Citation: *R.* v. *Taylor,* 2017 YKTC 3

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IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

DAVID PETER TAYLOR

Appearances:
Eric Marcoux — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Counsel for Mr. Taylor has filed a constitutional challenge to s. 719(3.1) of the *Criminal Code* (the "*Code*"*)*, in particular that portion of the section that limits the discretion of a sentencing judge to award more than 1:1 credit to an offender for time spent in pre-trial custody where: "… the person was detained in custody under s. 524(4) or (8)" (the "bail misconduct exclusion").

[2] A portion of these reasons was read in court on January 30, 2017, and I indicated to counsel that I would be providing a more comprehensive written ruling. This is that ruling.

[3] Mr. Taylor has entered guilty pleas to having committed the offence of assault contrary to s. 266 of the *Code* and possession of cocaine contrary to s. 4(1) of the *Controlled Drugs and Substances Act* ("*CDSA*"). Crown counsel and counsel for Mr. Taylor have agreed on a joint position for sentence. The only point of disagreement is the credit that Mr. Taylor should receive for his time in pre-sentence custody. Crown counsel submits that Mr. Taylor is not entitled to seek enhanced credit for a portion of his time in pre-sentence custody pursuant to s. 719(3.1).

[4] On June 3, 2016, Mr. Taylor was before the Court for a first appearance after being arrested on a warrant for a charge of failing to attend court on March 30, 2016, as well as on a warrant for having committed, on or about May 7, 2016, offences contrary to ss. 267(b), 264.1(1)(a) and four offences contrary to s. 145(3).

[5] Mr. Taylor had two other Informations before the court on that day alleging offences contrary to s. 4(1) and 5(2) of the *CDSA*, dated on or about September 29, 2015 and an offence contrary to s. 430(4) of the *Code* dated on or about July 29, 2015. Mr. Taylor had been released on a recognizance on October 28, 2015 in respect of these two Informations and remained out of custody until his arrest on the warrants and appearance in court on June 3, 2016.

[6] At the court appearance on June 3, 2016 Crown counsel elected to proceed summarily on both of the Informations relating to the March 30, 2016 and May 7, 2016 offences. The election was indictable on the s. 4(1) *CDSA* offence. Crown had been prepared to re-elect to summary on this offence but counsel for Mr. Taylor wished it to remain indictable and thus did not provide his consent.

[7] At the conclusion of Mr. Taylor's appearance on June 3, 2016, Crown counsel brought an application pursuant to s. 524(8) to revoke prior process on all the Informations. This application was granted by the presiding Justice of the Peace.

[8] Should I find s. 719(3.1) to be constitutionally valid, Mr. Taylor, as per the joint submission of counsel, will have a portion of time remaining to be served in custody. If I find s. 719(3.1) infringes Mr. Taylor's *Charter* rights, and that this infringement is not justified under s. 1 of the *Charter*, Mr. Taylor will have already served the entirety of the custodial portion of his sentence on the basis of the time he has spent in pre-sentence custody.

Relevant Legislation

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

> (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).

[10] Section 515(9.1) reads:

> (9.1) Despite subsection (9), [sufficiency of record of reasons], if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, on the record.

[11] The relevant portions of section 524(8) read:

> (8) Where an accused described in subsection (3), [arrest with or without warrant]…is taken before the justice and the justice finds
>
> > (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).

[12] At the outset, I can say that I have reviewed and considered the written arguments provided by both counsel, their oral submissions, and the many cases, articles and associated documentation filed. I will not, for the purposes of this decision, review in any detail these arguments and material.

Stare Decisis

[13] Before I am able to embark upon an analysis of the constitutionality of the bail misconduct exclusion, I need, as a Territorial Court Judge, to determine whether I am bound to follow the Yukon Court of Appeal decision of ***R.*** v. ***Chambers***, 2014 YKCA 13

[14] In overturning the judgment of Ruddy J. in ***R.*** v. ***Chambers***, 2013 YKTC 77, the Court of Appeal held that the bail misconduct exclusion did not violate either s. 7 or s. 15 of the *Charter*. The Court held, contrary to the decision of Ruddy J., that the bail

misconduct exclusion did not contravene s. 7 because it was not arbitrary, overbroad or grossly disproportionate. It also did not contravene s. 15 because it was not demonstrated that it created a distinction based on an enumerated or analogous ground.

[15] The basis upon which counsel for Mr. Taylor submits I should consider myself not bound by ***Chambers*** is that: (1) he is raising *Charter* issues that were not before the Court in ***Chambers***, and therefore there is a new legal issue; (2) the recent decision of the Supreme Court of Canada in ***R.*** v. ***Safarzadeh-Markhali***, 2016 SCC 14, constitutes a new development in the law thus, effectively, raising a new legal issue; and (3) there has been a change in the circumstances and evidence since the ***Chambers*** decision.

[16] Two cases from the Supreme Court of Canada have set out the principles to be applied when a lower court is considering whether to rule differently from a higher court whose precedent is binding. These are ***R.*** v. ***Bedford***, 2013 SCC 72, and ***Carter*** v. ***Canada (Attorney General)***, 2015 SCC 5.

[17] It is clear from para. 42 of ***Bedford***, that there are three routes whereby I am able to consider the *Charter* arguments raised by counsel for Mr. Taylor. I can:

> ..consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[18] While the Court agreed that lower courts should not be bound by the principle of *stare decisis* to follow decisions of higher courts that are unconstitutional, the threshold is high. The Court held in para. 44 of that:

> …this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[19] In ***Carter***, the Court first dealt with the preliminary issue of whether the trial judge was bound to follow the decision of ***Rodriguez*** v. ***British Columbia (Attorney General)***, [1993] 3 S.C.R. 519. The Court found that the legal and factual basis which existed at the time ***Rodriguez*** was decided had changed substantially. Thus the trial judge was not bound by *stare decisis*.

[20] In para. 44 the Court stated:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[21] The Court noted in para. 46 that: "…the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*".

[22] Also observed was the fact that "[t]he matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*". The Court noted

that the record before the trial judge contained evidence that, if accepted, was capable of undermining the three evidentiary conclusions that the Court relied on in ***Rodriguez*** (para. 47).

New Legal Issue/Significant Development in the Law

R. v. Chambers

[23] I will first consider the issue of whether there has been a new legal issue or significant development in the law as a result of the ***Safarzadeh-Markhali*** decision. Therefore I must review the ***Chambers*** decision.

[24] In ***Chambers***, the Court was dealing with a Crown appeal of the Territorial Court decision of Ruddy J. In that decision, in part, Ruddy J. found that the bail misconduct exclusion violated ss. 7 and 15 of the *Charter*.

[25] The Court of Appeal disagreed with the decision of Ruddy J. and found the bail misconduct exclusion to be constitutionally valid.

[26] In particular, in respect of the s. 7 analysis, the Court of Appeal disagreed with Ruddy J.'s conclusion that the bail misconduct exclusion offended the principles of proportionality and parity and that it was overbroad. In doing so, the Court of Appeal disagreed with the reasoning of Ruddy J. on the application of ***Gladue*** [***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688] considerations to the issue of the overbreadth of the bail misconduct exclusion.

[27] With respect to the objectives of the *Truth in Sentencing Act*, S.C. 2009, c. 29, the Court in ***Chambers*** stated the following in paras. 41-45:

41 At paras. 51-58 of her reasons for the Court in *Summers*, Madam Justice Karakatsanis discusses the intention of Parliament in enacting *TISA* [*Truth in Sentencing Act*]. 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. [Emphasis added]

[28] The Court considered whether the legislation is arbitrary, as this was argued before it on the appeal. In paras. 96-98, the Court stated:

> 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.

[29] On the issue of whether the legislation was overbroad, the Court stated the following in paras. 102-105:

> 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):

> 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.

[30] 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 [Emphasis added]. 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 [Emphasis added].

[31] The Court considered the concept of gross proportionality as applied by Ruddy J. The Court noted the following from the Territorial Court decision:

> 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 provision 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.

[32] The Court found that Ruddy J. erred, firstly in her assessment that ***Gladue*** considerations had not been applied and, secondly that it was also wrong to hold that ***Gladue*** has to be considered "…at all stages of the sentencing process as a matter of constitutional imperative". (para. 107)

[33] In para. 109, the Court quoted from para. 120 of ***Bedford*** in summarizing the test on gross proportionality as follows:

> 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.

[34] The Court concluded in para. 110 that the bail misconduct exclusion was not grossly disproportionate in its impact upon Aboriginal offenders:

> 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".

[35] The Court stated in para. 112 that the standard for gross disproportionality is the same regardless of whether the constitutional challenge is framed under s. 12 or s. 7 of the *Charter*.

[36] The Court went further to comment on the sentencing principle of disproportionality as follows:

> 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.

[37] The Court then reviewed the recently released (at that time) case of ***R.*** v. ***Safarzadeh-Markhali***, 2014 ONCA 627 and found that it had no bearing on its conclusions with respect to the bail misconduct exclusion.

[38] The Court stated in paras. 138-139:

> 138 In the case before us, on the contrary [to the issue in ***Safarzadeh-Markhali***], 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.

[39] The Court concluded that Parliament decided to distinguish between an offender who was denied bail for reasons unrelated to conduct while on process and an offender denied bail for other reasons (leaving aside the now unconstitutional "prior conviction" aspect of s. 719(3.1)), and that Parliament was within its rights to do so.

R. v. Safarzadeh-Markhali

[40] The question in ***Safarzadeh-Markhali*** was whether s. 719(3.1) of the *Code* was unconstitutional insofar as it "…removed a sentencing court's discretion to give any enhanced credit to offenders for pre-sentence custody, if they were denied bail primarily on the basis of their criminal record" (para. 2). The issue before the Court was only in regard to that portion of s. 719(3.1) (the "criminal record exclusion") and not in regard to the bail misconduct exclusion.

[41] McLachlin C.J.C. for the Court noted in paras. 1 and 8:

> [1] A person charged with a crime is held in custody pending trial unless released on bail. If found guilty at trial, an issue arises: In calculating the sentence, how much credit should the person receive for the time already spent in custody? A credit of one day for every day of pre-sentence custody will almost never put the person on equal footing with offenders released on bail, because the time spent in pre-sentence custody does not count for purposes of parole eligibility, earned remission and statutory release: *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 26. A one-for-one credit, in other words, results in longer incarceration for offenders detained in pre-sentence custody than for offenders released on bail. On account of this discrepancy and the reality that pre-sentence custody is generally more onerous than post-sentence custody, sentencing courts have historically given "enhanced" credit for time spent in pre-sentence custody.
>
> …
>
> [8] Enhanced credit serves two purposes. First, it ensures than an offender detained in pre-sentence custody – which is not subject to parole

> and early release provisos – does not spend more time behind bars than an identically situated offender released on bail. Second, it compensates for factors such as overcrowding, inmate turnover, and labour disputes that make pre-sentence custody more onerous than post-sentence custody: *Summers* at para. 28.

[42] The Court noted, in para. 12, that it was not disputed that the endorsement under s. 515(9.1) was, in some circumstances, unreviewable, noting the Crown concession to that effect:

> …that a s. 519(9.1) endorsement is unreviewable where the reviewing judge determines that an accused's detention is justified, even if the reviewing judge believes the bail judge erred in making the endorsement. Nor, it appears, would the sentencing judge have discretion to vacate an endorsement based, for example, on a clerical error, or on a conviction that was later reversed.

[43] The Court, while upholding the ultimate decision of the Court of Appeal that the criminal record exclusion aspect of s. 719(3.1) was unconstitutional, disagreed with the s. 7 analysis by the Ontario Court of Appeal. The Court held that:

> 21 …Proportionality in the sentencing process, as distinct from the well-accepted principle of gross disproportionality under s. 7 [of the *Charter*], is not a principle of fundamental justice.

[44] However, the Court found that the criminal record exclusion portion of s. 719(3.1) violated s. 7 of the *Charter* because it was overbroad, stating in para. 22 that: "….Laws that curtail liberty in a way that is arbitrary, overbroad or grossly disproportionate do not conform to the principles of fundamental justice…".

[45] Having so concluded, the Court declined to also consider whether the legislation was arbitrary or grossly disproportionate. (para. 22)

[46] The Court identified as a first step in the overbreadth analysis the need to ascertain the purpose of the impugned law, stating that: "Whether a law is overbroad within the meaning of s. 7 turns on the relationship between the law's purpose and its effect".

[47] The Court set out four considerations at paras. 25-29 that serve to "…guide the task of properly characterizing Parliament's purpose in a s. 7 analysis into overbreadth".

> 26 First, the law's purpose is distinct from the means used to achieve that purpose;
>
> 27 Second, the law's purpose should be characterized at the appropriate level of generality;
>
> 28 Third, the statement of purpose should be both precise and succinct; and
>
> 29 Fourth, the analysis is not concerned with the appropriateness of the legislative purpose.

[48] In order to determine a law's purpose for the s. 7 overbreadth analysis, the court is to look to: "(1) statements of purpose in the legislation, if any; (2) the text, context and scheme of the legislation; and (3) extrinsic evidence such as legislative history and evolution" (para. 31).

[49] In considering the *Truth in Sentencing Act*, the Court noted, in para. 32 that:

> The title of the statute suggests that the evil to which it is directed is opaqueness in the sentencing process. Beyond this, however, the statute is silent as to its purposes. More to the point, it contains no explicit statement of the specific purpose of denying enhanced credit to offenders denied bail primarily on the basis of a prior conviction.

[50] With respect to the contextual matrix, the Court, in para. 34, referred to the comments in ***R.*** v. ***Summers***, 2014 SCC 26, where it had stated that:

> …the broad purposes of the legislative scheme were to enhance public confidence in the justice system and make the process of granting enhanced credit more transparent: *Summers*, at paras. 52-53. *Summers* suggests a broad over-arching purpose for the 1.5:1 limit on enhanced credit for pre-sentence custody – enhancing confidence in the justice system. This purpose is pitched at a high level of generality and underlies the other objectives of the scheme and the challenged provision. In the words of *Moriarity*, enhancing confidence in the justice system is more of an "animating social value" than a statement of purpose.

[51] With respect to the text of the legislation, the Court noted that s. 515(9.1) provides little in the way of guidance in determining Parliament's purpose, other than indicating that Parliament intended to target accused persons with criminal records (para. 35).

[52] With respect to extrinsic evidence, the Court noted that there was little evidence of the legislative evolution of the challenged portion of s. 719(3.1) other than the statements of Minister of Justice Rob Nicholson who introduced the legislation.

[53] The Court, in paras. 37-40, noted the following comments of the Minister of Justice in presenting the *Truth in Sentencing Act* to Parliament and the House of Commons Standing Committee on Justice and Human Rights:

> **37** …the Minister of Justice explained that the denial of enhanced credit was aimed at promoting public safety and public confidence in the justice system, by imposing longer sentences on violent and repeat offenders and increasing their exposure to rehabilitative programming. He said:
>
> > The practice of awarding generous credit erodes <u>public confidence in the integrity of the justice system</u>. It also undermines the commitment of the government to <u>enhance</u>

> the safety and security of Canadians by keeping violent or repeat offenders in custody for longer periods.
>
> (*House of Commons Debates,* vol. 144, No. 41, 2nd Sess., 40th Parl., April 20, 2009 ("*Debates"*), at p. 2418)

The Minister's reference to "violent and repeat offenders" suggests that the challenged provision is targeted at two groups: (1) dangerous persons, who have committed crimes of violence or threatened violence; and (2) chronic offenders, whether convicted of violent crimes or not.

38 The Minister also linked longer periods in custody to rehabilitation:

> As a result of [the challenged provision], a greater number of offenders would now serve a federal sentence of two or more years, and there will be an increased number of federal offenders spending [time] in federal custody.
>
> > This time [in] the federal system will present the opportunity for longer-term programming that may have a positive effect on the offender.
> >
> > (Standing Committee on Justice and Human Rights,*Evidence,* No. 20, 2nd Sess., 40th Parl., May 6, 2009 ("*Evidence"*), at pp. 11-12),

39 The Minister referred to other goals. One was the goal of adequate or fit punishment, in a retributive sense. On this, he said:

> Not only does [enhanced credit] deprive offenders of the prison programs that might help to keep them out of jail in the future, it also fails to punish them adequately for the deeds that led to their convictions in the first place.
>
> (*Debates*, at p. 2418)

40 The Minister coupled the desire for adequate punishment with the idea that enhanced credit gives repeat offenders a "benefit" they do not deserve: "You shouldn't get any benefit for being detained if there are legitimate reasons for you not to make bail"…. Although the Minister erred in characterizing enhanced credit as a "benefit" (see *Summers*, at paras. 23-27), it is clear that he wanted to ensure adequate periods of incarceration for repeat offenders – a "final sentence that reflects the seriousness of the crime": *Evidence*, at p. 11.[All emphases in original].

[54] The Court stated in para. 41 that: “The weight of the legislative record suggests that the challenged provision was geared towards promoting public safety and security, not retribution. Achieving adequate punishment is not, in the s. 7 analysis, a purpose of the challenged provision”.

[55] The Court, in para. 42, further referred to the “….goals of making the system more transparent and preventing offenders from manipulating the system”. In this regard, the Court stated that: “…it is difficult to see these goals as the purpose of a total denial of enhanced credit for pre-sentence custody to persons denied bail primarily because of a prior conviction”.

[56] In para. 43, the Court noted that in regard to the challenged provision “…it cannot be said that the actual deprivation of liberty imposed by s. 719(3.1) seeks to further transparency.”

[57] The Court also noted that the challenged provision was not directed at the goal of preventing offenders’ manipulation of the system, stating the limit of 1.5:1 accomplished this.

[58] The Court concluded the following in paras. 46-49:

> 46 First, the *animating social value* behind the denial of enhanced credit for pre-sentence custody in s. 719(3.1) is enhancing public confidence in the justice system.
>
> 47 Second, the *legislative purpose* of the total denial of enhanced credit for pre-sentence custody to offenders who are denied bail because of a prior conviction is to *enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs*. To be sure, the Minister referred to other legislative purposes -- providing adequate punishment, increasing transparency in the pre-sentence credit

> system, and reducing manipulation. But these are peripheral, for the reasons discussed above.
>
> 48 Third, the *means* for achieving the purpose of enhancing public safety and security is the challenged provision itself -- the denial of enhanced credit for pre-sentence custody to persons refused bail primarily on the basis of their existing criminal record.

[59] The Court then moved on to the overbreadth analysis in paras. 50-55 and concluded that the inability to obtain enhanced credit by offenders who are denied bail because of a prior criminal conviction was overbroad "…because it catches people in ways that have nothing to do with enhancing public safety and security".

[60] The Court noted firstly that "…the provision's ambit captured people it was not intended to capture: offenders who do not pose a threat to public safety and security".

[61] Secondly, the Court noted the limited availability of judicial review, which meant that: "…persons wrongly tagged with an endorsement will be without recourse to have the error remedied". Two categories of individuals so affected were noted:

> 54 …This absence of review and discretion renders the challenged provision overbroad for at least two categories of individuals: (1) persons who erroneously received the endorsement because their detention is not warranted primarily because of their criminal record, and (2) persons who, during the period between the bail hearing and sentencing, successfully appeal the conviction that drew the endorsement. In both cases, the effect of the provision is to strip persons of liberty even though their detention does not obviously advance public safety and security.

[62] Leaving aside the *Charter* ss. 11(d) and 12 arguments counsel for Mr. Taylor has raised, in order for me to find that there has been a significant development in the law such that the principle of *stare decisis* does not require me to be bound by the decision in ***Chambers***, I must be satisfied that the Court in ***Safarzadeh-Markhali*** has stated the

purpose of s. 719(3.1) in a way that also includes the s. 524(8) limitation, and does so in a way that differs from what the Court in ***Chambers*** considered it to be. Alternatively, I must find that the evidence and circumstances have changed since ***Chambers*** in a way that undermines the conclusions reached by the Court of Appeal. Otherwise I am bound to follow ***Chambers***.

Bail misconduct exclusion cases since *Safarzadeh-Markhali*

[63] In ***R.*** v. ***Meads*** 2016 ONSC 7156, Fuerst R.S.J. found s. 719(3.1) to be unconstitutional in its denial of enhanced credit for offenders who have been subjected to a s. 524(8) application. Mr. Meads had been arrested on a "home invasion" robbery. He was released on a recognizance. He subsequently, contrary to the terms of his recognizance, cut off his ankle bracelet and absconded. He was arrested for having breached two of the terms of his recognizance and his bail was revoked pursuant to s. 524(8). He subsequently pleaded guilty to a breach of his recognizance and was sentenced to 30 days custody.

[64] At the time of sentencing on the home invasion charges, Mr. Mead argued that the limitation of 1:1 credit for his time in custody on remand was a breach of his s. 7 *Charter* rights.

[65] Fuerst J. analyzed the Supreme Court decision in ***Safarzadeh-Markhali*** and concluded that the bail misconduct exclusion similarly violated s. 7 of the *Charter* on the basis that it was overbroad and not justified under s. 1 of the *Charter*. Having concluded this, Fuerst J. did not decide whether the bail misconduct exclusion violated s. 7 on the basis of gross disproportionality or arbitrariness.

[66] Although Fuerst J. noted that the Court in ***Safarzadeh-Markhali*** did not deal with the constitutionality of the bail misconduct exclusion (para. 14), she noted the observation of the Court that "[i]t is clear that s. 719(3.1) limits liberty. Its effect is to require offenders who come within its ambit to serve more time in prison than they would have otherwise", and stated that this comment did not purport to be restricted to the criminal record exclusion.

[67] Fuerst J. also cited ***R.*** v. ***Kovich***, 2016 MBCA 19, in support of the applicability of the Court's comments to the bail misconduct exclusion (para. 18). I agree with Fuerst J. on this point and find that even though the Supreme Court in ***Safarzadeh-Markhali*** limited its reasoning to the criminal record exclusion, much of what it said is relevant to the bail misconduct exclusion.

[68] Fuerst J., in para. 21, referred to the articulation of the principle of overbreadth in ***Bedford*** in paras. 112-113 as adopted in ***Safarzadeh-Markhali*** (quoting ***Bedford***):

> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts… .
>
> Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effects 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*.

[69] Fuerst J. found that, just as the *Truth in Sentencing Act* does not contain an explicit statement of the specific purpose in refusing enhanced credit to offenders denied bail primarily on the basis of a prior conviction, it also does not contain an explicit statement of the specific purpose of denying enhanced credit to offenders subject to the bail misconduct exclusion (paras. 25 and 26). I agree with Fuerst J.'s observation.

[70] Fuerst J. noted in para. 27 that, equally applicable to the bail misconduct exclusion, is the Court's contextual observation in ***Safarzadeh-Markhali*** that the broad over-arching purpose for the limitation of enhanced credit for time in custody on remand to 1.5:1 is to enhance public confidence in the justice system and that this is more of an animating social value than a statement of purpose. Again, I agree.

[71] Fuerst J. wrote the following in para. 28 in regard to what is required to revoke prior process under s. 524(8):

> A finding of reasonable grounds to believe the accused committed an indictable offence, including, at this stage, a hybrid offence such as theft under, could theoretically lead to a detention order. A conviction for breach of release or an indictable offence is not required. Unproven allegations of misconduct could theoretically result in a detention order. The scope of the text of the provision does not give much guidance in determining Parliament's purpose, beyond indicating that it intended to target accused persons who engage in bail misconduct.

[72] I also agree with Fuerst J.'s comments in paras. 29 and 30 that:

> 29…The Court's comments at paragraphs 37 to 44 about the [Justice] Minister's statements of purpose are equally as applicable to the bail misconduct exclusion in s. 719(3.1) as they are to the criminal record exclusion.

> 30. The text, context and scheme of the legislation, coupled with the Minister's statements of purpose, lead to the same conclusions about the bail misconduct exclusion in s. 719(3.1) as they did in *Safarzadeh-Markhali* with respect to the criminal record exclusion. Specifically:
>
> 1. The animating social value behind the denial of enhanced credit for pre-sentence custody in s. 719(3.1) is enhancing public confidence in the justice system.
>
> 2. The legislative purpose of the denial of enhanced credit for pre-sentence custody to offenders detained because of bail misconduct is to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs. Other legislative purposes referred to by the Minister of Justice, such as providing adequate punishment, are peripheral.
>
> 3. The means for achieving that legislative purpose is the challenged provision itself, the denial of enhanced credit for pre-sentence custody to persons detained because of bail misconduct.
>
> 4. The effect of the provision is to impose longer periods of custody on all persons who are detained because of bail misconduct.

[73] Further, I agree with Fuerst J.'s observations in para. 31 that:

> …To the extent there are any appellate court decisions dealing with the second branch of s. 719(3.1), they are of limited assistance, because they dealt with issues other than constitutionality, and/or they pre-dated *Sadarzadeh-Markhali* in the Supreme Court of Canada and the overbreadth analysis set out there, and/or they turned on a proportionality analysis that the Court rejected. See, for example, *R. v. Chambers*, 2014 YKCA 13: and *Akintunde*.

[74] It is noteworthy that Fuerst J. specifically cites the ***Chambers*** decision as an example of a case that is of limited assistance because it was decided before ***Safarzadeh-Markhali***.

[75] In that respect, I agree with the submission of Crown counsel that the cases filed by counsel for Mr. Taylor in which the bail misconduct exclusion had been found to be unconstitutional for breaching the proportionality requirement of s. 7, are of limited assistance.

[76] Fuerst J. stated in para. 33 as follows:

> Like the first prong of s. 719(3.1), the bail misconduct exclusion catches individuals in ways that have nothing to do with enhancing public safety and security. Its ambit captures all persons who are alleged to have breached their release or committed indictable offences while on bail, had their bail cancelled, and been unable to obtain fresh release, even though the misconduct does not render the person a real threat to public safety and security.

[77] After providing examples of where this could be the case, Fuerst J. noted the following in regard to individuals whose bail has been revoked under s. 524(8) and who are thus denied any more than 1:1 credit for their time in pre-sentence custody:

> [33]…So too will individuals charged with committing indictable offences that are ultimately not proved, since the making of a detention order and the consequent loss of enhanced credit does not require a conviction for the alleged offence. No actual violation of release is necessary to engage s. 719(3.1). As expressed in *Kovich*, at para. 74, the person is being punished for charges, not necessarily for convictions.

[78] Certainly it should be viewed as problematic that individuals are receiving less credit for time in pre-sentence custody than what they would otherwise be entitled to, on the basis of an unproven allegation of misconduct while on release. In effect, it could mean that an individual serves more time in custody for misconduct that in fact may not have occurred.

[79] I also note that the bail misconduct exclusion catches individuals who have not been arrested and released on bail. This includes individuals who have simply been served with a summons or an appearance notice. As stated by Cournoyer J. in ***R.*** v. ***Goikhberg***, 2014 QCCS 3891, paras. 55-57,:

> A summons has nothing to do with judicial interim release because in such a case, the person is not taken before a justice but appear before the court under the compulsion of the summons. The person is not in custody. There is no implicit or unsigned undertaking to appear. The person is legally compelled to appear. (see also paras. 56 and 57; and ***R.*** v. ***Nowazek***, 2017 YKSC 8, paras. 18-24, in which ***Goihkberg*** is cited)

[80] As noted by Ruddy J. in her Territorial Court decision in ***Chambers***, the reality is that in many instances the individual denied enhanced credit, like Mr. Taylor in this case, is of Aboriginal ancestry. I am well aware of the undisputed fact that individuals of Aboriginal ancestry are over-represented in the justice system and that decisions of the Supreme Court of Canada (***Gladue***, ***R.*** v. ***Ipeelee***, 2012 SCC 13) have clearly stated, in strong language, that this issue of the over-representation of Aboriginal individuals in Canadian jails needs to be addressed. Add to this the recent Calls to Action in the 2015 Report of the Truth and Reconciliation Commission of Canada, and the need to be cognizant of this issue is very apparent.

[81] Certainly, the impact of the bail misconduct exclusion in keeping offenders, including Aboriginal offenders, in custody longer, including on the basis of allegations which may ultimately prove to be untrue, is overbroad. When the comments of Fuerst J., in reference to ***Safarzadeh-Markhali,*** that many of these offenders are not a threat to public safety and security, are factored in, the scope of the overbreadth of the bail misconduct exclusion is more manifest.

[82] As Fuerst J. states in para. 34, referring to ***Kovich***, "…the bail misconduct exclusion does not target wrongful conduct or violent offenders, but rather targets the inability to get bail". In saying this, she notes the comments in ***Summers*** at paras. 66 and 67 that an accused who has monies to deposit or family and friends who are able to act as sureties is better situated to obtain bail than an accused without the financial means or a network of friends and family. This is even more the case when there is a bail hearing after a s. 524(8) application, where the onus has shifted to the accused to show cause why he or she should be released.

[83] I further agree with Fuerst J.'s comments in para. 34 that: "Economically and/or socially disadvantaged members of society are at risk of being detained and denied enhanced credit under s. 719(3.1), even though they are not violent or 'chronic' offenders."

[84] ***Meads*** is not the only case to consider whether ***Safarzadeh-Markhali*** has altered the legal landscape with respect to the bail misconduct exclusion.

[85] In ***R.*** v. ***H.S.S.***, 2016 BCPC 430, Flewelling J. considered the ***Safarzadeh-Markhali*** decision and, in particular, whether it had any impact on the ***Chambers*** decision. Flewelling J. was sentencing an offender who had been convicted of sexual assault and who had spent time in pre-sentence custody as a result of his inability to be released on bail after being arrested for breaching the terms of his bail conditions. A s. 524(8) order had been granted.

[86] As a preliminary issue, Flewelling J. dealt with a "forceful" submission by Crown counsel that she should follow the decision in ***Chambers***, in particular as ***Chambers***

was written by Yukon Court of Appeal Chief Justice Bauman, who is also Chief Justice of British Columbia.

[87] As the Yukon Court of Appeal is generally comprised of members of the British Columbia Court of Appeal, with some exceptions, this "common membership" has resulted at times in counsel making submissions that decisions of both the Yukon Court of Appeal and the British Columbia Court of Appeal are to be considered as being close to, if not actually, binding on the lower courts in the other jurisdiction.

[88] This argument, however, was rejected by Woods J. in the case of ***R.*** v. ***Dominic***, 2009 BCPC 145 (see para. 93 of ***H.S.S.***). I note that it was also rejected by Gower J. in ***R.*** v. ***Mulholland***, 2014 YKSC 3.

[89] In paras. 55-69, Flewelling J. reviewed the analysis of the Court in ***Chambers*** before moving on, in paras. 70-88, to consider what the Court stated in ***Safarzadeh-Markhali***.

[90] In paras. 95-97, Flewelling J. stated:

> 95 The provisions at issue in *Chambers* and in the case before me both relate to denial of enhanced credit as a result of a decision made by a judge at the bail stage. They were both enacted as a consequence of the *Truth in Sentencing Act* and the analysis of the overall context and the purpose of law would, in my view, be virtually identical.
>
> 96 Furthermore, the court in *Chambers* identified the purpose of the legislation as restricting a specific population – those who are back in custody due to their own misconduct on bail – from obtaining enhanced credit and went on to conclude that the effect of the law was connected to its purpose.
>
> 97 In ***Safazadeh-Markhali***, the court identified the purpose of the legislation perhaps more broadly, but importantly, found that the effect of

> s. 719(3.1) caused longer periods of custody for all persons denied bail because of a previous conviction and that this caught persons "in ways that have nothing to do with enhancing public safety and security": para. 52.

[91] Flewelling J. went on in paras. 99 and 100 to state that she could not reconcile the decision in ***Chambers*** with that in ***Safarzadeh-Markhali***. In her view, the ***Safardazeh-Markhali*** decision constituted a major development in the law. She stated that: "The principle of *stare decisis* is fundamental to stability but in narrow circumstances, including when there has been a major developmental in the law and the authority is from the highest court in Canada, lower courts are not 'strait-jacketed' to following precedent."

[92] Flewelling J., noting that the court in ***Chambers*** did not have the benefit of the subsequent ***Safardazeh-Markhali*** decision, concluded in para. 118 that the bail misconduct exclusion in s. 719(3.1) was unconstitutionally overbroad as it deprived some persons of their liberty for reasons unrelated to its purpose and thus found the law to be invalid. She stated:

> 117 The impugned provision catches a person who is in custody because of a breach condition and who is detained because of an inability to put forward an adequate release plan. That may relate to socio-economic factors, employment, financial status, residence or access to suitable sureties. The provision catches those persons who are from the most vulnerable populations in our communities, including First Nations. It catches a person such as H.S.S. who is charged with a breach of curfew and abstention condition of his bail conditions but for a variety of reasons – which have nothing to do with enhancing public safety and security – was not able to show cause why he should be released.
>
> …
>
> 119 The provision is not minimally impairing or proportionate. H.S.S. if denied enhanced credit, would spend considerably more time in custody

> when compared to a similar person with a good release plan who was able to show cause why they should be released. For the reasons set out by the Supreme Court in *Safarzadeh-Markhali*, I find that the provision is a violation of s. 7 of the *Charter* and the infringement is not justified under s. 1.

[93] I agree with both Fuerst J. in ***Meads*** and Flewelling J. in ***H.S.S.*** In my opinion, the analysis of the Supreme Court of Canada in ***Safarzadeh-Markhali*** constitutes a significant development in the law, and I am satisfied on this point alone that I am not bound to follow the decision in ***Chambers***.

[94] Further, I agree with the reasoning of Fuerst J. and Flewelling J. in ***Meads*** and ***H.S.S.***, and I agree with the conclusions that they both reached. For reasons that will be expanded on below, I, like them, find that the bail misconduct exclusion is overbroad and is an infringement of s. 7 of the *Charter*.

Is the Infringement of the Section 7 *Charter* Right Justified Under Section 1

[95] Crown counsel submits that notwithstanding any finding that the bail misconduct exclusion breaches Mr. Taylor's *Charter* rights, any such infringement is justified under s. 1 of the *Charter*.

[96] Counsel submits that the comments of the Court in ***Safarzadeh-Markhali***, in finding that the criminal record exclusion portion of s. 719(3.1) was not minimally impairing nor proportionate to the balance between salutary and deleterious effects, do not apply to the bail misconduct exclusion.

[97] I disagree.

[98] In para. 58, the Court in ***Safarzadeh-Markhali*** stated:

> An infringement of the *Charter* is justified under s. 1 where the law has a pressing and substantial object and … the means chosen are proportional to that object: *Carter*, at para. 94. A law is proportionate where the means adopted are rationally connected to the law's objective, minimally impairing the right in question, and the law's salutary effects outweigh its deleterious effects: *R. v. Oakes*, [1986] 1 S.C.R. 103

[99] The objective of "…enhancing public safety and security with longer and more rehabilitative sentences for violent and chronic offenders" was considered to be pressing and substantial and rationally connected to the purpose of enhancing public safety and security by the Court. The Court accepted that the denial of enhanced credit gives rise to longer periods of custody, thus increasing the opportunities of some offenders to access rehabilitative programs (paras. 59, 61).

[100] However, the Court stated that the Crown had not discharged its burden to show that there were "…less drastic means of achieving the objective in a 'real and substantial manner'…". The Court stated in para. 63 that there were alternative and more reasonable means, such as:

> …-- a law requiring the sentencing judge to consider whether to grant enhanced credit for pre-sentence custody based on (i) the offender's criminal record, (ii) the availability of rehabilitative programs and the desirability of giving the offender access to those programs, and (iii) whether the offender was responsible for prolonging his or her time in pre-sentence custody. Such a regime would achieve the goal of promoting public safety and security through rehabilitation, without catching chronic or other offenders who pose no risk to public safety.

[101] I fail to find any distinction between the criminal record exclusion and the bail misconduct exclusion, which also is overbroad in that it catches not only chronic or

other offenders who pose no risk to public safety and security, but potentially even offenders who are not guilty of any misconduct on bail.

[102] The Court in ***Sadarzadeh-Markhali*** observed at para. 64 that the criminal record exclusion portion of s. 719(3.1) has the effect of making "…any person with a criminal record, even for missed court dates, a potential target for restriction of enhanced credit". In my view, the bail misconduct exclusion analogously makes any person subject to a s. 524(8) cancellation of prior process a recipient of the denial of enhanced credit, the only exception being if the person is released on bail at the show cause hearing that is held.

[103] Even so, if the show cause hearing is adjourned – for whatever reason, including the opportunity to obtain suitable sureties and a satisfactory release plan - for a period of time after a s. 524(8) application is made and the order granted, the person is denied enhanced credit between the time of the granting of the s. 524(8) application and release at the conclusion of the show cause hearing, because the person is detained in the interim, even if in custody on consent remand (see ***Chambers*** at paras. 51 and 52).

[104] Crown counsel submits that, unlike in the case of a criminal record exclusion, there is a review mechanism in the *Code* for individuals detained in custody after being denied release at a show cause hearing. While it is true that such an individual can have his or her their detention status reviewed, such a review does not guarantee release and does not constitute a review of the s. 524(8) order that was granted. The impact of that order continues.

[105] Finally, the Court in ***Safarzadeh-Markhali*** noted in para. 65 that the Crown had failed to establish benefits that outweigh the detrimental effect of the challenged

provision on the right to liberty. While recognizing that the benefit to public safety by increasing access to rehabilitation programs is not trivial, the Court nonetheless stated that the overbreadth of the law unnecessarily deprived offenders who have not committed violent offences or do not present a risk to public safety of their right to liberty. In the case of the bail misconduct exclusion, the provision could also capture offenders who are ultimately acquitted of any alleged misconduct.

[106] I find that the comments of the Court about the overbreadth of the criminal record exclusion are wholly applicable to the bail misconduct exclusion. As such, I find that the challenged provision is not saved under s. 1.

[107] Of note, in ***Meads***, Crown Counsel accepted that the Court's conclusions in ***Safarzadeh-Markhali*** about the minimum impairment and proportionality branches of the s. 1 test as set out in ***Oakes*** applied equally once it was found that the bail misconduct exclusion also infringed s. 7 on the basis of overbreadth (para. 36). In ***H.S.S.*** Flewelling J. ruled that the infringement of the s. 7 *Charter* right was not justified under s. 1, although there is no analysis on s. 1.

[108] I therefore declare that the bail misconduct exclusion in s. 719(3.1) is invalid and of no force and effect with respect to its application to Mr. Taylor. He is therefore entitled to seek enhanced credit of up to 1.5:1 for his time in pre-sentence custody.

[109] Having found that the bail misconduct exclusion infringes Mr. Taylor's s. 7 *Charter* rights on the basis of it being overbroad, it is unnecessary for me to consider whether it also does so on the basis of arbitrariness or gross disproportionality.

[110] I also do not find it necessary to consider whether Mr. Taylor's s. 11(d) or s 12 *Charter* rights have been infringed.

[111] As Mr. Taylor was subject to an application under s. 524(8) only, I have not made reference throughout my decision to an offender detained under s. 524(4). For the same reasons that I have declared the bail misconduct exclusion an unjustifiable infringement of Mr. Taylor's s. 7 *Charter* rights, insofar as it unconstitutionally limits Mr. Taylor's right to seek enhanced credit for his time in pre-sentence custody due to his having been detained pursuant to a s. 524(8) application, I consider that it would be equally unconstitutional in regard to its limitation on an offender's right to seek enhanced credit after having been detained under s. 524(4).

Change in Circumstances and Evidence

[112] Although not necessary for the purposes of my decision, I am also satisfied that there has been a change in the circumstances and evidence since ***Chambers*** was decided that fundamentally shifts the parameters of the debate and that this change similarly means that I am no longer bound by the principle of *stare decisis* to follow ***Chambers***. This alternative basis for overcoming *stare decisis* in no way affects my *Charter* analysis and finding that the bail misconduct exclusion infringes s. 7 of the *Charter* and cannot be saved by s. 1.

[113] This said, I agree with Crown counsel that much of what defense counsel has filed and has referred to as facts are either circumstances and evidence that were available at the time ***Chambers*** was decided, or are submissions not supported by evidence to the extent that I can rely on them as factually established. While some of

what defense counsel has put forward as facts may not be inaccurate or untrue, *per se*, they simply have not been determined to be sufficiently reliable and credible that I am prepared to rely on them in consideration of whether there has been the requisite change in the circumstances or evidence.

[114] I rely on three developments in particular since ***Chambers*** was decided:

> (a) The Fall 2016 Report of the Auditor General of Canada "Preparing Indigenous Offenders for Release – Correctional Service Canada";
>
> (b) The March 2015 Report of the Auditor General of Canada "Corrections in Yukon – Department of Justice"; and
>
> (c) The Final Report of the Truth and Reconciliation Commission of Canada released December 15, 2015, and the statement made by the Prime Minister on December 15, 2015 after receiving it.

The Fall 2016 Report of the Auditor General of Canada <u>(the "Fall 2016 Report")</u>

[115] The Fall 2016 Report stated the following with respect to the mission of the Correctional Services of Canada ("CSC"):

> 3.1 The mission of Correctional Services Canada (CSC) is to "contribute to public safety by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control." One of its main legislated responsibilities is to support the successful reintegration of offenders into the community.

[116] The mission as stated is consistent with what the Court in ***Safarzadeh-Markhali*** stated in paras, 37, 38, and 47 with respect to the purpose of the criminal record exclusion being to impose longer sentences in order to provide offenders greater access to rehabilitative programming, thus promoting their positive re-integration into the community and therefore increasing public safety and security.

[117] The Fall 2016 Report considered the continued overrepresentation of Indigenous offenders in the CSC and looked at how effectively rehabilitative programming is being provided to them.

[118] Paragraph 3.7 of the Fall 2016 Report states:

> 3.7 The 2015 report of the Truth and Reconciliation Commission recognized that the criminal convictions of Indigenous offenders frequently resulted from an interplay of many factors, including the intergenerational legacy of residential schools. The report called on the federal government to eliminate the overrepresentation of Indigenous people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate its progress in doing so. It also called for the government to eliminate barriers to the creation of additional Healing Lodges within the federal correctional system. In December 2015, the government committed to implementing all of the Commission's recommendations. As part of the criminal justice system, CSC has a role to play in addressing recommendations directed toward the successful reintegration of Indigenous offenders in federal custody.

[119] The Fall 2016 Report also noted:

> 3.13 …Offenders who have more time to benefit from a gradual and structured release into the community under supervision to the end of their sentences are less likely to reoffend.
>
> …
>
> 3.16 …Rehabilitation efforts while an offender is in custody can also reduce the likelihood that the individual will reoffend after release and be returned into custody.

[120] The notion of imposing longer sentences in order to allow rehabilitative programming to be successfully completed relies on the assumption that such programming is actually going to be provided in a meaningful and constructive manner.

[121] The conclusions reached in the Fall 2016 Report, however, suggest otherwise. Some of the significant findings of the Auditor General are summarized below.

