SUPREME COURT OF NOVA SCOTIA
Citation: R. v. T.W.O., 2013 NSSC 448

Date: 20130430
Docket: Hfx No. 414252
Registry: Halifax

Between:

T.W.O.

Applicant

v.

Her Majesty the Queen, The Attorney General for the Province of Nova Scotia, The Superintendent of the Central Nova Scotia Correctional Facility

Respondents

Restriction on Publication: Pursuant to the *Youth Criminal Justice Act*

Judge:	The Honourable Justice John D. Murphy
Heard:	April 30, 2013, in Halifax, Nova Scotia
Written Decision:	November 13, 2014 *{Oral decision rendered April 30, 2013}*
Counsel:	Chandrashakhar Gosine, for the Applicant Terry M. Nickerson, for Respondent Her Majesty the Queen; Peter C. McVey, for Respondents Attorney General of Nova Scotia, The Superintendent of Central Nova Scotia Correctional Facility.

By the Court:

Introduction

[1] T.W.O. applied for *habeas corpus* seeking release from custody following a decision by the Superintendent of the Central Nova Correctional Facility (the "Superintendent") to apply s.743.5 of the *Criminal Code* to convert the remaining supervision portion of his youth sentence into an adult sentence of incarceration. Upon hearing the Application I determined and advised the parties that T.W.O. should be released. When the result was communicated at the conclusion of the hearing, I immediately issued an Order, with counsel's agreement, that suspended the Superintendent's decision to collapse T.W.O.'s youth and adult sentences, and directed his release. To retain jurisdiction to provide written reasons for granting *habeas corpus*, I reserved issuance of a final order in the application. For the reasons which follow, a *Habeas Corpus* Order will issue.

Facts

[2] On November 29, 2011, T.W.O, who was then 17 years old, was found guilty of aggravated assault, assault with a weapon, and failure to comply with a youth sentence or disposition. Under s.42(2)(n) of the *Youth Criminal Justice Act*, S.C. 2002, c.1 as amended, ("*YCJA*") the Court ordered him to serve a total sentence of 625 days, comprised of 416 days in custody and followed by 209 days under supervision in the community, subject to a number of conditions.

[3] On October 4, 2012, T.W.O. turned 18 while still serving the custodial portion of his youth sentence. On January 18, 2013, he commenced the community supervision portion. On February 16, 2013, T.W.O. breached two of the conditions of community supervision. He was arrested on February 20, 2013 and charged as an adult with two counts of failure to comply with sentence or disposition pursuant to s.137 of the *YCJA*.

[4] Also on February 20, 2013, the Provincial Director issued a warrant of apprehension and remand for T.W.O, as permitted under s.102(1)(b) of the *YCJA*, pending review of his youth sentence under s.108 of the *YCJA*.

[5] A hearing was held before Judge Campbell (now Justice Campbell) under s.103 of the *YCJA* on February 25, 2013 to review the conditions of T.W.O.'s youth sentence and consider whether to substitute a period of custody. After carefully

considering T.W.O.'s history and circumstances, Judge Campbell ordered that he continue to serve the remainder of his sentence in the community and varied the conditions to include a three-month period of house arrest. T.W.O. remained under remand for the adult charges laid on February 20, 2013, until he was released on a recognizance on February 26, 2013.

[6] T.W.O. pleaded guilty to the adult charges on March 13, 2013 and Judge Williams of the Provincial Court sentenced him to a custodial period of 30 days, to be served on weekends. He served two weekends in a provincial correctional facility without incident. When he presented himself on March 29, 2013 to commence his third weekend, T.W.O. was informed by the Superintendent that he would not be released. She indicated that the remaining supervision portion of his youth sentence had been converted into an adult sentence of incarceration in accordance with Section 743.5(1) of the *Criminal Code* ["s.743.5(1)"], which provides as follows:

> 743.5 (1) Transfer of jurisdiction when person already sentenced under *Youth Criminal Justice Act* – If a young person or an adult is or has been sentenced to a term of imprisonment for an offence while subject to a disposition made under paragraph 20(1)(k) or (k.1) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or a youth sentence imposed under paragraph 42(2)(n), (o), (q) or (r) of the *Youth Criminal Justice Act*, the remaining portion of the disposition or youth sentence shall be dealt with, for all purposes under this Act or any Act of Parliament, as if it had been a sentence imposed under this Act.

[7] The effect of the Superintendent's decision was to set August 14, 2013 as T.W.O.'s committal warrant expiry date, with June 23, 2013 being the earliest date for release from custody. T.W.O.'s status changed on March 29, 2013 from being under community supervision until August 14, 2013 with house arrest until May 25, 2013 (youth sentence) and weekend custody until May 4, 2013 (adult sentence) to being committed to incarceration as an adult until August 14, 2013, with earliest release June 23, 2013.

[8] On April 10, 2013, T.W.O. filed an Application for a Writ of *Habeas Corpus*, claiming that the Superintendent's conversion of his sentence of community supervision and house arrest to adult custody was unlawful. When the Application was heard on April 30, 2013, I determined the detention was unlawful and granted an order suspending the Superintendent's decision to collapse the youth and adult sentences, pending providing reasons for final Order in the *Habeas*

Corpus Application. T.W.O. was immediately released from the detention which resulted from the sentence collapse.

