Citation: *R.* v. *Vittrekwa,* 2011 YKTC 64

Date: 20111014
Docket: 10-00878
Registry: Whitehorse

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

REGINA

v.

GEORGE VITTREKWA

Appearances:
Noel Sinclair — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING

Overview

[1] George Vittrekwa was charged with having committed the indictable offence of aggravated assault on March 22, 2011 by wounding Gregory King, contrary to s. 268 of the *Criminal Code*. On July 22, 2011 Mr. Vittrekwa entered a guilty plea to having committed the included indictable offence of assault with a weapon contrary to s. 267(1)(a) of the *Code*. The sentencing hearing commenced on July 22, but was adjourned to September 8 to allow for evidence to be called and argument made on the issue of the credit Mr. Vittrekwa should be given for his time on consent remand at the Whitehorse Correctional Center ("WCC"). The matter was adjourned until today's date for decision.

[2] The circumstances of the offence, briefly stated, are as follows.

[3] Mr. Vittrekwa and Mr. King were neighbours, friends and drinking partners. On March 22, 2011, in the course of a fight in the hallway of the apartment complex in which they were living, Mr. Vittrekwa stabbed Mr. King in the stomach and slashed his arm with a 25 cm long knife (including handle). Mr. King received a 5 cm long deep wound to his abdomen and a 6 - 7 cm long cut on his arm, both of which required sutures. Mr. King was treated at the Whitehorse General Hospital and released. Both Mr. King and Mr. Vittrekwa were intoxicated at the time of the offence.

[4] Crown and defense counsel have brought forward a joint submission that Mr. Vittrekwa receive a sentence of 12 months incarceration, less remand credit, to be followed by a period of probation of 12 months. Counsel disagree, however, on the credit Mr. Vittrewka should receive for the time he has spent in custody on remand.

[5] Mr. Vittrekwa has been in custody since his arrest on March 22. He consented to his remand on March 23 and has remained in custody on consent remand since that date. This amounts to a total of 123 days as of July 22, 171 days as of September 8, and 207 days as of today's date.

Positions of Counsel

[6] Defense counsel submits that Mr. Vittrekwa should receive enhanced credit of 1.5:1 for the time he was in custody on consent remand, solely on the basis that he was unable to earn remission during this period. Counsel's submission relies upon affidavit and oral evidence that the vast majority of serving prisoners at WCC receive their full remission. Further, it is likely that Mr. Vittrekwa, based upon his conduct while on

remand, would have received full remission had he been a serving prisoner rather than a remand inmate. Counsel relies on the reasoning set out by Green J. in ***R.*** v. ***Johnson***, 2011 ONCJ 77 and Derrick J. in ***R.*** v. ***Dann***, 2011 NSPC 22.

[7] No *Charter* issues have been raised.

[8] Crown counsel takes the position that Mr. Vittrekwa should be given 1:1 credit from March 22 until at least September 8. Crown does not take a position on the credit Mr. Vittrekwa should receive between September 8 and today's date.

[9] In the Crown Counsel Memorandum of Argument, counsel set out the issues as follows:

1) Mr. Vittrewka seeks credit for pre-sentencing custody at a rate of 1.5:1 the [sic] pursuant to the *ratio* in *R.* v. *Johnson*, 2011 ONCJ 77, *i.e.* that 1.5:1 credit is justified based upon the calculus of lost remission which constitutes circumstances justifying the maximum enhanced ratio of 1.5:1 credit. Mr. Vittrewka does not allege substandard remand conditions nor does he assert any *Charter* breach in relation to the effect of s. 719 of the *Criminal Code*.

2) The Crown contends that Mr. Vittrewka, having consented to his remand throughout these proceedings and thereby avoided a judicial determination of the form of his pre-sentencing process is thereby barred from asserting an entitlement to credit at a rate of greater than 1:1.

3) In the alternative the Crown asserts that the circumstances relied upon by Mr. Vittrewka in support of his application are no different from the circumstances of other remanded inmates and are therefore not circumstances which justify deviation from the presumption of a maximum credit ratio of 1:1 dictated by section 719(3) of the *Criminal Code*. To interpret the amendments to the *Criminal Code* in that manner disregards the intention of Parliament and creates a common law general rule of 1.5:1 credit for remanded prisoners in general notwithstanding the clearly stated presumption of a 1:1 maximum ratio.

4) It is further submitted that since the Yukon *Corrections Act, 2009* includes a program of earned remission for convicted offenders and no longer allows for automatic statutory remission, Mr. Vittrewka can not demonstrate that his post-

> conviction remission rate will be any different from a 1:1 pre-sentencing custody credit ratio.

Evidence

Evidence of Karen Goldsmith

[10] Defense counsel provided an Affidavit from Karen Goldsmith, sworn August 10, 2011. At that time, Ms. Goldsmith was a case manager at the WCC. Ms. Goldsmith testified at the September 8 continuation. On that date, she had been promoted to Manager of the Integrated Offender Management Team at WCC.

