Citation: *R.* v. *Mulholland,* 2013 YKTC 52

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Docket: 12-01001
12-01044
12-07818
Registry: Whitehorse
Heard: Carmacks and Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

SAMUEL HENRY MULHOLLAND

Appearances:
Keith Parkkari — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR SENTENCING

[1] Mr. Mulholland's matters came before me in Carmacks on June 19, 2013. On that date, counsel advised me that the s. 266 assault charge that was set for trial would be resolved by way of peace bond. Mr. Mulholland then entered a guilty plea to having committed an offence contrary to s. 266 of the Yukon *Motor Vehicle Act* ("*MVA*"). He had previously entered guilty pleas on April 19, 2013 to having committed offences contrary to ss. 253(1)(b), 129(a) and 145(5.1) of the *Criminal Code* ("*Code*").

[2] Due to technical difficulties on circuit, this matter was set over to June 20 in Whitehorse for further submissions. On that date, I requested additional information regarding Mr. Mulholland's time in custody on remand. The matter was then set over to June 25 for further submissions. After receiving the requested additional information and hearing further submissions, I gave my decision. I indicated at the time of my decision that I would be issuing written reasons as soon as possible, due to the pressing need to clarify the Yukon position on s. 719(3.1) of the *Code* in light of the recent decision of the British Columbia Court of Appeal in ***R.*** v. ***Bradbury***, 2013 BCCA 280. These are my written reasons.

Circumstances of Offences

[3] The circumstances of the offences to which guilty pleas have been entered are as follows:

[4] In December 2012 Mr. Mulholland was released on an Undertaking to a Peace Officer in respect of certain charges. One of the conditions of this Undertaking was that he have no contact with Melissa Tulk.

[5] On February 23, 2013, just before 11:00 P.M., RCMP in Whitehorse were conducting traffic stops. The vehicle Mr. Mulholland was driving came to their attention and an impaired driving investigation ensued. Mr. Mulholland's vehicle was pulled over by Schwatka Lake. In the vehicle were Ms. Tulk and two other passengers.

[6] Based upon the observations of the RCMP, Mr. Mulholland was arrested for impaired driving. Once outside of the vehicle, Mr. Mulholland refused to comply with directions, resisted attempts to restrain him by pulling away, and attempted to run away.

He was ultimately restrained and taken to the RCMP Detachment where he provided breath samples indicating that he had a blood/alcohol level of 200 mg/%.

[7] At the time he was disqualified from driving for a period of three years, commencing January 21, 2012.

Positions of Counsel

[8] Crown counsel is seeking a sentence of 9 – 12 months for the *Code* offences to be followed by a consecutive 45 day sentence for the s. 266 *MVA* offence. Crown is also seeking a three year driving prohibition.

[9] Defence counsel submits that a total sentence of six months custody would be appropriate. She takes no issue with the suggested driving prohibition.

Circumstances of Mr. Mulholland

[10] Mr. Mulholland has an extensive criminal record. He has convictions in 1994 and 1997 for s. 253(b) offences and a conviction in 2011 for a s. 253(1)(b) offence. He has a s. 259(4)(a) conviction in 2012. He has been convicted for numerous offences of violence, for several breaches of court orders and for a s. 129 obstruction offence in 1993. He was sentenced to 21 days custody for the 1997 impaired driving offence, to 30 days custody for the 2011 impaired driving offence and to 30 days custody for the s. 259 offence.

[11] Mr. Mulholland's driving abstract was also filed. He has numerous convictions for *MVA* offences, although there are no previous convictions for a s. 266 offence.

[12] Crown counsel has filed a Notice of Intention to seek Greater Punishment, therefore the minimum jail sentence for the s. 253(1)(b) offence is 120 days. The driving prohibition must also be for a minimum of three years.