Issue and Position of the Parties

[9] This Court must determine the appropriate sentencing outcome when an adult, still subject to a Youth Justice Court Order for Custody and Supervision, is sentenced to a period of adult incarceration for offences committed as an adult.

[10] T.W.O. maintains the Court should follow its decision in **R. v. R.M.W**, 2008 NSSC 420 ("**RMW**") in which Justice LeBlanc determined that the Superintendent does not have jurisdiction to apply s.743.5 (1) to override the decision of a Youth Court Judge and detain an inmate beyond the terms of a committal order. The Respondents suggest **RMW** is distinguishable because a different adult sentence was imposed; they also say that the ruling in **RMW** has been overtaken by subsequent case law, by changes to federal youth criminal justice and sentencing legislation in the *Safe Streets and Communities Act*, SC 2011-2012, c.1, and by an amendment to the definition of "sentence" in the *Corrections and Conditional Release Act*, S.C. 1992, c.20, as amended ("*CCRA"*). The Respondents submit that T.W.O.'s proper course of action was to appeal his adult sentence.

[11] T.W.O. also argues that invoking s.743.5(1) to merge his sentence into one adult sentence is prohibited by s.50(1) of the *Youth Criminal Justice Act* and inconsistent with Parliament's policy that criminal justice for young persons be separate from that for adults.

Analysis

1. Inferences from Factual Background

[12] Based on the affidavit evidence, Record Respecting Detention, and transcripts of the proceedings (including decisions) before Judges Campbell and Williams which were provided for the *Habeas Corpus* Hearing, I have determined:

(a) Prior to the Superintendent's informing T.W.O. on March 29, 2013 that the remaining supervision portion of his youth sentence was being collapsed to a period of adult incarceration, neither T.W.O. nor anyone involved with his court proceedings – no judge, prosecutor, defence counsel or T.W.O. family member – considered or anticipated

the possibility that s.743.5(1) was applicable or would be invoked in his case.

(b) The information provided does not indicate whether on March 29, 2013 the Superintendent was aware of comprehensive reasons Judge Campbell delivered February 25, 2013 explaining why T.W.O. should not be incarcerated.

2. The Test on an Application for *Habeas Corpus*

[13] An inmate who has been deprived of liberty as a result of an unlawful federal or provincial administrative decision may apply to a provincial superior court for relief in the form of *habeas corpus*. In **Mission Institution v. Khela**, 2014 SCC 24, [2014] SCJ No 24, the Supreme Court of Canada summarized the test to be applied on an application for *habeas corpus*:

> 30 To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.

[14] The basic question before the court on an application for *habeas corpus* is whether the decision resulting in the deprivation of liberty was lawful. Prior to the decision in **Khela**, it was clear that "a decision will not be lawful if the detention is not lawful, if the decision maker lacks jurisdiction to order the deprivation of liberty…or if there has been a breach of procedural fairness" (para.52). There was confusion, however, as to whether it was open to a superior court on an application for *habeas corpus* to review the reasonableness of a correctional decision which resulted in a deprivation of liberty. The Supreme Court of Canada confirmed in **Khela** that the reasonableness of a decision "is a 'legitimate ground' upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*" (para. 72).

3. Application of Test to the Facts

[15] T.W.O. has clearly been deprived of his liberty as a result of an administrative decision by the Superintendent. T.W.O.'s challenge to the Superintendent's jurisdiction to collapse his youth sentence raises a legitimate

basis to attack the legality of his detention. The *habeas corpus* remedy is available if that decision was unlawful.

[16] This Court has previously decided in **RMW** that the Superintendent has no jurisdiction under the *Criminal Code* or the *Correctional Services Act*, S.N.S. 2005 c.37, to interpret and apply s.743.5 (1) on her own initiative. I have concluded that **RMW** should be followed in this case; accordingly, I find T.W.O.'s detention was unlawful, and *habeas corpus* should be ordered.

a. The decision in RMW

[17] In **RMW**, Justice LeBlanc considered the issue of whether the Superintendent has jurisdiction to apply s.743.5(1) and detain an inmate beyond the terms of a committal order. R.M.W, like T.W.O, was subject to a youth sentence imposed under s.42(2)(n) of the *YCJA*. After becoming an adult, R.M.W. committed an offence, presenting a fraudulent cheque, while serving the community supervision portion of his sentence. R.M.W. pleaded guilty to the charge of fraud and was sentenced to one day deemed served by his presence in court, with any breaches of the youth sentence to be dealt with by the Youth Court. Later the same day, R.M.W. was found to have breached his conditional supervision order by failing to keep the peace as a result of the adult conviction. Based on a joint submission by the Crown and counsel for R.M.W., the Youth Court imposed a 14-day suspension of R.M.W.'s conditional supervision. The suspension was to be served in a provincial facility, after which R.M.W. would resume supervision in the community. The judge issued a committal order limiting R.M.W.'s custodial sentence to 14 days.

[18] Upon completion of the 14-day custodial sentence, R.M.W. was not released into conditional supervision pursuant to the terms of the amended youth court order. Instead, the Superintendent kept R.M.W. in custody on the basis that s.743.5(1) of the *Criminal Code* directed that upon receiving the Provincial Court sentence of one day in jail (served by his appearance in court) he must then serve the remainder of his original youth sentence as an adult in a provincial correctional facility. R.M.W. filed an application for *habeas corpus*.

