

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Safarzadeh-Markhali, 2016 SCC 14, [2016] 1 S.C.R. 180 | **Appeal heard:** November 4, 2015  **Judgment rendered:** April 15, 2016  **Docket:** 36162 |

Between:

Her Majesty The Queen

Appellant

and

Hamidreza Safarzadeh-Markhali

Respondent

- and -

Attorney General of Canada,

British Columbia Civil Liberties Association,

Criminal Lawyers’ Association (Ontario),

John Howard Society of Canada,

West Coast Prison Justice Society and

Aboriginal Legal Services of Toronto Inc.

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 74) | McLachlin C.J. (Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. concurring) |

R. *v.* Safarzadeh‑Markhali, 2016 SCC 14, [2016] 1 S.C.R. 180

Her Majesty The Queen Appellant

v.

Hamidreza Safarzadeh‑Markhali Respondent

and

Attorney General of Canada,

British Columbia Civil Liberties Association,

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2016 SCC 14

File No.: 36162.

2015: November 4; 2016: April 15.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for ontario

*Constitutional law — Charter of Rights — Fundamental justice — Overbreadth — Sentencing — Credit for pre‑sentence custody — Criminal Code denying enhanced credit in certain circumstances — Whether denial of enhanced credit for pre‑sentence custody to offenders who are denied bail primarily because of prior conviction is overbroad in violation of s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Criminal Code, R.S.C. 1985, c. C‑46, ss. 515(9.1), 719(3.1).*

*Constitutional law — Charter of Rights — Fundamental justice — Sentencing — Whether proportionality in sentencing process a principle of fundamental justice under s. 7 of Canadian Charter of Rights and Freedoms.*

Sentencing courts have historically given enhanced credit for time spent in pre‑sentence custody, typically at a rate of two days for every day of detention. The *Truth in Sentencing Act* amended the *Criminal Code* to provide a general expectation of one day of credit for every day spent in pre‑sentence custody and, if the circumstances justify it, enhanced credit to a maximum of one and a half days. Pursuant to s. 719(3.1) of the *Code*, enhanced credit is not available if the person was denied bail primarily because of a prior conviction. M was arrested, charged with several offences and consented to his detention. At his bail hearing, the bail judge concluded that s. 515(9.1) required her to make an endorsement that M’s detention was warranted primarily because of M’s criminal record. The endorsement made M ineligible to receive enhanced credit for pre‑sentence custody. The sentencing judge found the restrictions on enhanced credit in s. 719(3.1) of the *Code* unconstitutional. The Ontario Court of Appeal agreed and concluded that the challenged portion of s. 719(3.1) is of no force and effect.

*Held*: The appeal should be dismissed.

The denial of enhanced credit for pre‑sentence custody to offenders who are denied bail primarily because of a prior conviction is overbroad because it catches people in ways that have nothing to do with the legislative purpose of s. 719(3.1) of the *Code*, which is to enhance public safety and security. Section 719(3.1) thus violates s. 7 of the *Charter*.

It is clear that s. 719(3.1) limits liberty. Its effect is to require offenders who come within its ambit to serve more time in prison than they would have otherwise. Laws that curtail liberty in a way that is overbroad do not conform to the principles of fundamental justice.

The first step in the overbreadth analysis is to ascertain the purpose of the challenged law. To determine a law’s purpose, courts look to statements of purpose in the legislation, if any; the text, context, and scheme of the legislation; and extrinsic evidence such as legislative history and evolution. In presenting the *Truth in Sentencing Act* to Parliament, the Minister of Justice explained that denial of enhanced credit was aimed at promoting public safety and public confidence in the justice system, by imposing longer sentences on violent and repeat offenders and increasing their exposure to rehabilitative programming. Based on the text, context and scheme of the legislation, coupled with the Minister’s statements of purpose, the animating social value behind the denial of enhanced credit is enhancing public confidence in the justice system. The legislative purpose of the total denial of enhanced credit for pre‑sentence custody to offenders who are denied bail because of a prior conviction is to enhance public safety and security by increasing violent and chronic offenders’ access to rehabilitation programs. The means for achieving the legislative purpose is the challenged provision itself and the effect of the provision is to impose longer periods of custody on all persons who receive an endorsement under s. 515(9.1) of the *Code*.