[13] Mr. Mulholland is a 40 year old member of the Nacho Nyak Dun First Nation. He was raised primarily by his mother who attended residential school in Carcross. She was and remains a supportive mother. His father, now deceased, was an uninvolved parent. Alcohol abuse and related issues were a problem for Mr. Mulholland's extended family. He had a difficult youth and was in and out of youth detention centers.

[14] As a youth he was involved in the accidental shooting of his cousin that resulted in the death of the cousin. He has struggled with the associated grief and trauma of this incident since then.

[15] He completed Grade 9 in Whitehorse and completed his GED in Vancouver at the age of 19. He holds a number of trade certificates and has been employed primarily in the mining industry, although his last employment was at the Minto mine in 2011.

[16] He has a 21-year-old son and a 10-year-old daughter with Melissa Tulk. His at times difficult relationship with Ms. Tulk is currently off, and he has no plans to reunite. When he is working he is able to avoid abusing substances and can stay out of trouble. When he uses drugs and/or alcohol, he finds himself in trouble. When he is released from custody he plans to seek employment in the mining industry.

[17] The circumstances of the s. 253(1)(b) offence are aggravating in that he provided breath samples of 200 mg/%. He also had passengers in the vehicle. I note that two of

his impaired driving offences are somewhat dated. I find that an increase from 30 days for his last s. 253(1)(b) conviction to 120 days custody for the present conviction is sufficient and that is the sentence I will impose. I am also satisfied that a three year driving prohibition is sufficient.

Sentences to be Imposed

[18] For the s. 145(5.1) offence the sentence will be 30 days consecutive. Breaches of no-contact orders can generally be expected to attract a custodial disposition.

[19] For the s. 266 MVA offence the sentence will be 45 days consecutive. I take into account the aggravating factor of the s. 259 *Code* conviction in 2012. The driving disqualification is ultimately linked back to an impaired driving offence and, in order for sentences for impaired driving offences to have a greater deterrent and denunciatory effect, the driving prohibitions attached to them must be respected. Failure to do so almost invariably attracts a custodial disposition in the Yukon.

[20] For the s. 129(a) offence, taking into the total custodial sentence imposed, the sentence will be 15 days to be served concurrent. I find that the nature of the obstruction is towards the lower end for such offences.

[21] Therefore the total custodial disposition is 195 days.

Credit for Time in Remand

[22] Mr. Mulholland has been in custody for 123 days. He was arrested February 23, 2013 and detained after show cause on February 26. No application was made under

s. 524 to revoke prior process (he had previously been released on a promise to appear on an allegation of assault from August 17, 2012).

[23] Crown counsel submits that he should be provided credit on a one-to-one basis, from February 23 until Wednesday, June 19, 2012, conceding that the delay since then is attributable to the Court, thus allowing for enhanced credit for the past six days.

[24] Crown counsel relies on the recent decision in ***Bradbury***, in which the majority of the Court holds that the loss of statutory remission is not a circumstance that allows for enhanced remission to be granted under s. 719(3.1).

[25] Section 719(3) and (3.1) read as follows:

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

[26] In ***Bradbury***, Smith J. largely rejects the interpretation of s. 719(3) and (3.1) that has been adopted by the Nova Scotia Court of Appeal in ***R.*** v. ***Carvery***, 2012 NSCA 107, leave to appeal granted April 11, 2013, S.C.C. Docket No. 3515, the Manitoba Court of Appeal in ***R.*** v. ***Stonefish***, 2012 MBCA 116, and the Ontario Court of Appeal in ***R.*** v. ***Summers***, 2013 ONCA 147. All of these other appellate decisions have held that

the loss of parole eligibility or the potential to earn remission, are circumstances within the meaning of s. 719(3.1) that can justify the granting of enhanced credit up to 1.5:1.

