

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Summers, 2014 SCC 26, [2014] 1 S.C.R. 575 | **Date:** 20140411**Docket:** 35339 |

Between:

Her Majesty The Queen

Appellant

and

Sean Summers

Respondent

- and -

Director of Criminal and Penal Prosecutions of Quebec,

British Columbia Civil Liberties Association,

Criminal Lawyers’ Association of Ontario,

John Howard Society of Canada and

Canadian 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 89) | Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring) |

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

Her Majesty The Queen Appellant

v.

Sean Summers Respondent

and

Director of Criminal and Penal Prosecutions of Quebec,

British Columbia Civil Liberties Association, Criminal

Lawyers’ Association of Ontario, John Howard Society of

Canada and Canadian Civil Liberties Association Interveners

**Indexed as: R. *v.* Summers**

2014 SCC 26

File No.: 35339.

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 ontario

 *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 pre-sentence detention “if the circumstances justify it” — Sentencing judge applying enhanced credit on basis of lost eligibility for early release and parole — Whether lost opportunity for early release and parole during pre-sentence detention can be circumstance capable of justifying enhanced credit at rate of one and one-half to one — Criminal Code, R.S.C. 1985, c. C-46, ss. 719(3), 719(3.1).*

 The *Truth in Sentencing Act*, passed in 2009, changed the statutory regime governing credit for pre-sentence detention. Parliament modified s. 719(3) of the *Criminal Code* to limit credit for pre-trial custody “to a maximum of one day for each day spent in custody”. Parliament also provided in s. 719(3.1) that despite that limit, “if the circumstances justify it, the maximum is one and one-half days for each day spent in custody”.

 In this case, the accused was on remand for 10.5 months. The sentencing judge assigned a credit calculated at a rate of 1.5 to 1, on the basis that pre-trial detention did not count towards parole eligibility for the accused. The judge found that this was a circumstance justifying credit at a ratio of 1.5 to 1 under the *Criminal Code*. The Court of Appeal agreed and dismissed the appeal.

 *Held*: The appeal should be dismissed.

 When an accused person is not granted bail, and must be remanded in jail awaiting trial, the *Criminal Code* allows time served to be credited towards a resulting sentence of imprisonment. Historically, the *Code* imposed no restrictions on the reasons for giving credit, nor the rate at which credit was granted.

 Courts generally gave enhanced credit, at a rate higher than one day for every day of detention, for two reasons. First, statutory rules for parole eligibility and early release do not take into account time spent in custody before sentencing. Therefore, the *quantitative* rationale recognized that pre-sentence detention almost always needs to be credited at a rate higher than 1:1 to ensure that an offender who is released after serving two thirds of his sentence serves the same total amount of time in jail whether or not he is released on bail. Second, the *qualitative* rationale for enhanced credit recognized that conditions in detention centres tended to be harsher than corrections facilities. As a result of these twin rationales, a practice developed over time of granting credit for pre-sentence detention at a rate of 2:1.

 The *Truth in Sentencing Act* caps pre-sentence credit, but does not alter the reasons for which it may be assigned. Section 719(3.1) is free of any language limiting the scope of what may constitute “circumstances” justifying enhanced credit. While Parliament clearly turned its attention to the circumstances under which s. 719(3.1) should not apply, the provision is devoid of any limiting language which would support the position that “circumstances” resulting from the operation of law, and specifically lost eligibility for early release and parole, could not justify enhanced credit.

 While s. 719(3.1) is structured as an exception to s. 719(3), there is no general rule of statutory interpretation that the circumstances falling under an exception must be numerically fewer than those falling under the general rule. Therefore, it is not a concern that most remand offenders will qualify for enhanced credit on the basis of lost eligibility for early release or parole. Further, an interpretation of “circumstances” that includes loss of eligibility for parole and early release does not render s. 719(3) redundant. Where an accused falls under an explicit exception to s. 719(3.1), the one-for-one cap set by s. 719(3) will apply. In addition, the structure of s. 719 is consistent with the rationales for the existence of pre-sentence credit. Section 719(3) reflects the general rationale for giving credit; any time in jail should generally be credited day for day. On the other hand, s. 719(3.1) reflects the rationale for enhanced credit. Crediting a day in pre-sentence custody as a day served is insufficient to account for both loss of eligibility for parole and early release (circumstances with quantitative impact) and the harshness of the conditions (circumstances with qualitative impact).

 The practice of using the former s. 719(3) to award enhanced credit for both the quantitative and qualitative consequences of pre-sentence detention was deeply entrenched in our sentencing system. It is inconceivable that Parliament intended to overturn a principled and long-standing sentencing practice, without using explicit language, by instead relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*. Rather, it seems more likely that Parliament intended to do what it did explicitly. The amendments clearly impose a cap on the rate at which credit can be awarded, at 1.5 to 1. Having made its intention so clear on that point, Parliament gave no indication it intended to alter the reasons for which enhanced credit can be granted. Neither the language of the provision nor the external evidence demonstrates a clear intention to abolish one of the principled rationales for enhanced credit.