It is a principle of fundamental justice that a law that deprives a person of life, liberty, or security of the person must not do so in a way that is overbroad. The law must not go further than reasonably necessary to achieve its legislative goals. The provision in issue captures people it was not intended to capture: offenders who do not pose a threat to public safety or security. Section 515(9.1) does not specify or even broadly identify the offences that warrant an endorsement and limited availability of judicial review means that persons wrongly tagged with an endorsement will be without recourse to have the error remedied.

The infringement of s. 7 of the *Charter* is not justified under s. 1. While the challenged provision is rationally connected to its purpose of enhancing public safety and security, it is neither minimally impairing nor proportionate. Alternative and more reasonable means of achieving its purposes were open to Parliament. The benefit to public safety by increasing access to rehabilitation programs is not trivial but the law’s overbreadth means that offenders who have neither committed violent offences nor present a risk to public safety will be unnecessarily deprived of liberty.

The Court of Appeal erred in holding that proportionality in the sentencing process is a principle of fundamental justice under s. 7 of the *Charter*. The principles and purposes for determining a fit sentence, enumerated in s. 718 of the *Code* and provisions that follow — including the fundamental principle of proportionality in s. 718.1 — do not have constitutional status. The constitutional dimension of proportionality in sentencing is the prohibition of grossly disproportionate sentences in s. 12 of the *Charter*. The standard imposed by s. 7 with respect to sentencing is the same as it is under s. 12.

**Cases Cited**

**Applied:** *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; **referred to:** *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 12.

*Constitution Act, 1982*, s. 52.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 515(9.1), 520(1), 521(1), 524(4), (8), 718, 718.1, 718.2(b), 719(3), (3.1).

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

**Authors Cited**

Canada. House of Commons. *House of Commons Debates*, vol. 144, No. 41, 2nd Sess., 40th Parl., April 20, 2009, pp. 2417‑18 and 2432.

Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 20, 2nd Sess., 40th Parl., May 6, 2009, pp. 11-12 and 15.

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Watt and Strathy JJ.A.), 2014 ONCA 627, 122 O.R. (3d) 97, 316 C.C.C. (3d) 87, 325 O.A.C. 17, 13 C.R. (7th) 30, 319 C.R.R. (2d) 36, [2014] O.J. No. 4194 (QL), 2014 CarswellOnt 12258 (WL Can.), affirming a sentencing decision of Block J., 2012 ONCJ 494, 265 C.R.R. (2d) 32, [2012] O.J. No. 3563 (QL), 2012 CarswellOnt 9292 (WL Can.). Appeal dismissed.

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

Greg J. Allen and Kenneth K. Leung, for the intervener the West Coast Prison Justice Society.

Jonathan Rudin and Emily Hill, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

