by *United States of America v. Leonard,* 2012 ONCA 622, and *R. v. Anderson,* 2013 NLCA 2, both of which found a decision-maker's

failure to consider an individual's Aboriginal status was inconsistent with the principles of fundamental justice.

[130] In *Leonard*, Sharpe J. was reviewing the Minister of Justice's decision to surrender two Aboriginal individuals for extradition with respect to drug offences allegedly committed in the United States. Speaking for the full panel on this point, Sharpe J. found that the Minister's failure to consider the Aboriginal status of the applicants amounted to a significant legal error. While the Minister accepted that *Gladue* principles were relevant to his surrender decision, he did not apply the specific principle that the interests of justice require special consideration for Aboriginal defendants in order that entrenched patterns of discrimination are not perpetuated (para. 57). Because of this failure, the surrender decisions did not accord with the principles of fundamental justice, and, as noted in *United States of America v. Burns*, 2001 SCC 7, "an extradition that violates the principles of fundamental justice will always shock the conscience" (para. 56 of *Leonard*).

[131] Sharpe J. also reinforced the requirement that *Gladue* factors be considered by decision-makers in all proceedings that engage a liberty interest:

> [85] The jurisprudence that I have already reviewed indicates that the *Gladue* factors are not limited to criminal sentencing but they should be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system" (*Gladue* at para. 65) whenever an Aboriginal person's liberty is at stake in criminal and related proceedings.

[132] Similarly, in *Anderson,* the Newfoundland Court of Appeal found that the Crown's failure to consider an offender's Aboriginal status in its decision to seek greater punishment violated his section 7 *Charter* right. Welsh J.A. found that this failure

rendered the sentencing process fundamentally unfair and did not comply with the principles of fundamental justice (paras. 36 and 40). This conclusion was expressly adopted by the other two concurring judges (para. 51).

[133] Here, the impugned portion of the provision precludes the consideration of an accused's Aboriginal status in the calculation of remand credit for those offenders captured by ss. 515(9.1) and 524. While I have a serious concern about the operation of the impugned portion of the provision generally in the context of the *Charter* guarantee of proportionality and parity in sentence, this preclusion exacerbates this concern and, in my view, clearly renders the impugned portion of the provision unconstitutional.

[134] I adopt the reasoning of Malloy J. in *Smickle* that the test with respect to gross disproportionality is an objective one, which takes into account community standards and tolerance. I conclude that a reasonable person, knowledgeable about both the philosophy and principles of sentencing and the history of systemic discrimination which has led to the overrepresentation of Aboriginal offenders in the Canadian criminal justice system and in Canadian jails, would consider that the impugned portion of the provision operates in a fundamentally unfair manner with respect to Aboriginal individuals, such as Mr. Chambers. It will undeniably lead to lengthier sentences for Aboriginal offenders, and this is not only contrary to the express direction of the Supreme Court of Canada in *Gladue* and *Ipeelee*, but also contrary to the principles of fundamental justice. As noted by Cozens C.J. in *Mulholland*, 2013 YKTC 52:

> [38] … Canadians demand and expect a real justice system, i.e. a system where justice is done and is seen to be done. Only then can Canadians have confidence in the administration of justice. If a system of law and order results in unfair treatment of individuals, in particular when the

> individuals who bear the brunt of the unfair treatment are disproportionately those already disadvantaged in society, then we no longer have a justice system and we can no longer have confidence in it.

[135] A failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of s. 718.2(e) and will also "result in a sentence that [is] not fit and [is] not consistent with the fundamental principle of proportionality" (*Ipeelee,* para. 87). The application of the impugned portion of the provision to Aboriginal offenders will result in punishment that is in breach of the fundamental principle of proportionality and therefore render a sentence grossly disproportionate.