[19] The Nova Scotia Public Prosecution Service filed an *amicus curiae* brief, submitting that "time served" is not a legally recognized sentence and, consequently, there can be no adult sentence and therefore no merger under s.743.5(1) of the *Criminal Code*. Justice LeBlanc did not decide the matter on that

basis, and the issue does not arise for T.W.O. who received a 30-day intermittent custodial sentence for the adult charges.

[20] Before commencing his analysis, Justice LeBlanc noted that he intended "to defer the issue of whether s.743.5(1) in effect overrides any existing youth court order made under the *Youth Criminal Justice Act* without the necessity of obtaining the sanction of the court" (para. 9).

[21] Justice LeBlanc referred to s.46 of the *Correctional Services Act*, which provides that no employee shall admit an offender into a correctional facility unless the offender is the subject of a committal order. In his view, it was a logical extension of s.46, and consistent with basic principles of the freedom of the individual, that no employee should maintain the offender in a correctional facility once the term of the committal order has expired. He noted:

> 11 …It would be my view that an individual should not be detained in a correctional facility after the committal order has expired. The power to detain a person in a correctional facility is based not on the legislative interpretation of the Superintendent, or any of the employees of the facility, of the provisions of the *Criminal Code*. It is, rather, based on the terms of the committal order.

[22] Justice LeBlanc rejected the Superintendent's argument that interpreting s.743.5(1) is similar to calculating remission time:

> 13 The Superintendent claims that it is frequently necessary for correctional facility employees to determine the precise date upon which an offender is entitled to be released, and thus to make calculations with regard to remissions and other such matters. <u>It is my view that such decisions are made under the ambit of a mandate from the court, in the form of the sentence and the committal order, which triggers a consideration of the appropriate time to be allowed for remission. It is necessary to consider the committal order calculate the appropriate remission time pursuant to regulation.</u>
>
> 14 I am unable to agree with the Superintendent's argument that interpreting s.743.5(1) of the *Criminal Code* is similar to calculating remission time. I believe that there is a difference between the interpretation of the *Criminal Code*, including a determination that it overrides a provision of the *Youth Criminal Justice Act*, and a mathematical calculation of remission time. In reviewing the *Correctional Services Act*, I am unable to come to any other conclusion than that this statute does not invest the Superintendent with any such authority.
>
> [*Emphasis added*]

[23] Justice LeBlanc considered the sections of the *Correctional Services Act*, S.N.S. 2005, c.37, dealing with the duties of the Superintendent and the implementation of policies and procedures in provincial correctional facilities. He held that the Superintendent's authority under that statute or the *Criminal Code* does not extend to determining whether s.743.5(1) mandates that a person such as R.M.W. should be detained in custody:

> 19 In this instance, the Superintendent was given a committal order to hold R.M.W. for 14 days. Despite the clear and unambiguous terms of this order, the Superintendent interpreted s.743.5(1), and continued to hold R.M.W. on the basis that there was a merger of the original sentence and the additional one day-sentence imposed by Judge Gibson, which was deemed served by his one day in jail. This was distinct from his decision to cancel the conditional supervision without seeking direction from the youth court or a superior Court. It is fair to say that the Superintendent did not have any authority under the *Criminal Code* or under the *Correctional Services Act* to override the decision of the youth court judge who accepted jurisdiction based on a joint interpretation of both the Crown and counsel for the R.M.W.

[24] In T.W.O.'s case, no warrant of committal was issued after Judge Campbell's review of T.W.O.'s breach of the conditions of his *YCJA* custody and supervision; the relevant order provided: "The court …orders that the young person continue to serve the remainder of the sentence in the community…". The warrant of committal issued after T.W.O.'s conviction in Provincial Court for the s.137 *Criminal Code* adult breach charges specified his total sentence and/or custodial period to be 30 days, to be served intermittently. According to **RMW**, the Superintendent had no jurisdiction to override the decisions of the Youth Court and Provincial Court by applying s.743.5(1) to keep T.W.O. in custody.

b. Has R. v. RMW been displaced?

[25] The Respondents argue that the decision in R.M.W. has been displaced by subsequent decisions and an amendment to the definition of "sentence" under the *Corrections and Conditional Release Act* ("CCRA"). They rely on three decisions.

[26] In **R. v. A.C.,** 2008 ONCJ 613, [2008] OJ No 4721, the accused entered pleas of guilty to two counts of robbery as a youth. She had earlier been convicted of several robberies as an adult. Robertson, J. noted that in such a situation, s.743.5 of the *Criminal Code* applies:

> 17 Also important in this sentencing is the fact that s.743.5 of the *Criminal Code* applies. That section reads in part:
>
> "... [743.5(2) and (3)] ..."
>
> 18 What this means is that given that A.C. has now been sentenced on the adult matters and is therefore presently serving sentence, any youth sentence that I impose will be treated as if it was imposed under the *Criminal Code* as opposed to the *YCJA* and that the sentences will be treated as a single sentence, pursuant to s. 139 of the *Corrections and Conditional Release Act*.

