NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Stewart*, 2016 NSCA 12

Date: 20160224
Docket: CAC 419615
Registry: Halifax

Between:

Dennis Garry Stewart

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486 CC

Judges:	Beveridge, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	January 20, 2016, in Halifax, Nova Scotia
Held:	Leave to appeal granted. Appeal from sentence allowed (Case No. 2407391), per reasons for judgment of Beveridge, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring
Counsel:	Dennis Garry Stewart, appellant in person James Gumpert, Q.C., for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

[1] Mr. Stewart appeals the effective sentence he received on August 9, 2013. I use the qualifier "effective" because he does not suggest that any of the periods of jail ordered by the trial judge were tainted by legal error, or amount to an excessive sentence. His sole complaint (at the end of the day) was that the trial judge erred by not giving him 1:1 credit for the 19 months he spent on remand prior to being sentenced.

[2] For the reasons set out below, I agree with the appellant. I would grant leave to appeal sentence, allow the appeal and direct that the warrant of committal be changed to reflect a credit for all of the days he spent on remand.

FACTUAL BACKGROUND

[3] There is nothing to be served by a recital of all of the proceedings in the court below. Some detail is necessary to understand what happened and where the trial judge went astray.

[4] Mr. Stewart is now 74 years of age. He is estranged from his former wife, children, grandchildren and extended family. For many years he was apparently a productive member of society, working as a police officer in Halifax and elsewhere. Other jobs followed. Employment ceased due to disability caused by mental illness. Convictions for petty crimes started in 1989. Between that date and 2005, he accumulated a criminal record of over twenty convictions for fraud, making false statements, breach of probation, uttering threats and common assault. Probationary terms or minimal fines were the usual outcomes. Eventually, very short periods of incarceration were imposed in 2005.

[5] Things were quiet for some years. This changed in 2011. Three Informations with offence dates in 2011 and early January 2012 charged the appellant with various offences, including sexual interference, invitation to sexual touching, breaches of recognizance, internet luring and trafficking in a Schedule IV substance (s. 5(1) of the *Controlled Drug and Substances Act*, S.C. 1996, c. 19). The offence dates were July 30, October 29, 2011 and January 8, 2012. As of this latter date, the appellant was detained in custody until he was sentenced on August 9, 2013.

[6] There is no need to trace the various appearances for elections (on those offences on which this was an option), dates for preliminary inquiries, trials, and subsequent re-elections and pleas. Eventually, with the assistance of counsel, the appellant elected trial in provincial court (where necessary), and pled guilty to nine offences in March 2013. Pre-Sentence and Sexual Offender reports were ordered.

[7] The sentencing hearing was held before the Honourable Judge Del Atwood on July 31, 2013.

Positions of the Parties in Provincial Court

[8] Counsel for the appellant conceded that the appellant did not qualify for enhanced credit for the time he had spent in custody prior to being sentenced (PSC). The Federal Crown urged a sentence of two years federal incarceration on the s. 5(1) *CDSA* charge. In terms of overall sentence, she suggested a five year sentence, and did not oppose a remand credit of nineteen months on a one-to-one basis.

[9] The Provincial Crown sought a global sentence on the *Criminal Code* charges of 33 to 36 months. As to PSC, he suggested that this was entirely a matter of discretion for the trial judge, to be exercised as the judge thought fit. On how that discretion should be exercised, the Crown's position was that the appellant was remanded because he had breached his release conditions, and hence was denied bail by his own conduct. The case of *R. v. Hickey*, 2011 NSSC 186 was cited as authority for a denial of even one-to-one credit. I will discuss this case later.

[10] Judge Atwood reserved his decision. He prepared a written decision which he delivered orally on August 9, 2013 (2013 NSPC 64).

The Trial Judge's Decision

[11] In a thorough and thoughtful decision, Judge Atwood reviewed the facts, the relevant principles of sentencing, and case law to assist in determining a proper range of sentence. Finally, he applied those principles, including restraint and totality to arrive at a total penitentiary term, on a "go-forward basis" of five years' imprisonment.