The Chief Justice —

1. Introduction
2. A person charged with a crime is held in custody pending trial unless released on bail. If found guilty at trial, an issue arises: In calculating the sentence, how much credit should the person receive for the time already spent in custody? A credit of one day for every day of pre-sentence custody will almost never put the person on equal footing with offenders released on bail, because the time spent in pre-sentence custody does not count for purposes of parole eligibility, earned remission and statutory release: *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 26. A one-for-one credit, in other words, results in longer incarceration for offenders detained in pre-sentence custody than for offenders released on bail. On account of this discrepancy and the reality that pre-sentence custody is generally more onerous than post-sentence custody, sentencing courts have historically given “enhanced” credit for time spent in pre-sentence custody.
3. Parliament revised this regime in 2009. It did not do away with enhanced credit, but it capped that credit at one and a half days for each day of pre-sentence custody. Parliament also — which brings us to the issue in this case — removed a sentencing court’s discretion to give any enhanced credit to offenders for pre-sentence custody, if they were denied bail primarily on the basis of their criminal record. The question is whether this law violates the right to liberty guaranteed by s. 7 of the *Canadian* *Charter of Rights and Freedoms*.
4. For the reasons that follow, I conclude that the provision infringes s. 7 of the *Charter*,and is not justified under s. 1 of the *Charter*.
5. Background
6. The respondent, Hamidreza Safarzadeh-Markhali, was arrested and charged with several offences in November 2010. Because of the nature of some of the charges against him, Mr. Safarzadeh-Markhali bore the burden of justifying his release on bail. At his bail hearing, he initially sought to show cause for his release, but later made clear that he consented to his detention. Notwithstanding this consent, the bail judge concluded that s. 515(9.1) of the *Criminal Code*, R.S.C. 1985, c. C-46,required her to make an endorsement that Mr. Safarzadeh-Markhali’s detention was warranted primarily because of his criminal record. Under s. 719(3.1) of the *Code*, this endorsement made Mr. Safarzadeh-Markhali ineligible to receive enhanced credit for the pre-sentence custody that followed.
7. The sentencing judge and the Ontario Court of Appeal held that the removal of discretion to award enhanced credit for pre-sentence custody in s. 719(3.1) is unconstitutional*.* The Crown appeals.
8. Mr. Safarzadeh-Markhali has been deported to Iran. While the appeal is moot as to him, counsel agree that the issue of whether the relevant portion of s. 719(3.1) of the *Criminal Code* is constitutional is of importance throughout Canada, and that we should decide it.
9. The Challenged Legislation
10. The challenged legislation relates to the practice of granting enhanced credit for pre-sentence custody.
11. Enhanced credit serves two purposes. First, it ensures that an offender detained in pre-sentence custody — which is not subject to parole and early release provisos — does not spend more time behind bars than an identically situated offender released on bail. Second, it compensates for factors such as overcrowding, inmate turnover, and labour disputes that make pre-sentence custody more onerous than post-sentence custody: *Summers*, at para. 28. For these reasons, sentencing courts have long followed a practice of granting offenders enhanced credit — typically at a rate of two for one, but occasionally higher or lower depending on an offender’s particular circumstances — for time in pre-sentence custody.
12. Parliament sought to change this practice by enacting the *Truth in Sentencing Act*, S.C. 2009, c. 29, which amended the *Criminal Code* to provide (1) a general expectation of one day of credit for every day spent in pre-sentence custody; (2) the possibility of enhanced credit, capped at one and a half days of credit for every day of pre-sentence custody, “if the circumstances justify it”; (3) *a cap of one day (i.e., no enhanced credit) if the offender was denied bail primarily on the basis of a prior conviction as certified under s. 515(9.1)*, or if the offender’s bail was revoked under s. 524(4) or (8) of the *Code*.
13. These provisions are found in ss. 719(3) and 719(3.1) of the *Criminal Code*:

**(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).

This appeal is concerned only with the underlined portion of s. 719(3.1) of the *Criminal Code*.

1. The denial of enhanced credit in s. 719(3.1) relevant here is triggered by an endorsement made by a bail judge under s. 515(9.1) of the *Criminal Code*:

**(9.1)** Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.

1. No one disputes that a s. 515(9.1) endorsement is, in some circumstances, unreviewable. The review provisions of the *Criminal Code*, ss. 520(1) and 521(1), do not refer to endorsements under s. 515(9.1). In oral argument, the Crown took the position that if a reviewing judge vacates an accused’s detention order, the endorsement is also necessarily vacated. As a matter of statutory interpretation, it is not obvious that this is so. In any event, the Crown concedes that a s. 515(9.1) endorsement is unreviewable where the reviewing judge determines that an accused’s detention is justified, even if the reviewing judge believes that the bail judge erred in making the endorsement. Nor, it appears, would the sentencing judge have discretion to vacate an endorsement based, for example, on a clerical error, or on a conviction that was later reversed.
2. Judicial History
3. At his bail hearing, Mr. Safarzadeh-Markhali consented to detention pending trial and argued that the bail judge should therefore not make a s. 515(9.1) endorsement. The judge rejected this argument and concluded that an endorsement was required. This made Mr. Safarzadeh-Markhali ineligible for enhanced credit for pre-sentence custody.
4. Mr. Safarzadeh-Markhali was tried on June 14 and 17, 2011, and convicted on July 28, 2011. His sentencing was initially scheduled for December 9, 2011, but on December 1, newly retained counsel learned of the endorsement, and brought an application asserting that s. 719(3.1) of the *Criminal Code* violates s. 7 of the *Charter*.
5. The sentencing judge, Block J., found the restrictions on enhanced credit in s. 719(3.1) of the *Criminal Code* unconstitutional, and credited Mr. Safarzadeh-Markhali with 31 months of pre-sentence custody based on a rate of one and a half for one, to be deducted from his sentence of six years (2012 ONCJ 494, 265 C.R.R. (2d) 32). He held that the purposes of the statute that added s. 719(3.1) to the *Code*, the *Truth in Sentencing Act*, are to repress manipulation of pre-sentence custody to achieve a lower sentence than would otherwise be served, and to provide transparency in this aspect of the sentencing process. He went on to hold that s. 719(3.1): (1) problematically binds the discretion of the sentencing judge; (2) has a disproportionate effect on equally placed offenders; (3) creates arbitrariness because the deprivation of liberty effected has no rational connection to either of the statute’s stated aims; (4) leads to double-counting and double penalization; (5) improperly lowers the burden of proof for sentencing; and (6) has the oblique purpose of increasing sentences outside the sentencing process.
6. The Court of Appeal (Rosenberg, Watt and Strathy JJ.A. (now Strathy C.J.O.)) agreed that the challenged portion of s. 719(3.1) of the *Criminal Code* is inconsistent with s. 7 of the *Charter* (2014 ONCA 627, 122 O.R. (3d) 97). While it is open to Parliament to set markers to guide judges in sentencing, Strathy J.A. concluded that restricting credit for time served to a one-for-one ratio in this manner infringes s. 7, because it deprives affected persons of liberty in a manner inconsistent with the principle of proportionality in sentencing. This principle, which Strathy J.A. identified as a principle of fundamental justice under s. 7 of the *Charter*, prevents Parliament from making sentencing contingent on factors unrelated to the determination of a fit sentence. The challenged provision offends that principle because it subjects identically placed offenders to periods of incarceration of varying lengths for irrelevant reasons. Increasing the custodial terms of repeat offenders may be an appropriate objective. Strathy J.A. found, however, that Parliament’s attempt to give effect to that objective through ss. 515(9.1) and 719(3.1) of the *Criminal Code* misses the mark, and results in unfairness, discrimination, and unjust sentences.
7. The Court of Appeal held that the breach of s. 7 is not justified as a reasonable measure under s. 1 of the *Charter*. It held that the objectives of the denial of enhanced credit — which, at this stage, Strathy J.A. articulated as preventing manipulation of credit for pre-sentence custody and enhancing public safety by increasing the likelihood that repeat offenders and those who breach their bail conditions will serve part of their sentence in post-sentence custody with access to rehabilitative programs unavailable in remand centres — are pressing and substantial. However, the denial of enhanced credit for pre-sentence custody in s. 719(3.1) of the *Criminal Code* is not rationally connected to these purposes, because it draws distinctions between offenders with criminal records on arbitrary grounds — whether they seek bail and whether, if denied bail, they receive an endorsement under s. 515(9.1) of the *Criminal Code*. Nor does the provision minimally impair the right to liberty, since Parliament could have achieved its objectives through less intrusive measures. Finally, the benefit secured by the provision — keeping some offenders in jail longer and thus increasing their access to rehabilitative programs — is outweighed by the detriment flowing from an artificial distinction that undermines public confidence in the justice system. The court therefore dismissed the Crown’s appeal and concluded that the challenged portion of s. 719(3.1) is unconstitutional and of no force and effect.
8. Analysis
9. The central issue on this appeal is whether s. 719(3.1) of the *Criminal Code* infringes s. 7 of the *Charter*. If it does, we must ask whether the limitation is justified under s. 1 of the *Charter*.
10. Section 7 of the *Charter* provides the following:

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. It is clear that s. 719(3.1) limits liberty. Its effect is to require offenders who come within its ambit to serve more time in prison than they would have otherwise. The only issue under s. 7 is whether this deprivation of liberty comports with the principles of fundamental justice.
2. The Court of Appeal based its analysis on the principle of proportionality in the sentencing process, which it found to be a principle of fundamental justice. The Crown argues that, while proportionality is an important principle of sentencing, it should not be treated as a principle of fundamental justice under s. 7. I agree with the Crown. Proportionality in the sentencing process, as distinct from the well-accepted principle of gross disproportionality under s. 7, is not a principle of fundamental justice.
3. However, I conclude that the portion of the *Truth in Sentencing Act* challenged in this appeal — the denial of any enhanced credit for pre-sentence custody to persons to whom bail is denied primarily because of a prior conviction — violates s. 7 of the *Charter* for another reason: it is overbroad. Laws that curtail liberty in a way that is arbitrary, overbroad or grossly disproportionate do not conform to the principles of fundamental justice: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 105. Mr. Safarzadeh-Markhali contends that the challenged provision violates all three of these principles. For the reasons that follow, I conclude that the challenged law is unconstitutionally overbroad, because its effect is to deprive some persons of liberty for reasons unrelated to its purpose. This conclusion makes it unnecessary to address whether the law is arbitrary or grossly disproportionate.
4. The first step in the overbreadth analysis is to ascertain the purpose of the law. I turn to that now.
   1. The Purpose of Section 719(3.1)
5. Whether a law is overbroad within the meaning of s. 7 turns on the relationship between the law’s purpose and its effect: *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 24. It is critically important, therefore, to identify the purpose of the challenged law at the outset of the s. 7 inquiry.
6. *Moriarity* summarizes the considerations that guide the task of properly characterizing Parliament’s purpose in a s. 7 analysis into overbreadth.
7. First, the law’s purpose is distinct from the means used to achieve that purpose: *Moriarity*, at para. 27. A law’s means may be helpful in determining its objective, but the two must be treated separately.
8. Second, the law’s purpose should be characterized at the appropriate level of generality, which “resides between the statement of an ‘animating social value’ — which is too general — and a narrow articulation” that amounts to a virtual repetition of the challenged provision, divorced from its context: *Moriarity*, at para. 28.
9. Third, the statement of purpose should be both precise and succinct: *Moriarity*, at para. 29. Precision requires that courts focus on the purpose of the particular statutory provision subject to constitutional challenge: *ibid.*; see also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144.
10. Fourth, the analysis is not concerned with the appropriateness of the legislative purpose. The court must take the legislative objective “at face value” and assume that it is appropriate and lawful: *Moriarity*, at para. 30. The appropriateness of a legislative objective may be relevant to its constitutionality under other *Charter* provisions. But it has no place in the s. 7 analysis of overbreadth.
11. With these propositions in mind, I turn to the task at hand: to formulate a statement of purpose for s. 719(3.1)’s denial of enhanced credit to persons denied bail primarily because of a prior conviction.
12. To determine a law’s purpose for a s. 7 overbreadth analysis, courts look to (1) statements of purpose in the legislation, if any; (2) the text, context, and scheme of the legislation; and (3) extrinsic evidence such as legislative history and evolution: *Moriarity*, at para. 31.
13. The first source of purpose is statements of purpose in the legislation. The *Truth in Sentencing Act* does not contain explicit statements of legislative purpose. The title of the statute suggests that the evil to which it is directed is opaqueness in the sentencing process. Beyond this, however, the statute is silent as to its purposes. More to the point, it contains no explicit statement of the specific purpose of denying enhanced credit to offenders denied bail primarily on the basis of a prior conviction.
14. I turn next to the text, context and scheme of the legislation. These provide the contextual matrix in which the challenged portion of s. 719(3.1)’s denial of enhanced credit is embedded.
15. Part of the contextual matrix is this Court’s decision in *Summers*, which considered, as a matter of statutory interpretation, the one-and-a-half-for-one cap on enhanced credit for pre-sentence custody. The Court there said that the broad purposes of the legislative scheme were to enhance public confidence in the justice system and make the process of granting enhanced credit more transparent: *Summers*, at paras. 52-53. *Summers* suggests a broad over-arching purpose for the 1.5:1 limit on enhanced credit for pre-sentence custody — enhancing confidence in the justice system. This purpose is pitched at a high level of generality and underlies the other objectives of the scheme and the challenged provision. In the words of *Moriarity*, enhancing confidence in the justice system is more of an “animating social value” than a statement of purpose.
16. Turning to the text of the provision, s. 515(9.1) of the *Criminal Code* requires a bail justice to make a written endorsement if the accused is detained “primarily because of a previous conviction”. The language in this section is very broad. A lengthy record is not necessary, nor is a particular type of conviction required. Any previous conviction could theoretically lead to an endorsement. Section 515(9.1) tells justices only that they must make the endorsement if detention is ordered “primarily” for this reason. In short, the breadth of the section does not provide much guidance in determining Parliament’s purpose, beyond indicating that Parliament intended to target accused persons with criminal records.
17. This brings us to the third source of legislative purpose — extrinsic evidence of legislative history and evolution. We have little evidence of the legislative evolution of the challenged provision. However, we do have the statements of the Minister who introduced it. Statements of purpose in the legislative record may be rhetorical and imprecise. Yet providing information and explanations of proposed legislation is an important ministerial responsibility, and courts rightly look to it in determining the purpose of a challenged provision.
18. In presenting the *Truth in Sentencing Act* to Parliament and the House of Commons Standing Committee on Justice and Human Rights, the Minister of Justice explained that denial of enhanced credit was aimed at promoting public safety and public confidence in the justice system, by imposing longer sentences on violent and repeat offenders and increasing their exposure to rehabilitative programming. He said:

The practice of awarding generous credit erodes public confidence in the integrity of the justice system. It also undermines the commitment of the government to enhance the safety and security of Canadians by keeping violent or repeat offenders in custody for longer periods. [Emphasis added.]