[27] This case stands only for the proposition that s.743.5 applies where an individual is sentenced under the *YCJA* and as an adult. The decision does not consider the authority of a corrections employee such as the Superintendent to apply s.743.5(1).

[28] In **R. v. L.S.**, 2009 ONCA 762, [2009] OJ No 4551, the appellant pleaded guilty to robbery and failure to comply with a sentence imposed on a prior occasion under the *YCJA*. The robbery occurred at a time when the appellant was bound by and in violation of a curfew term of a sentence earlier imposed under the *YCJA*. Counsel proposed a joint submission on sentence. That joint submission had the following components:

1. Suspended sentence with 96 days of pre-disposition custody noted on the appellant's record;
2. Probation for two years on specified terms;
3. Restitution of $18.00 to the named complainant;
4. A DNA order; and
5. A prohibition under s.109 banning possession of firearms for five years and prohibited weapons for life.

[29] Before the appellant entered his plea of guilty, counsel appeared before the sentencing judge in chambers. Defence counsel proposed a change to the joint submission. In order to allow the appellant to retrieve his belongings from the correctional centre in which he had been confined prior to plea, defence counsel requested that the judge impose a sentence of imprisonment for one day. All the parties consented to this modification, and the judge sentenced the appellant accordingly. However, as the Court of Appeal noted, this modification had unintended consequences:

> It escaped the notice of all participants in the court below that at the time of sentence, the appellant remained subject to community supervision as a result of a sentence imposed nearly 15 months earlier. As a result, the imposition of the sentence of imprisonment for one day engaged s.743.5(1) of the *Criminal Code*, which required that what remained of the earlier youth sentence be dealt with "as if it had been a sentence imposed under the *Criminal Code*", rather than as a youth sentence. The appellant remained in custody until a judge of this court ordered his release.
>
> 7 The parties agree that the original joint submission represented a fit disposition. On all sides, the expectation was that the appellant would return to the correctional centre, pick up his belongings and be released, his subsequent conduct being supervised by a probation officer and regulated by the DNA order, weapons prohibition and obligation to make restitution. The application of s.743.5(1) dictated a different and unanticipated result.
>
> 8 With the concurrence of the respondent, the appellant seeks a variance of the sentence imposed to give effect to the intention of the parties and overcome the effect of s.743.5(1) of the *Criminal Code* that was not within their contemplation. We agree with this proposal.

[30] The facts in **R. v. L.S.**, *supra*, suggest that a corrections employee applied s.743.5(1) and kept the appellant in custody beyond the one day provided for in the committal order. While the Court of Appeal found that the sentence of one day did in fact engage s.743.5(1), it did not comment on whether the employee within the correctional facility had the authority to apply s.743.5(1) absent an order from the court to that effect. The Court noted only that "the appellant remained in custody until a judge of this court ordered his release."

[31] Finally, in **Buskirk v. Canada** (Solicitor General), 2012 FC 1463, [2012] FCJ No 1684, the applicant applied for judicial review of the calculation of his parole eligibility dates by the Chief of Sentence Management at Kent Institution. Several months before his 18th birthday, the applicant committed murder pursuant to a contract killing for profit. After turning 18, he entered into two separate conspiracies to commit murder. Neither conspiracy came to fruition. On December 21, 2006, the applicant received a 24-month custodial sentence for contempt of court because he refused to be sworn and give evidence in the trial of his co-conspirator. The applicant pleaded guilty on November 30, 2007 to first degree murder and was sentenced under s.42(2)(q)(i) of the *YCJA* to six years in custody, less credit for time already served, and four years of conditional community supervision.

[32] On December 10, 2007, the applicant received concurrent sentences of eight and six years, less credit for pre-sentence custody, for two counts of conspiracy to commit murder. These adult conspiracy sentences were to run consecutively to his contempt of court sentence and *YCJA* sentences.

[33] The applicant's sentences commenced on December 21, 2006. The Correctional Service of Canada ("CSC") informed him on December 13, 2007 that his warrant expiry date was February 20, 2024; his statutory release date was June 1, 2018; his full parole eligibility date was December 19, 2012; and his day parole eligibility date was June 19, 2012. In calculating these dates, the CSC had included the non-custodial part of his *YCJA* sentence.

[34] The applicant made submissions to the Chief of Sentence Management ("CSM") requesting an affidavit outlining his eligibility dates and asking if the combined sentences were considered one sentence under s.139 of the *CCRA*. On February 29, 2012, the CSM confirmed that all of the Applicant's sentences were considered one sentence under s.139 and provided the affidavit requested.

[35] During June and October 2012, the *CCRA* was amended to make express Parliament's intention that non-custodial youth sentences under s.42(2)(q)(i) would be included in calculating eligibility dates for full parole and day parole, statutory release date, and warrant expiry date.

[36] The applicant argued that the CSM erred in law by including the community supervision portion of the youth sentence when calculating day parole, full parole and statutory release dates. He relied on **P(J) v. Canada (Attorney General)**, 2009 FC 402, [2010] 3 FCR 3, aff'd 2010 FCA 90, [2011] 4 FCR 29 for the proposition that a non-custodial *YCJA* sentence does not fall within the meaning of "sentence" under the *CCRA*.

