

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Carvery, 2014 SCC 27, [2014] 1 S.C.R. 605 | **Date:** 20140411  **Docket:** 35115 |

Between:

Her Majesty The Queen

Appellant

and

Level Aaron Carvery

Respondent

- and -

Criminal Lawyers’ Association of Ontario and

British Columbia Civil Liberties Association

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 23) | Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring) |

R. *v.* Carvery, 2014 SCC 27, [2014] 1 S.C.R. 605

Her Majesty The Queen Appellant

v.

Level Aaron Carvery Respondent

and

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**Indexed as: R. *v.* Carvery**

2014 SCC 27

File No.: 35115.

2014:  January 23; 2014:  April 11.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for nova scotia

*Criminal law — Sentencing — Considerations — Credit for pre-sentence detention — Criminal Code permitting enhanced credit at rate of up to one and one-half days for every day of detention “if the circumstances justify it” — Sentencing judge applying enhanced credit on basis of lost eligibility for early release — Whether sentencing judge erred by granting credit for pre-sentence custody at rate of one and one-half to one to account for loss of early release — Criminal Code, R.S.C. 1985, c. C-46, ss. 719(3), 719(3.1).*

The accused was on remand for 9.5 months. The sentencing judge assigned a credit calculated at a rate of one and one-half to one, on the basis of loss of remission and parole eligibility. The Court of Appeal upheld the decision finding that the legislation provides for judicial discretion to grant credit of up to 1.5 to 1 for time spent in pre-sentence custody on the basis of loss of remission or parole eligibility.

*Held*: The appeal should be dismissed.

For the reasons given in *R. v. Summers*, the circumstances justifying enhanced credit of up to one and one-half days for every day of pre-trial detention under s. 719(3.1) of the *Criminal Code* include the effect of pre-sentence detention on access to early release. In this case, there is nothing in the record to indicate that the accused would be denied early release, and the accused did not try to drag out his remand to manipulate or “game” the system. Thus, there are no grounds to interfere with the sentencing judge’s exercise of discretion.

**Cases Cited**

**Applied:** *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, s. 719(3), (3.1).

*Truth in Sentencing Act*, S.C. 2009, c. 29, s. 3.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Hamilton and Beveridge JJ.A.), 2012 NSCA 107, 321 N.S.R. (2d) 321, 1018 A.P.R. 321, 305 C.C.C. (3d) 329, 267 C.R.R. (2d) 294, [2012] N.S.J. No. 527 (QL), 2012 CarswellNS 1062, affirming a sentencing decision of Derrick Prov. Ct. J., 2011 NSPC 35, 305 N.S.R. (2d) 167, 966 A.P.R. 167, [2011] N.S.J. No. 339 (QL), 2011 CarswellNS 425. Appeal dismissed.

*David W. Schermbrucker* and *Brad Reitz*, for the appellant.

*Luke A. Craggs*, for the respondent.

*Ingrid Grant*, for the intervener the Criminal Lawyers’ Association of Ontario.

*Ryan D. W. Dalziel* and *Anne Amos-Stewart*, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

Karakatsanis J. —

1. Introduction
2. Like its companion case, *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, this appeal concerns the interpretation of s. 719(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46. This provision allows judges to assign credit for pre-sentence detention at a rate of 1.5 days for every day of detention “if the circumstances justify it”. Pre-sentence detention does not count towards eligibility for early release or parole, and thus may result in a longer period of incarceration than if the offender were released on bail. The Nova Scotia Court of Appeal concluded that this loss of eligibility for parole and early release is a “circumstance” justifying credit at a rate of 1.5 to 1.
3. In light of the principles articulated in *Summers*, and for the reasons that follow, I would dismiss the appeal.
4. Statutory Provisions
5. In 2009, Parliament enacted the *Truth in Sentencing Act*, S.C. 2009, c. 29 (*TISA*). Section 3 of the *TISA* amended s. 719(3) of the *Criminal Code* and added s. 719(3.1) as follows (changes underlined):

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1)Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