[11] Ms. Goldsmith's evidence was that, from January through June 2011, out of 202 inmates serving sentences of incarceration (excluding those serving intermittent sentences), 11 failed to earn their full remission credit of 15 days for every 30 served, a total of 5.45%. Of those 11 who failed to earn full remission, "…none have had all of their possible remission denied to them. The denied remission was only for part of their possible remission, very often only one or two days of remission is lost by these inmates". (Affidavit, para. 5).

[12] Ms. Goldsmith testified that in August 2011, out of 31 serving inmates, three failed to earn their full remission credit. For all three the cause was related to behavioural issues. One individual failed to earn five out of 15 days, another three out of 15 days, and the third two out of 15 days. Of the additional seven inmates serving intermittent sentences, all received their full remission credit. Ms. Goldsmith did not have the statistics for July 2011 with her.

[13] Ms. Goldsmith further testified that the behaviour of a remand inmate, whether the inmate performs well or badly, does not have any effect upon the remission the inmate can earn as a sentenced prisoner. This is because earned remission is calculated on a monthly basis commencing on the date of sentencing.

[14] The fifteen days of remission a sentenced inmate can earn in a month is broken down into three categories of five days each, based on: the inmate's behaviour, the inmate's participation in programming and case planning, and the inmate's participation in employment. If the inmate is not directed to participate in programming or no employment is available, he or she is automatically credited the full five days remission in these categories. A failure by the individual to meet expectations in any of the three categories could cause him or her to fail to earn the full five days monthly credit for that category, although that is not necessarily what will occur.

[15] Ms. Goldsmith stated that she has not seen any behavioural reports concerning Mr. Vittrekwa, and, to her knowledge, there is no reason to believe that there have been any problems with how he has conducted himself while on remand. She testified that if he conducted himself as a serving prisoner the same as he had while he was on remand, he would likely earn his full remission.

[16] Ms. Goldsmith also provided evidence on the availability of programming and employment for remand inmates as compared to serving inmates. While there are some limitations or exclusions with respect to remand inmates, in a general sense remand inmates have access to the same programming and employment opportunities that serving inmates have. Sentenced inmates get first access to programs and

employment, but often there is sufficient space such that remand inmates also take courses and/or obtain employment. Remand inmates, with some exceptions, spend their time in general population and not, as used to be the case, in a separate remand unit. Mr. Vittrewka's time in custody on consent remand was spent in general population.

Excerpts from Hansard filed by Crown

[17] In support of its argument, the Crown filed evidence in the form of various excerpts from Parliamentary debate. When discussing Bill C-25, an underlying concern sought to be addressed by the new remand credit provisions can be seen in the following excerpts:

> Hon. Rob Nicholson (Minister of Justice and Attorney General of Canada): …The amendments to the Criminal Code proposed in this bill will limit the credit that a court may grant a convicted criminal for time served in pre-sentence custody. As some in the House may be aware, section 719(3) of the Criminal Code allows a court to take account of the time a convicted criminal has spent in pre-sentencing custody in determining the sentence to be imposed. The code does not set out any formula for calculating this credit, but the courts routinely give credit on a two-for-one basis. In many cases the courts give credit on a three-for-one basis…
>
> Explanations for the length of a sentence are usually provided in open court at the time of sentencing. However, judges are not required to explain the basis for their decision to award pre-sentence credit. As a result, they do not always do so and this deprives the public of information about the extent of the pre-sentence detention. It leaves people in the dark about why the detention should allow a convicted criminal to receive what is most often considered to be a discounted sentence. This creates the impression that offenders are getting more lenient sentences than they deserve.
>
> There is a concern that the current practice of awarding generous credit for pre-sentence custody may be encouraging some of those accused to abuse the court process by deliberately choosing to stay in remand in the hope of getting a shorter term of imprisonment once they have been awarded credit for time served.

For ordinary Canadians, it is hard to understand how such sentences comply with the fundamental purposes of sentencing, which is to denounce unlawful conduct, deter the offender from committing other offences and protect society by keeping convicted criminals off the streets.

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.
…

I have received many letters and representations from concerned Canadians on the issue of pre-sentencing custody credit. All too often they cite situations where violent offenders are set free after having served a relatively short prison term because a court has awarded them two or three to one credit for pre-sentence custody…
…

These are important reforms. Canadians have been waiting for a long time. Many say that offenders too often slip through the fingers of ou[r] justice system without serving adequate time. As a result, Canadians have been demanding change. They believe there must be more truth in sentencing and that the sentence one gets is the sentence one should serve. This approach set out in Bill C-25 would help restore the people's confidence in the criminal justice system. In the oft-repeated phrase, justice must not only be done, it must be seen to be done.
…

Mr. Paul Crete (Montmagny – L'Islet-Kamouraska-Riviere-du-loup, BQ): Mr. Speaker, as my colleague from Hochelaga said, the Bloc supports the bill, since we have been calling for it for a very long time. We know that eliminating the possibility of counting time spent in custody as double time may add to pressure on the justice system. Is the minister prepared to take the necessary measures to ensure that once this clause comes into force, cases will be dealt with more expeditiously?