 As the legislature is presumed to have created a coherent, consistent and harmonious statutory scheme, s. 719 should be interpreted in a manner that is consistent with the principles and purposes of sentencing set out in the *Criminal Code*. A rule that results in longer sentences for offenders who do not obtain bail, compared to otherwise identical offenders is incompatible with the sentencing principles of parity and proportionality. This is particularly so, given that vulnerable and impoverished offenders are less able to access bail.

 The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely. However, if it appears to a sentencing judge that an offender will be denied early release, there is no reason to assign enhanced credit for the meaningless lost opportunity. The onus is on the offender to demonstrate that he should be awarded enhanced credit based upon his pre-sentence detention. Of course, the Crown may challenge the inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process.

 Here, the sentencing judge did not err in law by granting enhanced credit under s. 719(3.1) on the basis of the accused’s loss of eligibility for early release and parole. There is no serious challenge to the conclusion that the accused was likely to access early release. It was therefore appropriate to grant credit at a rate of 1.5 days for every day in detention on the basis of the quantitative rationale for enhanced credit.

**Cases Cited**

 **Referred to:** *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455; *R. v. Bradbury*, 2013 BCCA 280, 339 B.C.A.C. 169; *R. v. Carvery*, 2012 NSCA 107, 321 N.S.R. (2d) 321; *R. v. Stonefish*, 2012 MBCA 116, 288 Man. R. (2d) 103; *R. v. Johnson*, 2013 ABCA 190, 85 Alta. L.R. (5th) 320; *R. v. Cluney*, 2013 NLCA 46, 338 Nfld. & P.E.I.R. 57; *R. v. Henrico*, 2013 QCCA 1431 (CanLII); *R. v. Rezaie* (1996), 31 O.R. (3d) 713; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*,2002 SCC 42, [2002] 2 S.C.R. 559; *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 S.C.R. 315.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 24(1).

*Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 120, 127(3).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 457(1), (2), 515(9.1), 524(4), (8), 672.14(3), 672.47(2), Part XXIII, 718, 718.1, 718.2, 719(1), (3), (3.1), (3.2), (3.3), 742.6(16), 745.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 14.

*Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, ss. 28, 28.1.

*Prisons and Reformatories Act*, R.S.C. 1985, c. P-20, s. 6.

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

**Authors Cited**

Babooram, Avani. “The changing profile of adults in custody, 2006/2007” (2008), 28:10 *Juristat* 1 (online:http://www.statcan.gc.ca/pub/85-002-x/2008010/article/10732-eng.pdf).

Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 20, 2nd Sess., 40th Parl., May 6, 2009, p. 11.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 14, 2nd Sess., 40th Parl., September 30, 2009, pp. 27-30.

Ruby, Clayton C., Gerald J. Chan and Nader R. Hasan. *Sentencing*, 8th ed. Markham, Ont.: LexisNexis, 2012.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

 APPEAL from a judgment of the Ontario Court of Appeal (Cronk, Pepall and Tulloch JJ.A.), 2013 ONCA 147, 114 O.R. (3d) 641, 304 O.A.C. 322, 297 C.C.C. (3d) 166, 279 C.R.R. (2d) 289, 3 C.R. (7th) 125, [2013] O.J. No. 1068 (QL), 2013 CarswellOnt 2626, affirming a sentencing decision of Glithero J., [2011] O.J. No. 6377 (QL), 2011 CarswellOnt 16080. Appeal dismissed.

 *Gregory J. Tweney* and *Molly Flanagan*, for the appellant.

 *J. Brennan Smart* and *Russell Silverstein*, for the respondent.

 *Dennis Galiatsatos*, for the intervener the Director of Criminal and Penal Prosecutions of Quebec.

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

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

 *Andrew S. Faith* and *Jeffrey Haylock*, for the intervener the John Howard Society of Canada.

 *Jasmine T. Akbarali* and *Josh Koziebrocki*, for the intervener the Canadian Civil Liberties Association.