[12] In terms of PSC, he decided that "full credit for time served" was not appropriate. Instead, he credited the appellant with only twelve months PSC even

though he had been on remand for fully nineteen months. Judge Atwood based his conclusion on what he said were the principles set out by this Court in *R. v. LeBlanc*, 2011 NSCA 60. He set out the sentences being imposed, and his reasons for denying credit for PSC as follows:

> [32] Taking into account that totality principle and the need to consider concurrency, the final sentence of the court is as follows:
>
> - case number 2365624, a summary-offence charge of invitation to sexual touching under s. 152 of the *Code*; the complainant is A.B.; 6-months' imprisonment; this is the starting point;
> - case number 2365625, a summary-offence charge of touching for a sexual purpose under s. 151; the complainant is C.D.; 3-months' imprisonment, reflecting totality, to be served consecutively;
> - case number 2365626, a summary offence charge of s. 151; the complainant is E.F.; 3-months' imprisonment, reflecting totality, to be served consecutively;
> - case number 2441275, and indictable offence under s. 151; the complainant is G.H.; 6-months' imprisonment, reflecting totality, to be served consecutively;
> - case number 2418754, an indictable charge of breach of undertaking under sub-s. 145(3), tied to case number 2441275; 6-months' imprisonment, reflecting totality, to be served consecutively;
> - case number 2407391, an indictable offence of computer luring under para. 172.1(1)(b); the complainant is I.J.; **three-years' imprisonment, reflecting totality, less one year credit for time served; full credit for time served is not appropriate in my view, as, applying the principles set out in *R. v. LeBlanc*,[footnote omitted] it is important to note that Mr. Stewart had been admitted to bail, but wound up being bail denied and bail revoked because of his ongoing and serious criminal conduct in January 2012**; accordingly, the sentence for this count is two-years' imprisonment to be served consecutively, and **I order and direct that the warrant of committal and information 647778 be endorsed in accordance with the Truth in Sentencing Act to record that, but for the time spent on remand, the sentence for this count would have been a three-year consecutive sentence;**
> - case number 2407392, an indictable offence under s. 152; the complainant is I.J.; a two-year term of imprisonment, to be served concurrently;
> - case number 2407394, an indictable charge of breach of undertaking under sub-s. 145(3) of the *Code* tied in to case nos. 2407391, 2407392 and 2407396; a one-year term of imprisonment, taking into account totality,

> but to be served consecutively given the need to generally deter this type of bail violation;
>
> - case number 2407396, an indictable charge of trafficking in a substance held out to be clonazepam, a schedule IV substance, contrary to para. 5(1) of the *Controlled Drugs and Substances Act*; a two-year term of imprisonment, to be served concurrently .
>
> [33] This results in a total penitentiary term, on a go-forward basis, of 5-years' imprisonment.
>
> [Emphasis added]

Proceedings in the Court of Appeal

[13] Since the commencement of his appeal in 2013, the appellant has vacillated between advancing an appeal against conviction and sentence, or just sentence alone. At one point, the appellant had counsel. He fired counsel. He applied for the appointment of state-funded counsel (2014 NSCA 56) and for bail pending appeal (2015 NSCA 70). The applications did not succeed. Finally, in August 2015, it was finalized - the appeal would be from sentence alone.

[14] The appellant did not file a factum. Some materials were filed, but they were not relevant to the sole issue on his sentence appeal: the failure to properly credit him with PSC.

[15] The Federal Crown did not participate in the hearing of this appeal. The Provincial Crown advanced two propositions in defence of the trial judge's decision. The first is that the grant of credit for PSC is discretionary, and the trial judge had good reason to refuse to grant one-to-one credit because the appellant had breached the terms of his release.

[16] The second proposition is that even if the trial judge erred by not giving proper credit, the sentence imposed was nonetheless fit and should be upheld. I am unable to accept either of the Crown's propositions.

DID THE TRIAL JUDGE ERR IN REFUSING TO GRANT CREDIT?

[17] The Crown is correct that the literal words of s. 719(3) of the *Criminal Code* appear to bestow an unfettered discretion on trial judges as to how much credit is to be allowed for PSC, up to a maximum of one-to-one. The precise words are:

> (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.

[18] But such a reading ignores the evolution of the *Criminal Code* and the considerable body of case law that has developed about credit for PSC (for an informative discussion see: Allan Manson, "*Pre-Sentence Custody and the Determination of a Sentence (Or How to Make a Mole Hill out of a Mountain)*" (2004) 49 *Crim. L.Q.* 292). Prior to 2009, s. 719(3) provided:

> (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.