Hon. Rob Nicholson: Mr. Speaker, what we are proposing in the truth in sentencing act is precisely to deal with the question and the problem identified by the hon. member. Provincial attorneys general right, across the country, have been telling me this is one of the main reasons why the courts do get clogged up and that while there is such pressure on provincial detention centres, it is because there is not an incentive to have these matters move forward.

This is exactly what has been asked for. The person who is charged who wants his or her day in court, who wants to be fairly treated by the system, and who wants to have a reasonable system will no longer have any incentive for a delay

> in the disposition, or in the case of the example of the British Columbia attorney general the individual did not even want to get bail. These are the things that are clogging up the courts, and this is what the truth in sentencing act takes dead aim at.
>
> Hon. Dominic LeBlanc (Beausejour, Lib.): …I can say at the outset that Liberal colleagues in this House will be supporting this bill. Like others in the House, we have been encouraging the government to introduce it. We were pleased when the minister took the step of introducing Bill C-25.
>
> My colleagues from British Columbia and other western provinces, principally my colleague from Vancouver South, the member for Wascana, and other members of our caucus from British Columbia, have been very sensitive to the difficulty that the two for one crediting of time in remand centres has created in terms of public confidence in the justice system.
>
> …
>
> Mr. Ed Fast (Abbotsford, CPC): …Quite frankly, one of the reasons we have brought forward this bill is because Canadians do not understand why those who are in custody and are later convicted get two-for-one and three-for-one credit when they are eventually sentenced after trial.
>
> Attorneys general and solicitors general across Canada have contacted our government and asked that we get this done. In fact, the attorney general and the solicitor general for British Columbia, my province, came to Ottawa specifically to plead with our government to get rid of two-for-one and three-for-one remand credits…
>
> *House of Commons Debates,* No. 041 (April 20, 2009) at 1205 and following.

Legislation

[18] The *Criminal Code* amendments to the sections governing pre-sentence custody credit were included in the "*Truth in Sentencing Act*" ("*TIS Act*") which came into effect February 22, 2010. The new or amended provisions limit the credit that may be granted to an offender for his or her time in pre-trial custody to a maximum of one day for each day of pre-trial custody, with the exception that "if the circumstances justify it", the offender can be credited with up to 1.5 days of credit for each day of pre-trial custody.

Prior to February 22, 2010, in many parts of Canada the usual credit applied to pre-trial custody on sentencing was 2:1. This was not invariably the case and I note that in the Yukon for the past several years remand credit was generally assessed at a 1.5:1 ratio.

[19] The relevant provisions of s. 719 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).

[20] Section 515(9.1) reads:

> (9.1) Despite subsection (9), 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, in the record.

[21] Sections 524(4) and (8) refer to offenders who were released on bail and then subsequently detained pending their trials, either because of a finding they had contravened or were about to contravene their original interim release orders, or a finding that there were reasonable grounds to believe that they had committed an indictable offence while released on bail.

[22] The Yukon *Corrections Act* SY, 2009, c. 3 reads as follows:

> Earned remission
>
> 35. An inmate who is serving a sentence for civil contempt or for an offence under an enactment may be credited with earned remission in accordance with the *Regulations*.

[23] The *Corrections Regulation*, OIC 2009/250 reads:

> **PART 5 PERFORMANCE APPRAISAL AND EARNED REMISSION**
>
> *Performance appraisal*
>
> 36.(1) A staff member must appraise the performance of each sentenced inmate.
>
> (2) An appraisal must include the evaluation of the inmate's
>
> (a) compliance with the rules governing the conduct of inmates; and
>
> (b) level of participation in programs established under subsection 10(1) of the Act [programs and services] that are not religious programs and section 33 of the Act [work programs].
>
> *Remission awards assessor*
>
> 37.(1) The person in charge must appoint one or more staff members to be remission awards assessors for the correctional centre.
>
> (2) A remission awards assessor or panel of remission awards assessors must determine the amount of earned remission to be credited to each inmate and must, in relation to each inmate
>
> (a) review the running record and appraisals of an inmate's performance since their last earned remission credit; and
>
> (b) determine the number of days of earned remission to be credited to the inmate in accordance with this Part.
>
> *Calculation of remission award*
>
> 38.(1) A remission award assessor or panel of remission awards assessors must credit earned remission
>
> (a) for each inmate, within 5 days of the end of the previous month; or
>
> (b) for an inmate about to be discharged, at the time of discharge for the days served since their last earned remission credit
>
> whichever is applicable.

(2) An earned remission credit for a portion of month must

(a) be made on the basis of one day's earned remission credit for each full two days that are served;

(b) be based on an assessment of the matters referred to in paragraphs 36(2)(a) and (b) [performance appraisal], and

(c) result in a monthly earned remission credit as follows

(i) good performance, 15 days;

(ii) fair performance, 8 to 14 days;

(iii) poor performance, 0 to 7 days.