[37] The respondent argued that it was appropriate to include the applicant's non-custodial *YCJA* sentence in determining his parole eligibility, statutory release date and warrant expiry date due to recent amendments to the *CCRA*. The respondent's argument can be summarized as follows:

- Section 743.5(1) deems a *YCJA* sentence to be a sentence imposed under the *Criminal Code* where an individual receives a youth sentence under s.42(2)(q)(i) of the *YCJA* and is subsequently sentenced for an offence as an adult.

- Section 743.5(1) brings the applicant's youth sentence within the scope of s.139(1) of the *CCRA*, the "merged sentences" provision. This section provides that where an individual is subject to a sentence that has not expired and receives additional sentences, he or she is deemed to have been sentenced to one sentence, beginning on the first of those sentences to be served and ending on the expiration of the last of them to be served. In other words, the sentences merge into one sentence.

- The applicant's consecutive sentences trigger s.120.1 of the *CCRA*, by which his parole eligibility is determined based on a sentence of 15 years and 2 months, being the sum of the consecutive adult sentence and time remaining (including community supervision) on his *YCJA* sentence on December 10, 2007, the date the adult consecutive sentence was imposed.

- Under ss.120(1) and 120.1 of the *CCRA*, the applicant's eligibility date for full parole is one third of his consecutive sentence of 15 years and 2 months. Under s.119(1)(c), he became eligible for day parole six months before becoming eligible for full parole. The effect of these provisions is that the applicant's eligibility dates are December 19, 2012 and June 19, 2012 for full parole and day parole, respectively.

- Finally, s.127 of the *CCRA* entitles a person serving a determinate sentence to release after serving a period of custody of no less than two thirds of their sentence. Based on his sentence, the applicant's statutory release date is June 1, 2018.

[38] In denying review of the parole eligibility calculation, the Court noted:

> 53 …The Applicant is subject to the conversion provisions under s.743.5 of the *Code* because he was sentenced to a term of imprisonment for an offence while subject to a youth sentence imposed under paragraph 42(2)(q) of the *YCJA*. The effect of the subsection 743.5(1) of the *Code* is that his youth sentence under paragraph 42(2)(q) of the *YCJA* must be dealt with, for all purposes under the *Code* or any other Act of Parliament (including the *CCRA*), as if it had been a sentence imposed under the *Code*....
>
> 54 Neither the applicant nor the respondent dispute that s.743.5 applies.

[39] In reaching its decision, the Court observed that the most important provision for the purposes of the application was s.743.5(3)(a) of the *Criminal Code*, which provides that where s.743.5(1) applies, the remainder of a youth

sentence and a subsequent term of imprisonment are deemed to constitute one sentence of imprisonment for the purposes of s.139 of the *CCRA* (para. 50). The Court concluded that s.743.5 and s.139 merged the applicant's non-custodial *YCJA* sentence with his other sentences into a single sentence of imprisonment for the purposes of calculating his parole eligibility and statutory release dates.

[40] In both **Buskirk**, *supra*, and **RMW**, *supra*, an administrative decision maker applied s.743.5(1) in determining an inmate's release date without direction from the court that the youth and adult sentences should be merged. Unlike the situation in **RMW** and in T.W.O.'s case, the applicant in **Buskirk** was not serving the community supervision portion of a custody and supervision order at the time he was sentenced for a subsequent offence. Instead, he was serving multiple custodial sentences at the same time. Notwithstanding this difference, the result of the application of s.743.5(1) by the CSM in **Buskirk** was that the inmate would remain in custody for several years longer than (presumably) provided for in the committal order pertaining to his *YCJA* sentence. While it could be argued that this conflicts with this court's decision in **RMW**, the parties did not raise and the Federal Court did not specifically address the wording in the committal order, or whether it is the role of the correctional decision maker or the court to apply s.743.5(1).

[41] In conclusion, while it can be inferred from the decisions in **L.S.**, *supra*, and **Buskirk**, that some correctional decision makers are applying s.743.5(1) without direction from the court, with the effect that inmates are being detained beyond the terms of the applicable committal orders, no decision since **RMW** has considered whether this is proper. For this reason, I am not convinced that the decision in **RMW** has been displaced.

c. Should R. v. RMW be followed in this case?

[42] I agree with the conclusion in **RMW** that s.743.5 (1) does not give the Superintendent jurisdiction to deny an inmate's release to court-ordered community supervision upon expiry of the terms of a committal order. In my view, Parliament did not intend by that section to authorize the Superintendent to act independently to detain a prisoner beyond the release date determined by a Court.

[43] The events in T.W.O.'s case, even more than those in **RMW**, demonstrate why penal statutes ought to be strictly construed, with administrative powers interpreted and exercised in context. Persons affected by the justice system should

be able to expect a reasonable level of communication among participants in our law enforcement, court, and corrections systems, and have confidence that judicial decisions will not be overridden by administrative acts.