[27] More recently, in ***R.*** v. ***Johnson***, 2013 ABCA 190, the Alberta Court of Appeal referred favourably to the reasoning of Cronk J. in ***Summers***, stating in paras. 23 – 33 that:

> **23** Given the Crown's concession that s 719(3.1) does not require extraordinary circumstances as a prerequisite to granting enhanced credit for pre-sentence custody, the interpretation to be given this section was not actively argued in this appeal. I have therefore approached my analysis through an examination of the arguments raised before the Ontario Court of Appeal in ***Summers,*** as described in its decision. Ultimately, I endorse Justice Cronk's comprehensive assessment, leading to her conclusion that s 719(3.1) does not require the existence of "exceptional" circumstances.
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> **24** Justice Cronk, in ***Summers,*** starts, at paras 48-50, by observing that there is no useful purpose in examining all the trial level authorities that address the conflicting interpretations of s 719(3.1). She next considers whether, while that subsection does not expressly state that circumstances must be exceptional before enhanced credit can be granted, it should be implied as a result of reading s 719(3) as an exception to s 719(3), which requires a sentencing judge to give a maximum of one-for-one credit on account of pre-sentence custody. She gives seven reasons for rejecting this conclusion.
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> **25** First, at paras 66-68, she notes that the word "circumstances" in that subsection is not qualified by "exceptional" or any other modifier. She finds, as did Beveridge J.A. in ***Carvery***, that Parliament's failure to employ restrictive language, when it could readily have done so, gives rise to the inference that a sentencing judge enjoys a wide discretion under the provision to consider all the circumstances which might warrant enhanced credit. The fact that Parliament chose to set out two express exceptions to the availability of enhanced credit in s 719(3.1), relating to ss 515(9.1), 524(4) or (8), shows that it expressly considered and created exclusions and that, therefore, its failure to mention that the circumstances justifying enhanced credit were required to be "exceptional" was a deliberate choice.
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> **26** Second, at paras 71-74, Justice Cronk considers that limiting language is used in relation to the word "circumstances" in some sections

of the *Criminal Code*; this triggers the presumption of consistent expression meaning that the failure to use such language in s 719(3.1) was, again, a deliberate choice.

27 Third, at paras 77-80, she finds that the "architecture" of ss 719(3), with s 719(3.1) being described as an exception to it, is not revelatory of the intended scope of the word "circumstances". Nor does the use of the word "exception" in the marginal note to s 719(3) indicate a contrary intention.

28 Fourth, at paras 82-88, Justice Cronk rejects the argument that the legislative history of the *Truth in Sentencing Act* suggests that enhanced credit was to be available in exceptional circumstances only. While that legislative history is not otherwise before us on this appeal, it is interesting to note Justice Cronk's observation that the legislative record is replete with conflicting and inconsistent statements made by representatives of the Government during the parliamentary review of the bill introducing s 719(3.1), and was therefore not of assistance.

29 Fifth, at paras 89-92, she rejects the suggestion that failing to limit enhanced credit to exceptional cases defeats Parliament's intention in s 719(3.1) to make one-for-one credit the general rule. She adopts the reason for rejecting this argument in ***Carvery***, noting that the wider interpretation of this section would not make enhanced credit available to virtually every offender because, at minimum, enhanced credit is not available where the reason for detaining a person in custody was stated on the record under ss 515 (9.1), or the person was detained in custody under ss 524(4) or (8). To this I would add that the express requirement for circumstances which "justify" enhanced credit must mean that Parliament did not intend it apply to every remand prisoner, but rather left the discretion of what circumstances supported it to the decision-maker in the arena in each individual case, the sentencing judge.

30 Sixth, at para 95, Justice Cronk, applying the contextual approach to statutory construction notes that: "The construction of ss. 719(3) and (3.1), therefore, must be undertaken in the context of, and in a manner that is harmonious, coherent and consistent with, that overall statutory scheme". She concludes that this requires those subsections to be interpreted in the context of the companion statutory requirement that sentences be proportionate to the gravity of the offence and the degree of responsibility of the offender. On the facts before her, proportionality supported an interpretation that allowed the sentencing judge to consider the effect of the loss of remission and parole eligibility faced by remand prisoners, in comparison with serving prisoners, as supportive of the overall principle of parity in sentencing.