(3) A disciplinary hearing that is ordered to be convened under subsection 26(3) [breach of rule] but is not yet concluded must not be considered in evaluating an inmate's compliance with the rules governing the conduct of inmates.

Review of remission awards assessor decision

39.(1) If full earned remission is not credited, the remission awards assessor must notify the inmate and the person in charge and give the reason in writing.

(2) An inmate who is not satisfied with their earned remission credit may, within 7 days of receipt of notification of the credit, apply in writing to the director of corrections for a review of the decision of the remission awards assessor or panel of remission awards assessors.

(3) Within 7 days of receiving the inmate's request for a review, the director of corrections must review the assessor's or panel's decision and

(a) confirm the earned remission credit;

(b) increase the number of earned remission days credited; or

(c) reduce the number of earned remission days credited.

(4) The director of corrections must notify the inmate and the assessor or panel of their decision under subsection (3) as soon as practicable and give the reason in writing.

Analysis

Summary of findings

[24] For the reasons that follow, I am in general agreement with the reasoning of Green J. in ***Johnson*** and Derrick J. in ***Dann*** and credit Mr. Vittrewka with 1.5 days of credit for each day he has spent in custody on consent remand.

[25] Mr. Vittrewka's decision to consent to his remand from the date he was charged with this offence excludes from operation the limiting provision of s. 719(3.1). As discussed below, I reject Crown counsel's submission that there should be a rebuttable presumption that Mr. Vittrewka's consent to his remand was because of his inability to obtain judicial interim release as a result of his previous convictions per s. 515(9.1).

[26] The simple reality is that, based upon the evidence before me, Mr. Vittrekwa would, in all likelihood, have received an additional 15 days credit for every 30 days he spent in custody, had he been serving his time in custody as a sentenced prisoner rather than as a remand inmate.

[27] As per the reasoning of Green J., this loss of opportunity to earn remission falls within the plain meaning of the words, "if the circumstances justify it" in s. 719(3.1).

[28] The words "if the circumstances justify it" must be read in a manner consistent with the rules governing statutory interpretation. A failure to consider the inability of a remand inmate to earn statutory remission would result in an interpretation that is inconsistent with these rules. As stated in ***R.*** v. ***Wust,*** 2000 SCC 18 at para. 34, "provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused" (See also ***R.*** v. ***McIntosh***, [1995] 1 S.C.R. 686, paras. 27 and 29; ***Johnson*** at para. 175). The objective of the *TIS Act* was to avoid those situations where remand inmates were receiving enhanced credit of 2:1 or 3:1 for their time in custody, and, on occasion, deliberately delaying matters to effectively reduce the actual amount of time they spent in custody.

[29] Allowing offenders who likely would have received 15 days credit for every 30 days time served, had they been serving inmates, to receive a 1.5:1 credit for their time in custody on remand, results in a situation where the sentence imposed is the sentence that is served. As no enhanced credit beyond what would be received as sentenced inmate is provided, there is no incentive to delay matters. Time served before sentencing is credited the same as time served after.

[30] To interpret the new s. 719 provisions in the limited and restrictive manner urged by the Crown would, for those offenders in similar circumstances to Mr. Vittrewka's, be categorically and unequivocally unfair and unjust. Canadians require that the justice system under which we live be fair and just in its treatment of participants, including offenders.

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

Effect of Consent Remand

[32] The Crown submitted that there should be a rebuttable presumption that an accused who consents to his or her detention is disentitled to credit beyond 1:1,

because in all likelihood they have done so “in recognition of the determinative effect of their criminal records on their judicial release status”. Counsel stated in his argument the following:

> …a remedial and liberal interpretation of the combined operation of section 719(3.1) and section 515(9.1) suggests that where offenders consent to their remand there ought to be a rebuttable presumption that they do so in recognition of the determinative effect of their criminal records on their judicial interim release status and that they are thereby disqualified from consideration for the enhanced remand credit unless persuasive evidence is forthcoming that the offender’s prior criminal record is not the primary reason for the consent remand. (Memorandum of Argument para. 5).

[33] I disagree. Sections 719(3.1), 515(9.1) and 524(4)(8) are clear and unambiguous with respect to those circumstances where there is no discretion to credit an offender more than 1:1 for time in pre-trial custody, and the language should be given its plain meaning.

[34] Under s. 515(9.1), if the justice at a bail hearing orders that the offender be detained because of a previous criminal conviction, he must state the reason in writing in the record. In the absence of this written record, there is no ability to “read in” that the offender must have been detained because of his or her prior criminal conviction.

[35] Further, where an offender has consented to his or her remand, it would clearly be speculative to conclude that he or she would have been detained after a judicial interim release hearing, and that the presiding justice would have necessarily endorsed the record as per s. 515(9.1). Such speculation would be improper and contrary to the fundamental principles of justice.

[36] Mr. Vittrewka has criminal convictions dating back to 1980 that include two for possession of a narcotic, one for mischief, six for assault, one for possession of a weapon, one for impaired driving and five for failing to abide by court orders.