4. Arbitrary and overbroad

[136] While the applicant has argued this as a single principle of fundamental justice, it is in fact two. The Ontario Court of Appeal in *Bedford* explains how they overlap and the state of the relevant tests in the following manner:

> [145] When the court considers arbitrariness, it asks whether the challenged law bears no relation to, or is inconsistent with, its legislative objective. Put another way, arbitrariness is established where a law deprives a person of his or her s. 7 rights for no valid purpose: *Rodriguez*, at pp. 594-595.
>
> [146] As the Supreme Court noted in *PHS*, at para. 132, the jurisprudence on arbitrariness is not entirely settled. The ambiguity arises from *Chaoulli*, in which the Court split 3-3 on the question of whether a more deferential standard of inconsistency, or a more exacting standard of necessity, should drive the arbitrariness inquiry. In other words, must a law be inconsistent with, or bear no relation to, its purpose to be arbitrary, or is it sufficient to establish that the law is not necessary to achieve the purpose?
>
> [147] In this case, we adopt the more conservative test for arbitrariness from *Rodriguez* that requires proof of inconsistency, and not merely a lack of necessity. Until a clear majority of the Supreme Court holds otherwise, we consider ourselves bound by the majority in *Rodriguez* on this point.
>
> [148] While the role of necessity in the arbitrariness inquiry remains uncertain, it is indisputably a key component of the overbreadth analysis.

> When the court considers overbreadth, it asks whether the challenged law deprives a person of his or her s. 7 rights more than is necessary to achieve the legislative objective: *Heywood*, at p. 792. In analysing whether a statutory provision offends the principle against overbreadth, the court must accord the legislature a measure of deference and should not interfere with legislation simply because it might have chosen a different means of accomplishing the objective: *Heywood*, at p. 793.

[137] In order to resolve both the overbroad and the arbitrary submissions, it is necessary to determine the objective(s) of the amendments to s. 719.

Objective of amendments to s. 719:

[138] As indicated above, section 719 and some other bail-related provisions were amended through the *Truth in Sentencing Act*. The objectives behind the amendments have been considered by this court in *Vittrekwa* and by six appellate courts in the context of interpreting what constitutes “circumstances” for the purposes of enhanced remand credit (the Quebec Court of Appeal has also considered this issue, although seemingly not in the context of a loss of earned remission argument).

[139] Mr. Chambers submits that the dominant objective of the act is “to curtail offenders manipulating the judicial process to achieve shorter sentences than they would otherwise have achieved through the application of overly generous remand credit”. The secondary objective is to increase transparency and interjurisdictional consistency in the award of remand credit, and a third objective is to enhance public safety.

[140] The Crown does not seem to differ markedly in its characterization of the *Truth in Sentencing Act’s* objectives, although it frames them as i) the need for clarity, ii) eliminating incentives for offenders to stay in remand in order to receive a

disproportionately discounted sentence, iii) ensuring that sentences meet the objectives of denunciation and deterrence and reflect the severity of crimes, and iv) the maintenance of public confidence in the justice system. The Crown also submits that the impugned portion of s. 719(3.1) is most specifically concerned with maintaining confidence in the administration of justice and with ensuring that the objective of denunciation is met.

[141] Interestingly, the appellate courts that have considered the s. 719 amendments indicated the difficulty they had in discerning Parliamentary intention, apart from the clear objective of the *Act* in limiting the amount of credit available for pre-sentence custody and, in particular, eliminating the practice that had evolved with respect to granting remand credit at 2:1. Beyond the submissions of counsel and what appears in the caselaw, the only 'evidence' before me were excerpts from Senate debates provided by the Crown, which do little, in my view, to clarify the confusion regarding the objective of the *Act*.

[142] I accept that the predominant purpose of the legislative amendments in the *Truth in Sentencing Act* is to limit the amount of credit for pre-trial custody and to preclude courts from awarding credit on a 2:1 or greater basis. This objective also applies specifically to the impugned portion of s. 719(3.1). However, I note that the recent appellate decisions have rejected the suggestion that Parliament intended to make 1:1 credit the general rule. Rather, routine 'circumstances' can justify enhancement, often up to 1.5:1.

