NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Carvery***, 2012 NSCA 107

Date: 20121003
Docket: CAC 353119
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Level Aaron Carvery

Respondent

Judge:	MacDonald, C.J.N.S.; Hamilton and Beveridge, JJ.A.
Appeal Heard:	March 23, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed in part per reasons for judgment of Beveridge, J.A.; MacDonald, C.J.N.S and Hamilton, J.A. concurring.
Counsel:	Jeffrey Moors, for the appellant Luke A. Craggs, for the respondent

Reasons for judgment:

INTRODUCTION

[1] The Crown appeals from the 30-month sentence of imprisonment imposed by the trial judge on the respondent for trafficking in cocaine. It is not the length of the sentence that is the subject of the complaint by the Crown; it is the amount of credit the trial judge gave to the respondent for the time he spent in custody before being sentenced.

[2] The Crown says the recent amendments to the *Criminal Code* made by Bill C-25, An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody), S.C. 2009, c. 29, precluded, in the absence of exceptional circumstances, any credit beyond the simple ratio of one day off the announced sentence for every day in pre-sentence custody. The trial judge disagreed and concluded that the respondent should be credited at a ratio of 1.5 days for every day in pre-sentence custody. The Crown complains that even if more than a one to one ratio were available, the trial judge was wrong to do so in this case. The Crown also complains that the trial judge erred in law by writing a decision that anonymized the identity of the respondent.

[3] For the reasons that follow, I agree that the trial judge erred in concluding the law required her to anonymize the identity of the respondent, but she committed no reversible error in granting to the respondent a credit of 1.5 to 1 for the time he spent in custody prior to being sentenced.

[4] I will first set out additional factual and legal information before explaining why I am unable to agree with the main complaint by the Crown.

BACKGROUND

[5] At the time of sentence in June 2011, the respondent was 19 years old. He was 18 on September 9, 2010 when he was on the street after midnight. The police saw him. They immediately arrested Mr. Carvery as they knew he was on a recognizance mandating a curfew of 12:00 midnight to 6:00 a.m. A search incident to arrest disclosed approximately five grams of crack cocaine in his hooded sweatshirt and $110 in cash in his pocket.

[6] The respondent was arraigned in Provincial Court the morning of September 9, 2010 on charges of possession for the purpose of trafficking and breaching his recognizance. The Crown was opposed to his release. The respondent's show cause, or bail hearing was initially set for September 13, 2010, but was adjourned from time to time for a variety of reasons. The bail hearing was never completed. The respondent consented to remand. On October 7, 2010 he elected trial in Provincial Court on the indictable offences, and pled not guilty on all charges. The trial was scheduled for November 16, 2010.

[7] On November 16, 2010 the respondent pled guilty to the charge of possession of cocaine for the purpose of trafficking and breach of his recognizance. No presentence report was requested by the Crown or defence. The Crown advised that a joint recommendation was expected. Defence counsel requested some time. Sentence was adjourned to December 13, 2010. On that date, defence counsel asked for a presentence report. Counsel made the observation that the respondent was doing "dead time", and so was "wearing" the consequences of the delay. Crown counsel commented that the respondent was doing "one for one time" on remand. Sentencing was adjourned to January 13, 2011.

[8] On January 13, 2011 sentencing was again adjourned. The respondent, through counsel, announced his intention to withdraw his guilty pleas. Thereafter, the proceedings were adjourned from time to time to permit retention and instruction of alternate counsel. Eventually, on May 27, 2011, new counsel indicated that the respondent would not be proceeding with an application to withdraw his guilty pleas. June 9, 2011 was set for a contested sentencing hearing.

[9] The Honourable Judge Anne S. Derrick was the presiding provincial court judge on June 9, 2011. The Crown sought a sentence of four years imprisonment in a federal penitentiary, less credit of 9.5 months spent on remand at a ratio of 1:1 for an actual sentence of three years and three months. The defence advocated for a minimum period of imprisonment in a federal institution of two years, less credit for remand time for a net sentence of approximately 15 months. Judge Derrick invited submissions on whether a proper interpretation of *Criminal Code* sections supported a higher credit ratio for time spent on remand of 1.5:1. Written

submissions were filed. Judge Derrick released her decision on June 22, 2011, reported as 2011 NSPC 35.

[10] Judge Derrick thoroughly reviewed Mr. Carvery's circumstances. The presentence report showed a number of very positive facts: he had grown up in a stable and loving family home with his mother, stepfather and siblings; he had completed Grade 11 in 2010, but had not attended school 2010-2011 due to incarceration. He had been an average academic student, but had been in some trouble with school authorities. It was also reported that Mr. Carvery was a gifted athlete who was respectful, and worked hard in the high school basketball program. Mr. Carvery also got good reviews from an employer he had worked for part-time doing carpentry, a career the respondent said he wanted to pursue. The respondent has a 21-year-old girlfriend. They have two children, a three-year-old son and a baby born in February 2011. The probation officer who had supervised the respondent described him as "very personable" with "good social skills . . . intelligent and capable of doing well".

[11] Although this was Mr. Carvery's first time being sentenced as an adult, he had a number of related convictions under the *Youth Criminal Justice Act*. He had three prior convictions for trafficking. For the first he had received probation. For the latter two, 60 days open custody, 30 days supervision, and 9 months probation. He also had three convictions for failing to comply with the terms of a disposition, undertaking and recognizance. After a thorough review of the principles of sentence, and the relevant mitigating and aggravating factors, Judge Derrick concluded:

> [37] I have concluded that a sentence of thirty months amply satisfies the imperatives in this case of denunciation and deterrence driven by the nature of L.C.'s crime and his prior record. A sentence of this duration acknowledges the aggravating factors of L.C.'s choice to continue drug trafficking notwithstanding a strong and pointed warning of the consequences and the fact that he had only just finished his last youth sentence when he was once again in possession of cocaine for retail, profit-making purposes. It ensures however that L.C. will have the opportunity, before too much more time has passed, to return to the community, perhaps with his rehabilitation underway if there are opportunities for rehabilitation available to him in custody. He will not only have to take up any such opportunities, he will have to distance himself from criminal associates and construct a plan for reintegrating successfully with his family and community.

[12] As I noted earlier, the Crown makes no complaint about any aspect of the 30-month sentence imposed by Judge Derrick. Its sole complaint is the amount of credit Judge Derrick decided was appropriate for the nine and a half months the respondent had already spent in custody prior to the commencement of his sentence on June 22, 2011. It is with respect to this issue that I now turn.