 The judgment of the Court was delivered by

 Karakatsanis J. —

1. Introduction
2. When an accused person is not granted bail, and must be remanded in jail awaiting trial, the *Criminal Code*, R.S.C. 1985, c. C-46, allows time served to be credited towards a resulting sentence of imprisonment. A day in jail should count as a day in jail.
3. However, crediting a single day for every day spent in a remand centre is often insufficient to account for the full impact of that detention, both quantitatively and qualitatively. Time in a remand centre does not count for the purposes of eligibility for parole, earned remission or statutory release, and this can result in a longer term of actual incarceration for offenders who were denied bail. Moreover, conditions in remand centres tend to be particularly harsh; they are often overcrowded and dangerous, and do not provide rehabilitative programs.
4. As a result, for many years courts frequently granted “enhanced” credit: 2 days for each day spent in pre-sentence custody. This practice was endorsed by this Court in *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455. When conditions were exceptionally harsh, judges granted credit at a rate of 3 to 1 or more.
5. The *Truth in Sentencing Act*, S.C. 2009, c. 29 (*TISA*), passed in 2009, amended the *Criminal Code* to cap pre-sentence credit at a maximum of 1.5 days for every day in custody. The purpose was to remove any incentive for an accused to drag out time in remand custody, and to provide transparency so that the public would know what the fit sentence was, how much credit had been given, and why.
6. In this case, the Court is called upon to interpret these amendments. There is no dispute that Parliament imposed a cap on enhanced credit at a rate of 1.5 to 1. However, there are conflicting lower court decisions on when “enhanced” credit at a rate higher than 1 to 1 is available.
7. The statute does not definitively address the issue, providing simply that enhanced credit is available when “the circumstances justify it” (s. 719(3.1)). The legislative history is contradictory and inconclusive. We must interpret the provisions to determine what “circumstances” justify enhanced credit of up to a rate of 1.5 to 1. The appellant, the Attorney General of Ontario, argues that the loss of eligibility for parole and statutory release cannot be a “circumstance” justifying enhanced credit under the new s. 719(3.1) of the *Criminal Code*.[[1]](#footnote-1) The Ontario Court of Appeal in this case and the Nova Scotia Court of Appeal in the companion case, *R. v. Carvery*, 2012 NSCA 107, 321 N.S.R. (2d) 321, came to the opposite conclusion,[[2]](#footnote-2) and held that the loss of eligibility for parole and statutory release is a “circumstance” that can justify enhanced credit.
8. In my view, while the *Truth in Sentencing Act* caps pre-sentence credit, it does not limit the “circumstances” that justify granting credit. Where Parliament intended to alter existing practice, as with respect to the maximum amount of credit, it did so expressly. However, the legislation excludes no particular “circumstances” from consideration. Had Parliament intended to alter the well-established rule that enhanced credit compensates for the loss of eligibility for early release, it would have done so expressly.
9. Statutory Provisions
10. This appeal concerns amendments to s. 719(3) of the *Criminal Code*, resulting from the *TISA*. Sections 719(3) and 719(3.1) now read (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 July 9, 2010, Sean Summers, the respondent, violently shook his infant daughter, resulting in her death three days later. He was initially arrested on a charge of second degree murder but, in April 2011, that information was withdrawn and he was charged with manslaughter. On May 30, 2011, he pleaded guilty to manslaughter.
3. The respondent was in custody for a period of 10.5 months, from his arrest in July 2010 until he pleaded guilty and was sentenced, in May 2011. There has been no suggestion that the conditions of detention were unusually harsh.
	1. Sentencing Decision, [2011] O.J. No. 6377 (QL) (S.C.J.)
4. Counsel agreed that an appropriate range for the sentence was between eight and ten years’ imprisonment.
5. Defence counsel argued that the respondent should receive credit at a rate of 1.5 days for every day in custody; the lost eligibility for early release and parole while in remand custody was a circumstance justifying the application of s. 719(3.1) of the *Code*. The Crown did not object to granting credit for the first six months of detention at a rate of 1.5 to 1; during this time, the accused was waiting for a post-mortem report to be disclosed. As for the rest of the detention, the Crown invited the judge to use his discretion in assessing credit.
6. The sentencing judge, Glithero J., of the Ontario Superior Court of Justice, reasoned that the traditional practice of granting credit at a rate of two days for every day in detention was based upon the fact that time served on remand did not count towards parole eligibility. Since most offenders are released on parole between the one-third and two-third marks of their sentences, it would be inequitable not to give enhanced credit to reflect time in pre-trial custody. The fact that pre-trial detention did not count towards parole eligibility for the respondent was a circumstance justifying credit at a ratio of 1.5:1 under s. 719(3.1) of the *Code*.
7. The judge sentenced the respondent to 8 years’ imprisonment, less a credit of 16 months for 10.5 months of pre-trial detention. This resulted in a sentence of 6 years and 8 months.
	1. Ontario Court of Appeal, 2013 ONCA 147, 114 O.R. (3d) 641
8. The Crown appealed on the basis that, under s. 719(3.1), credit cannot be assigned at a rate of 1.5:1 solely to account for an accused’s loss of eligibility for early release and parole.
9. Cronk J.A., writing for the Court of Appeal, concluded that enhanced credit under s. 719(3.1) was not limited to exceptional circumstances and could be justified on the basis of lost eligibility for early release and parole. She engaged in a thoughtful and thorough interpretation of s. 719(3.1), considering the text of the *TISA*, its legislative history, and the principles that underpin the *Criminal Code* sentencing scheme.
10. The Court of Appeal clarified that not every remand offender will be granted enhanced credit under s. 719(3.1) on the basis of lost eligibility for early release and parole. These may be circumstances justifying credit, but only if the accused would probably have received early release or parole. A judge retains the discretion to deny credit at the enhanced rate, for example when an accused intentionally delayed proceedings. Certain offenders are expressly excluded from s. 719(3.1), and are therefore entitled to no more than one-for-one pre-trial credit under s. 719(3).
11. Given that there was no basis to conclude that the respondent would have been denied parole or early release, there was no error in granting enhanced credit at a rate of 1.5:1 to account for lost early release and parole eligibility.
12. Issue
13. Is ineligibility for early release and parole while on remand a “circumstance” that can justify granting enhanced credit for pre-sentence custody under s. 719(3.1) of the *Criminal Code*?
14. Analysis
	1. Prior Regime for Crediting Pre-Sentence Custody
15. Prior to the enactment of the *TISA* in 2009, s. 719(3) of the *Criminal Code* simply provided that a sentencing court “may take into account any time spent in custody by the person as a result of the offence”. The *Code* imposed no restrictions on the reasons for giving credit, nor the rate at which credit was granted. In *R. v. Rezaie* (1996), 31 O.R. (3d) 713, Laskin J.A. of the Ontario Court of Appeal explained the rationale for granting credit. He noted that

