File No. 35115

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

and

LEVEL AARON CARVERY

Respondent
(Respondent)

and

CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

File No. 35339

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Applicant/Appellant)

and

SEAN SUMMERS

Respondent
(Respondent)

and

CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

INTERVENER'S FACTUM
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, INTERVENER
(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

British Columbia Civil Liberties Association, Intervener

Ryan D. W. Dalziel
Anne Amos-Stewart
Bull, Housser & Tupper LLP
Suite 900 – 900 Howe Street
Vancouver, B.C. V6Z 2M4
Telephone: (604) 641-4881
FAX: (604) 646-2671
E-mail: rdd@bht.com

Agent for British Columbia Civil Liberties Association

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0107
FAX: (613) 788-3500
E-mail: brian.crane@gowlings.com

Her Majesty the Queen, Appellant (35115)

David W. Schermbrucker
Bradley Reitz
Public Prosecution Service of Canada
1100-5251 Duke Street
Halifax, Nova Scotia B3J 1P3
Telephone: (902) 426-2285
FAX: (902) 426-1351
E-mail: david.schermbrucker@ppsc-sppc.gc.ca

Agent for Her Majesty the Queen

François Lacasse
Director of Public Prosecutions of Canada
284 Wellington Street, 2nd Floor
Ottawa, Ontario K1A 0H8
Telephone: (613) 957-4770
FAX: (613) 941-7865
E-mail: flacasse@ppsc-sppc.gc.ca

Level Aaron Carvery, Respondent

Luke A. Craggs
Burke Thompson
200-5162 Duke Street
Halifax, Nova Scotia B3J 2N7
Telephone: (902) 429-7701
FAX: (902) 423-2968
E-mail: lcraggs@bmtlaw.ns.ca

Agent for Level Aaron Carvery

Marie-France Major
Supreme Advocacy LLP
397 Gladstone Avenue, Suite 1
Ottawa, Ontario K2P 0Y9
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Her Majesty the Queen, Appellant (35339)

Gregory J. Tweney
Molly Flanagan
Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, Ontario M5G 2K1
Telephone: (416) 326-4582
FAX: (416) 326-4656

Agent for Her Majesty the Queen

Robert E. Houston, Q.C.
Burke-Robertson
200-441 MacLaren Street
Ottawa, Ontario K2P 2H3
Telephone: (613) 236-9665
FAX: (613) 235-4430
E-mail: rhouston@burkerobertson.com

[counsel and agents continue over page]

Sean Summers, Respondent

Timothy E. Breen
Fleming, Breen
370 Bloor Street E.
Toronto, Ontario M4W 3M6
Telephone: (416) 927-9000
FAX: (416) 927-9069

Agent for Sean Summers

Terri H. Semanyk
Shanbaum Semanyk Professional Corporation
305-150 Isabella Street
Ottawa, Ontario K1S 1V7
Telephone: (613) 238-6969 Ext. 2
FAX: (613) 238-9916
E-mail: tsemanyk@sspclaw.ca

Criminal Lawyers' Association of Ontario, Intervener

Russell Silverstein
Ingrid Grant
Russell Silverstein & Associate
100-116 Simcoe Street
Toronto, Ontario M5H 4E2
Telephone: (416) 977-5334
FAX: (416) 596-2597
E-mail: russell@silverstein-law.com

Agent for Criminal Lawyers' Association of Ontario

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0107
FAX: (613) 788-3500
E-mail: brian.crane@gowlings.com

TABLE OF CONTENTS

PART I: OVERVIEW OF ARGUMENT

1. The interpretation of the *Truth in Sentencing Act*, S.C. 2009, c. 29, of the courts below is supported by two interpretive doctrines. The first is that sensitivity to the liberty interests at stake is always part of the interpretive "context". The second is that the *Criminal Code* is properly read to minimally interfere with fit sentencing, and the principle of proportionality with which fit sentencing is fundamentally linked.

