# SUPREME COURT OF YUKON

Citation: *R. v. Mulholland*, 2014 YKSC 3

Date: 20140117
S.C. No. 13-AP003
Registry: Whitehorse

Between:

**HER MAJESTY THE QUEEN**

Appellant

And

**SAMUEL HENRY MULHOLLAND**

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Eric Marcoux — Counsel for the Appellant
Karen Wenckebach — Counsel for the Respondent

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This is a Crown appeal involving the credit to be given to an offender for time spent in pre-sentence custody pursuant to subsections 719(3) and (3.1) of the *Criminal Code*. In particular, the Crown submits that the sentencing judge erred in law by:

a) providing enhanced credit to the offender, Mr. Mulholland, at the rate of 1.5-to-1; and

b) not applying the majority decision of the British Columbia Court of Appeal in *R. v. Bradbury*, 2013 BCCA 280, as the members of that Court also comprise the Court of Appeal of Yukon.

[2] The appeal was argued on August 8, 2013. At the end of the hearing, Crown counsel informed me that there was another matter to be decided in the Territorial Court of Yukon in the near future involving the same pre-sentence custody credit issue. Consequently, counsel suggested that it might be helpful to the Territorial Court judge for me to provide an immediate summary of my decision on the appeal, on the understanding that more comprehensive written reasons would follow in due course. I agreed and summarily dismissed the appeal in brief reasons which were filed on August 12, and are cited at 2013 YKSC 77. These are my more detailed reasons.

**ISSUES**

[3] The following issues arise on this appeal:

1) Are the Territorial and Supreme Courts of Yukon bound by decisions from the British Columbia Court of Appeal?

2) Did the sentencing judge err by holding that the loss of parole eligibility or the loss of potential to earn statutory remission continue to be circumstances that can, on their own, justify enhanced credit under s. 719(3.1)?

3) Even if the sentencing judge did err in that regard, are there other reasons for supporting his decision to grant enhanced credit to the offender?

**ANALYSIS**

**1) Are the Territorial and Supreme Courts of Yukon bound by decisions from the British Columbia Court of Appeal?**

[4] The Court of Appeal of Yukon is comprised of the members of the British Columbia Court of Appeal (22 justices) and the resident judges of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice (12 justices). Similarly, the Northwest Territories Court of Appeal and the Nunavut Court of Appeal are largely made up of members from the Alberta Court of Appeal, although the judges of the northern courts are also appointed to those two Benches. As a matter of practice, when a panel of the Court of Appeal of Yukon is convened, it is most often comprised of members of the British Columbia Court of Appeal. Panels convened within the Courts of Appeal for Nunavut and Northwest Territories typically include one of the resident northern justices. Regardless, it is undisputed that decisions of the British Columbia and Alberta Courts of Appeal will be highly persuasive in the territories in which the members of those Courts also sit as members of the Courts of Appeal in the respective territories: see, for example, *Norris v. Norris*, 2005 NWTSC 18; and *Kitikmeot Corp. v. Cambridge Bay*, 2006 NUCJ 16. Indeed, both of these decisions were recognized by the sentencing judge at para. 33 of his reasons, cited at *R. v. Mulholland,* 2013 YKTC 52, where he stated:

> "I agree that judgments of the British Columbia Court of Appeal continue to be very persuasive in this Court, and are often more persuasive than cases from other appellate courts…"

[5] However, there are examples where northern courts have failed to follow the Court of Appeal which they are associated with. One Yukon example recognized by the

sentencing judge is *R.* v. *Joseph*, [1993] Y.J. No. 217 (T.C.), at para. 4. Another from the Northwest Territories is *R.* v. *Chivers*, [1987] N.W.T.J. No. 166 (S.C.).