[44] In this case, a series of communication deficiencies combined to deprive T.W.O. of his liberty, including:

1. The police arrested T.W.O. on February 20, 2013 without advising the Provincial Director concerning the alleged breach of his community supervision terms (this concern will be addressed later in these reasons);
2. T.W.O.'s youth sentence review and breach charges, both arising from the same incident, were addressed independently by different judges;
3. Different crown attorneys attended the youth and adult court proceedings;
4. None of the participants in either court proceeding – neither judge, crown attorney, T.W.O. or defence counsel was aware or expected that the Superintendent would invoke s.743.5(1). (Ironically, if the Superintendent's action had been anticipated, it is likely that T.W.O. could have delayed sentencing for the breach charges until after expiry of his term of supervision, and avoided the collapse of his youth sentence.)
5. The detailed reasons for the Youth Court Judge's decision not to incarcerate T.W.O. and the basis for the Adult Court Judge's imposition of a 30-day intermittent sentence were recorded. The Superintendent invoked s.743.5(1) either without knowing the reasons for those judicial decisions or without due regard to those determinations.
6. Despite the passage of more than a month – from February 25th to March 29, 2013 – between issuance of the committal order following Judge Campbell's decision and the sentence collapse, the Superintendent apparently did not consult with the crown attorney or seek Court input before converting the remaining supervision portion of the youth sentence into adult incarceration.

[45] The collapse of T.W.O.'s youth sentence and his consequent detention were especially unfortunate in this case; administrative action initiated a review of that sentence on February 20th, the Court rendered decision February 25th, and further

administrative action inconsistent with the Court's decision was taken March 29th. Judge Campbell gave particular consideration to T.W.O.'s circumstances and carefully and thoroughly explained why he was not ordering a custodial term. In Adult Court, Judge Williams was advised that T.W.O. was regularly attending school before he accepted a joint recommendation and imposed the 30-day intermittent sentence. Justice is not served if liberty is at risk because an administrative decision can trump judicial discretion properly exercised.

4. No Authority for the Adult Charges

[46] Although not an independent ground warranting *habeas corpus*, continued detention of T.W.O. would in my view be especially unjust, as I have concluded that the police had no jurisdiction under the *YCJA* or any other statute to detain and charge him for breaching a condition of community supervision.

[47] On February 20, 2013, the police arrested T.W.O. and charged him with two counts of failure to comply with sentence or disposition under s.137 of the *YCJA*. Section 137 states:

> **Failure to comply with sentence or disposition**
>
> 137. Every person who is subject to a youth sentence imposed under any of paragraphs 42(2)(c) to (m) or (s) of this Act, to a victim fine surcharge ordered under subsection 53(2) of this Act or to a disposition made under any of paragraphs 20(1)(a.1) to (g), (j) or (l) of the *Young Offenders Act*, chapter Y-1 of the *Revised Statutes of Canada*, 1985, and who wilfully fails or refuses to comply with that sentence, surcharge or disposition is guilty of an offence punishable on summary conviction. [*Emphasis added*]

[48] This section is triggered only where an individual is subject to a non-custodial youth sentence imposed under s.42(2)(c) to (m) or (s) of the *YCJA*. In this case, T.W.O. was subject to a custody and supervision order imposed under s. 42(2)(n) of the *YCJA*, which is not covered by s.137. The following comments in Lee Tustin & Robert Lutes, *A Guide to the Youth Criminal Justice Act, 2014 Edition* (Markham: LexisNexis Canada Inc., 2013) on s.137 are pertinent:

> It is important to note that this section is applicable only to community-based sentences. A young person cannot be charged for failing to comply with a condition of the community portion of a custody sentence, including a deferred custody and supervision order. (p. 229) [*Emphasis added*]

[49] A closer examination of the other relevant sections of the *YCJA* confirms that the police had no authority to arrest and charge T.W.O. in relation to the breaches. Section 102 of the *YCJA* provides:

> **Breach of conditions**
>
> 102. (1) If the provincial director has reasonable grounds to believe that a young person has breached or is about to breach a condition to which he or she is subject under section 97 (conditions to be included in custody and supervision orders), the provincial director may, in writing,
>
> (a) permit the young person to continue to serve a portion of his or her youth sentence in the community, on the same or different conditions; or
>
> (b) if satisfied that the breach is a serious one that increases the risk to public safety, order that the young person be remanded to any youth custody facility that the provincial director considers appropriate until a review is conducted.
>
> **Provisions apply**
>
> (2) Sections 107 (apprehension) and 108 (review by provincial director) apply, with any modifications that the circumstances require, to an order under paragraph (1)(b).

[50] The authors of *A Guide to the Youth Criminal Justice Act, 2014 Edition* state at page 182:

> *Legal Implications*
>
> This section authorizes the provincial director, if there are reasonable grounds to believe there has been a breach of a community supervision condition, to take action to deal with the breach. The provincial director can either do nothing, set different conditions or, if the breach is a serious one that increases the risk to public safety, order the young person to be remanded into custody in a youth custody facility in order for a review to take place.
>
> *Operational Implications*
>
> This section provides another area of increased responsibility for the provincial director and, subsequently, the youth worker (see Appendices, Table of Provincial Director Responsibilities). Once the provincial director is satisfied that a breach of the community supervision conditions has occurred, the provincial director begins the process. This section relies on section 107 to apprehend the young person if the breach is serious and increases the risk to public safety, and on section 108 to review the breach. This section empowers the provincial director to review and make certain decisions. Police officers are having some difficulty with the fact that they are not in a position of authority when a young person breaches a condition of community supervision. They have no authority to detain