2. During the period when the *Truth in Sentencing Act*, S.C. 2009, c. 29, was enacted and brought into force, there were about 13,600 adults in remand on any given day in Canada. The data available indicates that of those 13,600 individuals, some 29% – that is, almost 4,000 people – were or will be sentenced to a term of imprisonment in either a provincial facility or a federal penitentiary.[1]

3. Just two of those sentences are before the Court in these appeals. The respondents, Level Carvery and Sean Summers, were given credit for the time they spent in pre-sentence custody at a 1.5:1 ratio, meaning that their sentences were reduced by one and one-half days for each day they spent in remand. Section 719(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, as introduced by the *Truth in Sentencing Act*, provides that "if the circumstances justify it", a sentencing judge may grant credit in the amount received by the respondents. The respondents received the sentences they did because the judges who sentenced them were satisfied that *their* circumstances did indeed justify 1.5:1 credit.

4. The Crown says that was error. The Crown's argument is categorical: it is that the "circumstances" referred to in s. 719(3.1) of the *Criminal Code* were intended to impliedly exclude consideration of the fact that time spent in pre-sentence custody does not count toward statutory remission and parole eligibility. Nor may the court consider any other similarly "universal" or "nearly universal" circumstance.

5. The judgment of Beveridge J.A. in *Carvery* gave first voice to what has become a growing chorus of appellate disapproval of the Crown's position. Six provincial courts of appeal

[1] Lindsay Porter and Donna Calverley, "Trends in the use of remand in Canada" (Statistics Canada, May 17, 2011), pp. 5, 16

have now concluded that the well-known and oft-applied Driedger framework for statutory interpretation does not produce the interpretation for which the Crown contends (with the 2-1 B.C. judgment in *R. v. Bradbury*, 2013 BCCA 280, being the sole outlier).[2]

6. The generally common reasoning of these courts cannot persuasively be impeached. Not one step in the Driedger analysis favours the Crown's theory. To wit: The *text* of the provision says nothing about the limitation the Crown would introduce; instead, the words allow for an open-ended inquiry into "the circumstances". The *context* in which those words appear indicates that where Parliament intended to specifically limit the court's ability to grant enhanced credit (as in the case of pre-sentence custody caused primarily by previous convictions, or in cases where the offender has contravened a court order for release or may have committed an indictable offence while released), Parliament said so expressly. And the *purpose* of the provision – to limit the amount of credit granted for pre-sentence custody – is achieved by both proffered interpretations (given the prior practice of credit on a 2:1 ratio), and is therefore of no assistance to either side.

7. It would be possible to go on at greater length about these points – as Cronk J.A. did in her excellent reasons in *Summers*, setting out in full the seven reasons why the Driedger framework, correctly applied, favours the respondents' interpretation (see paras. 65-112). If that were all this case is about – if weighing up the legislative text and the legislative context and the legislative history were all that properly needed to be done – then this Court could adopt Cronk J.A.'s reasons in their entirety, and dismiss the appeals on that footing.

8. But there is more. What evades study in the judgments under appeal – but what are properly central to the Court's analysis – are the principles that thematically link the Court's approach to sentencing legislation. The values the Court has brought to bear in interpreting such legislation; the Court's understanding of the nature of the proportionality principle; and the techniques developed by this Court to reconcile the proportionality principle with other sentencing rules set out by Parliament in the *Criminal Code*, are all significant to how s. 719(3.1) should be interpreted.

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[2] In chronological order: *Carvery* (Nova Scotia); *R. v. Stonefish*, 2012 MBCA 116 (Manitoba); *Summers* (Ontario); *R. v. Johnson*, 2013 ABCA 190 (Alberta); *R. v. Cluney*, 2013 NLCA 46 (Newfoundland and Labrador); and *R. c. Henrico*, 2013 QCCA 1431 (Quebec).

9. Ultimately, the interpretive issues in these appeals are not only relevant to the 4,000-odd persons in remand today whose liberty may be affected by this Court's decision, and to the many thousands more who may engage with the remand system in the years ahead; the issues raised here go more generally to how Parliament and the courts will understand each other in their ongoing dialogue about criminal sentencing. The latter will be the focus of this factum.