[19] Because Courts had no power to antedate a sentence of incarceration, they used this provision (or its predecessor) as the springboard to grant enhanced credit to offenders who had spent time in PSC. In this way, courts recognized the fact that PSC incarceration is a qualitatively and quantitatively harsher denial of an accused's liberty, and accordingly discounted the incarceral sentence being imposed.

[20] More than one-to-one credit was the norm. The reasons for this are evident. Conditions on remand are usually harsher, and none of the time spent in PSC counts toward remission of sentence or parole. These realities are well documented and recognized by all levels of court in Canada. While not automatic, two-to-one credit for PSC became the accepted ratio, and failure to grant enhanced PSC could amount to legal error (see: *R. v. Tallman* (1989), 48 C.C.C. (3d) 81 (Alta. C.A.); *R. v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont. C.A.); *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont.C.A.); *R. v. Mills*, 1999 BCCA 159; *R. v. Orr*, 2008 BCCA 76).

[21] In fact, the Supreme Court of Canada recognized that the failure to grant PSC credit to reduce mandatory minimum sentences mandated appellate intervention (see: *R. v. Wust*, 2000 SCC 18; *R. v. Arthurs*, 2000 SCC 19; *R. v. Arrance*, 2000 SCC 20). Justice Arbour, writing for the Court in *Wust*, endorsed the usual 2:1 ratio, but recognized that it could vary:

> [45] In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been

> detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[22] Prior to the 2009 amendments to the *Criminal Code*, it was common for judges to simply state that PSC was taken into account in arriving at the sentence imposed (see for example, *R. v. A.N.*, 2009 NSSC 186, aff'd 2011 NSCA 21); or that the announced sentence was on a "go forward" basis (*R. v. LeBlanc*, 2010 NSSC 347, aff'd 2011 NSCA 60). As observed by Professor Nadin-Davis:

> While the common practice of sentencing Courts is simply to mention that time served awaiting trial has been taken into account, the matter has been discussed in detail on sufficient occasions for a number of rules and general practices to emerge.
>
> While the section is clearly permissive and not mandatory, it has been fairly generally agreed that credit against sentence should be given for more time than that actually served pending trial: the true rationale for this view is that time served pending trial does not attract remission and is therefore equivalent to a longer term of post-sentence custody. …
>
> (R. Paul Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982) at p. 155.)

[23] This practice could leave the public, and even interested parties, wondering what really happened. Professor Allan Manson explains:

> There will be situations where, by reason of pre-sentence custody, the ultimate sentence will not warrant additional imprisonment even though incarceration would ordinarily be expected. In these cases, judges should avoid using the phrase "time served," although that is essentially what is happening. Instead, clarity and frankness require an explanation of the effect of pre-sentence custody on the sentence which would otherwise be warranted. This ensures that everyone appreciates the kind of sentence that the offence usually produces. A similar caution applies to sentences of imprisonment which have been substantially reduced by pre-sentence custody. One often hears media reports which mention only the actual sentence without regard for a lengthy period of pre-sentence custody: this kind of incomplete information can generate unnecessary and ill-

> informed criticism. Judges cannot control how a sentence will be reported by the media, but they can ensure that it is properly explained in court.
>
> (Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001), p. 111.)

[24] The legal landscape changed with the 2009 amendments to s. 719 of the *Criminal Code*. The amendments were entitled the *Truth in Sentencing Act*, S.C. 2009, c. 29. PSC credit is now capped at 1.5 to 1.0. and is available only "if the circumstances justify it". Further, the court is required to give reasons for any credit granted, and to specifically endorse the warrant of committal with the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit, the amount of credit, and the sentence imposed. The actual words of the amendments to s. 719 are as follows:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).
>
> (3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.
>
> (3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.
>
> (3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

[25] In this case, the trial judge followed the law. He referred to the circumstances of the offences, remarking that for the October 2011 and January 2012 offences, the appellant was on judicial interim release with conditions of non-association with anyone under the age of 16 years. He violated those conditions when he committed the other offences.