> a young person in these circumstances unless there has been a warrant issued. Unlike a breach of a probation condition, a police officer who believes a young person has breached a condition of community supervision cannot detain or charge the young person. The police officer only has the authority to advise the provincial director of what was believed to be a breach, and it is the provincial director's decision to act upon it. If a young person was released on community supervision from an adult facility as a result of section 92 or 93 and was apprehended for a breach under this section, he or she would be placed in an adult facility pending a provincial director's review. [*Emphasis added*]

[51] Once the provincial director issues an order under s.102(1)(b), s. 107 and s.108 apply, with any modifications that the circumstances require (see s.102(2)). Section 107 provides:

> **Apprehension**
>
> 107. (1) If the conditional supervision of a young person is suspended under section 106, the provincial director may issue a warrant in writing, authorizing the apprehension of the young person and, until the young person is apprehended, the young person is deemed not to be continuing to serve the youth sentence the young person is then serving.
>
> **Warrants**
>
> (2) A warrant issued under subsection (1) shall be executed by any peace officer to whom it is given at any place in Canada and has the same force and effect in all parts of Canada as if it had been originally issued or subsequently endorsed by a provincial court judge or other lawful authority having jurisdiction in the place where it is executed.
>
> **Peace officer may arrest**
>
> (3) If a peace officer believes on reasonable grounds that a warrant issued under subsection (1) is in force in respect of a young person, the peace officer may arrest the young person without the warrant at any place in Canada.

[52] The authors of *A Guide to the Youth Criminal Justice Act, 2014 Edition* comment as follows on s. 107:

> **Legal Implications**
>
> This section sets out the rules for the apprehension of a young person whom the provincial director has ordered to be remanded. The provincial director may issue a warrant for the arrest of the young person, and a peace officer may execute this warrant anywhere in Canada, as was the case in section 26.4 of the *Young Offenders Act*.
>
> ....

> **Operational Implications**
>
> This section of the *Youth Criminal Justice Act* authorizes police to apprehend a young person who is believed to have failed to comply with community/conditional supervision conditions only if the provincial director has issued a warrant. If there is no warrant issued, the police cannot detain the youth.
>
> [*Emphasis added*]

[53] From the foregoing, I conclude that when a person who is subject to a custody and supervision order under s.42(2)(n) of the *YCJA* breaches a condition of community supervision, the police have no authority under s.137 or any other section of the *YCJA* to detain and charge that person. Where a police officer believes that an individual has breached a condition of community supervision, his or her authority is limited to advising the Provincial Director of the circumstances of the alleged breach. It is the Provincial Director's decision whether to act upon the information and issue a warrant authorizing the police to detain the individual pending the Provincial Director's review.

[54] The documentation in this case indicates that events did not take place in the sequence required by the legislation – the police arrested T.W.O. before the Provincial Director was advised of the alleged breaches and before a warrant was issued. Although the Provincial Director did issue a warrant under *YCJA* s.102(1)(b) on February 20, 2013, the same day as the police made the arrest, it was not in effect until after the arrest. The sequence is apparent from the Halifax Regional Police notes attached to the Breach of Custody and Supervision Order Report to the Provincial Director (Record Respecting Detention, document 10). The Police Narrative, dated 'Wednesday, 2013 - Feb- 20 at 8:25' states as follows:

> BAIL…Police request that the accused to be held in custody until his Probation Officer has an opportunity to review this incident. It is the Police's understanding that Probation Services will be seeking a warrant to conclude the Custody and Supervision Order.
>
> ….
>
> Police oppose the release of [T.W.O.] and consider him a risk to the safety of the community.
>
> ….
>
> On February 20, 2013 at 0726hrs, [T.W.O.] was placed under arrest inside his residence by Constable GREG MANUEL for breach of probation. [T.W.O.] was read His Charter of Rights and Police Caution to which he understood and wished

> to speak to a lawyer (legal aid). [T.W.O.] later spoke with Lyle Howe (legal aid) from 0806 - 0812hrs at the Lower Sackville RCMP office. The blue and white plaid shirt being sought was located and seized from T.W.O.'s bedroom by Constable Diane Hartley at 0740 hours[.]
>
> The probation officer of the accused has been notified of the breach and arrest and it is the police understanding that probation services will be seeking a warrant to conclude the Custody and Supervision Order.

[55] T.W.O. should not have been arrested by the police on February 20, 2013 and charged under s.137 of the *YCJA*. Instead, the police should have informed the Provincial Director of the circumstances of the alleged breaches. It would then have been open to the Provincial Director to issue a warrant, as he ultimately did after learning of T.W.O.'s arrest. Following a review by the Provincial Director, T.W.O.'s case would have been referred to Judge Campbell under s.103 of the *YCJA*. Judge Campbell's decision would have concluded the matter. There would have been no "breach charges", no activity in adult court, and issues as to the applicability of s.743.5(1) of the *Criminal Code* would not have arisen. Regretfully, the matter did not proceed in this manner. As a result, T.W.O. was essentially "sentenced" twice for the same breaches, and improperly ordered to serve 30 days of intermittent incarceration. The error was then compounded by the Superintendent's decision to apply s.743.5(1).