PART II: STATEMENT OF POSITION

10. As noted at the outset, this intervener's position is that the conclusions of the courts below find support in an interpretive approach that is sensitive to liberty, and in the Court's tradition of interpreting sentencing legislation to minimally interfere with fit sentencing.

PART III: STATEMENT OF ARGUMENT

A. *An Interpretive Approach that is Sensitive to Liberty*

11. There is an interpretive principle of "ancient lineage" (*per* Wilson J. in *R. v. Paré*, [1987] 2 S.C.R. 618, at p. 630), that holds that penal legislation should be given a strict construction, in order to preserve liberty (and, in a previous era, life) so far as reasonably possible.

12. Recent centuries have seen the relaxation of penal legislation (see *R. v. Hasselwander*, [1992] 2 S.C.R. 398, p. 412), and recent years have seen the ascendancy in Canada of the Driedger approach to statutory interpretation. The result of these developments was that for a time, this Court maintained that the principle of strict construction of penal statutes was only relevant in cases where, having undertaken the full Driedger analysis, the provisions in question remain ambiguous: see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, paras. 27-28; *Hasselwander*, p. 413. In the present cases, both appellate courts below declined to invoke the strict construction principle, or any similar principle, pointing to *Bell ExpressVu*.

13. The perceived problem with strict construction was that it could be *too* strict; it could have the effect of defeating Parliament's intent, as discerned through text, context, and purpose. To avoid that, the *Bell ExpressVu* approach essentially relegated interpretive principles to the role of tiebreakers.

14. Even so, in criminal cases the Court's jurisprudence has not ignored the fact that it is a *Criminal Code* the Court is expounding. The Court has consistently given special recognition to the fact that the *Criminal Code* is not akin to most other legislation. As Lamer C.J. said for the majority in *R. v. McIntosh*, [1995] 1 S.C.R. 686:

> The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. [para. 39; emphasis added]

15. There is the potential for tension between an approach that is "sensitive to liberty interests", and an approach that instead sets out to vindicate the intention of Parliament – whatever its effect on liberty – through the use of Driedger's tools. However, a recent decision written by Justice Cromwell shows how this circle can be squared. The solution lies in recognizing that because liberty is a long-cherished Canadian value, Parliament may fairly be taken to legislate in the expectation that courts will preserve liberty, absent clear indications of contrary intent. In this sense, the value of liberty forms part of the relevant "context", to use Driedger's nomenclature. Justice Cromwell described the analysis this way, in *R. v. A.D.H.*, 2013 SCC 28:

> Presumptions of legislative intent are not self-applying rules. They are instead principles of interpretation. They do not, on their own, prescribe the outcome of interpretation, but rather set out broad principles that ought to inform it. As Professor Sullivan has observed, presumptions of legislative intent, such as this one, serve as a way in which the courts recognize and incorporate important values into the legal context in which legislation is drafted and should be interpreted. These values both inform judicial understanding of legislation and play an important role in assessing competing interpretations[.]
>
> Professor Côté has described how these presumptions may inform the legal context in which legislation is drafted. He put it this way: "In some sense, presumptions of intent form part of the enactment's context, as they reflect ideas which can be assumed to have been both present in the mind of the legislature and sufficiently current as to render their explicit mention unnecessary"[.] [paras. 25-26; citations omitted]

16. This outlook views interpretive *techniques* and interpretive *principles* harmoniously, as complementary aspects of a holistic inquiry into legislative intent. Interpreting laws this way helps to ensure that the analysis remains alive to the basic values and interests, fundamental principles, and longstanding traditions that have guided the development of our law in any given area. Correspondingly, this approach helps to avoid viewing laws in a mechanistic or formalistic way, lest the tail wag the dog, and the inquiry into legislative intent be led astray by minute parsing of text and scheme.