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. [p. 721]

1. This recognized that it would be unfair if a day spent in custody, prior to sentencing, were not counted towards an offender’s ultimate sentence. Otherwise, an offender who spent time in pre-sentence custody would serve longer in jail than an identical offender who committed an identical offence, but was granted bail. Thus, a day of incarceration requires at least a credit of one day towards the sentence.
2. Courts generally gave enhanced credit in recognition of the fact that “in two respects, pre-trial custody is even more onerous than post-sentencing custody” (*Rezaie*, at p. 721). As Laskin J.A. explained:

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 awaiting trial. [*ibid.*]

1. First, the *quantitative* rationale for the practice of granting enhanced credit is to ensure that the offender does not spend more time behind bars than if he had been released on bail.
2. Under the *Corrections and Conditional Release Act*,S.C. 1992, c. 20 (*CCRA*), parole becomes available to a federal inmate after one third of the sentence has been served (s. 120), and statutory release is available once two thirds of the sentence has been served (s. 127(3)). Provincial inmates can earn essentially equivalent “earned remission”, absent bad conduct, credited at 15 days per month as calculated under the federal *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20, s. 6.[[3]](#footnote-3) Throughout these reasons, I refer to statutory release and earned remission collectively as “early release”.
3. In practice, the “vast majority of those serving reformatory sentences are released on ‘remission’ . . . at approximately the two-thirds point in their sentence”, and only two to three percent of federal prisoners are not released either by way of parole or “statutory release”: C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at §§13.38 and 13.39.
4. Because a sentence begins when it is imposed (s. 719(1)) and the statutory rules for parole eligibility and early release do not take into account time spent in custody before sentencing, pre-sentence detention almost always needs to be credited at a rate higher than 1:1 in order to ensure that it does not prejudice the offender.
5. A ratio of 1.5:1 ensures that an offender who is released after serving two thirds of his sentence serves the same amount of time in jail, whether or not he is subject to pre-sentence detention. A higher ratio than 1.5:1 was therefore often used to account for other circumstances, including the loss of parole eligibility (i.e., the loss of the opportunity to be released after serving one third of the sentence).
6. The second rationale for enhanced credit is *qualitative* in nature. Remand detention centres tend not to provide the educational, retraining or rehabilitation programs that are generally available when serving a sentence in corrections facilities. Consequently, time in pre-trial detention is often more onerous than post-sentence incarceration. As Cronk J.A. noted in this case, overcrowding, inmate turnover, labour disputes and other factors also tend to make pre-sentence detention more onerous.
7. The impact of overcrowding, or a lack of educational programs, varies depending on the particular offender’s needs, character and disposition. Assigning enhanced credit on this basis is a qualitative, fact-dependent and discretionary exercise.
8. As a result of these twin rationales, a practice developed over time of granting credit for pre-sentence detention at a rate of 2:1. In *Wust*, this Court endorsed this practice, but noted that the correct rate cannot be determined by a rigid formula, and is best left to the sentencing judge.
9. For example, when an accused was detained in a remand institution with full access to educational and rehabilitation programs, credit at a ratio of less than 2:1 was sometimes appropriate (although some enhanced credit was still generally appropriate to account for the quantitative rationale). Similarly, when extended pre-sentence detention could be attributed to bad conduct on the part of the accused (such as breaching bail conditions), that militated against enhanced credit (*Rezaie*). By contrast, when an offender was subjected to particularly harsh conditions, rates as high as 3:1 or (rarely) 4:1 were sometimes applied.
	1. The Interpretation of Section 719(3.1)
10. In 2009, Parliament changedthe statutory regime governing credit for pre-sentence detention. As noted above, the *TISA* amended s. 719 of the *Criminal Code* in two relevant ways. First, Parliament modified s. 719(3) to limit credit for pre-trial custody “to a maximum of one day for each day spent in custody”. Second, Parliament provided in s. 719(3.1) that despite that limit, “if the circumstances justify it, the maximum is one and one-half days for each day spent in custody” unless the accused was detained pending trial for specific reasons such as breach of bail conditions.
11. Our task in this case is to interpret these provisions. Specifically, we must determine the meaning of “circumstances” in s. 719(3.1), and whether the lost opportunity for early release and parole in pre-sentence detention can be such a circumstance, capable of justifying enhanced credit at a rate of 1.5:1.
12. I conclude that loss of access to parole and early release constitutes a “circumstance” capable of justifying enhanced credit. In reaching this conclusion, I am in substantial agreement with the exemplary reasons of both Cronk J.A. in this case, and Beveridge J.A. in the companion case *Carvery*.
13. In the reasons that follow, I discuss: (1) the text of the provision, (2) the structure of the section, (3) the intention of Parliament, and (4) the scheme of the *Criminal Code* (see *Rizzo & Rizzo Shoes Ltd*. *(Re)*, [1998] 1 S.C.R. 27). In my view, the meaning of the provision is clear on the basis of conventional principles of statutory interpretation, and it is therefore neither appropriate nor necessary to have recourse to the presumption that the legislation conforms to the *Canadian* *Charter of Rights and Freedoms*: see *Bell ExpressVu Limited Partnership v. Rex*,2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 28-30 and 61-66.
	* 1. The Text of the Provision
14. Section 719(3.1) reads as follows:

(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. As Beveridge J.A. and Cronk J.A. noted, this provision is free of any language limiting the scope of what may constitute “circumstances”. The legislature could easily have provided that only “exceptional circumstances” or “circumstances other than the loss of eligibility for early release and parole” justify enhanced credit.
2. As Cronk J.A. observed, language limiting the scope of the word “circumstances” is used elsewhere in the *Criminal Code*. For example, reference is made to “exceptional circumstances” or “compelling circumstances” in s.  672.14(3) (fitness assessments last no longer than 30 days, except they may last for 60 if “compelling circumstances” so warrant), s. 672.47(2) (when an accused is found unfit to stand trial, a disposition must be made within 45 days but, in “exceptional circumstances”, may be made within 90 days) and s. 742.6(16) (when an offender breaches a conditional sentence order, in “exceptional cases” some of the suspended sentence may be deemed to be time served).
3. The absence of qualifications on “circumstances” in s. 719(3.1) is telling since Parliament *did* restrict enhanced credit, withholding it from offenders who have been denied bail primarily as a result of a previous conviction (s. 515(9.1)), those who contravened their bail conditions (ss. 524(4)(*a*) and 524(8)(*a*)), and those who committed an indictable offence while on bail (ss. 524(4)(*b*) and 524(8)(*b*)). Parliament clearly turned its attention to the circumstances under which s. 719(3.1) should *not* apply, but did not include any limitations on the scope of “circumstances” justifying its application.
4. Consequently, at the hearing before this Court, the Crown conceded that the circumstances referred to in s. 719(3.1) need not be exceptional. Instead, the Crown took the position that “circumstances” resulting from operation of law, and specifically lost eligibility for early release and parole, could not justify enhanced credit. The Crown argues that “circumstances” suggest facts that are particular to the offender and do not include those consequences that are universal and inherent to the statutory regime.
5. However, the provision is devoid of any limiting language supporting this interpretation. Moreover, the *impact* of the legal regime is a circumstance that is particular to each offender because the law affects offenders differently. For example, the loss of parole or early release eligibility will not make a difference to offenders who would not have received early release or parole in any event. Moreover, the legislation can change over time such that its impact on offenders becomes less uniform.
	* 1. Structure of the Section
6. The Crown submits that s. 719(3) creates a general rule of credit at a rate of 1:1, to which s. 719(3.1) is an exception. If lost eligibility for early release or parole, while in pre-sentence custody, is a “circumstance” justifying enhanced credit of 1.5:1, then almost every remand offender will qualify. This would transform the “exception” into the new “general rule” and render s. 719(3) irrelevant, an absurd result.
7. I agree that s. 719(3.1) is structured as an exception to s. 719(3). Section 719(3.1) begins with the words “[d]espite subsection (3)” and applies only when “circumstances justify it”, which tends to indicate that it is an exception to the general rule. While marginal notes are not part of the enactment and are of limited value in statutory interpretation (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 14), the fact that the subsection has the marginal note “[e]xception” is consistent with this conclusion.
8. I also agree with the Crown that it is somewhat inelegant to create an exception that applies in more cases than the general rule. However, the strength of this argument is limited for three reasons.
9. First, there is no general rule of statutory interpretation that the circumstances falling under an exception must be numerically fewer than those falling under the general rule. If the criteria that permit departure from a general proposition are satisfied, the numerical relationship is not relevant.
10. For example, s. 457(1) of the *Code* makes it an offence to make, publish, print, execute, issue, distribute or circulate anything in the likeness of a current bank-note. However, s. 457(2) provides exceptions, including for the Bank of Canada, its employees carrying out their duties and its contractors. Presumably, the overwhelming majority of bank-notes are produced by the Bank of Canada, its employees, and its contractors, and therefore fall under the exception.
11. Indeed, Crown counsel accepts that the lack of programs in detention facilities and overcrowding are common problems, and could result in exceptions under s. 719(3.1) that are numerically greater than those limited by s. 719(3).
12. Second, an interpretation of “circumstances” that includes loss of eligibility for parole and early release does not render subsection (3) redundant. Where an accused falls under an explicit exception to s. 719(3.1) (for instance, because she has been detained for breach of bail conditions), the one-for-one cap set by s. 719(3) will apply. Moreover, enhanced credit need not be granted in every case. For example, when long periods of pre-sentence detention are attributable to the wrongful conduct of the offender, enhanced credit will often be inappropriate. Section 719(3) continues to exist for such cases.
13. Third, the structure of s. 719 is consistent with the rationales for the existence of pre-sentence credit. Section 719(3) reflects the general rationale for giving credit. As Laskin J.A. wrote in *Rezaie*, at p. 721, “[i]ncarceration at any stage of the criminal process is a denial of an accused’s liberty” ― any time in jail should generally be credited day for day. On the other hand, s. 719(3.1) reflects the rationale for *enhanced* credit. Crediting a day in pre-sentence custody as a day served is insufficient to account for the full prejudicial circumstances of remand custody; enhanced credit accounts for both loss of eligibility for parole and early release (circumstances with quantitative impact) and the harshness of the conditions (circumstances with qualitative impact). Thus, the division between the subsections reflects the different theoretical underpinnings of credit and enhanced credit.
14. Further, this structure builds resilience into the statutory scheme. For example, if Parliament were to amend the *Corrections and Conditional Release Act*, so that pre-sentence custody counted for the purposes of parole eligibility and early release,[[4]](#footnote-4) s. 719(3.1) would only be called upon to account for situations of *qualitative* harshness, and an increased number of cases would fall solely under s. 719(3). The structure of the provision logically mirrors the rationales for credit and enhanced credit.
	* 1. Intention of Parliament
15. The intention of Parliament can be determined with reference to the legislative history, including Hansard evidence and committee debates, although the court should be mindful of the limited reliability and weight of such evidence (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 593-94 and 609).
16. Parliament clearly intended to restrict the amount of pre-sentence credit. This is plain from the cap of 1.5 days credit for every day spent in detention. It is also consistent with statements made by the then-Justice Minister, before the House of Commons Standing Committee on Justice and Human Rights, on May 6, 2009:

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.

(*Evidence*, No. 20, 2nd Sess., 40th Parl., at p. 11)

This objective is achieved regardless of what circumstances may justify the use of enhanced credit in s. 719(3.1).

1. Parliament also intended that the process of granting credit under s. 719 should be more transparent and easily understood by the public. It achieved this end through the insertion of ss. 719(3.2) and 719(3.3), which provide that judges should give reasons for granting credit and state both the fit sentence and the amount of credit granted.
2. However, I agree with Beveridge J.A. and Cronk J.A. that the intention of Parliament with respect to what “circumstances” may justify enhanced credit under s. 719(3.1) is far less clear and even contradictory (*Carvery*, at paras. 79-82; *Summers*, at paras. 82-88). Therefore, the legislative history is of no assistance in answering this question.
3. Parliament is presumed to know the legal context in which it legislates.[[5]](#footnote-5) The practice of using the former s. 719(3) to award enhanced credit for both the quantitative and qualitative consequences of pre-sentence detention was deeply entrenched in our sentencing system. This practice was expressly endorsed by this Court in *Wust*, where the Court identified the loss of eligibility for early release and parole as a reason justifying enhanced credit.
4. Parliament does, of course, have the power to exclude these circumstances from consideration (barring a constitutional challenge). However, it strikes me as inconceivable that Parliament intended to overturn a principled and long-standing sentencing practice, without using explicit language, by instead relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*.
5. Rather, it seems more likely that Parliament intended to do what it did explicitly. The amendments clearly impose a *cap* on the rate at which credit can be awarded, at 1.5:1. This is a substantial and clear departure from pre-*TISA* practice. Having made its intention so clear on that point, Parliament gave no indication it intended to alter the reasons for which enhanced credit can be granted.
6. In my view, neither the language of the provision nor the external evidence demonstrates a clear intention to abolish one of the principled rationales for enhanced credit.
	* 1. Scheme of the Sentencing Regime
7. While the foregoing is sufficient to dispose of the appeal, I recognize that ss. 719(3) and 719(3.1) do not exist in isolation, but form part of the overall sentencing scheme in the *Criminal Code*. As the legislature is presumed to have created a coherent, consistent and harmonious statutory scheme, s. 719 should be interpreted in a manner that is consistent with the principles and purposes of sentencing set out in Part XXIII of the *Criminal Code*. Sections 718, 718.1 and 718.2 of the *Code* provide:

 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.

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

 718.2 A court that imposes a sentence shall also take into consideration the following principles:

. . .

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

1. As Beveridge J.A. and Cronk J.A. recognized, an interpretation of s. 719(3.1) that does not account for loss of eligibility for early release and parole during remand custody means that offenders who do not receive bail will serve longer sentences than otherwise identical offenders who are granted bail.
2. This result is incompatible with the parity principle. A rule that results in longer sentences for offenders who do not obtain bail, compared to otherwise identical offenders, does not result in “similar . . . sentences imposed on similar offenders for similar offences committed in similar circumstances”: s. 718.2(*b*).
3. The Crown says that parity does not require absolute equality and that in any event, enhanced credit is an ineffective tool to achieve equality between offenders, since it is premised on both being released on their statutory release date (after two thirds of their sentence). In practice, some offenders will be released on parole after one third of their sentences; others will never be released during their sentence.
4. Obviously, the scope of the disparity will vary, depending on if and when offenders are ultimately released. Nonetheless, a rule that creates structural differences in sentences, based on criteria irrelevant to sentencing, is inconsistent with the principle of parity.
5. The Crown also says that the Court of Appeal’s reliance on the sentencing principle of proportionality was misplaced. Proportionality is simply concerned with the imposition of a just sanction in a particular case; any comparison with similar offenders is irrelevant.
6. However, it is difficult to see how sentences can reliably be “proportionate to the gravity of the offence and the degree of responsibility of the offender” (s. 718.1) when the length of incarceration is also a product of the offender’s ability to obtain bail, which is frequently dependent on totally different criteria.
7. Judicial interim release requires the judge to be confident that, amongst other things, the accused will neither flee nor reoffend while on bail. When an accused is able to deposit money, or be released to family and friends acting as sureties (who often pledge money themselves), this can help provide the court with such assurance. Unfortunately, those without either a support network of family and friends or financial means cannot provide these assurances. Consequently, as the intervener the John Howard Society submitted, this means that vulnerable and impoverished offenders are less able to access bail.
8. For example, Aboriginal people are more likely to be denied bail, and make up a disproportionate share of the population in remand custody.[[6]](#footnote-6) A system that results in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay, can hardly be said to be assigning sentences in line with the principles of parity and proportionality. Accounting for loss of early release eligibility through enhanced credit responds to this concern.
	* 1. Conclusion
9. For these reasons, I conclude that the “circumstances” justifying enhanced credit under s. 719(3.1) may include loss of eligibility for early release and parole.
10. To conclude otherwise, it would be necessary for the Court to read limiting language into s. 719(3.1) that is simply not there. Such an interpretation would result in sentences inconsistent with the *Code*’s own statement of principles, and would presume that the legislature intended to abolish the quantitative rationale for enhanced credit — that offenders should not be punished more severely because they were not released on bail — without clear language. And this despite the well-established practice, endorsed by this Court in *Wust* in the year 2000, that enhanced credit can be justified based upon the loss of eligibility for parole and early release. Such a conclusion is not plausible.
	1. How to Calculate Pre-Sentence Credit
		1. Analytical Approach
11. In determining credit for pre-sentence custody, judges may credit at most 1.5 days for every day served where circumstances warrant. While there is now a statutory maximum, the analytical approach endorsed in *Wust* otherwise remains unchanged. Judges should continue to assign credit on the basis of the quantitative rationale, to account for lost eligibility for early release and parole during pre-sentence custody, and the qualitative rationale, to account for the relative harshness of the conditions in detention centres.
12. The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely. Of course, a lower rate may be appropriate when detention was a result of the offender’s bad conduct, or the offender is likely to obtain neither early release nor parole. When the statutory exceptions within s. 719(3.1) are engaged, credit may only be given at a rate of 1 to 1. Moreover, s. 719 is engaged only where the pre-sentence detention is a result of the offence for which the offender is being sentenced.
13. This means that two offenders, one of whom lost the opportunity for early release and parole, and a second who, in addition to losing those opportunities, was also subject to extremely harsh conditions, will likely both have credit assigned at a rate of 1.5 to 1. The unavoidable consequence of capping pre-sentence credit at this rate is that it is insufficient to compensate for the harshness of pre-sentence detention in *all* cases. However, this does not mean that credit should be scaled back in order to “leave room at the top” of the scale for the most egregious cases. A cap is a cut-off and means simply that the upper limit will be reached in more cases. It should not lead judges to deny or restrict credit when it is warranted.
14. Indeed, individuals who have suffered particularly harsh treatment, such as assaults in detention, can often look to other remedies, including under s. 24(1) of the *Charter*.
15. The sentencing judge is also required to give reasons for any credit granted (s. 719(3.2)) and to state “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” (s. 719(3.3)). This is not a particularly onerous requirement, but plays an important role in explaining the nature of the sentencing process, and the reasons for giving credit, to the public.
	* 1. The Particular Offender’s Prospects of Early Release
16. For many offenders, the loss of eligibility for early release and parole will justify credit at a rate of 1.5:1. However, as Beveridge J.A. concluded, it is not an “automatic or a foregone conclusion that a judge must grant credit at more than 1:1 based on loss of remission or parole” (*Carvery*, at para. 60). If it appears to a sentencing judge that an offender will be denied early release, there is no reason to assign enhanced credit for the meaningless lost opportunity.
17. As Beveridge J.A. wrote:

 . . . 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. [para. 66]

1. The Crown says it is not appropriate for the sentencing court to inquire into the likelihood that a particular offender will receive parole because considerations relating to the administration of the sentence are irrelevant to sentencing. Further, it is improper to reduce a sentence by granting enhanced credit based on speculation about when the offender may be released.
2. However, judges are often called upon to make assessments about an offender’s future, for example by considering prospects for rehabilitation. I see no reason why judges cannot draw similar inferences with respect to the offender’s future conduct in prison and the likelihood of parole or early release.
3. The process need not be elaborate. The onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention. Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the Crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom early release and parole are simply not available.[[7]](#footnote-7) Similarly, if the accused’s conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process.
4. As well, when evaluating the qualitative rationale for granting enhanced credit, the onus is on the offender, but it will generally not be necessary to lead extensive evidence. Judges have dealt with claims for enhanced credit for many years. The conditions and overcrowding in remand centres are generally well known and often subject to agreement between the parties; there is no reason this helpful practice should not continue. There is no need for a new and elaborate process — the *TISA* introduced a cap on the amount of enhanced credit that may be awarded, but did not alter the process for determining the amount of credit to apply.
	* 1. No Double Counting
5. The intervener the Quebec Director of Criminal and Penal Prosecutions argues that factors based on the personal circumstances of a particular inmate, with no relation to the conditions in which he or she was detained, cannot justify enhanced credit under s. 719(3.1).
6. It has long been recognized that credit for pre-sentence detention is intended to ensure that individuals are punished equally, whether they are released on bail or remanded in custody prior to trial. Consequently, any circumstances that speak to the relative harshness of pre-sentence custody, as opposed to serving a sentence, are relevant.
7. On this basis, it is difficult to see how factors such as reduced moral culpability of the offender, or the fact that it was a first conviction, could be relevant circumstances with respect to the *relative* harshness of pre-trial detention. The fact that the respondent entered an early guilty plea, accepted responsibility for his actions, and expressed sincere remorse are generally only relevant to the determination of a fit sentence and not to assigning credit under s. 719(3) or s. 719(3.1). To consider them again is what was described as “double dipping”.
8. Application to the Facts
9. The sentencing judge did not err in law by granting enhanced credit under s. 719(3.1) on the basis of the respondent’s loss of eligibility for early release and parole.
10. The sentencing judge in this case did not rely on improper factors in assessing credit for pre-trial detention. In his analysis of the appropriate credit, the judge focused on the lack of access to parole, not the respondent’s guilty plea and remorse (paras. 39-43). His discussion of the latter factors was directed at sentencing generally.
11. To the extent Cronk J.A. referred to these considerations, at para. 124 of her decision, I take her to be suggesting they are relevant for the limited purpose of determining whether the respondent was likely to be granted parole (which is relevant to whether the respondent, in fact, lost the opportunity for parole and early release). She did not treat them as independent circumstances justifying enhanced credit.
12. I agree with Cronk J.A. that there was no basis to think that the respondent would be denied parole or early release. She said of Crown counsel at trial:

By her reference to the likelihood of early parole for the respondent, she also conceded, in effect, the respondent’s good behaviour while in remand custody. Certainly, she did not suggest that the respondent’s conduct would in any way disentitle him to earned remission or negatively affect his statutory release and parole eligibility. [para. 125]

1. While little evidence was available on this point, there is no serious challenge to the conclusion that the respondent was likely to access parole and early release. Therefore, it was appropriate to grant credit at a rate of 1.5 days for every day in detention on the basis of the quantitative rationale for enhanced credit.
2. I would dismiss the appeal.

 *Appeal dismissed.*

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1. See also *R. v. Bradbury*, 2013 BCCA 280, 339 B.C.A.C. 169. [↑](#footnote-ref-1)
2. See also *R. v. Stonefish*, 2012 MBCA 116, 288 Man. R. (2d) 103; *R. v. Johnson*, 2013 ABCA 190, 85 Alta. L.R. (5th) 320; *R. v. Cluney*, 2013 NLCA 46, 338 Nfld. & P.E.I.R. 57; *R. v. Henrico*, 2013 QCCA 1431 (CanLII). [↑](#footnote-ref-2)
3. Incorporated by reference in Ontario through the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, ss. 28 and 28.1. [↑](#footnote-ref-3)
4. For example, when a life sentence has been imposed, parole eligibility is calculated as of the date of arrest for that offence: *CCRA*, s. 120(2). [↑](#footnote-ref-4)
5. Sullivan, atp. 205; *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 S.C.R. 315, at para. 9. [↑](#footnote-ref-5)
6. A. Babooram, “The changing profile of adults in custody, 2006/2007” (2008), 28:10 *Juristat* 1 (online); Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 14, 2nd Sess., 40th Parl., September 30, 2009, at pp. 27-30. [↑](#footnote-ref-6)
7. For example, a person who is convicted of first degree murder and sentenced to imprisonment for life shall not be eligible for parole until they have served 25 years of the sentence (s. 745 of the *Criminal Code*). [↑](#footnote-ref-7)