[122] Offenders who are released into the community through a gradual and structured re-integration, such as is accomplished by release on parole and community supervision, tend to have a lower rate of re-offending before their sentences end than those released on their statutory release date. However Indigenous offenders are released less often than non-Indigenous offenders prior to their statutory release date. Thus their re-integration into the community is likely to be less successful.

[123] Longer prison sentences for Indigenous offenders, due to the application of the bail misconduct exclusion, do not address the issue of rehabilitation through available programming. CSC is unable to provide Indigenous offenders with timely access to correctional programs to ensure completion by their first parole eligibility date (para. 3.38). The end result is that Indigenous offenders simply do more time in jail without improving their chances of a successful re-integration into the community.

[124] The CWC case files do not document how offenders' participation in Indigenous correctional interventions, such as Healing Lodges or Pathways Initiatives, contributed to their potential for successful reintegration into the community (para 3.38).

[125] It was determined that Indigenous offenders waited almost five months, on average, to start correctional programs after admission to federal custody. Most Indigenous offenders sentenced to imprisonment for more than two years are serving sentences of less than four years and are therefore first eligible for parole within one year after admittance. "As a result, few Indigenous offenders (20 percent) serving

short-term sentences were able to complete their correctional programs by the time they were first eligible for release" (paras. 3.46, 3.48).

[126] CSC was unable to demonstrate that it had provided Indigenous offenders with sufficient access to culturally specific correctional programs (para. 3.53).

[127] CSC further did not ensure that its culturally specific correctional programs operated with the required level of Elder involvement, thus potentially affecting the effectiveness of these programs. As a result, CSC was not able to demonstrate that programs for Indigenous offenders were delivered as intended (para. 3.61).

[128] Aboriginal liaison officers had not received guidance or training on how to evaluate the impact of Elder reviews and interventions on an offender's progress toward successful reintegration, and the capacity of Healing Lodges was less than the Indigenous offender population in every region (paras. 3.62, 3.64)

[129] While recognizing that "…culturally specific interventions can be effective in supporting the successful reintegration of Indigenous offenders", CWC had "… yet to develop tools to assess how these interventions contribute to an offender's progress toward successful reintegration" (para. 3.68).

[130] Indigenous offenders with a s. 84 release plan were likely to be twice as successful being granted parole as those without a s. 84 plan and were slightly more likely to successfully complete their supervision. However, parole officers were noted to have received little guidance or training in how to prepare s. 84 release plans, thus limiting their effectiveness (para. 3.70).

[131] CSC staff did not adequately consider Aboriginal social history factors in their case management decisions. They also lacked sufficient relevant information when conducting intake assessments. It was noted that: "With incomplete information, offenders may not be placed at the correct security levels or may not receive appropriate correctional programs to address their criminal risks" (para. 3.81).

[132] In addition, CSC staff were not provided with sufficient guidance and training on how to consider an offender's Aboriginal social history in case management decisions and did not properly document their consideration of this social in their assessments for conditional release.

[133] This incomplete information and inadequate training meant that an offender's Aboriginal social history was not adequately considered in assessments for conditional release.

[134] As such CSC failed to meet its own requirements for Aboriginal offenders. Further, CSC staff had not received sufficient guidance or training on how to consider Aboriginal social history in their assessments (paras. 3.98-3.103)

[135] The Fall 2016 Report concluded in para. 3.107 that:

> …Correctional Service Canada provided correctional programs to Indigenous offenders to assist with their rehabilitation and successful reintegration into the community, but did not do so in a timely manner. Correctional Service Canada staff did not adequately define or document how offenders' participation in culturally specific correctional interventions contributed to their potential for successful reintegration into the community. As well, staff was not provided with sufficient guidance or training on how to apply Aboriginal social history factors in case management decisions.

The March 2015 Report of the Auditor General of Canada

[136] A similar audit was done of the Yukon correctional system in 2015. The March 2015 Report by the Auditor General of Canada noted that the majority of offenders imprisoned at the Whitehorse Correctional Centre ("WCC") were male and of First Nations descent. As well, 70 – 90 % of all offenders held there were members of a Yukon First Nation.

[137] The March 2015 Report noted that the Department of Justice was:

> 18. …missing two key opportunities to improve offenders' chances for rehabilitation and successful reintegration into the community: the first is when offenders begin serving their custodial sentence in the Whitehorse Correctional Centre, and the second is when they make the transition to serve their sentence under community supervision. …

[138] For those offenders not offered core programming while in custody at WCC there was also a failure to deliver these programs while in the community after being released from custody.

> 20. This finding matters because the primary goal of Yukon Correctional Services is the safe reintegration of offenders into communities as law-abiding citizens. By not doing all that is required to help offenders with their rehabilitation, healing, and reintegration into the community, the Department is not meeting this goal.

[139] I recognize that the issue of what occurs in the community after offenders have been released from custody is not directly related to what occurs while offenders are in custody, and is thus less related to the operation of the bail misconduct exclusion. However, it appears that what is not happening for offenders in the community is a continuation of what is not happening for them while in custody at WCC.

[140] The Auditor General identified problems with the case management of offenders in custody at WCC that resulted in the offenders' most critical programming needs not being prioritized during the custodial portion of their sentence. While the Department of Justice stated that it is the Department's belief that it is not optimal to deliver all the required core programming while offenders are in custody, the reality is that for offenders who were not provided the core programs that were identified as being suitable for them while in custody, there was very little chance this programming would be subsequently provided to them while in the community (paras. 38, 39).

[141] First Nations offenders incarcerated at WCC are not being provided evidence-based core rehabilitative programming that incorporates the cultural heritage of Yukon First Nations and addresses the needs of these offenders (paras. 80, 82, 87). As such, the Department of Justice is not meeting its obligations.

[142] In conclusion it was noted that:

> 114. …the Department adequately planned for and operated the Whitehorse Correctional Centre. However, it did not adequately manage offenders in compliance with key requirements. Therefore, we concluded that the Department of Justice has not met its key responsibilities for offenders within the corrections system.

[143] This conclusion goes beyond any failure in regard to First Nations offenders. The conclusion of the March 2015 Report extends to all offenders, albeit with respect to some offenders, the failures are also in regard to what occurs after the offenders are released from custody at WCC.

Final Report of the Truth and Reconciliation Commission of Canada released December 15, 2015

[144] In May 2015 the Summary of the Final Report of the Truth and Reconciliation Commission of Canada was released (the "Summary Report"). The Final report was released in December.

[145] The Preface to the Summary Report contains the following excerpts:

> Canada's residential school system for Aboriginal children was an education system in name only for much of its existence. These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society, led by Canada's first prime minister, Sir John A. Macdonald. The schools were in existence for well over 100 years, and many successive generations of children from the same communities and families endured the experience of them. That experience was hidden for most of Canada's history, until Survivors of the system were finally able to find the strength, courage, and support to bring their experiences to light in several thousand court cases that ultimately led to the largest class-action lawsuit in Canada's history.
>
> ...
>
> The Commission heard from more than 6,000 witnesses, most of whom survived the experience of living in the schools as students. The stories of that experience are sometimes difficult to accept as something that could have happened in a country such as Canada, which has long prided itself on being a bastion of democracy, peace, and kindness throughout the world. Children were abused, physically and sexually, and they died in schools in numbers that would not have been tolerated in any school system anywhere in the country, or in the world.
>
> But, shaming and pointing out wrongdoing were not the purpose of the Commission's mandate. Ultimately, the Commission's focus on truth determination was intended to lay the foundation for the important question of reconciliation. Now that we know about residential schools and their legacy, what do we do about it?
>
> Getting to the truth was hard, but getting to reconciliation will be harder. It requires that the paternalistic and racist foundations of the residential

> school system be rejected as the basis for an ongoing relationship. Reconciliation requires that a new vision, based on a commitment to mutual respect, be developed. It also requires an understanding that the most harmful impacts of residential schools have been the loss of pride and self-respect of Aboriginal people, and the lack of respect that non-Aboriginal people have been raised to have for their Aboriginal neighbours. Reconciliation is not an Aboriginal problem; it is a Canadian one. Virtually all aspects of Canadian society may need to be reconsidered. This summary is intended to be the initial reference point in that important discussion. Reconciliation will take some time.