17. If, as was said in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, *administrative* decision-makers interpreting statutes are "*always* required to consider fundamental values" (para. 35; italics are Justice Abella's), the same should be true of *judicial* decision-makers interpreting sentencing laws. In such cases (including the present cases), the key value in play is that of liberty. The *Truth in Sentencing Act* deals directly with liberty on a scale that most criminal laws do not: it is one thing to prohibit a given class of behaviour by making it an offence; it is quite another to change the rules by which the punishment for *all* offences is determined, and to do so with reference specifically to time spent in custody. When Parliament does the latter, courts should consider the meaning of Parliament's innovation with sensitivity to the impact a potential interpretation may have on liberty.

18. An approach that is sensitive to liberty finds concrete expression in the earlier words of Dickson J. in *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, that "[i]f one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication" (p. 115).

19. Extending Dickson J.'s reasoning to the present case, it must also be true that if one is to be incarcerated for *longer* than would otherwise be the case, one should at least know Parliament expressly required it. It therefore ought to matter that when Parliament referred broadly in s. 719(3.1) to "the circumstances" that may justify up to 1.5:1 credit, it said nothing that would exclude consideration of *any* class of circumstances favourable to the offender, let alone a class of circumstances that will be favourable to *most* offenders.

B. *The* Criminal Code *is Properly Read to Minimally Interfere with Fit Sentencing*

20. As the Court recently underlined in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, proportionality is "[t]he fundamental principle of sentencing", and has "long been a central tenet of the sentencing process" (para. 36). Proportionality in the sentencing process is, of necessity, highly individualized: proportionality turns on the gravity of the *particular* offence committed, considered alongside the moral blameworthiness of the *particular* offender before the court: *Ipeelee*, para. 37. A fit sentence must first and foremost be tailored to those two primary considerations. Proportionality is thus the root principle from which other sentencing principles derive, including consideration of mitigating and aggravating circumstances, and the parity and totality principles: see *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, paras. 40-41.

21. A review of the Court's jurisprudence considering sentencing legislation reveals an approach that interprets changes to the *Criminal Code* in a way that avoids or mitigates derogations from the proportionality principle. There is an interpretive tradition that gives precedence to proportionality. In pursuance of that tradition, the Court has, with rare exception, preserved so far as possible courts' flexibility to achieve a fit sentence in all the circumstances. Three examples from the jurisprudence illustrate this.

22. The first is *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455. The Court there held that time spent in pre-sentence custody (plus associated enhanced credit) was a form of punishment that should count toward mandatory minimum sentences of imprisonment. The Court rejected the Crown's submission that a mandatory minimum provision should be treated as an exception to the principles requiring credit for pre-sentence custody. Instead, Arbour J. reasoned that:

> [I]t is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. [para. 22; emphasis added]

23. Second, the Court has extended the *Wust* approach in considering legislatively-dictated sentencing ranges. In respect of both mandatory minimum sentences and maximum sentences, the Court has held that the limits set by Parliament do not affect the proportionality calculus: *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 22; and *Nasogaluak*, at paras. 41-45.

Minimums and maximums only constrain the *outcome* of that calculus; they are not otherwise a point of reference for what is fit in a given case.

24. *Ipeelee,* the Court's most recent extended discussion of proportionality, provides an interesting final example of the paramountcy of that principle. The case considered the principles applicable to sentencing aboriginal offenders. The Court rejected the assertion that s. 718.2(*e*) of the *Criminal Code* involves a "race-based discount" for aboriginal offenders. The Court instead confirmed that the judge's duty in sentencing an aboriginal person is the same as for other offenders: it is to "fashion a sentence that is fit and proper in the circumstances of the offence, the offender and victim" (para. 69). The unique systemic and background factors that may properly be considered by a judge under s. 718.2(e) are thus to be treated as *part* of the usual proportionality analysis, not as a substitute for or qualification of it (para. 72). Here again, the Court was careful to interpret the *Code* in a way that *gave effect* to proportionality.

25. In the present appeals, the Crown does not address the existence of the interpretive tradition that gives precedence to proportionality. Instead, the Crown denies that proportionality is affected by its proposed interpretation in the first place (see the *Summers* Crown factum, at paras. 67 *et seq*.). The Crown takes two points in this regard.