[56] *Habeas corpus* is not available to address the unfortunate circumstances of T.W.O.'s arrest. Because he pled guilty and convictions were entered for the breach charges which were the basis of his arrest, the other remedies which may have been available to him – application to withdraw his plea or appeal the convictions – preclude *habeas corpus*. In this case, T.W.O. brought a civil application for *habeas corpus* related to an administrative decision made by the Superintendent, and he did not seek *habeas corpus* as a *Charter* remedy. The Supreme Court of Canada has ruled in several recent decisions that *habeas corpus* cannot he used to challenge the legality of a conviction, and the remedy is not a substitute for the exercise of a prisoner's right to appeal. Where a statute, such as the *Criminal Code*, confers jurisdiction on a Court of Appeal to correct the errors of a lower court and release an applicant if need be, *habeas corpus* will not be available. (**May v. Ferndale Institution**, 2005 SCC 82, [2005] SCJ No 84, para.36-50). See also **Gamble v. The Queen** 2 SCR 595; R. v. Sarson, [1992] 3 SCR 665; **R. v. Stewart**, [1991] 3 SCR 324; and **Mission Institution v. Khela**, *supra*.

[57] Although *habeas corpus* cannot be ordered to address T.W.O.'s unauthorized arrest or to set aside his conviction, it is fitting, in the interest of justice, that the remedy is available for other reasons.

5. Does *YCJA* s.50 (1) prohibit invoking s.743.5(1) to merge T.W.O.'s sentence into one adult sentence?

[58] *YCJA* s.50(1) reads as follows:

> 50.(1) Subject to section 74 (application of *Criminal Code* to adult sentences), Part XXIII (sentencing) of the *Criminal Code* does not apply in respect of proceedings under this Act except for paragraph 718.2(e) (sentencing principle for aboriginal offenders), sections 722 (victim impact statements), 722.1 (copy of statement) and 722.2 (inquiry by court), subsection730(2) court process continues in force) and sections 748 (pardons and remissions), 748.1 (remission by the Governor in Council) and 749 (royal prerogative) of that Act, which provisions apply with any modifications that the circumstances require.

[59] As T.W.O. is entitled to *habeas corpus* relief for another reason, it is not necessary to consider his argument that s.743.5(1) cannot apply because it is not listed as an exception under *YCJA* s.50(1). I would, however, reject that position as untenable. Section 743.5(1) applies to persons who have been sentenced to imprisonment while subject to a sentence under the former *Young Offenders Act* or the *YCJA*. The current s.743.5(1) is the result of a consequential amendment to the *Criminal Code* made by s.184 of the *YCJA* at the time it was introduced. It is inconceivable that when Parliament drafted s.50(1) of the *YCJA*, its intention was to render s.743.5(1) of the *Criminal Code* meaningless. Such a position is contrary to the presumption that the legislature does not intend to contradict itself. It is presumed to create coherent schemes. Therefore, "interpretations that avoid the possibility of conflict or incoherence among different enactments are preferred" (Ruth Sullivan, *Sullivan on the Construction of Statutes, Fifth Edition*, (Markham: LexisNexis Canada Inc. 2008) at p. 412).

Respondents' Request

[60] Counsel for the respondents indicated that circumstances similar to this case are expected to arise again. Persons in the Superintendent's position are reluctant to assume responsibility to release offenders when s.743.5(1) directs that the remainder of their youth sentence be custodial, and they seek the court's guidance for future events.

[61] Administrative officials in the corrections system are obliged to carry out sentencing directions from the courts. It is not the role of those officials to independently invoke s.743.5(1) or any other legislation to overrule the terms of a committal order or related direction from a judge. The difficulty which arose for the Superintendent in this case resulted from the communication gaps highlighted in paragraph 44 of these reasons. In future every reasonable effort should be made to have an individual's youth sentence reviewed and any related breach charge managed by the same crown attorney, and adjudicated by the same judge. The judge's reasons for disposition ought to be provided to the correctional facility. If those reasons are not received, the Superintendent should immediately request them. The Superintendent has an obligation, when contemplating application of s.743.5, to learn and comply with the terms of any committal or other court order affecting the offender. When he determined that the Superintendent did not have any authority to override the decision of the Youth Court Judge, Justice LeBlanc clearly stated this requirement in **RMW**, *supra*, at para.20:

> …if the Superintendent had any doubts or uncertainties about the effect of the youth sentence, the adult sentence, the cancellation of conditional supervision, or any combination thereof in relation to s.743.5 or otherwise, he ought to have requested that the sentence decision from which the committal order was derived, namely the youth court decision transcript which fully and clearly clarified the event and rationale behind the committal order.

[62] If a superintendent or other administrative decision maker contemplates detention of an offender beyond the term imposed by the court, directions should be obtained from the court before the person's liberty is curtailed.

Conclusion

[63] The Superintendent did not have jurisdiction to act independently to invoke s.743.5 to convert the remainder of T.W.O.'s community supervision sentence into an adult sentence of incarceration. The effect of the Superintendent's action was to override judicial decision and unlawfully deprive T.W.O. of his liberty by detaining him beyond the terms of a committal order. The Application brought by T.W.O. is granted, and a *Habeas Corpus* Order will issue.

J.