[13] At common law, a sentence cannot be antedated. In other words, it commences on the day it is pronounced. This legal reality is found in the *Criminal Code* as s. 719(1), which provides:

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

[14] The evolution of legislation governing this issue was succinctly set out by Rosenberg J.A. in *R. v. McDonald* (1998), 127 C.C.C. (3d) 57, [1998] O.J. No. 2990 as follows:

> [28] ...The predecessor to s. 719(1) was worded somewhat differently and at different times was found either in the *Code* or the *Prison and Reformatories Act*, R.S.C. 1927, c. 163 or the *Penitentiary Act*, 1939, S.C. 1939, c. 6. For example, s. 3 of the *Prison and Reformatories Act* provided that, "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing of such sentence." This court held that this provision did not provide authority to backdate a sentence to take into account pre-sentence custody. The applicable sentencing principle was expressed in *R. v. Sloan* (1947), 87 C.C.C. 198 at 198-9 (Ont. C.A.), at 198-99:
>
> > This Court has had occasion to recently point out in *R. v. Patterson*, 87 Can. C.C. 86, [1947] O.W.N. 146, that there is no authority for the "dating back of any sentence". The sentence can only bear the date on which it is imposed and any term of imprisonment contained therein cannot begin to run earlier than the date of the sentence itself. *This is not to say that the Court can not take into consideration, in imposing sentence, any period of incarceration which the accused has already undergone between the date of his arrest and the date of the sentence, but such period cannot form part of the term imposed by the sentence*. If the Court is of the opinion that the circumstance justifies such a course, it may reduce the term of imprisonment, which it would otherwise impose, by the whole or part of the period of imprisonment already served. [Emphasis added]

> [29] In 1969, Parliament made it clear through the *Criminal Law Amendment Act*, *1968-69*, S.C. 1968-69, c. 38 that a court had no general power to backdate a sentence by removing the words "unless otherwise directed in the sentence" from what had by then become s. 624 of the *Criminal Code* [S.C. 1953-54, c. 51]. The amended provision was as follows:
>
> > 624(1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

See also: Allan Manson, *Pre-Sentence Custody and the Determination of a Sentence (Or How to Make a Mole Hill out of a Mountain)* (2004), 49 *C.L.Q.* 292.

[15] The long history of courts considering the length of time an offender may have spent in custody prior to sentence, in order to arrive at a fit and proper sentence, evolved into a norm of courts granting a credit of two days for each day in custody. The reasons are easy to understand. Conditions while on remand are usually harsher than when serving a sentence, and none of the sometimes lengthy pre-sentence custody counts toward remission of sentence or release on parole. The rationale and importance of recognizing these realities has been expressed by all levels of court in Canada, on innumerable occasions. For example, in *R. v. Tallman* (1989), 48 C.C.C. (3d) 81 (Alta.C.A.), Laycraft C.J.A., for the Court, wrote (pp. 94-95):

> Except where the pre-trial custody has been so short as to have no significance in the sentence being imposed, courts in Alberta invariably take pre-trial custody into account. The difficulty which then is presented is to determine whether the time in pre-trial custody should be equated to custodial time after sentence has been passed, or whether it should be more. It is often said that pre-trial custody is "hard time" in that the time so served is not subject to the legislation governing parole and remission of sentence. From time to time arguments are addressed to the court urging that time in pre-trial custody should be considered as one and one half times or double, or even triple, time served as a result of sentence. This court has uniformly refused to prescribe any automatic formula leaving each case to the discretion of the sentencing judge in the light of the circumstances of the case. In *R. v. Regan* (1975), 24 C.C.C. (2d) 225 at p. 226 [1975] 4 W.W.R. 335 (Alta.C.A.), Sinclair J.A. said:
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> > In imposing sentence, the learned Judge adopted what he referred to as a "rule of thumb" by which imprisonment awaiting trial is said to be equivalent to a sentence of twice that length. . .

> In our view, no such rule of thumb has ever been recognized by the Courts of this Province, and, furthermore, such a rule ought not to be recognized in the future. Each instance of sentencing has to be considered on its own merits, and, no doubt, in proper cases time already spent in custody, and the circumstances thereof, may be taken into account as provided by the Criminal Code. Beyond that, we do not believe any rule in this regard can be laid down.

This case was applied in this court in *R. v. Tebb* (1986), 69 A.R. 11 (Alta. C.A.). At page 13, McClung J.A. said:

> The learned trial judge was, with respect, in error in equating six and a half months of pretrial custody to 18 months of post conviction sentence. There is no such rule of thumb in this jurisdiction. *R. v. Regan et al.* [1975] 4 W.W.R. 335. But it is still an obvious consideration in the fixing of a fit sentence.

In his excellent text *Sentencing in Canada*, Professor Nadin-Davis observes (p.156) "that most appellate courts have agreed that it would be unwise to lay down a definite formula for allowable time". But he also states (p. 155):

> 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 postsentence custody.

Again this statement accords with the general practice in Alberta absent unusual circumstances. ...

[16] Laskin J.A., in *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97, [1996] O.J. No. 4468 (C.A.), explained why a judge should not deny credit without good reason (p. 104):

> Although this section is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good reason. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life

> imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial. For these reasons, pre-trial custody is commonly referred to as "dead time", and trial judges, in deciding on an appropriate sentence, frequently give credit for double the time an accused has served.

[17] In *R. v. Mills,* 1999 BCCA 159, Donald J.A., on behalf of a unanimous five-member panel, emphasized that while a decision regarding pre-sentence custody is discretionary, failure to take it into account without good reason, can amount to an error in principle. In terms of how to calculate how much credit is to be given, he acknowledged the existence of a general approach or rule of thumb of two-to-one. He explained the reason for such an approach as follows:

> **46** Time in custody after sentence counts towards parole eligibility after one-third of the sentence is served and towards statutory release after two-thirds. Giving credit for double the time in pre-disposition custody hits the mid-point in a range between earning the equivalent of three days for every day served for parole purposes and one and a half days in the case of statutory release.
>
> **47** It is not an error in principle to give credit for double the time in pre-disposition custody; but it might well be an error for a judge not to give any credit without good reason.
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> **48** In some circumstances, it would be inappropriate to give double time. Assume, for example, that an accused with a bad record would never get parole. In such circumstances a judge may refuse to give double time credit because otherwise the accused would obtain compensation for a loss he is unlikely to suffer. Since very few inmates are held beyond the statutory release date (after serving two-thirds of the sentence) the judge may properly consider giving more than straight time. Another illustration is the recent decision of this court in *R. v. Schoenhalz*, (1999), B.C.C.A. 0077, [1999] B.C.J. No. 264. One of the grounds of the sentence appeal was that the judge did not give double time, although he credited approximately time and a half. This court did not give effect to that ground because one aspect of the rationale for double time, absence of educational and rehabilitation programs while on remand, did not occur in this case. At para. [11] I said:
>
> > [11] Schoenhalz spent 17 and a half months in custody before sentence. The judge gave her 24 months' credit as dead time. In this connection, it

> should be noted that her time was served in the Burnaby Correctional Centre for Women. Unlike most jails, this institution provides a full range of educational, vocational, and rehabilitation programmes for inmates awaiting disposition. Schoenhalz took full advantage of these opportunities. The judge noted that she obtained her grade 12 equivalency diploma, trained in floral design, and participated in religious and cognitive therapy programmes. The judge took these achievements into account in passing sentence. In my opinion, he was also entitled to give credit for less than double time for predisposition custody because of the help Schoenhalz was offered. Double credit is often given for dead time because no parole eligibility is earned and because conditions of incarceration are less favourable than conditions in post-sentence custody. The latter element is absent in this case.