26. First, the Crown says that "any credit for pre-sentence custody is given *after* arriving at a fit sentence, and simply results in a mathematical adjustment to the sentence actually imposed" (para. 71). This submission is directly at odds with *Wust*, which treated enhanced credit as an integral part of the determination of a fit sentence. Moreover, it is contrary to this Court's "collateral consequences" jurisprudence, which allows judges to take into account the totality of the impact of a sentence on the particular offender before the court.

27. The collateral consequences doctrine has its modern origins in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, which considered the availability of conditional sentences, and in particular, the requirement that such sentences may only be imposed where a term of imprisonment of less than two years is appropriate. The Court rejected the argument that before determining whether to impose a conditional sentence (*i.e.*, a sentence served in the community), it was necessary to first fix the appropriate term of imprisonment. That argument, Lamer C.J. said, "does not correspond to the reality of sentencing" (para. 52). "A judge does not impose a fixed sentence of

'x months' in the abstract"; rather, "its duration will depend on the type of conditions imposed" (*ibid.*). Sentencing is not compartmentalized. The same approach was taken very recently in *R. v. Pham*, 2013 SCC 15, in which the Court held that in crafting a fit sentence, a sentencing judge may consider the immigration consequences of a sentence of a particular term.

28. The Court's jurisprudence has been consistent: a fit sentence is one that is based on all relevant circumstances. We do not say that a fit sentence is the product of only certain things, and the rest is just a matter of "mathematical adjustment". If the impact of a sentence is that the total amount of time in custody is longer, that has a bearing on whether the sentence is fit.

29. The Crown's second point, referring to *R. v. Zinck*, [2003] 1 S.C.R. 41, is that the likelihood of early release is not an appropriate consideration in the sentencing process, "since it is well settled that considerations relating to the *administration* of the sentence are irrelevant at sentencing" (para. 84; italics in original). The majority of the B.C. Court of Appeal in *Bradbury* made the same point (paras. 34, 49).

30. Like the Crown's first point, at its heart this argument is that *Wust* is wrong. *Wust* relied on the nature of the corrections regime in embracing enhanced credit. Arbour J. did so quite properly; the Crown over-reads *Zinck* in saying such considerations are inappropriate. In *Zinck*, the Court declared improper the practice of imposing a *longer* sentence of imprisonment in order to offset the likelihood of early release (para. 18). The Court emphasized that an offender on parole is still serving his sentence – what has changed is only the way that sentence is being served (para. 20). The point was not that the administration of a sentence is an irrelevant consideration; it was the much narrower point that it is inappropriate to impose an unduly long sentence in order to effectively take parole timing out of the hands of the parole board.

31. In the end, *Zinck* is yet another example of the Court's repeated insistence on fit sentences. The holding in *Zinck* does not preclude the sentencing judge from considering the totality of the circumstances in crafting a fit sentence, including the way in which the administration of a sentence is likely to unfold, and other forward-looking eventualities. As Prowse J.A. (dissenting) pointed out in *Bradbury*, sentencing is inherently predictive:

> While this approach [i.e., awarding enhanced credit based on likelihood of remission or parole] requires sentencing judges to

> make predictions as to the future, that is almost always the case in sentencing proceedings where sentencing judges are regularly asked to assess such things as an offender's risk of recidivism, the degree of potential danger they present to the public, and their likelihood of overcoming addictions, to give but three examples. [para. 67]

32. In sum, a fit sentence is one that is based on the totality of the circumstances, including predictive circumstances such as the offender's likelihood of early remission and parole. The Court's interpretive approach to sentencing laws has been to preserve the sentencing judge's ability to impose a fit sentence, so far as is possible on the language chosen by Parliament. Both judgments below are in keeping with that approach.