[6] In *R.* v. *Cardinal*, 2013 YKCA 14, the Court of Appeal of Yukon recently considered a very similar appeal to the one at bar on the issue of pre-sentence custody credit. In *Cardinal*, although the sentencing judge did not have the benefit of *Bradbury* at the time of the sentencing, the Crown argued that the decision should nevertheless apply on the appeal. At para. 16, Chiasson J.A. stated:

> "[16] The positions of the parties on the applicability of *Bradbury* potentially raise a matter of comity because this Court is comprised mainly of judges of the Court of Appeal for British Columbia. In that court, one division of the court is bound to follow the decision of another division except in very limited circumstances. In my view, although this Court technically is not bound to follow a decision of the Court of Appeal for British Columbia, it would be unusual, and I would be reluctant, not to do so, but the issue does not arise on this appeal because I conclude that the decision in this case is not inconsistent with *Bradbury*." (my emphasis)

[7] Prior to this summary conviction sentence appeal, four other appellate courts had unanimously decided the credit issue in this appeal in the same manner as the sentencing judge: *R. v*. *Carvery*, 2012 NSCA 107; *R. v*. *Stonefish*, 2012 MBCA 116; *R*. v. *Summers*, 2013 ONCA 147; and *R. v. Johnson*, 2013 ABCA 190. Given that, as well as the fact that the three-member panel in *Bradbury* included a dissent by Prowse J.A., it is arguable that the law on the credit issue is unsettled, at the very least, and that, with great respect, the ratio of the majority in *Bradbury* may be in error. Accordingly, I am persuaded that this case is yet another example of one where it is appropriate, albeit unusual, to conclude that neither the Territorial Court nor this Court should feel compelled to follow the British Columbia Court of Appeal in *Bradbury*. I also note that the issue of

credit for the loss of earned remission is scheduled for argument before the Supreme Court of Canada later this month in appeals of *Carvery* and *Summers.*

**2) Did the sentencing judge err by holding that the loss of parole eligibility or the loss of potential to earn statutory remission continue to be circumstances that can, on their own, justify enhanced credit under s. 719(3.1)?**

[8] At para. 38 of Bradbury, the majority helpfully summarized the main points of common ground in *Carvery*, *Stonefish*, and *Summers*:

> "[38] …The following is a summary of what appears to be common ground in all three decisions:
>
> 1. The words of ss. 719(3) and 719(3.1) are not ambiguous and thus they should be interpreted by reference to their entire context and in their grammatical and ordinary sense, without reference to other tools of interpretation;
>
> 2. Subsection (3.1) contains no limiting language as to the circumstances in which an offender may be granted enhanced credit (e.g., it does not expressly prohibit the consideration of loss of remission as one such circumstance);
>
> 3. Subsection (3.1) does not require exceptional circumstances to justify the granting of enhanced credit but does require that the circumstances be individual to the accused;
>
> 4. The near universal application of earned remission or parole eligibility to most accused persons does not change the character of the circumstance as one that is individual to the accused; and
>
> 5. Such an interpretation of subsection (3.1) does not render ss. (3) redundant as there remain circumstances in which the baseline ratio of 1:1 in ss. (3) will still apply, including where: the express exclusions in ss. (3.1) apply; an accused has

> deliberately protracted their remand detention; or
> an accused has refused to participate in treatment
> while in remand, to name a few."

[9] Like Prowse J.A. in dissent, I do not propose to reinvent the wheel by reviewing the many statutory interpretation arguments precluding enhanced credit for loss of statutory remission or parole eligibility. As Cronk J.A. stated in *Summers*, at para. 7, this interpretive inquiry is not an easy one, rather it is a matter upon which reasonable people can disagree. Suffice it to say that I agree with the reasoning in *Carvery*. However, also like Prowse J.A., I will add a few comments of my own.

[10] With great respect, I have three principal reasons for disagreeing with the majority in *Bradbury*:

1) In my view, the prospect of losing the benefit of earned remission is a circumstance relevant to an individual accused, or to use the words of the majority, an "individual qualitative circumstance";
2) I disagree with the majority's treatment of the hypothetical example of the similarly situated offenders, one released on bail and the other remanded into custody, provided in *R. v. Vittrekwa*, 2011 YKTC 64, and relied upon in *Carvery*; and
3) I do not understand the majority's rejection of the need for "exceptional circumstances" in applying s. 719(3.1), while requiring "circumstances … outside the common experience of most offenders in remand custody".