1. Background
   1. Facts
2. On September 9, 2010, the respondent was arrested for being on the street after midnight in violation of his bail conditions. A search incident to arrest disclosed five grams of crack cocaine in his sweatshirt.
3. He was not released on bail. His trial was scheduled for November 16, at which point he pled guilty to the charges of possession of cocaine for the purpose of trafficking and breach of his recognizance.
4. Sentencing was adjourned to December 13; however, defence counsel requested a pre-sentence report. On January 13, 2011, sentencing was again adjourned when the respondent announced his intention to withdraw his guilty plea. Proceedings were repeatedly adjourned to permit the respondent to retain and instruct alternate counsel. On May 27, 2011, new counsel indicated that the respondent would not withdraw his guilty plea.
5. The sentencing hearing ultimately took place on June 9, 2011 and the decision was rendered on June 22. The respondent was on remand for 9.5 months.
   1. Sentencing Decision, 2011 NSPC 35, 305 N.S.R. (2d) 167
6. The Crown sought a sentence of four years’ imprisonment, less credit of 9.5 months, calculated at a rate of 1 to 1. The defence ultimately sought a sentence of two years, less credit, calculated at a rate of 1.5 to 1.
7. The sentencing judge determined the fit sentence was 30 months. Derrick Prov. Ct. J. concluded that loss of remission and parole eligibility can justify enhanced credit under s. 719(3.1). She concluded that s. 719(3.1) was deliberately not limited to “exceptional circumstances” and that the common law had long recognized that credit at a rate in excess of 1 to 1 is fair.
8. Derrick Prov. Ct. J. concluded that the respondent’s actions did not disentitle him from receiving enhanced credit because he was not dragging out his remand to manipulate the system. While the respondent could have been sentenced earlier, had he not explored the possibility of withdrawing his guilty plea, it would not be appropriate to penalize him for considering a legal option. She agreed that the conditions in which the respondent was detained did not themselves justify enhanced credit.
9. The sentencing judge assigned credit of 14 months and one week, calculated at a rate of 1.5 to 1, on the basis of loss of remission and parole eligibility.
   1. Nova Scotia Court of Appeal, 2012 NSCA 107, 321 N.S.R. (2d) 321
10. The Crown appealed on the grounds that enhanced credit at a rate higher than 1 to 1 is available only in exceptional circumstances. The Crown further argued that, even if a rate higher than 1 to 1 were available, it would be inappropriate on the facts of this case.
11. Beveridge J.A., writing for the Court of Appeal, engaged in a detailed analysis of s. 719(3.1) and concluded that “circumstances” justifying enhanced credit need not be exceptional. Pre-sentence credit is generally granted because the conditions on remand are usually harsher than those when serving a sentence and because pre-sentence custody does not count towards remission or parole eligibility.
12. Thus, Beveridge J.A. concluded that the legislation provides for judicial discretion to grant credit of up to 1.5 to 1 for time spent in pre-sentence custody on the basis of loss of remission or parole eligibility. He noted that the application of s. 719(3.1) would not be automatic — it would still be necessary to establish that an offender would have earned remission or been granted parole, although doing so will not be onerous.
13. A trial judge’s decision to credit pre-sentence custody is discretionary, and in this case, there was no error in principle justifying appellate intervention.
14. Issue
15. Did the sentencing judge err by granting credit for pre-sentence custody at a rate of 1.5 to 1 to account for loss of early release?
16. Analysis
17. For the reasons given in the companion case, *Summers*, I conclude that the “circumstances” justifying enhanced credit under s. 719(3.1) include the effect of pre-sentence detention on access to early release. Therefore, the only remaining question is whether the sentencing judge erred in granting enhanced credit on the facts of this case.
18. The Crown argues that the respondent’s own actions disentitled him from receiving enhanced credit.
19. Much of the pre-sentencing delay was caused by the respondent’s indecision as to whether he would plead guilty, and the changes in counsel this necessitated.
20. However, the sentencing judge found that the respondent did not try to drag out his remand to manipulate or “game” the system (paras. 55-56). That finding was available to the sentencing judge on this record and there are no grounds to set it aside.
21. Credit at a rate of 1.5 to 1 does not allow the respondent to derive a “benefit” from the delay, unless he ultimately does not qualify for early release. Indeed, while that rate compensates for loss of early release, if the respondent were to be paroled at any time before the 2/3 mark of his sentence, he would end up spending more time in jail because of the delay, notwithstanding the enhanced credit.
22. There is nothing in the record to indicate that the respondent would be denied early release. Therefore, I agree with the Court of Appeal that there are no grounds to interfere with the sentencing judge’s exercise of discretion.
23. I would dismiss the appeal.

*Appeal dismissed.*

Solicitor for the appellant:  Public Prosecution Service of Canada, Halifax.

Solicitors for the respondent:  Burke Thompson, Halifax.

Solicitors for the intervener the Criminal Lawyers’ Association of Ontario:  Russell Silverstein & Associate, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association:  Bull, Housser & Tupper, Vancouver.