[26] The appellant was charged and pled guilty to two charges of breaching the terms of his judicial interim release (s. 145(3)). For those two breaches, the trial judge imposed six months' imprisonment consecutive on the first, and one years' imprisonment, consecutive on the second. Yet it was that conduct that was the

basis for the trial judge to deny even one-to-one credit for PSC. His reasons on the issue of PSC bear repeating:

> [32] …
>
> - case number 2407391, an indictable offence of computer luring under para. 172.1(1)(b); the complainant is I.J.; three-years' imprisonment, reflecting totality, less one year credit for time served; **full credit for time served is not appropriate in my view, as, applying the principles set out in *R. v. LeBlanc*, [footnote omitted] it is important to note that Mr. Stewart had been admitted to bail, but wound up being bail denied and bail revoked because of his ongoing and serious criminal conduct in January 2012**; accordingly, the sentence for this count is two-years' imprisonment to be served consecutively, and I order and direct that the warrant of committal and information 647778 be endorsed in accordance with the *Truth in Sentencing Act* to record that, **but for the time spent on remand, the sentence for this count would have been a three-year consecutive sentence;**
>
> [Emphasis added]

[27] This reasoning reveals a serious error in principle. A trial judge cannot arrive at a fit and proper sentence for an offence, and then simply deny even one-to-one credit for time spent in PSC. Here, the appellant's morally blameworthy conduct had already been counted at least once, if not twice, by the trial judge when he took into account that the appellant committed the October and January offences with boys under the age of 16 when he was prohibited from associating with anyone under that age, and again specifically by the imposition of 1.5 years' consecutive incarceration for those very breaches.

[28] Even prior to the 2009 amendments, it was recognized that refusing to give credit because of the seriousness of the offence was legal error (*R. v. C. (R.C.)*, [1993] A.J. No. 468), as was the denial of enhanced PSC to express denunciation (*R. v. Neudorf*, 2004 BCCA 374; *R. v. Calder Berg*, 2007 BCCA 343). The debate was never about whether one-to-one credit was available, but whether there was legitimate justification to deny the usual 2:1 credit. Clayton Ruby explains:

> **§13.74** Still, departures from the 2:1 convention were exceptional and absent good reason, have been held to amount to an error in principle. Circumstances that justified less than 2:1 credit included where the offender (1) has little prospect of parole; (2) has repeatedly violated his bail conditions; (3) has committed the offence at issue while on bail or probation; (4) has not endured prison congestion; (5) has deliberately delayed the process in order to secure the

> benefit of credit for pre-sentence custody; (6) is unlikely to take advantage of rehabilitative programmes; or (7) the "dead time" concern is of *de minimis* value.
>
> **§13.75** Even where one of the above circumstances prevails, courts have tended to err on the side of enhanced pre-sentence custody credit. In *Plafker*, the offender was convicted of manslaughter where there was a high degree of moral blameworthiness. Pre-trial custody was lengthy (550 days). The sentencing judge awarded credit on a 1:1 basis only because the offender had breached bail. The Ontario Court of Appeal granted the offender's sentencing appeal, holding that "absent evidence that the appellant was responsible for the significant delay, and given his youth and prospects for rehabilitation, we are of the view that credit on a 1.5 to 1 basis should have been given."
>
> (Clayton Ruby, Gerald Chan & Nader Hasan, *Sentencing*, 8th ed (Markham: LexisNexis Canada, 2012) at pp. 532-533.

[29] The trial judge referred to a decision of this Court, *R. v. LeBlanc*, 2011 NSCA 60, as articulating principles for his conclusion that "full credit for time served" was not appropriate.

[30] With all due respect, the trial judge misunderstood what was at issue in *LeBlanc*, and what was decided by this Court in that case. Mr. LeBlanc was not governed by the 2009 amendments to the *Criminal Code* about credit for PSC. He was technically eligible for enhanced PSC. The trial judge, the Honourable Justice Felix A. Cacchione refused to give credit on a 2:1 basis. In the course of clarifying the sentence being imposed, the judge said: "He is not getting credit for... He is getting credit on a one-for-one basis. There is no credit time. He is not being credited for any remand time" (para. 18, *supra*.).

[31] On appeal, Mr. LeBlanc argued that the judge erred in not giving any credit for his 574 days spent on remand, or the judge's reasons were unclear whether and how the judge calculated remand credit (para. 19). Justice Fichaud wrote unanimous reasons for judgment. He referred to the usual ratio of a 2:1 credit, with the judge having the discretion to reduce that ratio, but only on a principled basis. Justice Fichaud cited a host of cases that identified factors that might justify a reduction or even a denial of enhanced credit for remand time. He wrote:

> [21] Under the earlier version of s. 719(3) that governs Mr. LeBlanc's sentencing, a 2 for 1 credit was "entirely appropriate" but remained discretionary with the sentencing judge: *R. v. Wust*, [2000] 1 S.C.R. 455, para. 45. This exercise of discretion must be exercised on a principled basis: *R. v. Doiron*, 2005 NBCA 30, para. 26; *R. v. A.N.*, para. 40. As this court said in *R. v. A.N.*:

> 41. Though 2 for 1 credit has been the norm, there is no strict formula and the calculation of credit for remand is a matter of judicial discretion: e.g., *R. v. Vermette*, 2001 MBCA 64, paras 64-66. ...
>
> [22] Various factors may justify the principled exercise of the sentencing judge's discretion to abridge or even deny credit for remand time, including evidence that earlier release would not promote rehabilitation, failure to seek bail, remand because the accused failed to appear as required, the offender's conduct while on bail such as breach of conditions of release, a significant or violence based criminal record, or that the offender would pose a danger to society. *R. v. A.N.*, para. 40; *R. v. Ali*, 2009 ABCA 120, paras 4 and 19; *R. v. Tschritter*, 2006 BCCA 202, paras 3-5, 15; *R. v. Gallant*, 2004 NSCA 7, paras 20-22; *R. v. Vermette*, 2001 MBCA 64, para. 66; *R. v. Gillis*, 2009 ONCA 312, para. 11; *R. v. Coxworthy*, 2007 ABCA 323, at paras 9, 16.

[32] In every case cited above, the offender sought a credit of at least 2:1. In some of the cases, no enhanced credit was given; in every case, at least one-to-one credit was given despite the existence of the factors that militated against the norm of 2:1 PSC. *LeBlanc* is not authority for the proposition that trial judges have a discretion to arrive at a fit sentence, and then refuse to credit an offender with time spent on remand. I will refer later to the limited circumstances where that might occur.

[33] Justice Fichaud saw no error by Cacchione J. "abridging credit" from the usual practice of 2:1 (para. 23). With respect to the complaint that the trial judge had not granted any credit, Fichaud J.A. was satisfied that the trial judge had indeed granted credit on a one-to one basis before fixing the term of imprisonment, and hence had committed no error:

> [24] The judge said: "He is getting credit on a one-for-one basis" and the sentence is "[s]ixteen years go forward". My interpretation of the sentencing decision is that the judge applied a 1 for 1 credit before fixing the sixteen year sentence. Mr. LeBlanc received that credit for his 574 days of pre-sentence custody, leaving "[s]ixteen years go forward" to be served. This was one reason the judge said "I am not looking at the 18 years that Crown counsel was looking for" and "I am not looking at the figure that I had in mind before I heard the submissions of counsel and the wiretaps". A sentencing judge's "go forward" term of incarceration is not erroneous merely because the judge applies the appropriate credit for remand before he pronounces the ultimate term of incarceration. …

[34] Mr. Gumpert, counsel for the Crown on appeal, with his usual candour, acknowledged that he knew of no case in Nova Scotia where less than one-to-one

credit was given. Nonetheless, he advanced two arguments in his oral and written submissions to urge us not to intervene.

[35] The first is a reiteration of the submission that trial judges, by virtue of s. 719(3), have a discretion to grant credit, up to a maximum of one-to-one credit. I have already addressed this submission. But the Crown, in oral argument cited the decision of this Court in *R. v. Carvery*, 2012 NSCA 107, aff'd 2014 SCC 27. Mr. Gumpert referred us to para 79, where the object of the 2009 amendments was discussed:

> [79] The purpose or object of the legislation is quite clear. As reflected in its title, the purpose is to limit the amount of credit that can be given for time spent by offenders in pre-sentence custody. Prior to the legislation, it was well accepted that if credit were appropriate, the normal ratio was 2:1, and sometimes even longer. Parliament has directed by this legislation that this is to cease. After proclamation, the maximum for offenders who have spent time on remand because of denial of bail due to previous convictions, or violation of bail conditions, is 1:1. Judges can grant more than 1:1, if the circumstances justify it, but only up to a maximum of 1.5 to 1.

[36] I do not see how these comments assist the Crown's position. On the other hand, this Court, also in *Carvery*, when addressing how to interpret s. 719 in light of the 2009 amendments, said that basic fairness demands that the offender get nothing less than one-to-one credit:

> [52] Secondly, although subsection (3) refers to the credit of 1:1 as "a maximum of one day for each day spent in custody", the reality is, unless an offender is in custody serving another sentence, basic fairness demands that he or she be granted nothing less than one day for each day in custody. The Crown conceded during oral argument that he could not think of any other circumstance that would bring the metric ***below*** the ratio of one to one. In other words 1:1 functions as both a minimum and a maximum.
>
> [Emphasis in original]

[37] The Crown also argues that even if the trial judge erred by not giving proper remand credit, the effective sentence imposed is fit, and hence should be upheld. For this, it cites *R. v. Dolphi*, 2009 BCCA 152, where in an oral judgment Rowles J.A. said:

> [17] Regardless of whether the sentencing judge refused to give credit for pre-disposition custody because he regarded the Crown's suggestion of a nine-month

> sentence to be inadequate, the question before this Court is whether the sentence imposed was fit. Section 687(1) of the *Criminal Code* provides:
>
> > 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
> >
> > > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> > >
> > > (b) dismiss the appeal.

[38] The Court upheld the nine month sentence without PSC credit.

[39] However, subsequent decisions of the British Columbia Court have pointed out that the trial judge in *Dolphi* did not arrive at what he considered to be a fit sentence, and then wrongfully refuse to give enhanced PSC (see: *R. v. Aubin*, 2009 BCCA 418; *R. v. Rufus*, 2009 BCCA 419; *R. v. Vedres*, 2012 BCCA 232). In *Dolphi*, the sentencing judge considered the jointly recommended sentence of nine months' incarceration to be "startlingly low" and refused in those circumstances to further reduce the proposed sentence by credit for PSC.

[40] As explained in *R. v. Aubin*, the proper approach for appellate courts is to correct the error while deferring to the sentence arrived at by the sentence judge:

> [27] In this case, Crown counsel takes the position that, as stated in *Dolfi*, the question for the Court under s. 687(1) of the *Criminal Code* is whether the sentence is fit. He submits that the actual sentence of five years is a fit sentence, and if the two-for-one credit for pre-sentence custody was added, the resulting effective sentence of eight years and two months, being within the range of sentences for this offence, would not be unfit.
>
> [28] In my opinion, the decision in *Dolfi* turned on different circumstances. The sentencing judge in that case had not stated the sentence that he considered appropriate before reducing the sentence for pre-sentence custody (see para. 10). In this case, the trial judge concluded, after reviewing all of the relevant sentencing principles, the range of sentences, and the aggravating and mitigating factors, that a fit sentence was seven years. Neither party suggests that an effective sentence of seven years was not fit in these circumstances.
>
> [29] The trial judge's error in this case, as in *Orr*, was in explicitly refusing to grant two-for-one credit for pre-sentence custody for reasons other than the opportunity to access rehabilitative programs while in remand. As Hall J.A. acknowledged in reviewing the sentences of Mr. Orr and Mr. Vansanten, in both cases the trial judge had properly determined the fit sentence for the particular

> offences and offenders, and those determinations were entitled to some deference (see paras. 26, 28). The sentencing judges' errors were the failure to grant two-for-one credit for pre-sentence custody. The Court dealt with that particular error by reducing the respective sentences accordingly.
>
> [30] The approach of the Court in *Orr* is appropriate in this case. The trial judge's determination that the fit sentence for this offender for this offence was seven years should be given effect. The sentence should be varied to correct his particular error in failing to grant two-for-one credit for the pre-sentence custody.

[41] This approach is consistent with the recent direction from the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64 that deference is owed to a trial judge's determination of a fit sentence. Wagner J., for the majority wrote:

> [42] My colleague states that a sentence may be unfit if there is a reviewable error in the thought process or reasoning on which it is based (para. 140). For this reason, in his view, where there is a reviewable error in the trial judge's reasoning, for example where the judge has characterized an element of the offence as an aggravating factor (para. 146), it is always open to an appellate court to intervene to assess the fitness of the sentence imposed by the trial judge. Having done so, the court can then affirm that sentence if it considers the sentence to be fit, or impose the sentence it considers appropriate without having to show deference (paras. 139 and 142). In other words, any error of law or error in principle in a trial judge's analysis will open the door to intervention by an appellate court, which can then substitute its own opinion for that of the trial judge.
>
> [43] With all due respect for my colleague, I am of the view that his comments on this point need to be qualified. I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. It is therefore necessary to avoid a situation in which [TRANSLATION] "the term 'error in principle' is trivialized": *R. v. Lévesque-Chaput*, 2010 QCCA 640, at para. 31 (CanLII).
>
> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

[42] As pointed out at the outset, there is no complaint about the fitness of the sentence the judge fixed for the offences. An error about credit for PSC is not a request to interfere with how the trial judge balanced the myriad principles of

sentencing and applied them to the circumstances of the offences and of the offender. The error by the trial judge was to find a fit sentence and then effectively increase it by denying any credit (let alone enhanced credit) for time spent in PSC.

[43] The failure to grant any credit for PSC was the issue in the recent decision of this Court in *R. v. Murphy*, 2015 NSCA 14. The Court split as to the outcome, but was unanimous that the failure to grant credit for PSC was an error in principle (per Farrar J.A, for the majority at para. 47). Scanlan J.A., in dissent said:

> [63] I agree with Crown Counsel's comment that the default position for remand credit is one to one unless the accused can convince the court, on a balance of probabilities, that he should get additional credit…

[44] Despite Parliament's direction that enhanced credit for PSC is now capped at 1.5:1, and is not available for certain offenders (subject to passing constitutional muster: *R. v. Safarzadeh-Markhali*, 2014 ONCA 627; leave to appeal granted [2014] S.C.C.A. No. 489), the reality remains that time spent in PSC is the most punitive form of imprisonment (see: *R. v. Monje*, 2011 ONCA 1 at para. 18).

[45] Given the universal acceptance of the qualitative and quantitative disadvantages inherent in time spent on remand, it is remarkable that Crown prosecutors or judges would even consider it possible, absent specific circumstances, to deny anything less than one-to-one credit. But that is what happened here. I have already pointed out the flaw by the trial judge in his reliance on *R. v. LeBlanc* for such an approach.

[46] The Crown at trial did not refer the trial judge to the decision of this Court in *Carvery*. Instead, he cited the trial decision in *R. v. Hickey*, 2011 NSSC 186 for the proposition that a trial judge was at liberty to deny any credit for PSC. Properly understood, it stands for no such thing.

[47] In *Hickey*, the offence date was 2008. Hence, the offender was eligible for enhanced PSC at the normal rate of 2:1. He spent a total of six months in PSC as a direct result of violating his terms of judicial interim release. The Crown recommended a term of four years with PSC credit being given on a 2:1 basis for a sentence of three years.

[48] The trial judge declined to be so generous. The trial judge refused to give enhanced credit for the pretrial custody. Instead he imposed a sentence of 42 months, which is the four years' incarceration requested by the Crown less the six

months that the offender spent in PSC. It is easy to see how confusion might be caused, because the judge did say he was not giving credit for any pretrial custody. However, the only reasonable interpretation of the judge's comments was that he was not giving *enhanced* credit. He explained why:

> [61] I am not prepared to give the accused credit for any pretrial custody. The court file shows that the accused was released from custody on June 3rd, 2008 and remained on bail until April 2010. He then spent approximately one month in custody until he was again released on a recognizance.
>
> [62] On October 14th, 2010 the surety rendered. The accused was then arrested and remanded. The accused has consented to his remand until trial. That covers a period of approximately five months.
>
> [63] The time spent in pretrial custody was as a direct result of the accused violating the terms of his release and not because the accused was denied bail. On two occasions the accused had the surety who acted for him render because of his failure to abide by the terms of his release. **The accused should not, in my opinion, benefit from his voluntary non-compliance with his bail conditions which resulted ultimately in his pretrial detention.**
>
> [Emphasis added]

[49] The only way an offender could possibly be seen as obtaining a "benefit" from PSC is if he were granted more than one-to-one credit for his time on remand.

[50] As indicated earlier, the circumstances are very limited that would permit less than one-to-one credit for PSC. Without trying to be exhaustive, those circumstances include if the offender were, at the same time, serving a sentence for another offence - in other words, if the time spent in custody was in relation to another offence (*R. v. Keepness*, 2014 SKCA 110; *R. v. Wilson*, 2008 ONCA 510; *R. v. Jean*, 2008 BCCA 465); where the offender has already been credited for time spent in PSC (*R. v. Jacque*, 2012 NLCA 18); or the time spent in PSC is inconsequential. Otherwise, basic fairness demands nothing less than one-to-one credit.

[51] I would grant leave to appeal, allow the appeal from sentence, and amend the Warrant of Committal to reflect a credit of 580 days for PSC to be deducted from the sentence of three years' imprisonment for the s. 172.1(1)(b) offence (Case No. 2407391). In all other respects, the sentences imposed are confirmed.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.