***Individual Circumstances***

[11] At para. 48, the majority in *Bradbury* concluded that the loss of remission or parole ineligibility, like the lack of programs available to inmates on remand and the conditions in

remand institutions, are all circumstances "commonly held" by remand inmates, such that they cannot qualify as circumstances to justify enhanced credit under s. 719(3.1). Rather, for a circumstance to qualify, it "must be personal to the individual offender", i.e. having:

> "[48] …[A] qualitative characteristic; that is a characteristic that is, individual to the offender but also distinct from those characteristics that are universal to, or almost universally held, by other similarly situated offenders. …"

[12] As I said in my summary reasons, in my view, the loss of remission or parole eligibility does have an aspect of being an "individual qualitative circumstance" simply by virtue of the fact that, in the Yukon, remission is not automatic and must be earned by each offender. While it may be correct to say that the vast majority of offenders earn such remission, the result is nevertheless not an automatic outcome. Like Prowse J.A., I agree with the comments of Steel J.A., speaking for the Manitoba Court of Appeal in *Stonefish*, at paras. 81 to 83:

> "[81] In summary then, I conclude that a reading of the provision in a holistic manner leads to the conclusion that the circumstances justifying enhanced credit need not be exceptional. However, they do need to be individual to the accused. Loss of remission and statutory release may be individual circumstances justifying enhanced credit where the accused can bring evidence to the court that, had he or she been a sentenced inmate, they would have most probably received remission and/or statutory release. Just because the circumstance will be applicable to many, if not most, accused does not mean it cannot be a circumstance relevant to an individual accused (see *Desjarlais* at paras. 17-18). Later in these reasons I will discuss the nature of that evidence and the question of onus.
>
> [82] I disagree with the Crown that to allow a court the discretion to consider the loss of earned remission would render s. 719(3) of the *Code* redundant and create an absurd consequence where no one would receive 1:1 credit except those denied bail. A trial judge has discretion to grant or not grant the enhanced credit. For example, an otherwise

> eligible accused who intentionally delayed proceedings by continuously discharging counsel, or an accused who created delay by not cooperating with probation officers during the preparation of the pre-sentence reports, or an accused who refuses to participate in treatment programs may not receive enhanced credit despite the loss of earned remission or may not receive any credit at all, depending on the discretion of the sentencing judge. All the circumstances should be taken into account.
>
> [83] But, on the other hand, if the accused can show that his or her behaviour on remand was such that they would have received remission had they been a sentenced prisoner, that is a factor that a court may take into account when exercising its discretion to award enhanced credit for PSC [pre-sentence custody]." (my emphasis)

***The Hypothetical Example***

[13] The example referred to by Cozens C.J.T.C. in *Vittrekwa*, at para. 56 (and approved of in *Carvery* at para. 76) is as follows:

> "[56] A simple example where the unavailability of enhanced credit based upon the loss of remission contravenes the fundamental purpose and principles of sentencing is as follows: Two male offenders of approximately the same age, education and criminal history jointly commit a serious offence with the same degree of involvement and culpability. One offender is released on bail due to having a residence, family support and the ability to offer significant cash bail. The other offender is detained due to an inability to offer up the same assurances to the court. A year passes before the matter comes to trial, findings of guilt are made and sentence pronounced. A fit sentence for both offenders is determined to be 18 months. Assuming each offender earns full remission, which is usually the case in the Yukon and seems also to be the case in those jurisdictions referred to in *Johnson* [2011 ONCJ 77]**,** the offender who was released on bail will serve 12 of these months in custody before being released due to statutory remission. In contrast, the offender who was denied bail will receive 12 months credit for the 12 months spent in remand. He will have to serve four more months in custody before being eligible for statutory release. The offender who did not secure bail will have served a total of 16 months in jail on an

> 18 month sentence. The other offender will have served 12 months."