[146] Included within the Summary Report was a section entitled “Calls to Action”, with 94 distinct recommendations in a number of different areas. The Call to Action in the area of justice included the following:

> 30) We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
>
> ...
>
> 31) We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
>
> ...
>
> 32) We call upon the federal government to amend the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.
>
> ...
>
> 33) We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD),and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.

...

34) We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:

i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.

ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.

iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.

iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

...

35) We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.

36) We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused.

...

37) We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.

...

38) We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

[147] The federal government has stated that it intends to implement each of the above recommendations, along with all the others made in this Report. On the date of the release of the Final Report, December 15, 2015, in Ottawa, Prime Minister Justin Trudeau issued the following statement, in part:

> The Indian residential school system, one of the darkest chapters in Canadian history, has had a profoundly lasting and damaging impact on Indigenous culture, heritage, and language. As a father and a former teacher, I am overwhelmingly moved by these events.
>
> Seven years ago the Government of Canada apologized for this abhorrent system. The apology is no less true, and no less timely, today. The Government of Canada 'sincerely apologizes and asks forgiveness of the Aboriginal peoples of this country for failing them so profoundly'.
>
> Today, on behalf of the Government of Canada, I have the honour of accepting the Commission's Final Report. It is my deepest hope that this report and its findings will help heal some of the pain caused by the Indian residential school system and begin to restore the trust lost so long ago.
>
> To the former Indian residential school students who came forward and shared your painful stories, I say: thank you for your extraordinary bravery and for your willingness to help Canadians understand what happened to you. As the previous government expressed so eloquently in its formal apology: your courage 'is a testament to [your] resilience as individuals and to the strength of [your] cultures...The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a government, and as a country'.
>
> Moving forward, one of our goals is to help lift this burden from your shoulders, from those of your families, and from your communities. It is to accept fully our responsibilities – and our failings – as a government and as a nation.
>
> This is a time of real and positive change. We know what is needed is a total renewal of the relationship between Canada and Indigenous peoples. We have a plan to move towards a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership, and we are already making it happen.
>
> A national inquiry into missing and murdered Indigenous women and girls is now underway. Ministers are meeting with survivors, families, and loved ones to seek their input on how best to move forward. We have also

> reiterated our commitments to make significant investments in First Nations education, and to lift the two per cent cap on funding for First Nations programs.
>
> And we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples [Emphasis added].
>
> ...

[148] The federal government formally apologized to the Aboriginal peoples of Canada in 2008 for the harm the government has caused through its policies. In 2015 the federal government re-iterated its support for this apology, and, in promising to implement all of the Calls to Action recommendations, placed the commitment to reduce the over-incarceration of Aboriginal Peoples in Canadian jails as a front and centre issue.

[149] When the finding of the Truth and Reconciliation Commission of Canada are considered alongside the conclusions reached in the Fall 2016 and March 2015 Reports referred to above, in particular with regard to the failure of the federal and Yukon corrections systems to meet their obligations to provide the recommended and necessary programming to Aboriginal offenders, in order to assist in the rehabilitation of these offenders, the overbreadth of the bail misconduct exclusion is apparent.

[150] It is clear that Minister of Justice Nicholson's intent that the longer sentences through the operation of the bail misconduct exclusion, would afford offenders a better opportunity for programming and hence increase their prospects for rehabilitation, albeit

perhaps a laudable objective, is not working for Aboriginal offenders in the manner that it was envisioned.

[151] It is true that the Fall 2016 Report speaks to the inability of CSC to provide sufficient programming when an offender is incarcerated for too short a period and that therefore longer sentences provide better opportunity for programming to be completed. However, it is also apparent from this Report, as well as the March 2015 Report that there are other factors and shortcomings in the both the federal and Yukon corrections infrastructure that are not allowing this programming to develop and be provided as it should, even when an offender is sentenced to a period of custody that would otherwise be long enough to allow for rehabilitative programming.

[152] So while the notion of using longer sentences for offenders in order to allow for rehabilitative programming is a legitimate one, in and of itself, the mechanism for implementing this objective is flawed in that the intended programming is not necessarily adequately delivered, despite longer sentences. To this extent, the bail misconduct provision is overbroad.

[153] The overbreadth of the bail misconduct exclusion is apparent in that it is clear that the exclusion intends for offenders to be punished by additional imprisonment in order to obtain access to more programming that in fact is often not available to them or is inadequate. While both of the referenced Auditor General Reports are weighted towards the operation of the Corrections systems in regard to Aboriginal offenders, I would expect that some of the analysis in regard to programming availability would also

be true in regard to non-Aboriginal offenders. Certainly the assessment of the Yukon corrections system relates to all offenders.

[154] Neither of the Auditor General Reports referred to above was before the Court when ***Chambers*** was decided. Similar information with respect to what is stated in the two Auditor General Reports may have been available through other sources, but, in my opinion, not in the same way and with the same impact.

[155] Certainly the Final Report of the Truth and Reconciliation Commission of Canada and the Government's statement in response were not available for consideration.

[156] I find that the bail misconduct exclusion in s. 719(3.1) is clearly overbroad and that it flies in the face of, and is, in fact, directly contradictory to, the federal government's stated commitment to reduce the over-incarceration of Aboriginal offenders. It commits offenders who do not pose a risk to public safety and security to longer periods of custody, custody in which the offenders are often not able to access the programming required to reduce recidivism and allow for their successful re-integration into the community.

[157] From my experience sitting as a Territorial Court judge in the Yukon, sometimes the additional periods of time in custody that Aboriginal offenders spend as a result of the application of the bail misconduct exclusion is measured in days or weeks, certainly not long enough to allow for additional programming to be provided. It is simply more time in jail, something that the Government has committed to reducing for Aboriginal offenders. This is also the case in many instances involving non-Aboriginal offenders.

[158] Further, as the Supreme Court stated in ***Summers***, it is often the case that Aboriginal individuals are less likely to obtain judicial interim release because of the very socio-economic issues that the Government of Canada has apologized for contributing to, and has stated it will seek to redress.

[159] In my opinion, the evidence and circumstances have changed since ***Chambers*** was decided in a way that means I am no longer required to follow ***Chambers***. Further, this change in the circumstances and the evidence demonstrates that the bail misconduct exclusion in s. 719(3.1) is an infringement of the s. 7 *Charter* right of Mr. Taylor on the basis that it is overbroad and it cannot be justified by s. 1, for not only the reasons stated earlier based on a significant development in the law, but for the particular way in which Aboriginal offenders are incarcerated for reasons not connected to the purpose of the legislation.

_____
COZENS T.C.J.