31 Finally, at paras 108-109, Justice Cronk observes that the broader interpretation of s 719(3.1) is consistent with the focus of the adjudicative inquiry on the fitness of a sentence in the context of the facts of a specific case. She concludes that the narrower interpretation is not necessary to meet the legislative purpose in enacting this section - to curtail credit for time spent in pre-sentencing custody - which it achieves in any event.

32 In conclusion, Justice Cronk found no ambiguity in the wording of s 719(3.1) which would support the application of principles of statutory interpretation yielding the requirement to establish exceptional circumstances. She stated:

> 113. In this case, in my opinion, the requisite contextual and purposive analysis reveals nothing within s. 719(3.1) itself, the four corners of ss. 719(3) and (3.1) read together, or the overall sentencing and punishment regime of the Code that bars consideration of the absence of remission and parole eligibility during remand custody as a relevant and proper circumstance for the potential grant of enhanced credit for pre-sentence custody under s. 719(3.1).
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> 114. It follows that I share the view expressed by Beveridge J.A. in *Carvery*, at paras. 40 and 84, that the phrase "if the circumstances justify it" as it appears in s. 719(3.1) of the Act is not ambiguous. This phrase is not unclearly circumscribed. Apart from the maximum cap of 1.5:1 for enhanced credit and the explicit exclusions from 1.5:1 crediting set out in s.719(3.1), the phrase is simply uncircumscribed altogether.
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> 115. Further, as Beveridge J.A. also observed in *Carvery*, at para. 40, the fact of persisting disagreement at the trial level concerning the meaning of the phrase "if the circumstances justify it" and, in particular, the word " circumstances" in s. 719(3.1) does not demonstrate ambiguity in the law. *Bell ExpressVu* holds, [2002] 2 S.C.R. 559, at para. 30, that differing interpretations of a statutory provision by the courts or doctrinal writers do not reveal ambiguity in the provision under scrutiny. Rather, a court must evaluate a claim of statutory ambiguity after undertaking the contextual and purposive interpretive analysis mandated by *Re Rizzo & Rizzo*, [1998] 1 S.C.R. 27, and *Bell ExpressVu*. [...]

33 In summary, therefore, we agree that, as conceded by the Crown, s 719(3.1) does not require the existence of "exceptional" circumstances as a prerequisite to a sentencing judge giving enhanced credit for pre-sentence custody. The sentencing judge here, therefore, made no error in interpreting this section which might have indirectly borne on the reasonableness of her decision to refuse such credit

[28] I recognize that the majority in Bradbury did not say that exceptional circumstances are required. However, they urge a much narrower application of the words “if the circumstances justify it”, than that of the other courts of appeal.

[29] In ***Bradbury***, Prowse J., in her dissent, states at para. 63 that:

> While there is no doubt that Parliament intended to do away with what had become the judicial norm of granting 2:1 credit for pre-sentence custody, I cannot accept, as a matter of statutory interpretation, that it intended the words “if the circumstances justify it” to be so narrowly construed as my colleague suggests. Nor do I accept that Parliament intended the undoubted implications of such a narrow interpretation, which would leave those who are arrested and unable to obtain or perfect bail without redress by way of enhanced credit, simply because loss of remission, and other forms of deprivation, relating to conditions on remand, are common. I agree with the Court in *Carvery* that such an interpretation offends several principles of sentencing as set out in Part XXIII of the *Code*, including parity, proportionality and restraint in relying on the use of incarceration, with specific reference to Aboriginal offenders, who are notoriously over-represented in the prison population.

[30] Since ***R.*** v. ***Vittrekwa***, 2011 YKTC 64, was decided, the practice in the Yukon has been to allow remand prisoners up to 1.5:1 credit for time spent in pre-trial custody, upon sufficient information being provided to the sentencing judge to show that it is likely that, had the offender been serving time as a serving prisoner, he or she would have received credit for earned remission, or that the offender was deprived of, or not able to avail themselves, of the opportunity to earn such remission through participation in programming and/or employment. As remand inmates are considered a lower priority with respect to accessing employment or counselling opportunities, the loss of such an opportunity is also a factor for consideration.

[31] In the present case, Crown counsel submits that I should follow the reasoning of the majority in ***Bradbury*** and find ***Vittrekwa*** to no longer be applicable in the Yukon. In large part, Crown counsel's submission is based upon the fact that courts in this jurisdiction have tended to find decisions of the British Columbia Court of Appeal more persuasive than appellate decisions from other jurisdictions, as the judges of the British Columbia Court of Appeal generally sit as judges on the Yukon Court of Appeal.

[32] I note that in ***R.*** v. ***Joseph***, [1993] Y.J. No. 217, Lilles C.J.T.C., in considering the impact of a decision of the Ontario Court of Appeal on the case before him, stated in para. 17 that:

> The reasoning in St. Pierre is compelling, although judgments from the British Columbia Court of Appeal are usually considered to be very persuasive in this jurisdiction by virtue of the fact that members of that court also sit on the Yukon Court of Appeal.

[33] I agree that judgments of the British Columbia Court of Appeal continue to be very persuasive in this Court, and are often more persuasive than cases from other appellate courts, for the reason stated by Lilles C.J.T.C. They are not, however, binding on this Court. See also ***Norris*** v. ***Norris***, 2005 NWTSC 18 where the Northwest Territories Supreme Court states in para. 14:

> The main issue is whether there should be any order for retroactive support in the circumstances of this case. Counsel for the Applicant relies on recent decisions of the Alberta Court Appeal in *D.B.S.* v. *S.R.G.*, [2005] A.J. No. 2, 2005 ABCA 2 and *Henry* v. *Henry*, [2005] A.J. No. 4, 2005 ABCA 5. These decisions are highly persuasive since the Northwest Territories Court of Appeal is largely made up of members of the Alberta Court of Appeal.

and ***Kitikmeot Corp.*** v. ***Cambridge Bay***, 2006 NUCJ 16, where the Nunavut Court of Justice states in para. 22 that:

> This Alberta case law is very persuasive. In addition, Alberta case law is given careful consideration by this Court because many of the judges of the Alberta Court of Appeal also sit on the Nunavut Court of Appeal…..

[34] I repeat, however, that decisions of the British Columbia Court of Appeal, as persuasive as they are, are not binding on this Court.

[35] With all due respect, I find that I cannot agree with the majority decision in ***Bradbury*** and I prefer the reasoning of Prowse J. in dissent and that of the appellate courts mentioned above.

[36] I repeat what I said in ***Vittrekwa*** in paras. 46 – 51, regarding legislative intention:

> **46** Section 719(3) establishes that the baseline for awarding credit for pre-trial custody is one day credit for each actual day spent on remand. Section 719(3.1) allows for this to be increased to 1.5:1 "if the circumstances justify it". There is no legislative direction provided with respect to the types of circumstances contemplated. It is clear, however, from the choice of the legislators not to utilize words such as "special", "exceptional" or "unusual" to describe these "circumstances", that ordinary or common circumstances are sufficient. The critical factor is that the circumstances are enough, in the particular case, to justify increasing the credit for remand custody up to the maximum of 1.5:1.
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> **47** In paragraphs 105 and 106 of ***Johnson***, [***R.*** v. ***Johnson***, 2011 ONCJ 77], Green J. referred to testimony given by David Daubney on June 1, 2009 before the House Committee. Mr. Daubney was the head of the Criminal Law Policy Section of the Department of Justice. He was commenting on the earlier evidence of Professor Anthony Doob regarding a potential inconsistency in the legislation, whereby offenders detained in pre-trial custody automatically end up serving longer custodial sentences than similarly situated offenders released on bail. Mr. Daubney did not dispute the evidence of Professor Doob. He further stated that: "... [t]he direction we had from our minister and from the government generally was

to prepare a bill based on one to one, with an opportunity to go up to 1:5 if the circumstances justified it".

