

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Clarke, 2014 SCC 28, [2014] 1 S.C.R. 612 | **Date:** 20140411  **Docket:** 35487 |

Between:

Calvin Clarke

Appellant

and

Her Majesty The Queen

Respondent

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

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| **Reasons for Judgment:**  (paras. 1 to 19) | Abella J. (McLachlin C.J. and LeBel, Rothstein, Cromwell, Karakatsanis and Wagner JJ. concurring) |

Appeal heard and Judgment rendered: January 24, 2014

Reasons delivered: April 11, 2014

R. *v.* Clarke, 2014 SCC 28, [2014] 1 S.C.R. 612

Calvin Clarke Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.*** Clarke

2014 SCC 28

File No.: 35487.

Hearing and judgment:  January 24, 2014.

Reasons delivered:  April 11, 2014.

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

on appeal from the court of appeal for ontario

*Criminal law — Sentencing — Legislation — Interpretation — Truth in Sentencing Act providing that changes to how much credit given for pre-sentence custody “apply only to persons charged after” Act came into force — Accused committed offences before Truth in Sentencing Act came into force, but charged after Act came into force — Whether s. 5 of Truth in Sentencing Act applies only to offenders charged after amendments have come into force regardless of when offences were committed — Truth in Sentencing Act, S.C. 2009, c. 29, s. 5.*

Section 5 of the *Truth in Sentencing Act* states that the caps on how much credit should be given for pre-sentence custody “apply only to persons charged after” the *Act* came into force. The accused committed the offences for which he was convicted before the *Act* came into force but he was charged after the *Act* came into force. He argued that since he committed the offences before the *Act* came into force, the caps did not apply to him. He did not challenge the constitutionality of the provision. The trial judge and the Court of Appeal held that the impugned provision unambiguously applied.

*Held*: The appeal should be dismissed.

While it is true that new sentencing legislation is presumed not to apply retrospectively, in the absence of a constitutional challenge the presumption can be displaced by a clear legislative direction that a provision is to apply retrospectively. In this case, the language used in s. 5 of the *Truth in Sentencing Act* is unambiguous. In the absence of ambiguity the court must give effect to the clearly expressed legislative intent. The application of the interpretive assistance of *Charter* values is precluded by this absence of ambiguity. Section 5 states clearly that the new provisions apply to persons charged after the *Truth in Sentencing Act* came into force. The only triggering event is when the person was charged, regardless of when the offences were committed. The presumption is therefore rebutted.

In this case, the accused was charged after the *Truth in Sentencing Act* came into force. He was therefore subject to the credit limits for pre-sentence custody in accordance with s. 5.

**Cases Cited**

**Referred to:** *R. v. Serdyuk*, 2012 ABCA 205, 68 Alta. L.R. (5th) 152; *R. v. A.A.M.*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *R. v. Carvery*, 2014 SCC 27, [2014] 1 S.C.R. 605; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*.

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

*Truth in Sentencing Act*, S.C. 2009, c. 29, ss. 3, 5.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Goudge and Gillese JJ.A.), 2013 ONCA 7, 115 O.R. (3d) 75, 302 O.A.C. 40, 293 C.C.C. (3d) 369, 274 C.R.R. (2d) 370, [2013] O.J. No. 94 (QL), 2013 CarswellOnt 263, affirming a sentencing decision of O’Donnell J. Appeal dismissed.

Diana Lumba, for the appellant.

Mabel Lai, for the respondent.

The judgment of the Court was delivered by

1. Abella J. — Sentencing legislation will not be given retrospective application unless the legislation unequivocally states that it is to have retrospective effect. This does not immunize it from a *Charter* challenge, but if no such challenge is brought, the ordinary rules of statutory interpretation apply. This is not to suggest that these rules exclude *Charter* values as one aspect of the broader interpretive context contemplated by our “modern rule of interpretation”, but that is different from using those values to create ambiguity when none exists.
2. The focus of this appeal is on s. 5 of the *Truth in Sentencing Act*,[[1]](#footnote-1) a brief provision which says that the caps on how much credit should be given for pre-sentence custody “apply only to persons charged after” the *Act* came into force. The marginal note to s. 5 says “Application — persons charged after coming into force”.
3. The accused in this case, Calvin Clarke,did not bring a constitutional challenge to s. 5. Nor did he allege abuse of process. His argument instead was that the provision was ambiguous and that the appropriate interpretive exercise involved the application of *Charter* values.
4. With respect for those with a different view (*R. v. Serdyuk* (2012), 68 Alta. L.R. (5th) 152 (C.A.), and *R. v. A.A.M.* (2013), 335 Nfld. & P.E.I.R. 199 (N.L.C.A.)),I agree with the trial judge and Court of Appeal in this case that the impugned provision unambiguously applies only to those offenders *charged* after the amendments came into force, regardless of when the offences were committed. In the absence of a *Charter* challenge, this ends the interpretive exercise.