[143] I am not able to discern any other clear legislative objectives in both the *Act* overall and in the impugned part of s. 719 specifically, or at least I cannot do so on the record before me. While most of counsel's submissions about Parliament's intent were plausible, there is nothing definitive to support them. I reject, however, the Crown's submission that the impugned portion of the provision is meant to denounce and deter. At the point that the decision triggering a limit on pre-sentence custody is made, the accused enjoys the presumption of innocence with respect to both the offence that he or she had previously been granted release for, and for the new offence that triggered the application of s. 524.

Arbitrary:

[144] I agree with the Ontario Court of Appeal in *Bedford* that the relevant test comes from *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519, and asks whether the law is inconsistent with its legislative objective.

[145] I find that the law, including the impugned provision, is consistent with its objectives. It does limit the amount of credit for pre-trial custody, and, to the extent that one existed, removes the incentive for an offender to delay his trial or sentencing in order to ultimately serve less time.

[146] Accordingly, I find that the impugned portion of the provision is not arbitrary.

Overbroad:

[147] The test for overbreadth is set out in *R. v. Heywood,* [1994] 3 S.C.R 761, and asks whether the challenged law is necessary to achieve the legislative objectives. It

requires balancing the state interest against that of the individual, and a measure of deference should be paid to the means chosen by the legislator.

[148] As noted, the legislative objective is to limit the amount of credit for pre-trial custody and to preclude courts from awarding credit on a 2:1 or higher basis.

[149] In my view this objective is accomplished by the amendments to s. 719(3) and the attenuated (3.1). Put another way, the impugned portion of s. 719(3.1) is not necessary to achieve the objectives of the *Truth in Sentencing Act.*

[150] Following the amendments, there is a presumption that an offender will be credited for pre-sentence custody at a 1:1 ratio. At most, he or she will receive credit at 1.5:1, and there is an evidentiary burden to demonstrate that 'circumstances' justify this higher award. There is no possibility of 2:1 credit.

[151] The Courts of Appeal of Nova Scotia, Manitoba, Ontario and Alberta have all ruled that the legislative objectives of Parliament are met by a sentencing regime that places an upper limit on credit but does not restrict enhanced 1.5:1 credit to unusual or exceptional circumstances.

[152] To the extent that the impugned portion of the provision goes beyond this, it is unnecessary to achieve Parliament's legislative objective and overbroad. It places an excessive limit on pre-sentence credit for a subset of offenders. There appears to be no clear rationale for singling out individuals subject to s. 524 orders or individuals with some unspecified but aggravating criminal conviction, and subjecting them to a regime that is more restrictive than necessary to achieve the legislative intention.

[153] In addition, having found that the impugned portion of the provision is grossly disproportionate in its effect, and recognizing the overlap in the two concepts, it would be logically inconsistent, in my view, to not also find that it is overbroad in its application.

[154] Accordingly, I am satisfied that the impugned portion of the provision has a grossly disproportionate impact on Aboriginal offenders and is overbroad in its reach such that it offends s. 7 of the *Charter*.

Section 15 Analysis:

[155] Mr. Chambers other argument is that the legislation violates his s. 15 right to equality under the law. This right is enshrined in s. 15(1):

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[156] At the root of the *Charter* guarantee is a societal awareness that certain groups have been historically disadvantaged, and that state action that widens rather than narrows the gap is discriminatory (*Quebec (Attorney General) v. A.*, 2013 SCC 5, at para. 332). The generally accepted test for determining a violation of s. 15 has two parts (see *R. v. Kapp*, 2008 SCC 41):

1) Does the law create a distinction based on an enumerated or analogous ground?