48 Green J. noted that, in his comments before the House Committee, Mr. Daubney did not offer any further justification for the 1:1 metric. Green J. referred to Mr. Daubney's comments about how courts "... trying to do justice will find that in many cases the circumstances do justify something between one to one and 1.5 to one". Mr. Daubney explained that in drafting Bill C-25 his Department:

> ... deliberately didn't use [the more common phrase "in exceptional circumstances"] because the circumstances won't be that exceptional: they'll be fairly common and, in the case of the parole loss and the remission loss will be universal.
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> Mr. Daubney reiterated that the loss of remission and parole eligibility: "... is going to apply universally to all these [remand] offenders now". Unlike poor remand conditions and lack or programming, the remission and parole considerations, he added, could "actually be dealt with arithmetically".

49 I disagree with Crown counsel's submission that using evidence of the lost opportunity to receive earned remission creates a presumption of 1.5:1 that runs counter to the wording of s. 719(3) and (3.1) and the intention of Parliament. It is clear from the Hansard excerpts referred to above that the real concern underlying the *TIS Act* [*Truth in Sentencing Act*] was in relation to an offender receiving enhanced credit at a 2:1 or 3:1 ratio and deliberately working the system to serve less actual jail time than he or she would have had they been serving the entirety of their sentence as a sentenced inmate. Leaving aside the extensive body of case law, including from the Supreme Court of Canada, that defended the rationale for this enhanced credit, including factors such as harsh remand conditions and the lack of programming (factors which perhaps the general public is not fully aware of, see ***R. v. Monje***, 2011 ONCA 1, paras. 15 - 18), the concern expressed by Minister Nicholson related to what he referred to as the public's perception that offenders were getting more lenient sentences than they deserved.

50 While this perception may be understandable with the application of a 2:1 or 3:1 credit ratio, it cannot be honestly said that this perception would be true in relation to the application of a 1.5:1 ratio where the evidence indicates that this credit for remand would place the offender in exactly the same position that he or she would have been in had they been a serving inmate rather than a remand inmate. In such cases the sentence served by the offender would be precisely the sentence that was imposed upon him or her.

> **51** An informed public would also understand that the application of a 1.5:1 ratio does not encourage offenders to deliberately delay proceedings, as not only would they not receive any enhanced credit beyond that of a serving prisoner, they would also, in most jurisdictions, be unable to access the programming and better conditions that a serving inmate has access to. Thus, there would be no benefit to the offender and, in fact, they would suffer more hardship than if they had dealt with their matter earlier.

[37] I also repeat what I stated in para. 31 of ***Vittrekwa***:

> **31** If the *Truth In Sentencing Act* is intended to be just that, i.e. truthful in its sentencing of offenders, then s. 719(3.1) must be interpreted in a manner that results in sentences that are fair, just, transparent and in accord with the principles of sentencing set out in ss. 718 - 718.2. Any interpretation that does otherwise would render Parliament's *Truth in Sentencing Act* akin to something emanating from the deceptively named Ministry of Truth in George Orwell's classic novel, *1984*. Such a result, I believe, would not accord with the fair and just treatment Canadians demand from their justice system.

[38] I cannot lose sight of the fact that 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.

[39] Following the more restrictive approach to the interpretation of s. 719(3) and (3.1) of the majority of the Court in ***Bradbury*** would result in just such an unfair application of the law, would be contrary to the purposes, objectives and principles of sentencing, and would undermine public confidence in the Canadian justice system.