[37] Two Bail Assessment Reports ("BSRs"), dated March 25 and 30, 2011, were prepared for Mr. Vittrewka. Such reports are routinely provided to the Court in the Yukon, either at the request of the Crown or the accused, and are prepared by probation officers. They provide a quick view of the accused's circumstances, including release plans. While a BSR is not determinative of release, it is a fairly thorough source of information, given the brief time to prepare it, for use in considering whether an offender should be granted judicial interim release. Neither of these BSRs were supportive of Mr. Vittrewka's release. I have no doubt that the information in these BSR's may well have been a factor in Mr. Vittrewka deciding not to seek judicial interim release and to consent to his remand.

[38] That said, the possibility of Mr. Vittrewka being detained, had he elected to run a judicial interim release hearing, in no way amounts to the required judicial determination that Mr. Vittrewka would have been detained, that his detention would have been primarily as a result of his prior criminal history, and that the record would have had this endorsement on it. Such a speculative chain of reasoning is untenable.

[39] While, as Green J. stated in ***Johnson*** at para. 91, "…any offender at risk to detention on this basis can effectively evade the statutory 1:1 cap on pre-sentence custody credit by simply consenting to his or her detention", this possibility is not a reason to turn the plain wording of ss. 719(3.1), 515(9.1) and 524(4)(8) on its head.

Had Parliament wished to also exclude offenders consenting to their remand or detention from consideration for 1.5:1 credit, Parliament could have done so. It did not.

[40] If the new provisions were interpreted as Crown suggests, the practical effect would likely be that, in cases where the Crown is not consenting to release, every offender with any prior criminal conviction would be inclined to run a judicial interim release hearing, in order to avoid the presumed denial of any enhanced credit. This could have significant impact on the administration of justice. Dockets would clog up and the limited court resources would be taxed beyond their capacity.

[41] As well, interpreting these provisions in this way would work a more profound injustice. As Green J. pointed out, individuals often consent to their detention because they lack the stable social connections that would allow them to attain bail. These people are often the poor, marginalized, homeless and mentally distressed, and the Crown's urged interpretation effectively penalizes them more severely for these disadvantages (***Johnson***, para. 20). As well, factors like attenuated social connections, unemployment and addictions disproportionately characterize the aboriginal community, and such a presumption flies in the face of the philosophy and reasoning in **R.** v. ***Gladue****,* [1999] 1 S.C.R. 688.

[42] Whether s. 515(9.1) can withstand *Charter* scrutiny in such cases remains a consideration for another day. It is enough to say that the plain reading of these provisions of the *Code* are clear and unambiguous. Mr. Vittrewka's decision to consent to his remand excludes from operation the limiting provision of s. 719(3.1) and he is therefore able to seek enhanced credit beyond the 1:1 ratio.

Presumption of 1:1 vs. 1.5:1

[43] While these provisions of the *TIS Act* have not yet been fully considered by any appeal court, the British Columbia Court of Appeal in ***R.*** v. ***Mayers***, 2011 BCCA 365 stated at para. 23:

> It is fair to say that there is no dispute between the parties that the intent and effect of the *Act* is to limit a judge's discretion in determining the amount of credit to grant an offender for pre-sentence custody. The clear wording of the *Act* indicates Parliament's desire to change the *status quo*, under which sentencing judges generally granted two days credit for each day in custody, and implement a different approach to sentencing. The changes to s. 719 give effect to Parliament's intention.

[44] There is no doubt that Parliament intended to, and has, altered the approach to awarding credit for pre-trial custody, and has intentionally taken steps to limit the discretion of judges in making this calculus.

[45] I note that in the Yukon, the status quo for several years has differed from much of the rest of Canada in that inmates in pre-trial custody were routinely awarded 1.5:1 credit for their time. This practice was based upon evidence that remand inmates in the Yukon, generally speaking, spent their time in custody in circumstances not much different from serving inmates (see, e.g. ***R.*** v. ***Dick***, 2006 YKTC 33, paras. 18, 19; ***R.*** v. ***Boya***, [2006] Y.J. No. 29, para. 10; ***R.*** v. ***Nowazek***, [2009] Y.J. 100, paras. 30-35).

[46] Section 719(3) establishes that the baseline for awarding credit for pre-trial custody is one day credit for each actual day spent on remand. Section 719(3.1) allows for this to be increased to 1.5:1 "if the circumstances justify it". There is no legislative direction provided with respect to the types of circumstances contemplated. It is clear, however, from the choice of the legislators not to utilize words such as "special",

"exceptional" or "unusual" to describe these "circumstances", that ordinary or common circumstances are sufficient. The critical factor is that the circumstances are enough, in the particular case, to justify increasing the credit for remand custody up to the maximum of 1.5:1.