33. There is a final point to be made in this regard. The *Truth in Sentencing Act* inevitably involves *some* interference with proportionality and fitness, in that on any interpretation there is at least *some* constraint on judicial discretion in respect of sentence length. What warrants emphasis, however, is that the Crown's interpretation would interfere with proportionality in an additional – and unusual – way. Accordingly to the Crown, the *Truth in Sentencing Act* was intended to make *irrelevant* what was previously *relevant*, namely, lost opportunity for statutory remission and parole. The Crown takes this to its logical conclusion and says further that any factor that is "universal" or "nearly universal" is also, now, an improper consideration. On this view, the judge must disabuse himself of these otherwise material considerations. The Crown's theory would not just constrain the *outcome* of the analysis (as do mandatory minimums, and the approach of the courts below to pre-sentence custody); the Crown's theory would alter the *content of the analysis itself*.

34. This would amount to a significant unwritten interference with proportionality. It is also implausible, given how potentially unworkable the resulting inquiry would become. Can a judge really be expected to first inquire about whether something is "nearly universal" to remand prisoners, in order to decide whether he is allowed to even treat it as a factor? Parliament, in its wisdom, answered that question when it placed no limit on "the circumstances" that may be considered: it said "no".

C. *A Wider Appraisal of the Interpretive Problem*

35. The consequences of the Crown's interpretation – deepening the *Truth in Sentencing Act*'s deprivation of liberty, and more greatly impacting proportionality in sentencing for persons in remand – counsel caution.

36. Taken as a whole, the Crown's argument has two main planks: the structure of ss. 719(3) and 719(3.1), and the statements of the then-Minister of Justice in the Parliamentary record. As evidence of Parliament's intention, it is not much: when the Minister of Justice speaks *to* Parliament, he does not speak not *for* it; and common sense dictates that Parliament's intention is better reflected in the words it chose than in the order in which those words appear. Ultimately, there seems to be no answer to the point that if Parliament truly intended that only some circumstances would be capable of justifying enhanced credit, it could easily have said so. For now, it has not.

37. The Court's interpretive role gives it a choice. The Court can follow tried-and-true interpretive techniques, buttressed by the values and traditions developed in the Court's sentencing jurisprudence – and agree with the courts below; or the Court can draw big inferences from a small point about structure, to in effect prefer the words of the Minister of Justice over those of Parliament – and agree with the Crown. Respectfully, the BCCLA endorses the former.

PART IV: SUBMISSIONS REGARDING COSTS

38. The BCCLA does not seek costs and asks that costs not be awarded against it.

PART V: REQUEST FOR ORAL ARGUMENT

39. The BCCLA requests the Court's permission to make 10 minutes of oral argument at the hearing of these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 20th day of November, 2013.

Ryan D. W. Dalziel	**Anne Amos-Stewart**

PART VI: TABLE OF AUTHORITIES

PART VII: LEGISLATION IN ISSUE

English

Truth in Sentencing Act, S.C. 2009, c. 29, s. 3

3. Subsection 719(3) of the Act is replaced by the following:

(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).

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

Criminal Code, R.S.C. 1985, c. C-46, s. 718.1

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

French

Loi sur l'adéquation de la peine et du crime, L.C. 2009, ch. 29, art. 3

3. Le paragraphe 719(3) de la même loi est remplacé par ce qui suit :

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par

suite de l’infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d’un jour pour chaque jour passé sous garde.

(3.1) Malgré le paragraphe (3), si les circonstances le justifient, le maximum est d’un jour et demi pour chaque jour passé sous garde, sauf dans le cas où la personne a été détenue pour le motif inscrit au dossier de l’instance en application du paragraphe 515(9.1) ou au titre de l’ordonnance rendue en application des paragraphes 524(4) ou (8).

(3.2) Le tribunal motive toute decision d’allouer du temps pour la période passée sous garde et fait inscrire les motifs au dossier de l’instance.

(3.3) Il fait inscrire au dossier de l’instance et sur le mandat de dépôt l’infraction en cause, le temps passé sous garde, la période d’emprisonnement qui aurait été infligée n’eût été tout temps alloué, le temps alloué, le cas échéant, et la peine infligée.

(3.4) L’inobservation des paragraphes (3.2) ou (3.3) n’entache pas la validité de la peine infligée.

Code criminel, L.R.C. (1985), ch. C-46, art. 718.1

718.1 La peine est proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant.