COURT OF APPEAL OF YUKON

Citation: *R. v. Chambers*,
2014 YKCA 13

Date: 20141007
Docket: CA 13-YU731

Between:

Her Majesty the Queen

Appellant

And

David Frederick Chambers

Respondent

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Cooper

On appeal from: An order of the Territorial Court of Yukon dated September 30, 2013 (*R. v. Chambers,* 2013 YKTC 77, Dockets 11-00309, 12-00409, 12-00722)

Counsel for the Appellant:	D. Schermbrucker
Counsel for the Respondent:	B. Land-Murphy L.A. Whyte
Place and Date of Hearing:	Whitehorse, Yukon April 29, 2014
Place and Date of Judgment:	Vancouver, British Columbia October 7, 2014

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Cooper

Summary:

While on judicial interim release on certain initial charges, the respondent was arrested and charged with a new offence. He was then remanded on consent for several months until he applied for and was granted judicial interim release. The sentencing judge ultimately sentenced the respondent to 15 months in custody with enhanced credit of 1.5:1 for pre-sentence custody.

The Crown appeals, submitting that enhanced credit is not available in respect of a portion of the time the respondent spent in pretrial custody pursuant to ss. 524(8) and 719(3.1) of the Criminal Code . The respondent submits that enhanced credit is available because no "detention order" was made. Alternatively, the respondent submits that a portion of s. 719(3.1) unjustifiably infringes his rights under ss. 7 and 15 of the Charter by denying him, an Aboriginal person, a consideration of his Gladue factors as part of the enhanced credit assessment.

Held:

Appeal allowed. Subsection 524(8) applies in the circumstances of this case. The sentencing judge's declaration of invalidity is set aside. The respondent is therefore ineligible for enhanced credit for pre-sentence custody.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I.

[1] David Frederick Chambers is an Aboriginal person. He is a member of the Champagne Aishihik First Nation. His sentencing in the Territorial Court upon pleading guilty to offences of break, enter and commit assault, common assault and uttering threats, brings into focus the issues on this appeal. They center on the amendments to s. 719 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 ("*Code*") introduced in the *Truth in Sentencing Act*, S.C. 2009, c. 29 (at times, "*TISA*"), specifically the provisions of s. 719(3.1) dealing with the calculation of enhanced credit for periods of pretrial custody.

[2] Mr. Chambers' case involves an issue of the interpretation of s. 719(3.1) and, depending on the outcome of that matter of construction, the issue of the constitutionality of the provision as it applies to Aboriginal persons in light of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 ("*Charter*").

[3] The learned sentencing judge resolved the issue of statutory interpretation in favour of Mr. Chambers, holding him entitled to an enhanced credit for presentence custody. She nevertheless proceeded to consider the *Charter* issues and concluded that a portion of s. 719(3.1) offended ss. 7 and 15 of the *Charter*. The learned judge declared this portion of the provision of no force and effect in the case of Mr. Chambers. I respectfully disagree with these conclusions.

II.

[4] The offences began with an incident in July 2011, which included the counts of break, enter and commit assault and common assault. They involved Mr. Chambers' common-law partner and two men at the residence of one of them. The count covering uttering threats involved conduct in September 2012, while Mr. Chambers was on judicial interim release on the initial charges.

[5] Mr. Chambers came before The Honourable Chief Judge Ruddy. Her reasons for sentencing are very comprehensive and they are indexed as 2013 YKTC 77.

[6] After reciting Mr. Chambers' background, the learned judge turned to consider an appropriate sentence. She reviewed similar cases and concluded (at para. 33) "that the appropriate starting point for Mr. Chambers would be a sentence of 18 months". Chief Judge Ruddy then considered Mr. Chambers' participation in the Community Wellness Court.

[7] The judge concluded (at para. 37):

> [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.

[8] I take this global sentence of 15 months, down from the initial 18 month assessment, to generally reflect an application of s. 718.2(e) of the *Code* and a consideration of the so-called *Gladue* factors (*R. v. Gladue*, [1999] 1 S.C.R. 688) engaged in Mr. Chambers' case.

[9] The sentencing judge then turned to the calculation of credit for remand pursuant to ss. 719(3) and (3.1) of the *Code*.

[10] The judge summarized the two positions before her so (at paras. 39-41):

> 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.
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> 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).
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> 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.

III.

[11] I turn to outline the sentencing judge's analysis in light of the positions advanced by the parties.

[12] Sections 719(3) and (3.1) of the *Code* read:

> 719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.
>
> ...
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> (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).

[13] The sentencing judge dealt first with the issue of statutory interpretation. Mr. Chambers' submission hinged on whether he was a person detained in custody under s. 524(8) of the *Code* (in the circumstances, s. 524(4) did not apply). If he was not so detained, he would not be ineligible for the enhanced credit of one and one-half days for each day spent in custody.

[14] Section 524(8) of the *Code* provides:

> (8) Where an accused described in subsection (3), other than an accused to whom paragraph (a) of that subsection applies, is taken before the justice and the justice finds
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> > *(a)* that the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance, or
> >
> > *(b)* that there are reasonable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,
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> he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

[15] The sentencing judge introduced the "statutory interpretation argument" at paras. 53-54 of her reasons:

> 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).

[16] Chief Judge Ruddy noted and distinguished the Ontario Court of Appeal's decision in *R. v. Atkinson* (2003), 170 O.A.C. 117 (of which more, below). She then concluded (at paras. 62 and 68):

> 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.
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> ...
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> 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.

[17] Having so concluded, she found that Mr. Chambers was not precluded by virtue of s. 719(3.1) from seeking enhanced credit for the second remand period. In the event she was found to be wrong in this conclusion, the judge went on to consider the constitutional challenge. She noted (at para. 71) that what she referred to as "the impugned portion of the provision" was the entire exception set out in s. 719(3.1), that is:

> ...unless the reason for detaining the person in custody was stated in the record under ss. 515(9.1) or the person was detained in custody under ss. 524(4) or (8).

[18] Beginning with the s. 7 analysis, the judge noted that an allegation of a s. 7 breach requires 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.

[19] The sentencing judge quickly concluded that Mr. Chambers' liberty interest was affected as, absent the impugned portion of the provision, she would have granted Mr. Chambers enhanced credit for the second remand period of 236 days for an additional credit of 354 days (at para. 77):

> 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.

[20] The sentencing judge turned to consider whether the deprivation of liberty was in accordance with the principles of fundamental justice. She did so (at para. 79) in light of the four grounds advanced by Mr. Chambers in support of his position:

- 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.

[21] The sentencing judge dismissed the arguments under the first two bullets and as these did not found the submissions before us, I will say no more of them. But the

judge did give affect to the arguments under "proportionality and parity" and "arbitrariness and overbreadth".

[22] On proportionality in sentencing, the sentencing judge noted (at para. 109) that "[t]he constitutional standard for proportionality in the criminal law context is that a law cannot stand if it is grossly disproportionate" and she cited *R. v. Malmo-Levine*, 2003 SCC 74 as importing the constitutional standard under s. 12 of the *Charter* to arguments made under s. 7. The judge summarized the position of Mr. Chambers (at para. 110):

> 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.

[23] At para. 119, the sentencing judge quoted para. 169 of *Malmo-Levine*:

> ... 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*.

She then set out the question before her (at para. 120):

> 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.

[24] The learned judge proceeded to note the judicial consideration of the experiences of Aboriginal persons in Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC13; in particular, she quoted para. 60 of *Ipeelee*:

> 60 Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts 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. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.

[25] The learned judge then made this critical finding (at para. 126):

> 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.

[26] The judge concluded so (at paras. 128 and 135):

> 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:
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> > 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.
>
> ...
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> 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.

[27] Turning to arbitrariness and overbreadth, the sentencing judge cited the Ontario Court of Appeal's decision in *R. v. Bedford*, 2012 ONCA 186, not then having the Supreme Court of Canada's reasons in that case, 2013 SCC 72, and then turned to determine the objectives of the amendments to s. 719. She concluded that the predominant purposes of the legislative amendments in the *Truth and Sentencing Act* are to limit the amount of credit for pretrial custody and to preclude courts from awarding credit on a 2:1 or greater basis and that these objectives also apply specifically to the impugned portion of s. 719(3.1). As I will suggest below, this is a narrow view of the objectives of the amendments and it tended to misdirect the sentencing judge's ultimate conclusions.

[28] The judge found that the impugned provision is consistent with its objectives as she described them (at para. 145):

> 145 ... 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.

[29] Accordingly, the sentencing judge found that the impugned provision is not arbitrary.

[30] She then turned to consider whether it is overbroad in the sense that the impugned provision is not necessary to achieve the legislative objectives. Recalling that the judge concluded that a central objective of the legislation was to preclude courts from awarding credit on a 2:1 or higher basis, she stated (at paras. 150-152):

> 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.
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> 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.
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> 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.

[31] Having found what the judge viewed as a disproportionate impact on Aboriginal offenders and overbreadth in the reach of the impugned provision, she found the s. 7 breach to be made out.

[32] On the s. 15 argument, the learned judge noted the Supreme Court of Canada's decisions which today inform this analysis: *R. v. Kapp*, 2008 SCC 41 and *Quebec (Attorney General) v. A.*, 2013 SCC 5. She then proceeded to consider the two-part test in *Kapp* as explained in *A*:

> (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?

[33] On the first question, the sentencing judge reasoned that because the impugned provision precludes a court from considering the unique circumstances of Aboriginal people, it deprives them of the fullest benefit of an analysis necessary to address their historical disadvantage. Thus, the first question in the *Kapp* test was answered in the affirmative.

[34] On the basis of *A*, the sentencing judge then posed the second question in these terms (at para. 170):

> 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?

[35] The learned judge concluded (at para. 175):

> 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*.

[36] In the final result, the learned judge concluded that the impugned provision could not be saved under s. 1.

IV.

[37] I now consider the errors alleged in the sentencing judge's disposition of the central issues. I will not separately set out the positions of the parties, but I will address them as necessary in my discussion.

[38] I begin, however, by discussing the objectives of the *Truth in Sentencing Act*. As I have related, the sentencing judge adopted what I respectfully suggest is a very narrow view of the legislative objectives for the amendments (at para. 148):

> 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.

[39] Chief Judge Ruddy, however, did not have the benefit of the Supreme Court of Canada's reasons in *R. v. Summers*, 2014 SCC 26, which definitively discuss the statutory regime created by the 2009 *Truth in Sentencing Act*.

[40] The central issue before the Court in *Summers* required it to determine the meaning of "circumstances" in s. 719(3.1), and "whether the lost opportunity for early release and parole in pre-sentence detention can be such a circumstance, capable of justifying enhanced credit at a rate of 1.5:1" (at para. 33).

[41] At paras. 51-58 of her reasons for the Court in *Summers*, Madam Justice Karakatsanis discusses the intention of Parliament in enacting *TISA*. I extract these basic conclusions from the discussion:

- "Parliament clearly intended to restrict the amount of presentence credit. This is plain from the cap of 1.5 days credit for every day spent in detention..." (para. 52);
- "Parliament also intended that the process of granting credit under s. 719 should be more transparent and easily understood by the public..." (para. 53);
- Parliament did not intend to prevent sentencing judges from considering the quantitative and qualitative consequences of presentence detention in considering what "circumstances" may justify enhanced credit under s. 719(3.1) (paras. 54, 57, 58).

[42] I would add two important additional objectives of Parliament in crafting the amendments. The first is perhaps the most important over-arching objective of the legislation (at para. 4):

> The purpose was to remove any incentive for an accused to drag out time in remand custody, and to provide transparency so that the public would know what the fit sentence was, how much credit had been given, and why.

[43] The second is identified by Karakatsanis J. at para. 39 of her reasons:

> 39 The absence of qualifications on "circumstances" in ss. 719(3.1) is telling since Parliament did restrict enhanced credit, withholding it from offenders who have been denied bail primarily as a result of a previous conviction (s. 515(9.1)), those who contravened their bail conditions (ss. 524(4)(a) and 524(8)(a)), and those who committed an indictable offence while on bail (ss. 524(4)(b) and 524(8)(b)). Parliament clearly turned its attention to the circumstances under which s. 719(3.1) should not apply, but did not include any limitations on the scope of "circumstances" justifying its application.

[44] This last aspect of Parliament's intention in enacting the amendments found in *TISA* is of significance in resolving the issues before the Court here. Parliament clearly intended to create the exception to the exception set out in s. 719(3.1) in the impugned provision. Parliament clearly intended to target the population identified in that provision, that is, persons who have been expressly noted as previous offenders and persons who have breached their bail conditions or committed an indictable

offence while on bail. Parliament clearly intended to deny this target population the benefit of consideration for enhanced credit for presentence detention.

[45] One must keep this intention in mind when one looks at the issues of arbitrariness and overbreadth. The sentencing judge took a narrow view of the intention of Parliament in *TISA*, suggesting that it was simply aimed at precluding the award of credit at a rate of 2:1 or greater. It becomes somewhat of a self-fulfilling prophecy to then conclude that denying the target population a chance at enhanced credit of 1.5:1 is overbroad because Parliament has already achieved its narrow objective. Rather, the resolution of the overbreadth issue must, I suggest, take place in the context of *Summers'* more nuanced view of the intention(s) of Parliament in promulgating *TISA* and in particular of Parliament's intention to deny the target population a consideration of the 1.5:1 enhanced credit.

[46] This is a convenient point to narrow the constitutional consideration of s. 719(3.1). The impugned provision includes in the target population of those who will not qualify for a consideration of enhanced credit, persons who are detained in custody for reasons "stated in the record" under ss. 515(9.1). Mr. Chambers was before the Court in the context of s. 719(3.1) in the circumstances of s. 524(8). It was not necessary for the sentencing judge to consider the s. 515(9.1) aspect of the impugned provision. Its constitutionality was not discussed at any length by the sentencing judge in her reasons and it was not by any measure fully argued before us. This aspect of the impugned provision was considered and found to be unconstitutional in *R. v. Beck*, 2014 NWTTC 09. Different considerations may well be engaged in the constitutional review of this specific portion of the provision. In my view, it is inappropriate to embark upon that consideration in this case and I decline to do so. My comments hereafter are restricted to the remainder of the impugned provision and when I refer to the "impugned provision" I am now not including reference to the s. 515(9.1) aspect. It follows that I consider the sentencing judge to have erred in dealing with this aspect of the impugned provision. [As a footnote, the Ontario Court of Appeal has now dealt with the s. 515(9.1) aspect in a decision I discuss below in Part IX of these reasons.]

V.

[47] The threshold issue before Chief Judge Ruddy and this Court on appeal is whether Mr. Chambers was detained under s. 524(8). The sentencing judge concluded that he was not. I respectfully disagree.

[48] Section 524(8) provides:

> (8) Where an accused described in subsection (3), other than an accused to whom paragraph (*a*) of that subsection applies, is taken before the justice and the justice finds
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> > (*a*) that the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance, or
> >
> > (*b*) that there are reasonable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,
>
> he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

[49] In Mr. Chambers' case, the matter proceeded before the bail judge in this way:

> THE CLERK: The matters of David Chambers.
>
> [DEFENCE COUNSEL]: Just for the record, Robert Dick; I'm appearing as duty counsel with Mr. Chambers. There's an Information - there's three Informations before the Court. Waive reading of those Informations.
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> [CROWN COUNSEL]: On the one count for breaching by failing to report between June the 14th and July the 5th, the Crown would proceed summarily. And with respect to the new uttering threats Information, the Crown will reserve its election at this time. And I understand - or, pursuant to s. 524, I would revoke prior process. I understand Mr. Chambers is not seeking -
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> THE COURT: Application to revoke prior process granted.
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> [CROWN COUNSEL]: Thank you. I understand Mr. Chambers will not be seeking his release today but would have the matter go over to October the 3rd -
>
> [DEFENCE COUNSEL]: That's correct

> [CROWN COUNSEL]: - at 9:30 for plea. In the meantime, I would ask for no-contact with a number of individuals.

[50] Mr. Chambers was thereafter remanded on consent on numerous occasions from 26 September 2012 until 3 December 2012, when it became apparent that he would not be readmitted to the Community Wellness Court. Mr. Chambers was again remanded on consent on various occasions until 18 February 2013, when he pleaded guilty to the new charges of uttering threats. He was then remanded on consent from time to time until 17 May 2013 when he was admitted to bail.

[51] Adopting a common-sense approach to s. 524(8) and what happened in this case, it is very difficult to reach any conclusion but that Mr. Chambers was "detained in custody" during this period under s. 524(8). If he was not, by what authority was he detained? With respect, to suggest that by the simple expedient of consenting to remand, an accused can take himself or herself beyond the reach of s. 719(3.1) invites the kind of manipulation by accused persons that the *TISA* amendments are generally directed against.

[52] To proceed from "common sense" to a more legalistic approach, it is noted that the impugned provision applies where "the person was detained in custody under ss. 524...(8)". There is no requirement for an express order of detention after a show cause hearing initiated by an accused person.

[53] There are two recent decisions of this Court considering the application of s. 719(3.1) in cases that predated *Summers* but were back before the Court following its pronouncement: *R. v. Taylor*, 2014 BCCA 304, and *R. v. McBeath*, 2014 BCCA 305.

[54] Neither case appears to deal with the precise issue before the Court here.

[55] Two Ontario cases were cited by the Court in *McBeath*: *R. v. Morris*, 2013 ONCA 223, and *R. v. Nevills*, 2014 ONCA 340.

[56] *Nevills* cited *Morris*. In *Morris*, it is not precisely clear, but it appears that the accused was in custody for a period before sentencing because he breached his

conditions of bail, but he did not then apply for further release on bail; he consented to remand. The sentencing judge according to the Court of Appeal (at para. 15):

> 15 ...reasoned, at para. 54, that while the appellant was not detained in custody under ss. 524(4) or (8), "the conduct of the accused while on bail prior to revocation, if applicable, may be a relevant factor in determining whether to grant enhanced credit." She concluded that, in this case, the circumstances were analogous to ss. 524(4) and (8), and therefore did not justify enhanced credit.

[57] The Court of Appeal agreed:

> 18 Subsections 524(4) and (8) provide, in part, that where an accused has contravened or was about to contravene an undertaking or recognizance, or there are reasonable grounds to believe that the accused has committed an indictable offence after an undertaking or recognizance was entered into by him, the undertaking or recognizance shall be cancelled and the accused shall be detained in custody, "unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10)."

[58] There appears to be a simple assumption here that because an accused has not applied for bail in the circumstances of s. 524(4) or (8), he is "not detained in custody" under those sections for the purposes of s. 719(3.1). The Court did not undertake any detailed analysis of the question so I do not feel the decision is of much assistance here.

[59] The Crown summarizes its submission on this point at para. 40 of its factum and I substantially agree with this submission:

> 40. Once the prosecution establishes that the statutory preconditions are met, the presiding justice must cancel the existing release and the accused is detained. The effect of a revocation of bail is immediate - no further order of the Court is required for the accused to be detained. This is because the revocation of bail under section 524(8), by itself, also reverses the onus and creates a presumption that the accused remain in custody. Unless and until the accused makes a successful application, he is detained under section 524(8) of the *Criminal Code.* At any point after the revocation of the prior release, the accused may be given a reasonable opportunity to show cause why his or her detention is not justified. The common practice of “consenting” to remand in these circumstances is only the deferral of the right, which may be exercised at any time, to show cause. Upon cause being shown, the presiding justice may make a further order under section 524(8) of the *Criminal Code* to detain the accused or

> release him under suitable conditions. Section 719(3.1) of the *Criminal Code* excludes from enhanced credit a person “detained” under section 524(8) and not “ordered detained” under the section.

[60] The issue in *Atkinson* concerned the interpretation of the phrase "on the making of an order to detain the offender in custody under ss. 515(6)" contained in s. 742.6(12) in relation to the procedure on breach of a conditional sentence order.

[61] The facts in *Atkinson* are set out in paras. 1-2 of the judgment of Mr. Justice Rosenberg:

> [1] The appellant appeals in writing from a finding by Thomson J. that the appellant breached his conditional sentence. The hearing judge found that the appellant had breached the house arrest term of the sentence and revoked the conditional sentence. The appellant was therefore required to serve the time of 13 days remaining on the sentence in custody, subject to any earned remission.
>
> [2] The appellant submits that his conditional sentence had expired at the time of the alleged breach. He does not dispute that he breached a condition of the sentence, it if was still running at the time. The appeal turns on the interpretation of s. 742.6 of the *Criminal Code*. The appellant submits that because he was in custody for certain periods the conditional sentence had expired prior to the date of the alleged breach. Since I agree with the appellant's interpretation of that section I would allow the appeal and set aside the order of the hearing judge.

[62] Section 742.6(12) of the *Code* provides:

> A conditional sentence order referred to in subsection (10) starts running again on the making of an order to detain the offender in custody under subsection 515(6) and, unless section 742.7 applies, continues running while the offender is detained under the order.

[63] Mr. Justice Rosenberg summarized the positions of the parties (at paras. 18-19):

> [18] The narrow issue in this case is the meaning of the phrase "on the making of an order to detain the offender in custody under subsection 515(6)". The appellant contends that as soon as the offender is brought before a justice, a detention order is made and therefore, unless the offender shows cause, he or she is in custody under s. 515(6) and the sentence begins to run again. The appellant's position is that it should not matter whether there has been a formal show cause hearing, as long as the offender remains in custody and is not serving any other sentence.

> [19] The Crown's position is that a detention order within the meaning of s. 515(6) and 742.6(12) means the formal order detaining the offender after a show cause hearing. In the appellant's case he requested adjournments of the show cause hearings when he was arrested on the three previous breaches and the conditional sentence did not run during those periods. The Crown counsel particularly relies upon s. 742.6(16), which allows a court to order that some or all of the period of suspension be deemed to be time served under the conditional sentence. She submits that Parliament turned its mind to the possibility of unfairness and thus gave the judge the discretion to relieve against it in special circumstances.

[64] Section 515(6) of the *Code* provides:

> (6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law ...

[65] Mr. Justice Rosenberg for the Court concluded:

> [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).

[66] While not on all fours with the issue of interpretation before the Court here, it is the common sense of this conclusion that appeals: in my view, there is no rational distinction to be drawn between an accused detained pursuant to a revocation of process or a formal detention order following a show cause hearing; in either circumstance, the accused is surely "detained in custody" under s. 524(8) of the *Code*.

[67] That being so, Mr. Chambers was detained for the purposes of the impugned provision and it is necessary to advance to the *Charter* arguments.

[68] However, before I do so, I would add a further observation on the sentencing judge's treatment of *Atkinson*.

[69] The sentencing judge rejected the common-sense approach in *Atkinson* largely because its application in this case would result in Mr. Chambers spending more time in custody and she held that ambiguities in penal statues must be resolved in favour of the accused (at paras. 57-59). Respectfully, this was another error. The strict construction of penal statutes and similar principles of interpretation should be employed only after a court concludes that a legislative ambiguity exists following the application of Driedger's modern approach to statutory construction (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 26-30; *Summers* at para. 35). The trial judge did not adopt that approach in her reasons and I am not convinced that an ambiguity results from the application of the modern approach to the section under consideration.

VI.

[70] The critical submission by the Crown in responding to the *Charter* challenges is the argument that a sentencing judge is not constitutionally required to consider *Gladue* factors at each stage of the sentencing process for an Aboriginal offender. The Crown makes this point in its factum at para. 42 in submitting that the sentencing judge here proceeded on "a faulty starting premise":

> 42. The sentencing judge had the benefit of the relevant and leading cases on sections 7 and 15 of the *Charter*, however in applying them, her entire analysis was tainted by a faulty starting premise: namely, that a sentencing judge is constitutionally required to apply the *Gladue* factors as a separate and specific consideration at each and every step of the sentencing of an Aboriginal offender. In finding that section 719(3.1) offends section 7 of the *Charter*, the sentencing judge said as follows:
>
> > 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.

[71] I respectfully agree with the thrust of this submission.

[72] In my view, the sentencing judge has elevated a statutory direction in s. 718.2(e) to consider the unique circumstances of Aboriginal offenders in considering "all available sanctions other than imprisonment that are reasonable in

the circumstances" to the level of a stand-alone and pervasive *Charter* right or direction.

[73] First and foremost, s. 718.2(e) imposes a statutory duty on the sentencing judge (*Ipeelee* at para. 87).

[74] It is true, as *Ipeelee* also holds, that a failure to abide by the statutory duty will result in a sentence that is not fit and not consistent with the fundamental principle of proportionality. In this sense, it would offend s. 7 of the *Charter*. But I suggest such a sentence represents a deprivation of liberty that is not consistent with the principles of fundamental justice because it has been imposed in contravention of an express statutory direction to consider the unique circumstances of the Aboriginal offender. It is a statutory direction to consider these circumstances, not a constitutional requirement.

[75] Alternatively, if it may be viewed (imprecisely, I suggest) as a constitutional requirement, it is in the sense that it is a principle of fundamental justice that a sentence (the end result of the criminal justice process in the case of a finding of guilt) be fit and proportionate to the gravity of the offence and the culpability of the offender. It is critically important for a sentencing judge to consider an Aboriginal offender's *Gladue* factors when crafting a fit and proportionate sentence, but this does not imply it is a constitutional imperative that an Aboriginal person's *Gladue* factors be considered at every point of his or her interaction with the justice system.

[76] Viewing s. 718.2(e) as a statutory duty rather than a constitutional imperative in and of itself also helps explain a number of the cases relied upon by the sentencing judge.

[77] *R. v. Cardinal*, 2013 YKCA 14, a recent decision of this Court, was cited by the sentencing judge at para. 50 of her reasons. It involved an application of s. 719(3.1) of the *Code* in the circumstances of an Aboriginal offender and eligibility for the enhanced credit for presentence detention.

[78] Essentially, this Court concluded that in determining "if the circumstances justify it" (the enhanced credit), the sentencing judge took into account the *Gladue* principles discussed in reports before the Court. Mr. Justice Chiasson found this to be appropriate (at paras. 24-25):

> [24] The judge also made it clear that he considered the respondent's Aboriginal background and "the positive prospects he has for rehabilitation" as "circumstances that justify enhanced credit". The Crown asserts that these are matters that are taken into account at first instance when determining the appropriate sentence and should not be considered again in the context of credit for time served pre-sentence. In my view, this is too narrow an approach. Section 719(3.1) of the *Criminal Code* mandates consideration of the "circumstances" to determine whether they justify increasing the credit for time served. The circumstances in this case to which the judge referred in para. 155 were the respondent's Aboriginal background, the particular circumstances of his life and the positive prospects he has for rehabilitation "as set out in the Psychiatric Report, the PSR and the *Gladue* Report".
>
> [25] These factors, like the time required to obtain the various reports and the delay from hearing to sentencing, were personal and significant to the respondent in this case. They are part of the overall circumstances and are relevant in that context. That context is something more than the near-universal circumstances common to most accused in remand custody.

[79] But, of course, what the sentencing judge in *Cardinal* was doing was what he was directed to do by the statute: to consider the enhanced credit "if circumstances justify it"; *Gladue* factors were part of the particular offender's circumstances; as a matter of statutory direction, they had to be taken into account. As *Summers* later held (at para. 37), s. 719(3.1) "... is free of any language limiting the scope of what may constitute 'circumstances'".

[80] *R. v. Leonard*, 2012 ONCA 622, was also relied upon by the learned sentencing judge, as was the Newfoundland and Labrador Court of Appeal's decision in *R. v. Anderson*, 2013 NLCA 2.

[81] The reliance on these decisions to found the sentencing judge's expansive view of a duty to take an Aboriginal offender's unique circumstances into account when that offender is in contact with various players in the greater justice system is problematic. In my view, that foundation has been undermined by the Supreme Court of Canada's decision in *Anderson*, 2014 SCC 41, which allowed the appeal

from the Newfoundland and Labrador Court of Appeal's decision in the same case and in doing so explained the Ontario Court of Appeal's decision in *Leonard* in a manner that confirms my analysis of what really drives decisions like *Cardinal*. The Supreme Court of Canada's decision in *Anderson* was decided after argument before us concluded. The Court invited and received counsels' further submissions on it.

[82] *Anderson* was a case of an Aboriginal person convicted of impaired driving. A conviction for impaired driving attracts mandatory minimum sentences for second and subsequent offences but only if the Crown notifies the accused of its intention to seek a greater punishment prior to plea. In *Anderson*, the trial judge held that Crown counsel breached s. 7 of the *Charter* by tendering the notice without considering the accused's Aboriginal status.

[83] Mr. Justice Moldaver wrote the judgment for the Court. He discussed the issues before the Court at paras. 16-17 of his reasons:

> 16 This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options available to a judge -- here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of "core" prosecutorial discretion, and if so, the standard by which it may be reviewed.
>
> 17 Before analyzing these two issues, a brief explanation of how they are connected is warranted. The respondent argues that all state actors (including Crown prosecutors) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. He maintains that this is a principle of fundamental justice. If this argument is accepted, it matters not whether the decision is one of prosecutorial discretion. The principle of fundamental justice -- perhaps more aptly described as a constitutional duty -- would apply regardless. As will be discussed in greater detail, prosecutorial discretion provides no answer to the breach of a constitutional duty. If, on the other hand, the respondent's argument is rejected, the distinction between prosecutorial discretion and tactics and conduct before the Court becomes important, as the categorization affects the standard of review to be applied to the decision.

[84] The Court rejected this broad view which would elevate the duty under s. 718.2(e) to a constitutional requirement binding all state actors when making a

decision affecting the liberty interests of an Aboriginal person. In doing so, the Court stressed that the duty imposed by s. 718.2(e) is one that applies only to judges.

[85] In this context, the Court discussed both *Gladue* and *Ipeelee*. At para. 24, the Court again noted the connection between s. 718.2 and the principles of fundamental justice and importantly, the Court characterized the judge's duties under s. 718.1 and s. 718.2 of *Code* as "statutory obligations":

> 24 Section 718.2(e) was also central to the discussion in *Ipeelee*. In that case, the Court noted that the *Gladue* principles bear on the ultimate question of what is a fit and proper sentence and assist the judge in crafting a sentence that accords with the fundamental principle of proportionality. The failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders thus breaches both the judge's statutory obligations, under ss. 718.1 and 718.2 of the *Code,* and the principle of fundamental justice that sentences be proportionate: *Ipeelee*, at para. 87.

[86] In rejecting the broad view advanced by Mr. Anderson, the Court acknowledged the decision in *Leonard* and, indeed, quoted the very same paragraph upon which the sentencing judge here relies (at paras. 26-28):

> 26 In so concluding, I have not ignored *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. , a case upon which Mr. Anderson relies. In *Leonard*, the United States sought the extradition of two Aboriginal Canadians. Sharpe J.A. held that in deciding whether or not to surrender the accused, the Minister of Justice was required to consider their Aboriginal status, noting that
>
> > the *Gladue* factors are not limited to criminal sentencing but ... 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. That category includes extradition. [para. 85]
>
> 27 Mr. Anderson submits that, like the Minister of Justice in *Leonard*, Crown prosecutors should be required to consider Aboriginal status as they are "decision-makers" who "have the power to influence the treatment of aboriginal offenders in the justice system" (*Gladue*, at para. 65). With respect, I cannot agree. The excerpt from *Leonard* upon which Mr. Anderson relies should not be taken out of context. Pursuant to s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18, the Minister of Justice must refuse to surrender an individual if "the surrender would be unjust or oppressive having regard to all the relevant circumstances". As Sharpe J.A. notes, determining whether the surrender would be unjust or oppressive requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state with the likely sentence that would be imposed in Canada -- a task which is

> impossible to do without reference to the *Gladue* principles. As Sharpe J.A. explained, the proper exercise of the Minister's discretion in this context
>
> > ... requires an assessment of the likely result if the case were prosecuted domestically and a comparison of that result to the likely outcome in the foreign state if the individual sought were surrender[ed]. In the case of an Aboriginal offender, I fail to see how that assessment and comparison could be accomplished without reference to the *Gladue* principles. [para. 87]
>
> 28 It follows, in my view, that Leonard does not support the much broader application of *Gladue* that Mr. Anderson seeks.

[87] So, again, the importation of a consideration of *Gladue* principles into the decision-making process of the state actor in *Leonard* – there, the Minister of Justice – was pursuant to a statutory direction to determine if "the surrender would be unjust or oppressive having regard to all the relevant circumstances". In this way, *Leonard* is another example of cases like *Cardinal*. As Mr. Justice Moldaver says, "...*Leonard* does not support the much broader application of *Gladue* that Mr. Anderson seeks". Nor does it support the much broader view of *Gladue* and *Ipeelee* that the sentencing judge here posits.

VII.

[88] The foregoing analysis and the Supreme Court of Canada's decision in *Anderson*, I suggest, undercut the sentencing judge's critical "starting premise" here.

[89] The sentencing judge stated categorically (at para. 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.

[90] I leave aside for the moment, the notion, which I do not credit, that s. 719(3.1) "disallows any consideration of an individual's Aboriginal status". It is more accurate and fairer to say that it does not require such considerations to again be taken into account as they undoubtedly were and should be in the sentencing process, which is, after all, a single, holistic, highly individual-centric process. Further, the categorical statement of the sentencing judge would extend to affect the

constitutionality of every minimum sentence in the *Code* as it applies to Aboriginal persons, in particular, the minimum sentence for murder, for example.

[91] In any event, to the extent the sentencing judge's strong view is based on the Court of Appeal's decision in *Anderson*, and her reading of *Leonard*, it simply cannot be sustained.

[92] This conclusion goes a long way to meeting the *Charter* challenges to s. 719(3.1) under ss. 7 and 15 and I turn there now.

[93] Section 7 of the *Charter* is concerned with capturing inherently bad laws, that is, laws that take away life, liberty or security of the person in a way that runs afoul of our basic values. Those basic values include those against arbitrariness, overbreadth and gross disproportionality (*Bedford* at para. 96).

[94] In the s. 7 analysis, the sentencing judge concluded that the impugned provision is consistent with her view of the legislative objective, and that it is not arbitrary. I have taken a broader view of that objective and so I agree with this conclusion. The respondent before us, however, citing the Supreme Court of Canada decision in Bedford, argues that a consideration of "arbitrariness" requires that there be a direct, rational connection between the purpose of the law at issue and the limit it imposes on security of the person, life or liberty.

[95] Mr. Chambers then, baldly concludes (in his factum at para. 31):

> 31. As discussed in paragraphs 28 and 29, the Impugned Provision bears no rational connection to the objectives of the legislation, and the evidence adduced in this case demonstrates that the Impugned Provision will not advance the Act's objectives. As such, the Impugned Provision is arbitrary.

[96] As I have outlined, the general purpose of s. 719(3) and (3.1) of the *Code* is to restrict the amount of presentence credit (I do not overlook the other subsidiary purposes identified in *Summers* as discussed above). Parliament has chosen to do so by capping that credit at 1.5:1, if circumstances justify it. But Parliament has also targeted a population which includes those who find themselves back in custody

because of their own misconduct on bail, who are not entitled to an award of this enhanced credit.

[97] This cannot be said to be an improper objective in the exercise of Parliament's criminal law power. It serves a valid state interest.

[98] Clearly, viewed in this light, there is a rational connection between the objectives of s. 719(3.1) and the limits it imposes on the liberty of persons subject to it, like Mr. Chambers. The section is not arbitrary.

[99] On the issue of overbreadth, I have related the sentencing judge's view that the legislative objective is to preclude courts from awarding credit on a 2:1 or higher basis. At para. 150 of her reasons, the sentencing judge said:

> [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.

[100] The learned judge concluded at para. 151:

> [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.

[101] These are very broad conclusory statements. I recognize the scope afforded judges in the application of the *Charter* tests for arbitrariness, overbreadth and gross disproportionality but I say, with respect, that given Parliament's legitimate criminal law objectives and state interest in the impugned provision, these are not statements for the Court here to make.

[102] *Bedford* provides the most recent guidance on the concept of "overbreadth" (at para. 113):

> 113 Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of

> the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.

[103] Overbreadth should now be considered as "a distinct principle of fundamental justice related to arbitrariness" (at para. 117):

> Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

And at para. 119:

> 119 As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

[104] Again, given the objectives of the legislation, I cannot conclude that there is, in the impugned provision, "no connection, in whole or in part, between its effects and its purpose".

[105] As the Crown submits, Parliament made a deliberate choice to deny the noted subset of offenders' credit greater than 1:1. As stated by the Minister of Justice and Attorney General of Canada during second reading of the Bill in the House of Commons (*House of Commons Debates*, 40th Parl., 2nd Sess., No. 41 (20 April 2009) at 1205 (Hon. Rob Nicholson)):

> The practice of awarding generous credit erodes public confidence in the integrity of the justice system. It also undermines the commitment of the government to enhance the safety and security of Canadians by keeping violent or repeat offenders in custody for longer periods.

> ...
>
> Not only does the current practice deprive offenders of the prison programs that might help them, but it also fails to punish them adequately for the deeds that led to their convictions in the first place. This is especially the case of those offenders who have been denied bail and sent to a remand centre because of their past criminal records or because they have violated their bail conditions.

[106] On the issue of gross disproportionality, the essence of the sentencing judge's conclusion is found in para. 135 of her reasons:

> 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.

[107] I observe first that there was an application of *Gladue* in the case of Mr. Chambers. It resulted in a reassessment of his sentence from 18 to 15 months. Second, this conclusion is driven by the sentencing judge's error in holding that *Gladue* must be considered at all stages of the sentencing process as a matter of constitutional imperative.

[108] Referring to "gross disproportionality", the Court in *Bedford* (at para. 109) described it as the "second evil":

> 109 The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

[109] The Court summarized the test so (at para. 120):

> 120 Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its

> object must be entirely outside the norms accepted in our free and democratic society.

[110] Again, given the objectives of this measure, the impugned provision in s. 719(3.1), I simply cannot conclude that its impact on Aboriginal offenders creates "a draconian impact ... outside the norms accepted in our free and democratic society".

[111] Mr. Chambers submits that *Anderson* has established a new standard for evaluating the constitutionality of sentences. He argues that gross disproportionality is no longer required and instead submits that the fundamental principle of proportionality in sentencing is breached if a sentence is merely disproportionate. In this submission he relies on paragraph 25 of *Anderson*, which provides that "if a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged."

[112] I cannot accept this submission. The constitutionality of sentences is generally challenged under s. 12 of the *Charter*, which prohibits cruel and unusual punishment. The Supreme Court of Canada has consistently held that mandatory minimum sentences are unconstitutional only if they are grossly disproportionate (*R. v. Smith*), [1987] 1 S.C.R. 1045; *R. v. Ferguson*, 2008 SCC 6 at paras. 13-14). In *R. v. Morrisey*, 2000 SCC 39, the Court explicitly held that "where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the Court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable" (at para. 26). While Mr. Chambers has framed his case under s. 7 of the *Charter* instead of s. 12, the standard is the same in either case (*R. v. Malmo-Levine*, 2003 SCC 74 at paras. 159-161). I am not persuaded that the Court in *Anderson* intended to overrule itself on these long-standing principles by way of the brief reference relied on by Mr. Chambers.

[113] I should note further discussion on the sentencing principle of proportionality in *Summers*. The Court in *Summers* said (at paras. 65 and 67):

> 65 However, it is difficult to see how sentences can reliably be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1) when the length of incarceration is also a product of the offender's ability to obtain bail, which is frequently dependent on totally different criteria.
>
> ...
>
> 67 For example, Aboriginal people are more likely to be denied bail, and make up a disproportionate share of the population in remand custody. A system that results in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay, can hardly be said to be assigning sentences in line with the principles of parity and proportionality. Accounting for loss of early release eligibility through enhanced credit responds to this concern.

[114] I stress that with respect to the impugned portion of the section, the exception to the exception, the effective imposition of a longer sentence of incarceration is based on the wrongfulness of this subset of offenders' conduct while on judicial interim release. It is not based on offenders' "isolation and inability to pay" and resulting inability to obtain bail.

VIII.

[115] I turn to the s. 15 issue. The sentencing judge noted the two-part test articulated in *Kapp*:

> (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?

[116] The sentencing judge summarized Mr. Chambers' submission on the first, threshold question (at para. 160):

> 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.

[117] Later, at para. 164, the judge reiterated Mr. Chambers' point:

> 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.

[118] Note again the mistaken premise that *Gladue* and *Ipeelee* considerations are effectively a right whenever an Aboriginal offender comes before a decision-maker in the justice system and the Aboriginal person's liberty is at stake. That is not the law at this time. Mr. Chambers' submission on this aspect of the s. 15 analysis is further developed in his factum at paras. 64-67 and it is necessary to quote these paragraphs at some length:

> 64. As noted in paragraph 35, Aboriginal offenders are overrepresented in the criminal justice system as a result of their unique history of dislocation, colonialism and residential schools, which has translated into increased substance abuse issues, high unemployment, and the fragmentation of family and community. They are also drawn into the criminal justice system as a result of systemic discrimination. Courts have recognized that these factors ("Gladue factors") combine to ensure that Aboriginal offenders are also detained more frequently and for longer periods of time than non-Aboriginal offenders. In *Gladue* and *Ipeelee,* the Supreme Court acknowledged this reality and directed courts to take Gladue factors into account when sentencing Aboriginal offenders. Although this direction first emerged in the context of interpreting s. 718.2(e) of the *Code*, it is now accepted that Gladue factors are to be considered whenever an Aboriginal person interacts with the criminal justice system.
>
> 65. However, the Impugned Provision prevents a judge, when calculating pre-sentence custody credit for Aboriginal offenders, from addressing whether Gladue factors have contributed to the fact of or length of the offenders' remand detention if they were detained pursuant to s. 515(9.1), s. 524(4) or s. 524(8) of the *Code.* The Impugned Provision thus has the effect of denying those Aboriginal offenders the benefit of the full analysis set out in *Gladue* with regard to the determination of credit for pre-sentence custody.

> 66. While the Impugned Provision deprives all offenders to whom it applies the benefit of such an analysis, the distinction created by the Impugned Provision lies in the fact that the deprivation has a disproportionately adverse impact on Aboriginal offenders. This is so for two reasons. First, due to the influence of Gladue factors, a disproportionate number of Aboriginal offenders will be caught by the Impugned Provision. Accordingly, a disproportionate number of Aboriginal offenders will be barred from eligibility for enhanced credit and will ultimately spend more time in custody.
>
> 67. Moreover, it is only Aboriginal offenders for whom Parliament and the Supreme Court have created a specific remedial sentencing analysis designed to address their historically marginalized position in society, a position that is intimately and uniquely tied to the legacy of colonialism. Therefore, while some non-Aboriginal offenders may be deprived of attention to factors relevant to the determination of credit for pre-sentence custody due to the Impugned Provision, *all* Aboriginal offenders who have been detained prior-to sentencing pursuant to the Impugned Provision will lose the benefit of the remedial analysis set out in *Gladue.* Thus, by treating Aboriginal offenders and non-Aboriginal offenders equally when they should be treated differently, the Impugned Provision creates a distinction.

[119] Mr. Chambers' submission here flows from the same faulty premise that, in the words of the Crown, has "tainted" the entire analysis, that is:

> Although this direction first emerged in the context of interpreting s. 718.2(e) of the *Code* it is now accepted that *Gladue* factors are to be considered whenever an Aboriginal person interacts with the criminal justice system.

[120] What I take this submission to suggest is that s. 719(3.1) creates a distinction based on an enumerated or analogous ground because it denies Aboriginal offenders in contrast to all others, a right or benefit they must otherwise enjoy (the consideration of *Gladue* factors in each interaction with the criminal justice system). Hence, Mr. Chambers says in summary:

> Thus, by treating Aboriginal offenders and non-Aboriginal offenders equally when they <u>should</u> <u>be</u> treated differently, the Impugned Provision creates a distinction.

[121] I take it that "should be" means "as a matter of right or entitlement". This is an error. Section 719(3.1) does not deny Aboriginal offenders a consideration to which they are otherwise entitled. The statute, which is the source of that entitlement, does not accord it in the narrow circumstances of the application of s. 719(3.1), although it does so in the overall context of the sentencing process.

[122] This submission is echoed in the sentencing judge's decision in *R. v. T.M.B.*, [2011] O.J. No. 4836 (O.C.J.) (appeal dismissed, 2013 ONSC 4019) which was relied upon by Chief Judge Ruddy here.

[123] There, the sentencing judge noted that the 14-day mandatory minimum sentence for sexual interference denied Aboriginal offenders "the fullest possible range of sentencing options" which according to *Gladue* and s. 718.2(e) should be given consideration (para. 88).