[18] The Supreme Court of Canada in *R. v. Wust*, 2000 SCC 18, approved of Justice Laskin's explanation of the phenomenon in *R. v. Rezaie*, *supra*. Arbour J. in *Wust*, for the Court, wrote:

> [41] To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody so carefully delineated by Laskin J.A., in *Rezaie, supra*, and by Gary Trotter in his text, *The Law of Bail in Canada* (2nd ed. 1999), at p. 37:
>
> > Remand prisoners, as they are sometimes called, often spend their time awaiting trial in detention centres or local jails that are ill-suited to lengthy stays. As the Ouimet Report stressed, such institutions may restrict liberty more than many institutions which house the convicted. Due to overcrowding, inmate turnover and the problems of effectively implementing programs and recreation activities, serving time in such institutions can be quite onerous.
>
> Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3). ...

[19] Justice Arbour in *Wust* also endorsed the oft used 2:1 ratio for pre-sentence custody, while noting that it was not mandatory in every case:

> [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**. [My Emphasis]

[20] However, the granting of a 2:1 credit was by no means automatic. Appellate courts consistently upheld the denial of credit where offenders had tried to delay proceedings or where otherwise undeserving of any credit beyond one to one. Judge Green referred to some of the case law in *R. v. Johnson*, 2011 ONCJ 77:

> **39** On the other hand, where an offender has little prospect of parole (*R. v. Francis* (2006), 79 O.R. (3d) 551 (C.A.), at para. 25), has repeatedly violated his bail conditions (*R. v. Warren* (1999) 127 O.A.C. 193, at para. 7) or committed the offence at issue while on bail and probation (*R. v. Stewart* (2002), 163 O.A.C. 391, at para. 10), has not endured prison congestion (as in the just-noted case of *Davis*), has deliberately delayed the process in order to secure the benefit of credit for pre-trial custody (*R. v. Thornton* (2007), 224 O.A.C. 219, at paras. 31-33) or is unlikely to take advantage of rehabilitative programs (*R. v. Bradley*, [2009] O.J. No. 750), or when the "dead time" of concern is of *de minimis* value (*R. v. Nusrat* (2009), 239 C.C.C. (3d) 309, at para. 60), a reduced credit ratio or, on very rare occasion, no credit at all (*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500) might result.

See also *R. v. LeBlanc*, 2011 NSCA 60, at para. 22.

[21] Parliament changed the law by enacting Bill C-25 "An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)". It is now S.C. 2009, c. 29. The *Act* has but four substantive sections. The full text of the *Act* is:

An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)

[Assented to 22nd October, 2009]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the Truth in Sentencing Act.

CRIMINAL CODE

2. Section 515 of the Criminal Code is amended by adding the following after subsection (9):

Written reasons

(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.

3. Subsection 719(3) of the Act is replaced by the following:

Determination of sentence

(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.

Exception

(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).

Reasons

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

Record of proceedings	(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.
Validity not affected	(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.
	4. Form 21 in Part XXVIII of the Act is replaced by the following: [omitted]
Application — persons charged after coming into force	5. Subsections 719(3) to (3.4) of the Act, as enacted by section 3, apply only to persons charged after the day on which those subsections come into force.
	COMING INTO FORCE
Order in council	6. This Act comes into force on a day to be fixed by order of the Governor in Council.

[22] This legislation was proclaimed in force February 22, 2010 (SI/2010-9). The amendments to s. 719 have caused a host of reported decisions that have wrestled with interpreting and applying these provisions. It is safe to say that there are two general camps. One camp holds the view that judges are prohibited from granting anything more than 1:1 credit for pre-sentence custody unless satisfied that exceptional circumstances exist to justify increasing the credit to a maximum of 1.5:1 (see *R. v. Morris*, 2011 ONSC 5206, *R. v. Abubeker*, [2011] O.J. No. 2927 (ONCJ), *R. v. B.R.S.*, 2011 ONCJ 484, *R. v. Bridgeman*, 2011 ONCJ 117, *R. v. Jones*, 2011 ONSC 5330, *R. v. Larochelle*, 2011 ONCJ 339, *R. v. Sharkey*, 2011 BCSC 1541).

[23] The other camp concludes that exceptional circumstances need not be shown in order for a judge to conclude that "the circumstances justify" a ratio of up to 1.5:1 (see *R. v. Johnson*, 2011 ONCJ 77, *R. v. Dann*, 2011 NSPC 22, *R. v. Billard*, 2011 NSPC 31, *R. v. Summers*, [2011] O.J. No. 6377 (Sup. Ct.), *R. v. J.A.*, [2011] O.J. No. 3938 (ONCJ), *R. v. Vittrekwa*, 2011 YKTC 64). There is no useful purpose in examining all of these authorities. Two will suffice, *R. v. Johnson*, *supra*, and *R. v. Morris*, *supra*.

[24] In *R. v. Johnson*, the Crown and defence agreed that a sentence of 18 months was appropriate, less credit for the 12 months the offender had spent in custody prior to his date of sentence. The amount of that credit was in dispute. The defence brought a *Charter* motion challenging the constitutional validity of subsections (3) and (3.1) of s. 719 on the basis that they offend ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Judge Green found no violation of the offender's equality rights under s. 15 of the *Charter*. With respect to the remainder of the constitutional challenge, he found they rested on a "narrow and tendentious reading" of s. 719. Properly interpreted, he concluded that access to the 1.5:1 ratio was not limited to the exceptional, rare or extraordinary.

[25] Although at one point he referred to his conclusion as being based on a "contextually fair construction" (para. 160), Judge Green found the phrase "if the circumstances justify it" to be "fraught with ambiguity". He then relied on a number of rules or canons of statutory interpretation available to resolve ambiguity. These included interpretation consistent with the *Charter*, interpretation of a penal statute, and the Parliamentary Record. His conclusion was:

> **182** The ambiguity surrounding the relationship between sub-ss. (3) and (3.1), and, in particular, the words "if the circumstances justify it", mandate consideration of appropriate cannons of construction. But for the expressly excluded categories of remand offenders, I am satisfied that, properly interpreted, these provisions empower sentencing judges to grant pre-sentence custody credit at a ratio of between 1:1 and 1.5:1 whenever the case *and* offender specific circumstances properly warrant the exercise of such discretion and reasons for doing so are enunciated. In my view, and but for those situations where the common law has long-recognized enhanced credit disqualification, a ratio in excess of 1:1 (and ordinarily 1.5:1) is both fair and apposite in every remand offender sentencing case warranting compensation for the loss of remission. In so far as the regime set out at sub-ss. 719(3) and (3.1) is intended to compensate fairly for the correctional systems' failure to account for the incarceration of offenders prior to the commencement of their sentences, Parliament did *not* "get the arithmetic wrong".