[14] It appears to me that the majority in *Bradbury* rather summarily brushed aside this example on the basis that no two offenders or offences are ever identical. The rationale for doing so is found at para. 45 of the decision:

> "[45] As to the hypothetical scenario relied on by the appellate courts and by Mr. Bradbury in this appeal (at para. 42 above), I am unable to agree that an offender who is detained, subject to the interpretation of the subsections I have proposed, would receive a disproportionate and therefore unjust sentence from the offender who is granted bail. I concede that if two offenders were indeed identical in their personal circumstances and in the circumstances of their offences, then the hypothetical scenario might offer a compelling argument that the sentence of the detained offender would be disproportionate. However, the reality is that no two offenders or offences are ever identical. This reality is evident in the wording of s. 718.2 (b) which provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (emphasis added). The principle of parity in s. 718.2(b) does not mandate identical sentences. Nor does the fundamental principle of proportionality in s. 718.1, which provides that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". The potential for the hypothetical scenario has always existed under both regimes. I see no basis for assuming that the spectre of a disproportionate sentence, which sentencing judges have always been alive to, will not continue to be appropriately addressed under the new regime." (my emphasis)

[15] With respect, I find this rationale to be less than compelling. I accept that no two offenders or offences are ever "identical", but it is easy enough to conceive of an example where they would be sufficiently similar that the disparate outcomes in the hypothetical example of Cozens C.J.T.C. would very likely attract *Charter* scrutiny. Note that the offender on remand in the example would serve 33 1/3% more jail time than the offender

on bail. Even assuming minor differences between the circumstances of each offender, that seems a large gap to close on the basis of the majority's rationale. Finally, the last sentence in the paragraph above suggests there is "no basis" for assuming that the concern over the possibility of a disproportionate sentence will not continue to be appropriately addressed under subsections 719(3) and (3.1). However, the majority does not go on to explain how the new statutory regime will in fact appropriately address disproportionality, if the regime is interpreted as the majority suggests it ought to be. In my view, the hypothetical example suggests that, if the 'norm' is to be 1-for-1 credit, unless an offender can point to circumstances beyond the loss of remission or parole eligibility, then the likelihood of disproportionality would seem to be uncomfortably high.

[16] One must also not forget here that, as Cozens C.J.T.C. pointed out in *Vittrekwa*, at para. 50, applying the 1.5-to-1 ratio simply places an offender:

> "[50] … [I]n exactly the same position that he or she would have been in had they been a serving inmate rather than a remand inmate. …"

***Exceptional vs. Uncommon Circumstances?***

[17] Once again, para. 48 of the majority's decision in *Bradbury* is central to the ratio of the case, so I set it out again in full:

> "[48] I also agree with the other appellate decisions that the exception in ss. (3.1) does not require "exceptional" circumstances and that circumstances that will justify enhanced credit must be personal to the individual offender. In my opinion, however, circumstances that would justify enhanced credit must have a qualitative characteristic; that is, a characteristic that is individual to the offender but also distinct from those characteristics that are universal to, or almost universally held, by other similarly situated offenders. Examples of commonly held circumstances might include the lack of programs, the conditions of the remand institution, and the loss of remission or parole eligibility.

> Individual qualitative circumstances might include the imposition of segregated or protective custody through no fault of the accused, the harsh effect of remand conditions because of a particular health issue by an accused, or a delay in the proceedings that is not attributable to the accused. Stated otherwise, circumstances to justify enhanced credit must be ones that are outside of the common experience of most offenders in remand custody."

[18] Here, I agree with Prowse J.A., at para. 69, that requiring an offender to point to circumstances "outside the common experience" of most remand prisoners is similar in effect to requiring an offender to demonstrate "exceptional circumstances", which the majority expressly rejected as necessary. As Prowse J.A. put it:

> "[69] … I observe that, although my colleague has stated that she rejects "exceptional circumstances" as a requirement for enhanced credit, she has substituted what, in my view, is a requirement similar in effect, namely "circumstances ... outside the common experience of most offenders in remand custody". As earlier stated, I do not accept that Parliament intended such a narrow interpretation of these provisions."