[124] The judge in *T.M.B.* continued (at para. 89):

> In so doing, in my view, the mandatory minimum creates a distinction between Aboriginal and non-Aboriginal offenders, as submitted by the Applicant. The former group loses 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. The loss of this benefit or entitlement is in my view a form of adverse impact or indirect discrimination as defined in *Withler*. It has a negative effect, disentitling Aboriginal offenders to the fullest benefit of a refined analysis on sentencing, even if the effect on sentence would ultimately have been minimal. The culturally specific analysis was designed to apply regardless of the seriousness of the offence: see *R. v. Kakekagamick* 200 ONCA 90 (CanLII), (2006), 84 O.R. (3d) 664 at paragraph 38 (C.A.), leave to appeal to S.C.C. denied.

[125] Here again, the sentencing judge is characterizing the inapplicability of a *Gladue* analysis in a mandatory sentencing regime as the "loss of this benefit or entitlement". I would respectfully not so characterize it for the reasons I have stated.

[126] *T.M.B.* was appealed to the Ontario Superior Court of Justice. Mr. Justice Code apparently had some difficulty accepting the sentencing judge's conclusion that the first *Kapp* question was to be answered in the affirmative but he accepted that "*arguendo*" (at para. 44).

[127] While it is likely true, as the sentencing judge here concluded, that Aboriginal persons will proportionately be affected more by the impugned provision because of their over-representation in the target population, it is not because they are targeted as a result of a distinction based on an enumerated or analogous ground. Virtually every provision in the *Code* is more likely to affect a disproportionate number of

Aboriginal persons than other segments of the population but the *Code* creates distinctions on the basis of who breaks the law (or in this case, bail conditions), not on the basis of race.

[128] I conclude that Mr. Chambers' s. 15 attack fails because he cannot demonstrate that the law has created a distinction based on an enumerated or analogous ground. In the circumstances, it is not necessary to carry the analysis further.

IX.

[129] Since writing these reasons, the Ontario Court of Appeal has pronounced judgment in *R. v. Safarzadeh-Markhali*, 2014 ONCA 627.

[130] The Court there was dealing with what I have identified as the s. 515(9.1) aspect of s. 719(3.1), that is, the words "the reason for detaining the person in custody was stated in the record under s. 515(9.1)...". The Court found this aspect to unjustifiably infringe the rights of offenders under s. 7 of the *Charter* and declared it to be of no force or effect.

[131] Of course, I have specifically declined to consider the constitutionality of this aspect of the section in this case but I should nevertheless deal with this decision.

[132] I note, first, that the Court specifically stated (at para. 124) that "the validity of the references to ss. 524(4) and (8) in s. 719(3.1) is not before us and it is not appropriate to make any declaration in relation to their validity".

[133] That said, it is clear that what was of primary concern to the learned justices in *Safarzadeh-Markhali* was that the s. 515(9.1) aspect potentially distinguished between at least "three identically placed accused who commit exactly the same offences and have the same criminal record" (at paras. 92-94):

> [92] Take the case of three identically-placed accused who commit exactly the same offences and have the same criminal record. Each is convicted and receives a sentence of six years in jail. One is released on bail, while two are

denied bail. One of the two denied bail is subject to an endorsement under s. 515(9.1):

> *Accused X* has strong ties to the community and his sureties are substantial. He is granted bail and released.
>
> *Accused Y* (i.e., Mr. Safarzadeh-Markhali) is denied bail and detained in custody primarily on account of his record and the justice makes the endorsement under s. 515(9.1). He spends 18 months in pre-trial custody. He is convicted and receives the maximum 1:1 credit permitted by s. 719(3.1) as a result of the endorsement.

[93] The consequences are illustrated by the following table:

Accused (Credit Ratio)	Credit Given for 18 months pre-sentence custody (months)	Sentence in addition to pre-sentence custody (months)	Sentence served (including parole and warrant expiry) (months)	Overall time in custody (months)
X (Bail)	0	72	24-48	24-48
Y Mr. Safarzadeh-Markhali (No bail, endorsement) (1:1)	18	54	18-36	36-54
Z (No bail, no endorsement) (1.5:1)	27	45	15-30	33-48

[94] The result in these examples is that Mr. Safarzadeh-Markhali, and others similarly situated, could serve up to an additional 12 months in custody due to their inability to obtain bail. The greater the time spent in pre-sentence custody, the greater the disparity will be. These examples refute the Crown's submission that the impugned provision does not distinguish between equally placed offenders.

[134] That result does not obtain from the application of the impugned provision to ss. 524(4) and (8) offenders in light of my conclusion that they are caught by the section whether they are formally ordered detained after an application for bail or they are detained on a revocation of process and thereafter consent to remand without exercising their right to apply for bail. All ss. 524(4) and (8) offenders are treated similarly.

[135] Further, the Court was concerned with the distinction drawn between repeat offenders who receive an endorsement under s. 515(9.1) and those who do not (at para. 100):

> [100] ...It is arbitrary to remove these assumptions in relation to a subset of repeat offenders based on an irrelevant distinction. ...

[136] And the Court was clear to state that (at para. 101):

> [101] This is not to say that the legislative purpose of s. 719(3.1) – increasing the custodial terms of repeat offenders – is not an appropriate objective. Nor is it to say that it cannot be achieved in accordance with the principles of fundamental justice. Unfortunately, however, like many attempts to replace the scalpel of discretion with a broadsword, its application misses the mark and results in unfairness, discrimination and ultimately unjust sentences. Instead of ensuring that repeat offenders serve a greater portion of their custodial sentences, the law targets only those denied bail due to their previous convictions.

[137] Finally, the Ontario Court of Appeal was concerned that the s. 515(9.1) aspect of s. 719(3.1) "...skews the sentencing process" by bringing the bail process into the determination of a fit custodial sentence (at paras. 96-97):

> [97] Whether or not an offender was released on bail is entirely irrelevant to the determination of a fit sentence. An offender denied bail is entitled to the same sentence as an equally placed offender who has been released on bail.

[138] In the case before us, on the contrary, the question is this:

> Is <u>any</u> similarly placed offender who has been subject to a revocation of bail by reason of s. 524(4) or (8) entitled to the same credit for pre-sentence custody as a dissimilarly placed offender who has been denied bail for reasons unrelated to his or her conduct after the offence?

[139] Parliament has said "No". I cannot gainsay its wisdom in doing so.

[140] In my respectful view, the decision in *Safarzadeh-Markhali* raises no impediment to my conclusions in this case.

X.

[141] In the result, I would grant the Crown leave to appeal and allow the appeal by setting aside the judge's declaration that s. 719(3.1) is of no force and effect as it pertains to the s. 524(4) and (8) exceptions and direct that the calculation of Mr. Chambers' sentence take into account a credit of 1:1 for the disputed period of pre-sentence custody.

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Madam Justice Cooper"