[26] In *R. v. Morris*, *supra*, Harvison-Young J. convicted an accused of several firearms offences. The offender had spent almost 15 months in custody prior to

sentence. She declined to adopt the reasoning of Judge Green from *Johnson*. Instead she said:

> **31** In my view, it is clear from a reading of ss. 719(3) and (3.1) that the general rule is that credit be given "up to 1:1". Enhanced credit of 1.5:1 pursuant to subsection (3.1) is the exception. The general rule is articulated first and the exception follows. I am unable to accept Mr. Rippell's argument that, in effect, the norm should be enhanced credit whenever the offender has served pre-sentence time.
>
> **32** There is no ambiguity, in my view, that would justify such a departure from the clear wording of the statute. There is also no basis, or indeed justification, for this court to interpret this provision on the assumption that Parliament was not aware of the effect this provision would have on actual time served. Law-makers are presumed to enact legislation for a particular purpose, with consequences of which they are not only aware, but also, of which they approve as the means to achieving a particular end: to which the parties referred, addresses the principle that:
>
> > A second dimension endorsed by the modern principle [of statutory interpretation] is legislative intent. *All texts, indeed all utterances, are made for a reason* ... In at p. 2 the case of legislation, *the law-maker wants to communicate the law that it intended to enact because that law*, as set out in the provisions of a statute or regulation, *is the means chosen by the law-maker to achieve a set of desired goals*. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. [Emphasis added.] (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: LexisNexis Canada Inc., 2008), at p. 2.).
>
> **33** In this case, it is clear that Parliament would have known that enacting s. 719(3) using the language it chose to use would have the effect of restricting judges from giving any greater credit than one day for each day served in pre-trial custody. Parliament must have intended that enacting such a restriction would increase actual time served when compared to the previous, common practice of giving 2:1 credit, as a mandatory limit on time credited could have no other consequence but increasing the total time served.
>
> **34** Similarly, Parliament would have known that by enacting subsection (3.1) using the phrase "despite subsection (3)", that it would create an *exception*, and not a *replacement*, to subsection (3) "if the circumstances justify it". Parliament

> would not have created an exception that was meant, in practice, to displace the very rule it created in the previous subsection.
>
> **35** The defence position that 1.5:1 is to be the default would leave only (i) the absolute bars and (ii) the judicial discretion to reduce credit below 1.5:1 where, traditionally, judges have refused to grant enhanced credit (such as where the accused has unduly lengthened his or her pre-sentence custody by manipulating the justice system).
>
> **36** In effect, the defence interpretation would read out the sub-clause in the first line of subsection (3.1): "if the circumstances justify it". It would also make subsection (3) redundant. Neither of these consequences is consistent with the basic presumption that language in a statute has meaning.
>
> ...
>
> **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 of 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.

[27] It is with this factual and legal background I return to the issues raised by the Crown on this appeal.

ISSUES

[28] Originally the Crown framed its complaint in three grounds of appeal. They were:

> 1. That the sentencing Judge erred in law by incorrectly interpreting the “pre-trial custody” provisions of s. 719 of the *Criminal Code*.
>
> 2. That the sentencing Judge erred in principle in the application of s. 719.1, and found that the circumstances justified enhanced credit for pre-trial custody at the elevated rate of one and one half days to one, as a result of misapprehending the evidence and falling into palpable and overriding error.

> 3. That the sentencing Judge erred in law by initializing the Respondent's name in the sentencing decision.

[29] In its factum, they proposed the issues to be addressed were:

> Issue 1: Did the sentencing judge err in law in her interpretation of section 719 of the *Criminal Code* concerning sentencing credit to be given for time spent on pre-trial remand?
>
> Issue 2: Did the sentencing judge err in law in ruling that the identity of the respondent, an adult at the time of the commission of the offence at bar, could not be published pursuant to s. 110 of the *Youth and Criminal Justice Act* ("*YCJA*") because to publish his identity now would identify him as a young person who was previously dealt with under the *YCJA.*

[30] Despite the apparent narrowing of the issues, the Crown in its factum and oral argument advocated that, in the circumstances, it was not appropriate for the trial judge to grant 1.5:1 credit. I will address each complaint separately.

INCORRECT INTERPRETATION OF S. 719

[31] Ordinarily appellate courts show great deference to sentencing decisions (*R. v. L.M.*, 2008 SCC 31). But here, in deciding the issue of credit under s. 719 of the *Criminal Code*, the trial judge was engaged in an exercise of statutory interpretation, which as a question of law attracts a correctness standard of review (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 8; *R. v. MacDonald*, 2012 NSCA 50, at para. 44).

[32] The case under appeal was not the first time the trial judge addressed the issue of interpreting s. 719(3) and (3.1). In *R. v Dann*, 2011 NSPC 22 (paras. 30-40) and *R. v. Billard*, 2011 NSPC 31 (paras. 38-41), Derrick Prov. Ct. J. explained her views. In both of these earlier decisions she endorsed as sound the reasons and conclusions by Judge Green in *R. v. Johnson*, *supra*. In the case under appeal, she heard argument from the Crown, which she described as follows:

> [42] The Crown disagrees. While Mr. Moors does not assert that L.C. is statutorily disqualified from an enhanced remand credit, there having been no adverse bail determination based on L.C.'s prior record, pursuant to section

> 515(9.1), and no bail revocation pursuant to section 524(4) or (8), he argues that (1) *Johnson* is wrongly decided, (2) that L.C. cannot make out a case for an enhanced credit based on the conditions of his remand, and (3) that L.C.'s own actions with respect to his remand disentitle him from receiving additional credit. I will examine each of these submissions separately.

[33] On the issue of the correctness of the reasons by Judge Green in *R. v. Johnson*, the trial judge saw no need to repeat her earlier assessments and simply said:

> [44] ...I remain satisfied with my assessment that *Johnson* represents a sound legal analysis of the legislative language used in the sections. I further note that the Attorney General of Ontario did not appeal the decision.

[34] In effect, we are called upon to pass judgment on the correctness of Judge Green's reasons and conclusions. While I do not necessarily agree with all of the reasons penned by Judge Green in *Johnson*, I agree with his ultimate conclusion. I get there by a different route.

Principles of Statutory Interpretation

[35] Most rules and principles of statutory interpretation are judge made. For federal enactments the *Interpretation Act*, R.S.C. 1985, c. I-21, provides some general guidance. It provides:

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[36] It also directs "shall" is to be construed as imperative and "may" as permissive (s. 11); the preamble of an act is to be read as part of the enactment intended to assist in explaining its purport and object (s. 13); and marginal notes, references to former enactments and other divisions in an enactment form no part of it, but are for convenience only (s. 14).

[37] The Supreme Court of Canada has given clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the court in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 wrote:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

[38] The same approach holds true for federal enactments, including tax and penal statutes. In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci, writing again for the court, quoted Driedger's principle of modern interpretation and said:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's

> preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

[39] Importantly, Justice Iacobucci clarified the role of other principles of interpretation. He said:

> 28 Other principles of interpretation – such as the strict construction of penal statutes and the "*Charte*r values" presumption – only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

[40] The Crown argues that we should not follow *R. v. Johnson* because Judge Green was wrong to conclude that the legislation was ambiguous, then resolve the ambiguity by reference to *Charter* values, construction of penal provisions and excerpts from *Hansard*. I have little hesitation in saying that if I viewed the legislation as ambiguous, I would agree with the reasons by Judge Green that led him to his conclusion that a judge has the discretion under s. 719(3.1) to grant credit up to 1.5:1 for loss of earned and statutory remission and parole eligibility "if the circumstances" warrant. However, with respect, while there is clearly some uncertainty and persistent disagreement on how to interpret and apply subsections

719(3) and (3.1), I agree with the Crown that the provisions in question are not "ambiguous" as that term is known in law.