**3) Even if the sentencing judge did err in his consideration of the loss of earned remission, are there other reasons for supporting his decision to grant enhanced credit to the offender?**

[19] At paras. 13 through 16 of his reasons in the case at bar, Cozens C.J.T.C. set out Mr. Mulholland's personal circumstances, including what could be characterized as the following *Gladue* factors: he is a 40-year-old member of the Na-cho Nyack Dun First Nation; he was raised by a mother who was a residential school survivor; his father was an uninvolved parent; alcohol abuse and related issues were a problem for his extended family; he had a difficult youth and was in and out of youth detention centers, in

particular, as a youth, he was involved in the accidental and fatal shooting of a cousin; and his “extensive criminal record” is related to his use of drugs and/or alcohol.

[20] At the end of his determination of whether Mr. Mulholland would have earned full remission based upon his performance as a remand inmate, Cozens C.J.T.C. took Mr. Mulholland’s circumstances as an Aboriginal offender into account. At para. 50, he stated:

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

[21] Defence counsel also raised a point at the hearing of this summary conviction appeal about a portion of the overall period of Mr. Mulholland’s pre-sentence custody. As I understand it, Mr. Mulholland was arrested on February 23, 2013. At that time he was on an undertaking not to have contact with his former common-law spouse, M.T. He was found driving a motor vehicle in an impaired condition with M.T. in the vehicle. He resisted arrest and attempted to run away. He was charged with impaired driving, resisting a police officer, breach of undertaking, an offence contrary to the *Motor Vehicle Act*, and a common assault charge. He was detained following a show cause hearing on February 26, 2013. On April 19, 2013, he entered guilty pleas to the impaired driving, the resist police officer, and the breach of undertaking, but adjourned the sentencing of those matters because the common assault charge (apparently related to the breach) was set for trial. On June 19, 2013, the common assault was resolved by way of a peace bond.

On that date Mr. Mulholland also entered a guilty plea to the charge under the *Motor Vehicle Act*. The sentencing was to have occurred on June 20, but was adjourned by the Court to June 25th.

[22] Crown counsel conceded at the sentencing that Mr. Mulholland was entitled to enhanced credit for the six days between June 19 and 25, 2013.

[23] However, defence counsel now also submits that, if he is ineligible for enhanced credit on the basis of *Bradbury*, Mr. Mulholland should nonetheless be entitled to enhanced credit over the period from April 19, 2013, until his sentencing on June 25th. The rationale is that Mr. Mulholland intentionally delayed his sentencing in order to deal with all of his matters at the same time. While that allowed him to gain the benefit of the totality principle, counsel submits that it also benefited the Crown and the court, saving time and resources by dealing with all the matters at once, rather than returning to court on separate occasions to deal with matters piecemeal. Further, counsel submits that it would not have been logical to sentence Mr. Mulholland on the breach charge in April, when the substantive offence from which the breach arose (the assault) had not yet been resolved. As such, the court would not have had a full understanding of the circumstances of the breach in April.

[24] I do not recall Crown counsel specifically responding to this argument at the appeal hearing. Further, although the argument was not addressed by Cozens C.J.T.C., it does seem to have merit.

[25] *Cardinal*, cited above, was decided on September 18, 2013, after the hearing of the summary conviction appeal in the case of bar and prior to these reasons. In *Cardinal*, like the case at bar, the Crown was arguing that the sentencing judge erred in granting

the offender 1.5-for-1 credit and that loss of remission or eligibility for parole was not a circumstance justifying such increased credit. At para. 17, Chaisson J.A., speaking for a unanimous panel, referred to the majority in *Bradbury* as holding that the circumstances justifying enhanced credit must be "something more" than the near universal loss of remission or parole eligibility. At para. 24, Chaisson J.A. acknowledged that the sentencing judge had considered the offender's Aboriginal background as "circumstances that justify enhanced credit", and then continued:

> "[24] … 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."

[26] In the case at bar, even if the sentencing judge did err in granting enhanced credit on the basis of the loss of earned remission, my view is that the offender's Aboriginal circumstances and the delay between the original guilty pleas and the sentencing are relevant circumstances that can justify increasing the credit for time served in any event. Based upon the above comments in *Cardinal,* these are factors which are capable of

constituting “something more than the near universal circumstances common to most accused in remand custody.”

**CONCLUSION**

[27] I would dismiss this appeal.

GOWER J.