[40] Therefore I find that the loss of parole eligibility and of the potential to earn statutory remission continue to be circumstances that can allow, in appropriate cases, for offenders to be granted enhanced credit under s. 719(3.1).

[41] I have been provided information from the Whitehorse Correctional Centre regarding Mr. Mulholland's time in custody on remand. It shows that Mr. Mulholland has 140 entries on his progress log. Of these, 17 are negative. They note that Mr. Mulholland has at times been rude and disrespectful to officers and had made rude comments. He has been warned about loitering, covering lights and windows, tenting his bed and making a harassing phone call. He was twice placed on administrative lockup for failing to lock up on a Code Yellow and for swearing at an officer who told him to remove a towel from his cell that was obstructing the officer's view.

[42] He was charged internally for threatening an officer and received four days separate confinement, suspended for 30 days.

[43] The remaining 123 entries are primarily positive. They indicate that Mr. Mulholland is a quiet individual who gets along well with his peers. His interaction with staff, which is minimal, is polite and respectful for the most part.

[44] He was employed as a cleaner from March 14 until April 19, however, after he was moved to segregation pending a disciplinary hearing, in which he was found not guilty, he was removed from this position. He was regularly noted to be a good worker who had one entry on his log regarding the "excellent job" that he did. There is no indication that he subsequently made a request to be placed on a waitlist for a job after he was found not guilty of the charge for which he had been placed in segregation.

[45] There is no requirement for remand inmates to participate in programming. Mr. Mulholland did not participate in programming and there is no indication that he made any requests to be allowed to do so.

[46] Based upon the reasoning in ***Vittrekwa***, the evidence as to how earned remission is calculated, and the practice that has developed in the Yukon since then, I would fully credit Mr. Mulholland for that portion of earned remission that attaches to employment. He was working and was doing well until placed in segregation for charges for which he was found not guilty. The fact that he did not subsequently ask to be put on a waitlist is not the same as refusing to work when offered the opportunity, which could provide a basis for a decision not to allow full credit.

[47] I will also credit him fully for that portion of earned remission that attaches to programming. Remand inmates are not directed to take programming and earned remission can be reduced in the event that an inmate refuses to do so. Since ***Vittrekwa***, this Court has consistently granted full credit for this portion of the earned remission calculation in the absence of any refusal to take programming.

[48] I understand that, in his submissions, Crown counsel does not contend against credit being given for these components, unless I had decided to follow ***Bradbury*** and counsel for Mr. Mulholland was seeking it other than on the basis of the loss of the opportunity to earn remission.

[49] With respect to the behavioural component, I note that the majority of the entries in regard to Mr. Mulholland are positive. For the most significant negative entry, an internal consequence resulted. The evidence relied on in ***Vittrekwa*** was that not all

negative activity results in earned remission being lost and that, even where it is, it is often only a portion of what is available to the inmate.

[50] Overall, I am satisfied that Mr. Mulholland should be granted full credit for this component as well. To the extent that I could perhaps have chosen to reduce it somewhat on the basis that there were negative entries, although I decline to do so, I would also have taken into account Mr. Mulholland's Aboriginal heritage, including his mother's attendance at residential school, and the impacts and consequences of his heritage, in accordance with s. 718.2(e).

[51] Therefore I grant Mr. Mulholland credit at 1.5:1 for his 123 days in remand. This results in a credit of 185 days.

Sentence Imposed

[52] The sentence I impose on Mr. Mulholland is broken down as follows:

- For the s. 253(1)(b) offence, 120 days time served;
- For the s. 145(5.1) offence, 30 days time served consecutive;
- For the s. 129(a) offence, 15 days time served concurrent; and
- For the s. 266 *MVA* offence 45 days, of which 35 will be time served, leaving a remanet of 10 days.

[53] Mr. Mulholland is prohibited from operating a motor vehicle on any street, road,

highway or other public place for a period of three years.

[54] I will waive the victim fine surcharges.

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COZENS C.J.T.C.