[41] The Supreme Court in *Bell Express Vu*, *supra*, set out the test for ambiguity. In that case, like ours, there were numerous cases that had gone both ways on the issue of the proper interpretation of the *Radiocommunication Act*, R.S.C., 1985, c. R-2. Nonetheless, Iacobucci J. observed that the mere existence of differing opinions does not equate to ambiguity. He directed the correct approach on this issue to be:

> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> 30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis*, *supra*, at pp. 4-5).

[42] A similar approach was articulated by Doherty J.A. in *R. v. Mac*, [2001] O.J. No. 375 where he suggested (para. 27):

> ...The meaning of words cannot be determined by examining those words in isolation. Meaning is discerned by examining words in their context. True ambiguities in a statute exist only where the meaning remains unclear after a full contextual analysis of the statute. ...

[43] On further appeal to the Supreme Court (2002 SCC 24) the result reached by the Ontario Court of Appeal in *R. v. Mac* was overturned, not due to any disagreement with the approach articulated by Justice Doherty, but because the ambiguity was resolved by resort to the French version of the provision – an equally authoritative source – an issue that had not been argued in the Ontario courts. Here, I note that the parties agree the French version of s. 719 does not offer any assistance in shedding light on the appropriate meaning of subsections (3) and (3.1).

Application of the Principles

[44] The key phrase is "if the circumstances justify it" in s. 719(3.1). Can a judge, acting under this subsection, grant credit for pre-sentence custody at a ratio greater than 1:1 to account for the fact that time spent in pre-sentence custody based solely on loss of earned or statutory remission and parole eligibility, or must an offender demonstrate something more?

[45] I do not think it controversial to say that the various directions involved in the so-called 'modern approach' are closely related and interdependent (*Chieu v. Canada (Minister of Citizenship and Immigration*), 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 28). The ultimate goal is to determine the intent of Parliament.

The Grammatical and ordinary sense of the words

[46] The ordinary sense of the words "if the circumstances justify it" reveals little. Section 719 does not define "circumstances". No examples were given by Parliament of when or what type of circumstances would justify a credit of more than 1:1 and up to 1.5:1. This led Chief Judge Cozens in *R. v. Vittrekwa*, 2011 YKTC 64, to reason:

> **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] Section 719(3.1) does provide examples where any credit beyond 1:1 is ***not*** available: where "the reason for detaining the person in custody was stated in the record under subsection 515(9.1)" (the accused is detained/denied bail primarily because of a previous conviction); or "the person was detained in custody under subsection 524(4) or (8)" (the accused has contravened a court order authorizing his release and/or committed an indictable offence while released). It is certainly correct to say that if Parliament intended to exclude as a circumstance factors such as loss of remission that might justify granting more credit than 1:1, it could have easily inserted some qualifying words such as "if the circumstances, other than loss of remission or parole eligibility, justify it, the maximum is one and one-half days for each day spent in custody". However, the fact that Parliament did not provide such direction is not, in my view, conclusive. There are other factors to consider.

The scheme of the Act

[48] In the text *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: LexisNexis Canada Inc., 2008), the author explains this concept (p. 364):

> When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan.

[49] This engages two examinations: what is the scheme of the new provisions enacted by the *Truth in Sentencing Act*; and how does it fit within the relevant provisions of the *Criminal Code*? I will start first with the scheme of the new provisions.

[50] The legislation is not long. Section 719(3) creates a caveat to the previous version by adding the words "but the court shall limit any credit for that time to a maximum of one day for each day spent in custody". But this "maximum" is not really a maximum. I say this for two reasons.

[51] First, s-s.(3.1) provides that "Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days". A recognized synonym of "despite" is "notwithstanding" (Daphne Dukelow, *The Dictionary of Canadian Law*, 3rd ed. (Scarborough: Thomson Canada, 2004) at 344). It my view, this means the limit set by subsection (3) may be ignored "if the circumstances justify it".

[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.

[53] The remainder of the enactment ensures that the judge giving credit provides the public with his or her reasons for doing so, and the exact method of calculation is recorded for officials on the warrant of committal. Failure to do either will not affect the validity of the sentence imposed. These provisions shed no light on the interpretive issue at stake.

[54] The Crown relies heavily on what is usually referred to as the presumption against tautology. As part of the contextual analysis, it is appropriate to consider that presumption, along with a related one – the presumption that a legislature seeks an orderly and economical arrangement. Sullivan, *ibid*, in her text sets out these well known presumptions as follows:

> It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan. (p. 209)
>
> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. (p. 210)

[55] Although not specifically mentioned in her decision by name, it is these interpretative tools that motivated Harvison-Young J. in *Morris*, *supra* to say that the arrangement of the sections and the language used made Parliament's meaning plain and unambiguous. I quote again portions of her reasons. She said:

> **31** In my view, it is clear from a reading of ss. 719(3) and (3.1) that the general rule is that credit be given "up to 1:1". Enhanced credit of 1.5:1 pursuant to subsection (3.1) is the exception. The general rule is articulated first and the exception follows. I am unable to accept Mr. Rippell's argument that, in effect, the norm should be enhanced credit whenever the offender has served pre-sentence time.
>
> ...
>
> **36** In effect, the defence interpretation would read out the sub-clause in the first line of subsection (3.1): "if the circumstances justify it". It would also make subsection (3) redundant. Neither of these consequences is consistent with the basic presumption that language in a statute has meaning.

[56] The Crown relies on these same rationales to urge that Parliament's intent is clear. Their argument is:

> 35. If anything is clear from the *Truth in Sentencing Act* it is that the purpose of the amendments to s. 719 was to reduce credit for pre-trial custody. The grammar used makes it plain that the general rule is credit, if any, to a maximum ratio of 1:1, with a maximum ratio of 1.5:1 in exceptional cases. Interpreting the section otherwise, so that the 1.5:1 maximum becomes the norm, and 1:1 the exception, would result in no reduction in credit for pre-trial custody since virtually every remanded offender would get credit at the ratio of 1.5:1.
>
> ...
>
> 37. Reference may also be made to the doctrine of "tautology" as discussed by Sullivan. To interpret s. 719(3.1) so as to apply to virtually all prisoners on pre-trial remand, as the trial judge did in the case at bar, leaves very, very few candidates for the application of s. 719(3). In effect, that interpretation of s. 719(3.1) eliminates s. 719(3), rendering it meaningless. This is contrary to basic principles of statutory interpretation and must be incorrect.

[57] With respect, I do not find that the arrangement of the subsections and the language used leads to a conclusion that Parliament intended judicial discretion

would be limited to granting credit of 1.5:1 only in exceptional cases. Parliament could have chosen any number of different drafting approaches. It is not up to the courts to grade Parliament on either the wisdom or clarity of enactments. It is patent by the number of cases that have disagreed on what these provisions mean, the intent of Parliament could have been made much clearer. It falls to the courts to arrive at the correct interpretation of the legislation.

[58] I have no hesitation in agreeing that the inter-relationship of subsections and the wisdom of giving meaning, if we can, to all of the words chosen by Parliament, are important interpretative tools. I disagree that by interpreting "if the circumstances justify it" in subsection (3.1) to permit a judge to increase the credit for pre-sentence custody based on 'non-exceptional' factors, such as the potential impact of parole and loss of remission, creates any pressing discord with the previous subsection or renders s-s. (3) redundant.