2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[157] The second part of the test has recently been considered in *A., supra*, with Abella J. noting for the majority on this point that a focus on prejudice and stereotyping

improperly narrows the scope of the inquiry (para. 325). Although prejudice and stereotyping are indicia of discrimination, the fundamental question that needs to be answered is "Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" The inquiry is flexible and contextual, and asks 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).

[158] The focus of the s. 15 inquiry is on the impact of the law, not on the intent behind the law: "If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory" (*A.* at paras. 327-328*,* citing *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114).

[159] If a law is found to be discriminatory, a court will consider whether it can nonetheless be upheld under s.1 of the *Charter*, as a limit that is reasonable and justified in a free and democratic society.

[160] Mr. Chambers submits that, although it appears neutral on its face, the impugned provision works to the disadvantage of Aboriginal offenders, who are well-recognized as overrepresented in the justice system. In light of the direction to take specific account of the circumstances of Aboriginal offenders in s. 718.2(e), the impugned portion of the provision, which does not allow a court to consider *Gladue* factors when determining pre-sentence credit, disproportionately negatively affects this group.

[161] The Crown disagrees, taking the position that the context-dependent nature of the inquiry recognizes that pre-sentence credit is only a part of the overall sentencing

process, which does allow judges to consider the circumstances of Aboriginal offenders. As noted in *Withler v. Canada (Attorney General)*, 2011 SCC 12, a court must view the impugned law within the context of the broader scheme, and isolating s. 719(3.1) for this analysis would be inappropriate. The Crown also argues that the mere fact of disproportionate numbers is not sufficient to establish discrimination; rather there must be a clear causal nexus between the law and the discriminatory effect. In the case of Aboriginal offenders, the social circumstances that underlie their overrepresentation in the justice system are complicated and cannot said to be caused by the impugned provision. The Crown observes that accepting the offender's argument means that any tightening of criminal penalties could be viewed as impermissibly discriminatory.

[162] I think it is fair to say that s. 15 jurisprudence has largely developed outside the sphere of criminal law. While cases such as *Kapp* and *A.* clearly set out the principles and social values that underlie the *Charter* guarantee of equality, I have been assisted in situating it within the overall scheme of the *Criminal Code* and the criminal justice system by *R. v. T.M.B.*, 2011 ONCJ 528, aff'd 2013 ONSC 4019.

[163] In *T.M.B.*, Sparrow J. of the Ontario Court of Justice considered whether the *Criminal Code's* then-14-day mandatory minimum sentence for sexual interference infringed s. 15 of the *Charter* in the context of an Aboriginal offender. While she found that, given s. 718.2(e) and *Gladue*, the mandatory minimum provision created a distinction between Aboriginal and non-Aboriginal offenders, she also found that no clear link had been established between the relatively short minimum sentence and the perpetuation of prejudice and discrimination against Aboriginal individuals in the criminal justice system (para. 134). In the ensuing summary conviction appeal, Code J.

accepted, at least for the sake of argument, that a distinction was created, but agreed with Sparrow J. that it did not meet the second part of the test as set out in *A.* (It should be noted that the summary conviction appeal court had the additional benefit of not only *A.* but also *Ipeelee* before rendering its decision).

i) Does the law create a distinction based on an enumerated or analogous ground?

[164] To apply the s. 15 test as enunciated in *Kapp*, explained in *A.,* and applied in *T.M.B.,* the first question to be resolved is whether the law creates a distinction on the basis of Aboriginal background. There is no issue that this distinction, if it exists, is on the enumerated ground of race. The thornier question is whether there is a distinction created at all. As indicated, counsel for Mr. Chambers acknowledges that there is no explicit distinction made between Aboriginal and other offenders in the legislation itself. Rather, any disadvantage flows from the fact that the provision disallows the kind of the differential treatment that is otherwise required pursuant to *Gladue* and *Ipeelee* in the determination of appropriate credit for time spent in pre-trial custody.