Analysis

1. Prior to the enactment of the *Truth in Sentencing Act*, judges routinely exercised their discretion to give offenders extra credit for time spent in custody awaiting sentencing at a ratio higher than one day of credit for every day in custody. This was a reflection of the reality that unlike custody after sentencing, pre-sentence custody conditions were often harsher, remedial programs were unavailable and time spent in custody did not count for the purposes of early release (statutory release or remission) (*R. v. Wust*, [2000] 1 S.C.R. 455). Credit was usually given at a rate of two days for every day served in pre-sentence custody, but could be higher depending on the offender’s pre-sentence custodial circumstances.
2. Section 3 of the *Truth in Sentencing Act* restricted this discretion by limiting it to “a maximum of one day for each day” in “custody” (*Criminal Code*, R.S.C. 1985, c. C-46, s. 719(3)) unless “the circumstances” justified an increase to a maximum of one and a half days (s. 719(3.1)). Those provisions are the subject of two decisions of this Court which are being concurrently released: *R. v.* *Summers*, [2014] 1 S.C.R. 575, and *R. v.* *Carvery*, [2014] 1 S.C.R. 605. These decisions considered what “circumstances” would justify an increase to the maximum allowable credit.
3. On February 20 and 21, 2010, Mr. Clarke committed a number of offences, including break and enter. The amendments were enacted on February 22, 2010. He was charged in March, 2010.
4. Mr. Clarke pleaded guilty on November 10, 2010 and was sentenced to 10 years. The trial judge gave him the maximum allowable credit under the amendmentsof one and a half days for each day spent in pre-sentence custody. His sentence was therefore reduced by 17 months.
5. Mr. Clarke argued unsuccessfully at trial and before the Court of Appeal that on a proper interpretation of s. 5, the *Truth in Sentencing Act* did not apply to him because the *offences* were committed before the legislation came into force and he was therefore entitled to the two or three days’ credit that was available when the offences were committed. Rather than bring a direct *Charter* challenge, he argued that the provision was ambiguous and that *Charter* values should therefore be applied in a way that gave s. 5 prospective effect.
6. It is true that new sentencing legislation should be presumed not to apply retrospectively (*R. v. Dineley*, [2012] 3 S.C.R. 272). The presumption can be displaced, however, by a clear legislative direction that a provision is to apply retrospectively. The requirement for clarity, as Deschamps J. noted in *Dineley*, ensures that

the cases in which legislation has retrospective effect must be exceptional. . . . New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively . . . . [para. 10]

1. In this case, the language is sufficiently clear to rebut the presumption. With respect, it is difficult to find a less ambiguous expression of statutory intent than in the simple language of s. 5. It states clearly that the new provisions apply to persons charged after the *Act* came into force. The only triggering event is when the person was charged, regardless of when the offences were committed.
2. The absence of ambiguity also precludes the application of the interpretive assistance of *Charter* values, which only play a role if there is genuine ambiguity as to the meaning of a provision (*Bell ExpressVu Limited Partnership v. Rex*,[2002] 2 S.C.R. 559, and *R. v.* *Rodgers*, [2006] 1 S.C.R. 554). If the statute is unambiguous, the court must give effect to the clearly expressed legislative intent.
3. The role of *Charter* values in interpreting statutes was explained by Iacobucci J. in *Bell ExpressVu* as follows:

. . . to the extent this Court has recognized a “*Charter* values” interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original; para. 62.]

. . .

. . . a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. . . . [para. 64]

. . .

. . . if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret *this* sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. *As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.* [Emphasis added; para. 66.]

1. In *Rodgers*, Charron J. confirmed these interpretive borders in the criminal law context:

. . . It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter* . . . . However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, *it is appropriate to prefer the interpretation that accords with Charter principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the Charter to achieve a different result.* . . . [Emphasis added; para. 18.]

If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator’s intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose — the determination of the constitutional validity of the legislation . . . . [para. 19]

1. The requirement of statutory ambiguity as a prerequisite to the application of *Charter* values was most recently acknowledged in *R. v.* *Mabior*, [2012] 2 S.C.R. 584, where the Chief Justice stated that *Charter* values are “always relevant” to the interpretation of a “disputed” provision of the *Criminal Code* (para. 44). The two cases relied on by the Chief Justice for this proposition — *R. v. Sharpe*,[2001] 1 S.C.R. 45, at para. 33 and *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, at para. 35 — both assert that where more than one interpretation of a provision is equally plausible, *Charter* values should be used to determine which interpretation is constitutionally compliant.
2. Nor, with respect, is Mr. Clarke assisted by *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, which was referred to by the Alberta Court of Appeal in *Serdyuk*. Only in the administrative law context is ambiguity not the divining rod that attracts *Charter* values. Instead, administrative law decision-makers “must act consistently with the values underlying the grant of discretion, including *Charter* values” (*Doré*,at para. 24). The issue in the administrative context therefore, is not whether the statutory language is so ambiguous as to engage *Charter* values,it is whether the exercise of discretion by the administrative decision-maker unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme.
3. In the case before us, as Laskin J.A. noted in his inarguable reasons, “[t]he words of s. 5 are clear and admit of only one meaning”, namely:

. . . The new provisions apply to the sentencing of all persons charged after the Act came into force, no matter when the offences were committed. . . . [T]o give effect to the appellant’s position, one would have to read into s. 5 the following underlined words:

[The new provisions], as enacted by s. 3, apply only to persons charged with an offence committed after the day on which those [provisions] come into force. [para. 19]

Parliament has to be taken to know the difference between the date an offence takes place and the date a person is charged with the offence. To read in those underlined words would change Parliament’s intent on the applicability of the *Truth in Sentencing Act*. The trial judge’s interpretation of the Act is therefore consistent with the plain words of the statute. [para. 20]

. . .

One obvious purpose of the *Truth in Sentencing Act* is to reduce the credit available for the population of offenders detained before sentencing. The triggering date for detention before sentencing is the date the person is charged and held pending a bail hearing. The date a person commits an offence is of no relevance to this purpose of the *Truth in Sentencing Act*. . . . [Text in brackets in original; para. 22.]

1. Mr. Clarke was charged after the *Act* came into force. He was therefore subject to the credit limits for pre-sentence custody in accordance with s. 5.
2. The appeal is dismissed.

*Appeal dismissed.*

Solicitors for the appellant:  Lockyer Campbell Posner, Toronto.

Solicitor for the respondent:  Attorney General of Ontario, Toronto.

1. S.C. 2009, c. 29 [↑](#footnote-ref-1)