[47] In paragraphs 105 and 106 of ***Johnson***, Green J. referred to testimony given by David Daubney on June 1, 2009 before the House Committee. Mr. Daubney was the head of the Criminal Law Policy Section of the Department of Justice. He was commenting on the earlier evidence of Professor Anthony Doob regarding a potential inconsistency in the legislation, whereby offenders detained in pre-trial custody automatically end up serving longer custodial sentences than similarly situated offenders released on bail. Mr. Daubney did not dispute the evidence of Professor Doob. He further stated that: "…[t]he direction we had from our minister and from the government generally was to prepare a bill based on one to one, with an opportunity to go up to 1:5 if the circumstances justified it".

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

> …deliberately didn't use [the more common phrase "in exceptional circumstances"] because the circumstances won't be that exceptional: they'll be fairly common and, in the case of the parole loss and the remission loss will be universal.

> Mr. Daubney reiterated that the loss of remission and parole eligibility: "…is going to apply universally to all these [remand] offenders now". Unlike poor remand conditions and lack or programming, the remission and parole considerations, he added, could "actually be dealt with arithmetically".

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

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

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

Purpose and Principles of Sentencing

[52] The purpose and principles of sentencing are set out in ss. 718 through 719 of the *Code*. Section 718 reads as follows:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[53] Section 718.1, which describes the fundamental principle of proportionality, reads:

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

[54] Section 718.2 reads in part as follows:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender….
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> ….
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention paid to the circumstances of aboriginal offenders.

[55] Sentencing is a balancing of a number of factors particular to the circumstances of each case as set against the backdrop of the underlying purposes and principles important to Canadian society.

[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,*** 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.

[57] Such a result offends the sentencing principles of proportionality in s. 718.1 and of similarity in 718.2(b). It also offends the principle of restraint set out in ss. 718.2(d) and (e), to the extent that the offender serving 16 months in custody, by comparison, has been in custody for four more months than was considered appropriate for the offence, assuming that the 12 months in custody his co-accused served was appropriate. This effectively imposes four more months of actual jail time for no justifiable juridical reason.

[58] In addition, it is well-established that Canadian prisons are disproportionately populated by individuals of aboriginal heritage (***Johnson*** at para. 94). Certainly, from my experience in the Yukon, this overrepresentation is evident in both the sentenced and remand populations of the WCC. The following statistics for the Yukon are consistent with my observations. According to Statistics Canada data for 2005-2006, 72% of remand inmates were aboriginal as were 73% of sentenced inmates. According to the Yukon Department of Justice, these numbers were up in 2010, to 76% of the remand inmates and 75% of sentenced inmates. In 2005-2006, aboriginal people made up 25% of the Yukon population, and I am not aware of there being a significant increase in the aboriginal population of the Yukon since 2006. (see Landry L. and Sinha M. (2008), Adult Correctional Services in Canada, 2005/6, *Juristat*, 28(6) (Cat. No. 85-

002-XIE); Ottawa, ON: Statistics Canada; *Facts 2011*. Whitehorse, YT: Department of Justice)

[59] As mentioned above, aboriginal people likely constitute a significant portion of those individuals who, due to systemic discrimination and dysfunction, are unable to proffer viable plans for judicial interim release and so are most likely to spend time in pre-trial custody. To interpret s. 719(3.1) in the restrictive manner urged by the Crown would, in particular, offend s. 718.2(e).

[60] As I stated in ***R.*** v. ***Quash,*** 2009 YKTC 54, paras. 54-56:

> It is important to consider the context in which s. 718.2(e) is to be applied today, in light of the apology offered by the Canadian government on June 11, 2008, to former students of residential schools in Canada, for the government's role in the residential school system. In this apology, Prime Minister Harper recognized that the damage went beyond the negative impact on the individual, stating that:
>
> > …the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.
> >
> > The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.
>
> In accepting responsibility for their role in causing such a negative impact on First Nations individuals, their families and their communities, the Government of Canada implicitly should be seen as also accepting responsibility for ongoing participation in ameliorating the consequences of this impact on First Nations individuals, their families and their communities. All too often, it is in the criminal justice system where these negative impacts are to be found, not just in the victims of criminal activity, but in the offenders who commit the crimes.
>
> It is not enough to apologize for harm done without making reparation for the harm. This reparation must reach beyond the payment of monies to former students of the residential schools. It must extend to how we treat First Nations peoples involved in the criminal justice system, regardless of their role within it. Legislation designed to "get tough" on crime must not lose sight of the fact that the very individuals that suffered harm, either directly or indirectly, perhaps as children of students of residential schools, may be the same individuals who are

> committing the crimes and who are, under such legislation, the individuals that the justice system will "get tough" on.
>
> True justice requires proportionality and it is incumbent of the criminal justice system to strive to achieve this proportionality in each case for each offender…

[61] There are other considerations that make it only logical to include loss of remission time as a circumstance that could justify the awarding of enhanced credit. There are factors outside of the offender's control which may lead to delays between the time the offender first comes into custody and the time he or she is sentenced. Some of these are related to the availability of court time. Others are related to the offender's need to obtain counsel.