[59] If subsection (3) did not set a base ratio of 1:1, what then would be the ratio for those offenders referred to in subsection (3.1) – ones that have had their bail revoked or were remanded primarily due to his or her prior conviction? It is a maximum of one to one, by virtue of subsection (3). Subsection (3) is therefore not rendered superfluous or redundant by interpreting s-s. (3.1) as not requiring exceptional circumstances before a judge can increase the credit.

[60] The Crown suggests that "virtually every remand offender would get a credit at the ratio of 1.5:1" thereby creating a *de facto* maximum of 1.5:1 rather than 1:1. Also, it would leave "very, very few candidates for the application of s. 719(3)." With respect, I am unable to accede to this logic as being the guide to the contended for interpretation. As just mentioned, those denied bail due to a previous conviction (whatever that may mean) or for violation of bail conditions would be governed by s. 719(3). Furthermore, I do not see it as automatic or a foregone conclusion that a judge must grant credit at more than 1:1 based on loss of remission or parole.

[61] Remission and parole are two different avenues for an earlier release than the face amount of a sentence of imprisonment. They are governed by statute. Parole by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, and remission by the *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20.

[62] Remission is earned by a prisoner by obeying prison rules and by actively participating in programs. Section 6(1) of the *Prisons and Reformatories Act* provides:

> **6.** (1) Every prisoner serving a sentence, other than a sentence on conviction for criminal or civil contempt of court where the sentence includes a requirement that the prisoner return to that court, shall be credited with fifteen days of remission of the sentence in respect of each month and with a number of days calculated on a *pro rata* basis in respect of each incomplete month during which the prisoner has earned that remission by obeying prison rules and conditions governing temporary absence and by actively participating in programs, other than full parole, designed to promote prisoners' rehabilitation and reintegration as determined in accordance with any regulations made by the lieutenant governor of the province in which the prisoner is imprisoned.

[63] Nova Scotia enacted regulations pursuant to s. 6 of this statute (N.S. Reg 249/88). They provide, in part, that:

> **2** A prisoner shall be deemed to have applied himself industriously for the purpose of being credited with remission of sentence where he has complied with the following:
>
> (a) maintained living and working area in a clean and tidy condition as required by prison staff;
>
> (b) been prompt and conscientious in the performance of regular duties or work assigned from time to time;
>
> (c) performed all work at a level acceptable to prison staff;
>
> (d) complied with all instructions given by prison staff;
>
> (e) observed all fire regulations and safety requirements;
>
> (f) maintained a high level of personal cleanliness and grooming;
>
> (g) respected the rights and dignity of fellow prisoners;
>
> (h) made reasonable efforts to avoid damaging, wasting or neglecting prison property;

> (i) made reasonable efforts to avoid behaviour upsetting to fellow prisoners, staff and the prison programs;
>
> (j) complied with all rules.

[64] The regulations require prison officials to keep a daily performance report with respect to each prisoner and to regularly calculate the number of days or earned remission to be credited. But if the superintendent or his delegate determines that a prisoner has violated any of the regulations respecting correctional facilities, earned remission may be forfeited in whole or in part.

[65] Parole can be either day or full parole. It is a form of conditional release from custody. As with remission, eligibility only arises from serving the actual sentence. Obviously, since conditional release is a discretionary decision, whether an offender will be granted day or full parole is not certain. But as the Crown acknowledged in this case, a judge can make an assessment, a prediction if you will, whether an offender being sentenced would be likely to earn remission or be granted parole. (As recognized in *R. v. Francis* (2006), 79 O.R. (3d) 551 (Ont.C.A.), at para. 23, and *R. v. Mills*, *supra*, at para. 48). Where there is little prospect of parole, or earned remission, a credit greater than 1:1 is not likely to be appropriate.

[66] I do not lose sight of the fact that it would not be onerous for most offenders to establish that they would have earned remission or been granted parole, and hence, it is not likely to be a rare occurrence for an offender to be worthy of a credit of more than 1:1. I adopt with respect the comments by Chief Judge Cozens in *R. v. Vittrekwa*, *supra*, where he said:

> 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.

[67] Respectfully, I disagree with the view that the sequence of the subsections means subsection (3) creates a general rule and "exceptional" circumstances must be demonstrated to justify any increase above 1:1. The problem is that Parliament did not say any such thing – when it would have been so easy to do so, if that were its intent. More fundamentally, those that advocate this approach fail to take into account all of the relevant context in trying to determine Parliament's intent. Specifically, regard must be had to the legislative framework that informs the provisions being examined (see *Bell Express Vu*, *supra*, at para. 55).

[68] In other words, interpreting the amendments to s. 719 should not be done in isolation. To do so obscures the fact that the section is situated within Part XXIII of the *Criminal Code* dealing with sentencing. Part XXIII is patently part of the legislative framework and provides context that can assist in discerning the intent of Parliament. The unanimous decision by the Supreme Court of Canada in *R. v. Wust*, *supra* demonstrates the correctness of this approach.

[69] The Court in *Wust* was required to determine if the discretion under the former s. 719(3) to take into account pre-sentence custody permitted a court to reduce a sentence, on a go forward basis, below the mandatory minimum four-year sentence for robbery while using a firearm mandated by s. 344(a) of the *Criminal Code*.

[70] The judgment of the court was written by Justice Arbour. An isolated approach – one that only examined ss. 719(3) and 344(a) alone – could well have led to the conclusion, as some courts had found that no credit for pre-sentence custody was available if it resulted in a sentence below the mandatory minimum. Instead, Justice Arbour relied on the overall scheme of the sentencing regime, and the potential consequences flowing from the differing interpretations. She wrote:

> 18 Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the *Code*, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the *Code*: the principle of proportionality. Several mandatory minimum sentences have been challenged under s. 12 of the *Charter*, as constituting cruel and unusual punishment: see, for example, *R. v. Smith*, [1987] 1 S.C.R. 1045, *R. v. Goltz*, [1991] 3 S.C.R. 485, and *Morrisey*, *supra*.

...

> 21 Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92, *per* Lamer C.J.; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93, *per* Cory and Iacobucci JJ.
>
> 22 Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited extent required to give effect to a mandatory minimum.

[71] Arriving at a fit sentence was, prior to 1996, left mostly to the discretion of judges, guided by well established principles. The mostly common law approach was codified by amendments to the *Criminal Code* that defined the purpose, objectives and some of the principles of sentence. The relevant purpose and objectives of sentence are:

> **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 acknowledgment of the harm done to victims and to the community.

[72] The fundamental principle of sentence is defined as:

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

[73] Other principles of sentence are set out in s. 718.2 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, and, without limiting the generality of the foregoing,
> >
> > ...
> >
> > (*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> >
> > (*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> >
> > (*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 to the circumstances of aboriginal offenders.

[74] These provisions and the importance of the fundamental principle of proportionality were recently described by LeBel J. in *R. v. Ipeelee*, 2012 SCC 13 as follows:

> [35] In 1996, Parliament amended the *Criminal Code* to specifically codify the objectives and principles of sentencing (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995 c. 22 (Bill C-41)). According to s. 718, the fundamental purpose of sentencing is to contribute to

"respect for the law and the maintenance of a just, peaceful and safe society". This is accomplished by imposing "just sanctions" that reflect one or more of the traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[36] The *Criminal Code* goes on to list a number of principles to guide sentencing judges. The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. As this Court has previously indicated, this principle was not borne out of the 1996 amendments to the *Code* but, instead, has long been a central tenet of the sentencing process (see e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.), and, more recently, *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 40-42). It also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.

[37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that

> reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[75] The Crown argues that loss of earned or statutory remission and impact on parole eligibility are precluded from being considered as circumstances justifying credit of up to 1.5:1. Yet the consequences of this contended for interpretation would be contrary to the fundamental principle of proportionality mandated by s. 718.1 of the *Code* and contrary to s. 718.2(b). The respondent offers the following example:

> 23. As an example, imagine two identical twins who participate equally in a crime. Their family only has enough security to get one of them out on bail. As a result, one is on bail for six months while the other is on remand for six months. At the end of the six months, both twins plead guilty and get sentenced on the same day to a gross sentence of 18 months imprisonment.
>
> 24. The twin who was granted bail would earn remission and serve 12 of the 18 month jail sentence. The twin who was not granted bail would receive six months remand credit and be sentenced to a further 12 months jail, of which he would serve 8 months, for a total of 14 months in jail.
>
> 25. The contrast between the two sentences becomes starker when the crime is serious enough to warrant a period of two years or more of incarceration. To use the same hypothetical twins charged with the same crime, the twin who did get bail is sentenced to two years in a federal institution six months after being released on bail. He would be eligible for parole and released from custody under supervision in as little as 8 months. The twin who did not get bail would be granted six months remand credit, sentenced to a further period 18 months prison in a provincial institution, and with remission time would be released after 12 months, for total of 18 months - a difference of 10 months for two offenders whose circumstances were identical except one was granted bail and one was not.

[76] The Crown does not dispute the accuracy or stark unfairness of this example. Other courts have recognized the consequences of denying appropriate credit for loss of remission. Chief Judge Cozens in *R. v. Vittrekwa*, *supra*, wrote:

> **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.

[77] An interpretation that would lead to the imposition of sentences that offend the mandated principles of sentencing set out in the *Criminal Code* seems wrong. Parliament is of course at liberty to change the law and, if the intent of Parliament is clear in the language it used in an enactment, courts must, subject to a properly pleaded and successful constitutional challenge, give effect to it. The problem with the language of s. 719(3.1) is that the circumstances a court may properly take into account are not defined specifically or even generally. The courts are left to discern what Parliament intended. In my opinion, an interpretation that is in accord with the legislative framework is the correct one, unless some other conclusion is dictated by other interpretative considerations.

[78] Lastly, I turn to the object of the legislation.

Object of the legislation

[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.

[80] It can also be readily concluded that Parliament wanted judges, if some had not been doing so, to articulate for the public how much credit and why. In addition, Parliament decided it was worthwhile for the official record, the warrant of committal, to be clearly endorsed with information as to the exact offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit, the amount of time credited and the sentence imposed (s-s. 3.3).

[81] Legislative history of an enactment consists of everything that relates to the conception, preparation and passage of the legislation. There has been some reliance on the legislative history of Bill C-25 in trying to resolve what Parliament intended by the words and structure of the amendments to s. 719. For example Judge Green in *R. v. Johnson*, *supra*, referred to comments made by the Minister and his senior aides in resolving the meaning and purpose of the language. He reasoned:

> **180** Statements made by a Minister and his or her senior aides may afford ancillary assistance in construing the meaning and purpose of ambiguous statutory language. Here, no clear direction as to government's intendment respecting the relationship between sub-ss.(3) and (3.1) can be gleaned from a close reading of the House debates and Committee proceedings. What is clear is that the Minister, despite ample opportunity to do so, conspicuously refrained from characterizing sub-s. (3.1) as an "exception" to the "general rule" in sub-s. (3). Further, and as noted earlier, he stressed that apart from the excluded categories, the language chosen by the government, and ultimately endorsed by Parliament, "permits the court to have discretion to consider on a case-by-case basis where the credit to be awarded for time spent in pre-sentence custody should be more than the general

> rule of one-to-one". His senior policy advisor, David Daubney, was more direct. The word "exceptional", he said, had been deliberately omitted from the provision by the legislative drafters. Further, in his view "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". This testimony, of course, belies any government intention to have sub-s. (3.1) read as applying only to exceptional situations. His advice to the Senate committee studying Bill C-25 reinforces this interpretation: "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."

[82] The Crown acknowledged that there exist comments in the legislative record that support an interpretation that it would not be unusual for circumstances to be found to justify a credit of up to 1.5:1, but advocated caution in relying on the legislative record because there were other comments, in particular by the Minister of Justice, that could support a more restrictive interpretation. The Crown submitted that the Justice Minister appeared before the House of Commons Standing Committee on Justice and Human Rights on May 6, 2009 and said in part:

> The current practice of awarding two-for-one credit for pre-sentence custody is problematic. For instance, in some cases it may encourage some 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. Also, the population in remand centres now exceeds the population found in sentenced custody in Canada's provincial and territorial jails. This is why attorneys general and correctional ministers strongly support limiting credit for time served as a way to reduce, among other things, the growing size of their remand population.
>
> The practice of awarding overly generous credit can put the administration of justice into disrepute because it creates the impression that offenders are getting more lenient sentences than they deserve. The public does not understand how the final sentence reflects the seriousness of the crime. For these reasons, the current practice of routinely awarding two-for-one credit must be curtailed.
>
> There are cases where courts have awarded less than two-for-one, and the reasons they justified doing so support the proposal contained in Bill C-25. In those instances, the credit awarded was justified because the offenders were unlikely to obtain early parole because of their criminal record, or because the time spent in remand is a result of a breach of bail conditions. It is for all of these reasons that Bill C-25 proposes to provide, as a general rule, credit of one-to-one.

> However, where circumstances justify it, courts will be able to award up to one and a half days for every day spent in pre-sentence custody. In such cases the courts would be required to provide an explanation of those circumstances.
>
> Now, those circumstances are not defined in the bill. This permits the court to have discretion to consider on a case-by-case basis where the credit to be awarded for time spent in pre-sentence custody should be more than the general rule of one-to-one. We would expect the application of a credit ratio of one and a half to one would be considered where, for whatever reason, the conditions of detention were extremely poor, or when the trial is unnecessarily delayed by factors not attributable to the accused.

[83] I have no difficulty with the admissibility of these sources, nor with reliance on them to assist in understanding the mischief the legislation was meant to address and hence, the object of the *Act*. The debates and speeches reveal what is already easily discernible – the general rule of a 2:1 credit was to be scrapped in all circumstances, and there was a perceived need to address public perception that sentences were being viewed as too lenient due to a lack of information about why and how much credit was being given for time spent in custody.

[84] In oral argument, the Crown submitted that reliance on comments by senior officials and others was not appropriate because the legislation was not ambiguous and, as demonstrated above, there were other comments supporting its view of how the legislation should be interpreted. As detailed earlier, I do not find the legislation ambiguous. I decline to weigh into the academic and jurisprudential debate on the need for ambiguity before turning to such extrinsic aids as legislative history or whether it can be relied on as direct evidence of legislative intent (see for example the discussion in *Sullivan*, *ibid*, at pp. 576; 593-615; Pierre-André Coté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell 2011) at pp. 462-468). These issues were not argued before us. In my opinion, in the circumstances of this case, it is simply not appropriate to try to rely on these extrinsic materials to try to discern what Parliament intended by the language and structure of the legislation.

[85] In the end, taking into account the words of ss. 719(3) and (3.1) in their grammatical and ordinary sense and read in the entire context of the legislative scheme and the object of the *Act*, the legislation provides for judicial discretion to grant credit of up to 1.5:1 for time spent in pre-sentence custody if a judge is

satisfied that the circumstances justify it, which includes consideration of the potential loss for the offender of earned or statutory remission and parole. I see no error by the trial judge in her interpretation of the statutory provisions. Accordingly, I would dismiss this ground of appeal.

SHOULD CREDIT HAVE BEEN GRANTED

[86] The initial ground of appeal alleging palpable and overriding error and misapprehension of evidence evolved into a complaint that it was simply not appropriate for the trial judge to have granted the respondent credit at 1.5:1. The Crown points to a number of factors, such as the abandonment of the bail hearing, and delay caused by the respondent altering his positions and instructing various counsel before finally being sentenced.

[87] The Crown makes no submissions on the standard of review this Court must apply in considering this issue. The respondent argues that, absent palpable and overriding error, or error in principle, deference must be accorded to the decision by the trial judge. I agree.

[88] The authorities are clear that a trial judge's decision as to how much, if any credit, beyond 1:1 for pre-sentence custody, is a discretionary one. Absent an error in principle, an appellate court is not to intervene (see *R. v. Vermette*, [1988] 1 S.C.R. 985; *R. v. A.N.*, 2011 NSCA 21; *R. v. LeBlanc*, *supra*).

[89] The arguments presented by the Crown on appeal are the same ones made to the trial judge. Judge Derrick thoroughly reviewed all of the information relevant to the issue of pre-sentence custody. She found as a fact that the respondent did not try to drag out his remand to manipulate the system to try to obtain a benefit (para. 54). In short, he did not try to "game" the system (para. 55). Given the uncontradicted information before the trial judge, she was fully entitled to make these findings and conclude that the circumstances of loss of remission justified a fair calculation of 1.5 days for each day of pre-sentence custody. I would dismiss this ground of appeal.

NON-PUBLICATION OF THE RESPONDENT'S IDENTITY

[90] The trial judge concluded her reasons by observing that she had referred to the respondent by his initials. She explained that she had done so because of s. 110 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (*YCJA*). This section is found in Part 6 of the *Act*. It provides:

> **110.** (1) Subject to this section, no person shall publish the name of a young person, or any information related to a young person, if it would identify the young person as a young person dealt with under this Act.

[91] During the course of her reasons, the trial judge referred to the fact that the respondent had a Youth Justice Court record. She also set out the details of his record, and included excerpts from the reasons for judgment by a youth justice court judge that had imposed sentence in an earlier youth court proceeding. While the trial judge acknowledged that the respondent was not a young person but an adult, she decided to exercise what she said was a "cautious approach" and not publish the identity of the respondent. She reasoned as follows:

> [63] L.C. is no longer a young person under the *Youth Criminal Justice Act* but he was, and he has a Youth Justice Court record. He is therefore a young person who was dealt with under the *Youth Criminal Justice Act*. To identify him would be to identify that fact which, on a plain reading of section 110 appears to be prohibited. I am not aware of this issue having been judicially considered. While it is correct that if L.C. was a young person under the *YCJA* who was being sentenced as an adult, his identity and information about his youth record could be published, that situation is specifically provided for in section 110(2)(a) as an exception to section 110. In the absence of any statutory or authoritative judicial clarification of the ambit of section 110 of the *YCJA*, I have decided to exercise a cautious approach and am not publishing L.C.'s identity.

[92] I agree with the Crown that the trial judge erred in effect ruling that information about the respondent could not be published without violating s. 110 of the *YCJA*.

[93] The respondent was not a young person before Judge Derrick, he was an adult. As such, the usual and constitutionally enshrined, open court principle applied without restriction. The breadth of this principle was recently described

by Fichaud J.A. in *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, as follows:

> [24] ...The open court principle derived from the common law: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, paras 53-63. But it is now constitutionally embedded as an element of freedom of expression, including freedom of the press and other media, in s. 2(b) of the *Charter*: see authorities cited in *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, paras 33 and 81, and *Canadian Broadcasting Corp v. The Queen*, [2011] 1 S.C.R. 65 ["Dufour"], paras. 11-14. The exercise of judicial discretion under Rule 59.60 must comply with the constitutional standards: *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 [*Vancouver Sun* 2004], para 31, per Justices Iacobucci and Arbour for the majority, and authorities there cited; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para 48; *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592, para 87; *Dufour*, paras 13-14.

[94] There was no request before the trial judge to keep the identity of the respondent from the public. The respondent was an adult. He no longer came within the concern that publication or disclosure of his identity might hinder rehabilitation by stigmatization or premature labelling of a youth in his or her formative years (*Re. F.N.*, [2000] 1 S.C.R. 880; *Re Southam Inc. and The Queen* (1984), 48 O.R. (2d) 678 (H.C.), aff'd (1986), 53 O.R. (2d) 663 (C.A.), leave to appeal to the Supreme Court of Canada refused, [1986] 1 S.C.R. xiv.).

[95] Furthermore, even if the respondent had been a young person under the *YCJA*, but was receiving an adult sentence, there would have been no restriction on publication of his name. Section 110(2) sets out a number of exceptions to the breadth of the ban on publication in subsection (1). It provides as follows:

> (2) Subsection (1) does not apply
>
> (*a*) in a case where the information relates to a young person who has received an adult sentence;
>
> (*b*) subject to sections 65 (young person not liable to adult sentence) and 75 (youth sentence imposed despite presumptive offence), in a case where the information relates to a young person who has received a youth sentence for an offence set out in paragraph (*a*) of the definition "presumptive offence" in subsection 2(1), or an offence set out in paragraph (*b*) of that definition for which the Attorney General has given notice under subsection 64(2) (intention to seek adult sentence); and

> (*c*) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

[96] I agree with the Crown that it makes little sense to interpret s. 110(1) as prohibiting publication of the name of an adult offender to protect his identity as a former young person under the *YCJA* when no such protection would be given to an actual young person who is being sentenced as an adult. In my opinion, s. 110(1) does not apply to restrict the publication of the identity of an adult offender who has previously been sentenced as a young person.

[97] This approach would be consistent with the s. 120(6) of the *YCJA* that makes the provisions of Part 6 of the *Act* (Publication, Records and Information) no longer applicable if a young person commits an offence as an adult within five years of completion of the youth sentence. The section reads:

> (6) If, during the period of access to a record under subsection (3), the young person is convicted of an additional offence set out in the schedule, committed when he or she was an adult,
>
> (a) this Part no longer applies to the record and the record shall be dealt with as a record of an adult and may be included on the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police; and
>
> (b) for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

[98] I would therefore give effect to this ground of appeal and remove any restriction on the publication of the name of the respondent. Apart from this issue, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

MacDonald, C.J.N.S.

Hamilton, J.A.