[165] As already explained in relation to my findings with respect to s. 7 and gross disproportionality, it is an accepted and well-documented reality that Aboriginal people in Canada have experienced and continue to experience significant and unique historical and sociological disadvantages flowing from our country's colonial history, including the residential school system.

[166] In *T.M.B.*, Sparrow J. found that the effect of the mandatory minimum provision in preventing sentencing judges from considering alternative sentencing options, such as conditional sentences, denied Aboriginal people the fullest possible range of sentencing

options required by *Gladue* and s. 718(2)(e). This effectively created a distinction between Aboriginal and non-Aboriginal offenders, as Aboriginal offenders "[lose] the fullest benefit of an analysis which was deemed necessary to address historical disadvantage not similarly recognized as having been suffered by the latter group", and this loss is a form of adverse impact contemplated by s. 15 (paras. 88 and 89). On appeal, Code J. substantially agreed with Sparrow J.'s reasoning on this point, however he noted that the sentence did not have a disproportionately negative impact on B. himself and would, in fact, only rarely have a disproportionate effect on Aboriginal offenders as a whole, as, in the vast majority of cases, the appropriate sentence would be well above the minimum tariff given the nature of the offence.

[167] While the context here is not precisely the determination of appropriate sentence, the reach of *Gladue* extends well past s. 718(2)(e) of the *Code*. As noted by the Ontario Court of Appeal *Leonard*, *supra,* the factors set out in *Gladue* and *Ipeelee* should be considered whenever an Aboriginal person interacts with the justice system (para. 53). *Leonard* has additional language about the role courts have in addressing inequity through the application of the principles enunciated in *Gladue:*

> [60] … *Gladue* stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons. Yet it is on the idea of formal equality of treatment the Minister rests his *Gladue* analysis. That approach was soundly rejected by the Supreme Court in both *Gladue* and *Ipeelee*, which emphasize that consideration of the systemic wrongs inflicted on Aboriginals does not amount to discrimination in their favour or guarantee them an automatic reduction in sentence. Instead, *Gladue* factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances. Treating *Gladue*

> in this manner resonates with the principle of substantive equality grounded in the recognition that "equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality": *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 15. ….

[168] I have already referenced my decision in *Magill*, specifically paragraphs 25 and 26 regarding the significance of *Gladue* factors at the bail stage, during my findings in relation to gross disproportionality under s. 7. Those comments are equally applicable to the s. 15 analysis.

[169] I am mindful of the fact I was not provided with specific statistics about Aboriginal overrepresentation in the remand population of the WCC; however, both *Gladue* and *Ipeelee* clearly recognize that, just as courts are more inclined to impose more and longer sentences on Aboriginal offenders, they are also more inclined to deny bail to them (*Gladue,* para. 65, *Ipeelee,* para. 61). This is part of the systemic bias or discrimination that demands the equalizing consideration of *Gladue* factors. Although this may be more relevant in the second part of the *Kapp* test, to the extent that s. 719(3.1) precludes a court from considering the unique circumstances of Aboriginal people, I find, as did Sparrow J. in *T.M.B.*, that the consequence is to deprive them of the fullest benefit of an analysis necessary to address their historical disadvantage. Unlike the case of the mandatory minimum considered in *T.M.B.*, this is not simply an academic point. The vast majority of Aboriginal offenders stand to be impacted, and for all but the shortest detention periods, the impact will be meaningful and well beyond minimal.

[170] In terms of the first step of the *Kapp* test, I find that it has been satisfied. The law creates (or perpetuates) a distinction based on the enumerated ground of race.

ii) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? Or, more broadly, does the distinction have the effect of perpetuating arbitrary disadvantage on the claimant because of his Aboriginal status?

[171] The second step of the *Kapp* test asks whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping, however, as stated by the majority in *A.*, the inquiry is not limited strictly to prejudice or stereotyping; a distinction that has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in the group is the ultimate concern of the inquiry.

[172] In *T.M.B.*, the applicant failed to meet this second step. Sparrow J. found that a 14-day mandatory minimum was brief in comparison to the sentences usually imposed for child abuse offences (para. 126), and while the court was precluded from taking an offender's Aboriginal status into account, the result did not obviously perpetuate prejudice. In all likelihood an Aboriginal offender would properly receive a longer sentence, *Gladue* principles notwithstanding. As noted, Sparrow J. did not have the benefit of the more expansive articulation of the test in *A.*, however Code J. on the summary conviction appeal did. In his application of the second step of the *Kapp* test, he indicated the 'flexible and contextual' nature of the inquiry, and considered that this includes an assessment of the 'larger social, political and legal context' (paras. 49-50). Although Code J. considered the four factors enumerated in *Law v. Canada (Minister of Citizenship and Immigration),* [1999] 1 S.C.R. 497, I note that these are not intended to

be exhaustive and may well vary with the facts of a given case (*Withler,* paras. 37-38, 53-54, 66; *Kapp,* paras. 19-25; *A.,* para. 331).

[173] There seems to be some confusion in the law regarding to what extent it is appropriate to consider legislative purpose in this stage of the s. 15 analysis as opposed to under the s. 1 assessment. I accept, as did Code J., that there is room to consider whether the legislative scheme is generally tailored to the actual needs and circumstances of the claimant group (see generally his discussion in para. 56). Indeed, this is the ground on which Code J. found the appellant T.M.B. foundered; while he had established that the law was not tailored to a few members of the claimant group, the low mandatory minimum did accord with the needs and circumstances of most members.

[174] Unlike the *T.M.B.,* case, and as has already been noted, the disadvantage perpetuated by the impugned portion of the provision here does affect a substantial number of Aboriginal offenders. Indeed, I have already found it to be grossly disproportionate in its impact and overbroad in its reach largely because of its impact on Aboriginal offenders. This law will clearly affect more than just 'some individuals', and I conclude that it is not at all tailored to the needs and circumstances of Aboriginal offenders.

[175] While I do not have to formulaically apply the other factors enumerated in *Law* (historically disadvantaged group, ameliorative purpose, severe or localized consequences), I find that a consideration of them does nothing to change my view that

the legislation creates a disadvantage for Aboriginal offenders relative to the offender population overall such that it offends s. 15 of the *Charter*.

Section 1 Analysis:

[176] Having determined that the impugned portion of the provision offends both ss. 7 and 15 of the *Charter*, I must next address whether it is nonetheless saved under s. 1. At this stage of the proceedings, the burden shifts to the Crown to show, on a balance of probabilities, that the law is 'demonstrably justified'.

[177] The Supreme Court of Canada examined the role of the court in the s. 1 analysis in *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, noting the following:

> [129] The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

[178] The caselaw suggests that infringements of s. 7, in particular, given that it affords protection with respect to fundamental rights, will not easily be saved by s. 1 (see *New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 S.C.R. 46 at para. 99).

[179] The test to be considered is still that set out in *R. v. Oakes*, [1986] 1 S.C.R. 103: is the purpose for which the limit has been imposed pressing and substantial and are

the means used proportionate. The proportionality test, in turn, has three components: (i) are the means rationally connected to the objective; (ii) do the means minimally impair the right(s) in question; and (iii) are the effects of the limit proportionate to the objective?

[180] An assessment of the *Oakes* test in the context of this case requires consideration, again, of the objectives and purpose of the legislation. I have discussed my findings in this regard at paragraphs 138 – 143 of this decision.

[181] There is little difficulty with applying the first branch of the *Oakes* test. I accept for the purposes of this decision, that the purpose for which the limit was imposed, namely to limit pre-trial custody credit with a view to addressing the practice of delaying sentence to accumulate what was seen as excessive credit for remand, was pressing and substantial. This has largely been conceded by the defendant and is generally accepted in the caselaw.

[182] With respect to the three-pronged proportionality test, again, I take no issue with the first branch of the test. There is clearly a rational connection between the objective and the means. However, it is my conclusion that the Crown has failed to demonstrate that the other two prongs of the proportionality test are met in this case.

[183] I am not of the view either that the impairment is minimal or that the effect is proportionate when I consider the impact of the limit on Aboriginal offenders. Noting again the significant importance the Supreme Court of Canada has placed upon the obligation of the courts to address, proactively, the negative impacts the Canadian history of systemic discrimination has had on Aboriginal peoples *vis-a-vis* the criminal

justice system, I am hard-pressed to accept that a limitation which would preclude the court from considering *Gladue* factors at any stage of the proceedings could possibly be considered a minimal impairment of the s. 7 right for Aboriginal offenders. The same can be said of an assessment of the disproportionate effect of the limit on Aboriginal offenders. This is particularly true when I consider that the primary objective could have, as I have already noted, been addressed by imposition of a presumptive 1.5:1 ratio for remand credit.

[184] For these reasons, I am not satisfied that the impugned portion of the provision is saved by s. 1. However, I am in agreement with the Crown's submission that the declaration sought by the defendant that the law is of no force and effect is beyond the jurisdiction of a statutory court to grant. As noted in the case of *R. v. Shewchuk* (1986), 28 D.L.R. (4th) 429 (B.C.C.A):

> It is clear that the power to make general declarations that enactments of Parliament or of the Legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts.
>
> But it is equally clear that if a person is before a court upon a charge, complaint, or other proceeding properly within the jurisdiction of that court then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the *Canadian Charter of Rights and Freedoms*, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context, is nothing more than a decision of a legal question properly before the court.

[185] I take this to mean that it is open to me to find that the impugned portion of the provision is of no force and effect as it offends ss. 7 and 15 of the *Charter*, but, in so finding, my jurisdiction extends to determining that the impugned portion of the provision

should be read down only as it relates to the case before me. Accordingly, I find that the impugned portion of the provision is of no force and effect in this case and does not preclude me from granting Mr. Chamber enhanced credit of 1.5:1 for the second remand period.

The Final Sentence:

[186] In light of the foregoing conclusions, with credit at 1.5:1, the appropriate sentence is one of time served. The record will be endorsed to indicate sentences of one day deemed served with respect to each of the three counts and I would ask that the record reflect that the credit for time spent in pre-trial custody, which I calculate at 450 days, will be credited as against the three offences as follows:

1. Section 348: 360 days credit;
2. Section 266: 45 days credit;
3. Section 264.1: 45 days credit.

[187] In addition, a probationary term of 12 months will attach to all counts and will be on the following terms and conditions:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify your Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;
4. Report to a Probation Officer within two working days and thereafter, when and in the manner directed by the Probation Officer;

5. Abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
6. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
7. Take such assessment, counselling and programming as directed by your Probation Officer:
8. Provide your Probation Officer with consents to release information with regard to your participation in any counselling or programming you have been directed to do pursuant to this order; and
9. Have no contact directly or indirectly or communication in any way with Freda Brown, Allan Faulds and/or Bonny Chambers except with the prior written permission of your Probation Officer in consultation with Victim Services.

[188] The s. 348(1)(b) offence is a primary designated offence for the purposes of the DNA provisions. Accordingly, there will be an order that Mr. Chambers provide such samples of his blood as are necessary for DNA testing and banking.

[189] The s. 348(1)(b) offence also triggers a mandatory firearms prohibition pursuant to s. 109 of the *Code*. Accordingly, there will be an order prohibiting Mr. Chambers from having in his possession any firearms, ammunition or explosive substances for a period of 10 years.

[190] Victim Fine Surcharges will be $100 on the s. 348 and s. 266 convictions in light of the indictable election; and $50 on the s. 264.1 conviction with time to pay to be determined.

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RUDDY T.C.J.