[62] There was a recent case before me that illustrates this. A young First Nations individual believed to suffer from FASD (although not formally diagnosed), had been charged with several offences, primarily with not complying with court orders, although there were offences of uttering a threat and mischief. He had been in custody since his arrest. This offender had informed Crown counsel at one of his initial appearances that he wished to plead guilty and be sentenced. Crown counsel, quite properly, was concerned about the need for this cognitively impaired individual's right to be properly informed about the charges against him and the potential legal repercussions. As a result, counsel urged the offender to delay proceeding to sentencing until he was able to obtain legal representation. This took time and the offender remained in custody in the interim. I speculate, from what I know of this accused and his circumstances, that he was unable to come up with a viable release plan, although it may be that he knew he had committed a criminal offence and would end up spending some time in custody.

[63] The only reason for the delay in this case was to ensure that the accused was able to make full answer and defence to the charges against him. This could include pleading guilty to some or all of the charges against him. If he is ultimately convicted of the offences, surely his reasonable action in taking time to retain counsel, as properly urged by Crown counsel, should not result in his spending more time in custody than if he had simply entered a guilty plea and been sentenced at first instance. This type of situation is not unusual, in fact, in most cases there will be some unavoidable delay in order to allow for the retention of counsel, the obtaining of disclosure and a consideration of the options available to an accused, all of which are fundamental to fairness in the criminal justice system.

[64] It is also important to keep in mind the presumption of innocence that underlies the criminal justice system in Canada. Accused individuals have the right to respond to charges against them. This will invariably take time, regardless of how diligent the accused person is in attempting to bring the matter to a resolution. The resolution in the end could be a guilty plea to a lesser offence or to fewer charges than the accused originally faced. The result could also be an acquittal after trial, perhaps after succeeding on an important *Charter* issue to the benefit of Canadian society as a whole.

[65] It would be contrary to the principles of justice to create a legal environment with a coercive atmosphere where, because of the prospect of spending more time in custody due to a potential loss of remission, an accused does not avail him- or herself of his or her legal rights. This coercive effect would, in all likelihood, disproportionately impact those who are already the most disadvantaged in Canadian society, being those

who are least likely to have the resources, both socially and economically, to obtain judicial interim release.

[66] I questioned Crown counsel on the unfairness that could result from adopting the restrictive approach urged by the Crown to interpretation of the words “if the circumstances justify it” in s. 719(3.1). Counsel submitted that fairness is not the issue before this court and the matter should be resolved by applying the principles of statutory interpretation to s. 719(3.1) of the *TIS Act*. With all due respect, I disagree.

[67] The negative impacts, unfairness and injustices mentioned above, as well as others unmentioned, can be avoided simply by using a logical and proper interpretation and application of the plain words “if the circumstances justify it” in s. 719(3.1). If unfairness can be avoided by interpreting the word “circumstances” as being just that, “circumstances”, and not adding omitted adjectives such as “special” to the “circumstances”, then this is what must be done. I am confident that the average Canadian requires the administration of criminal law in Canada to be just and fair and would further require that criminal law legislation, where possible, be interpreted so as to achieve such a just and fair result.

Presumption against Tautology

[68] Crown counsel submits that interpreting s. 719(3.1) in a manner that allows the loss of remission opportunity to be a circumstance justifying 1.5:1 credit offends the presumption against tautology. This presumption recognizes the principle that “…every word and provision found in a statute is supposed to have a meaning and a function.

For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless, pointless or redundant".

[69] It appears to me that acceding to Crown counsel's argument would have the effect of offending the principle against tautology, and not the other way around. Section 719 must be read in conjunction with ss. 718 to 718.2 so as to make all these sections of the *Code* meaningful.

[70] This does not mean that I find the presumptive 1:1 credit ratio set out in s. 719(3) should be replaced by a presumptive 1.5:1 credit ratio. The presumption remains at 1:1, unless circumstances justifying enhanced remand credit are brought to the court's attention. In order to receive enhanced credit, an offender must establish on a balance of probabilities that he or she has suffered the loss of their opportunity to earn statutory remission, and that, had this opportunity existed, he or she would have, in all likelihood, received this statutory remission. In practice in the Yukon, this will likely require some evidence from the offender's caseworker at WCC about the offender's behaviour and activities while he or she was on remand, and, ideally, an opinion that had the time been served as part of a sentence, they would have earned remission. I do not anticipate that this evidence will be difficult to obtain or generally result in prolonged sentencing hearings. A simple phone call or e-mail to the offender's case worker by counsel should provide the necessary information to the satisfaction of all parties.

[71] In this regard, I distinguish the reasoning of Harvison Young J. in ***R.*** v. ***Morris***, 2011 ONSC 5206 which reads at para. 41:

> The effect of the defence argument, and the reasoning in *Johnson*, in my view, would be to turn the exception reflected in s. 719(3.1) into the general rule. This would fly in the face of the plain meaning of the section. The effect of establishing a general rule expressed in mandatory terms of a maximum 1:1 credit is to exclude from consideration under s. 719(3.1) factors that would apply to *all accused* who have been detained in custody prior to sentence.

[72] The defence argument which appears to concern Harvison Young J., is that the urged interpretation would create a virtually automatic entitlement to 1.5:1 credit for every inmate on remand due to the universal inability to earn statutory remission. This automatic entitlement in her view would turn the general rule of 1:1 in s. 719(3) on its head and replace it with a general rule of 1.5:1, contrary to the intention of the legislators.

[73] Requiring each individual inmate in the Yukon to show that he or she experienced a loss of opportunity to earn remission while on remand and that, as a result of this lost opportunity, he or she would, in all likelihood, end up serving a longer period of time in custody than they would have had they not been detained, does not create a general rule of 1.5:1. The fact that this enhanced credit may be available to many inmates and is not restricted to only a few, does not alter how the legislation should be interpreted. In fact, such a result may be said to accord with the intent of the legislators.

[74] The Yukon, by legislation, is an earned remission jurisdiction. Should other jurisdictions, by legislation, have a regime of presumed statutory remission, subject to an offender, through his or her conduct losing this entitlement, it could be argued that the practical effect in that jurisdiction is to displace the 1:1 presumption by a 1.5:1 presumption. However, each offender is sentenced as an individual and the particular

offender's behaviour nonetheless remains a viable consideration. Fairness in sentencing must be achieved for each offender as an individual in the sentencing process. I would think that an inability to give 1.5:1 credit for loss of remission in those jurisdictions would attract considerable scrutiny from a *Charter* perspective.

[75] As previously noted, words such as "extraordinary, "exceptional", "unusual" and "special" were not included in s. 719(3.1), but rather, according to Mr. Daubney's testimony before the House Committee, specifically excluded. Consistent with the rules governing statutory interpretation, I assume that this deliberate exclusion has an intention and a meaning and, logically, the intention and meaning was to leave a relatively broad door for those circumstances where enhanced credit is consistent with the fundamental purposes and principles of sentencing. I find that establishing, by evidence, a loss of ability to earn statutory remission is a circumstance that can allow me to use my discretion to award credit for time on remand at a 1.5:1 ratio.

[76] I note that Crown counsel, in his written argument, makes reference to the requirement that the circumstances be "unique", "specific [and] special", and "exceptional" (paras. 12 and 14). I disagree. The legislation deliberately does not so limit the circumstances; the only criteria is that the enhanced credit be justified. The fact that evidence may be able to be adduced in a large number of cases to justify the awarding of enhanced credit in no way detracts from the justification for awarding such enhanced credit in the individual case.

[77] I conclude that the loss of statutory remission is clearly a consideration that can allow a sentencing judge to consider time spent in pre-trial custody as a circumstance that could justify an offender receiving credit for this time at a 1.5:1 ratio.

Earned Remission

[78] The Yukon *Corrections Act* requires an inmate to earn his or her remission. There is no automatic entitlement to a 1/3 reduction in sentence. This said, it is clear on the evidence that the vast majority of sentenced inmates in WCC serve only 2/3 of their sentence. It is also clear that, although the remission is, strictly speaking, “earned”, in practice an inmate receives the full 1/3 credit unless he or she acts in such a manner as to lose this remission.

[79] Here, the evidence is clear that Mr. Vittrewka would in all likelihood have received full 1/3 statutory remission, had he been a serving prisoner rather than on remand.

[80] Therefore, not only does the loss of opportunity to earn statutory remission while on consent remand open the door for me to consider whether the circumstances justify Mr. Vittrewka receiving 1.5:1 credit for this time, the evidence is clear that he would, in all likelihood, have received it.

[81] As such, it would offend the fundamental principles of justice and fairness to award him any less than 1.5:1 credit.

[82] I consider the joint submission of counsel to be appropriate and will not interfere with it. Mr. Vittrewka is sentenced to 12 months custody. The sentence of 12 months

shall be reduced by 311 days for time served, leaving him 54 days remaining in his sentence.

[83] Mr. Vittrewka will be placed on probation for a period of 12 months on the following terms:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or probation officer of any change of name or occupation;

4. Remain within the Yukon Territory unless you obtain written permission from your probation officer;

5. Report to a probation officer immediately upon your release from custody and thereafter when, and in the manner, directed by the probation officer;

6. Reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;

7. Take such alcohol and drug assessment, counselling and programming as directed by your probation officer;

8. Take such other assessment, counselling and programming as directed by your probation officer;

9. Have no contact directly or indirectly or communication in any way with Gregory King while under the influence of alcohol;

10. Not attend at the residence of Gregory King except with the prior written permission of your probation officer in consultation with Victim Services;

11. Provide your probation officer with consents to release information with respect to your participation in any counselling or programming that you have been directed to do pursuant to this probation order.

[84] In addition there will be the mandatory s. 109 prohibition order prohibiting you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance. Pursuant to s. 109(2) and (3) this prohibition is for life.

[85] As this is a primary designated offence under s. 487.04 you will provide such samples of bodily substances as are reasonably required for the purposes of forensic DNA analysis.

[86] The victim fine surcharge is waived.

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COZENS C.J.T.C.