(*House of Commons Debates*, vol. 144, No. 41, 2nd Sess., 40th Parl., April 20, 2009 (“*Debates*”), at p. 2418)

The Minister’s reference to “violent or repeat offenders” suggests that the challenged provision is targeted at two groups: (1) dangerous persons, who have committed crimes of violence or threatened violence; and (2) chronic offenders, whether convicted of violent crimes or not.

1. The Minister also linked longer periods in custody to rehabilitation:

As a result of [the challenged provision], a greater number of offenders would now serve a federal sentence of two or more years, and there will be an increased number of federal offenders spending time in federal custody.

This time [in] the federal system will present the opportunity for longer-term programming that may have a positive effect on the offender. [Emphasis added.]

(Standing Committee on Justice and Human Rights, *Evidence*, No. 20, 2nd Sess., 40th Parl., May 6, 2009 (“*Evidence*”), at pp. 11-12)

1. The Minister referred to other goals. One was the goal of adequate or fit punishment, in a retributive sense. On this, he said:

Not only does [enhanced credit] deprive offenders of the prison programs that might help to keep them out of jail in the future, it also fails to punish them adequately for the deeds that led to their convictions in the first place.[Emphasis added.]

(*Debates*, at p. 2418)

1. The Minister coupled the desire for adequate punishment with the idea that enhanced credit gives repeat offenders a “benefit” they do not deserve: “You shouldn’t get any benefit for being detained if there are legitimate reasons for you not to make bail” (*Evidence*, at p. 15). Although the Minister erred in characterizing enhanced credit as a “benefit” (see *Summers*, at paras. 23-27), it is clear that he wanted to ensure “adequate” periods of incarceration for repeat offenders — a “final sentence [that] reflects the seriousness of the crime”: *Evidence*, at p. 11.
2. Do the Minister’s comments on achieving adequate sentences for repeat offenders reflect the central purpose of denying any enhanced credit for pre-sentence custody to offenders denied bail because of a prior conviction? I think not. Those comments must be considered in context. The weight of the legislative record suggests that the challenged provision was geared towards promoting public safety and security, not retribution. Achieving adequate punishment is not, in the s. 7 analysis, a purpose of the challenged provision.
3. Finally, the Minister referred to the goals of making the system more transparent and preventing offenders from manipulating the system: see e.g. *Debates*, at p. 2417. Once again, it is difficult to see these goals as the purpose of a total denial of enhanced credit for pre-sentence custody to persons denied bail primarily because of a prior conviction.
4. The challenged provision — the denial of enhanced credit to repeat offenders who receive a s. 515(9.1) endorsement — is difficult to relate to a desire to make the system clearer or easier to understand. While requiring a bail judge to make a written notation that the primary basis for denying bail is a prior conviction may enhance transparency in the bail system, it cannot be said that the actual deprivation of liberty imposed by s. 719(3.1) seeks to further transparency.
5. Similarly, the challenged provision, by its words and how it operates, is not directed at preventing offenders’ manipulation of the system. The Minister expressed concern that under the old system, offenders were prolonging pre-sentence custody to take advantage of enhanced credit that would shorten their total time in custody. While this goal is reflected in the one-and-a-half-for-one cap on enhanced credit, which removes the incentive to extend the period of pre-sentence custody, it is not related to the challenged provision.
6. In summary, examined in the light of *Moriarity*,the text, context and scheme of the legislation, coupled with the Minister’s statements of purpose, lead me to the following conclusions.
7. First, the *animating social value* behind the denial of enhanced credit for pre-sentence custody in s. 719(3.1) is enhancing public confidence in the justice system.
8. Second, the *legislative purpose* of the total denial of enhanced credit for pre-sentence custody to offenders who are denied bail because of a prior conviction is *to enhance public safety and security by increasing violent and chronic offenders’ access to rehabilitation programs*. To be sure, the Minister referred to other legislative purposes — providing adequate punishment, increasing transparency in the pre-sentence credit system, and reducing manipulation. But these are peripheral, for the reasons discussed above.
9. Third, the *means* for achieving the purpose of enhancing public safety and security is the challenged provision itself — the denial of enhanced credit for pre-sentence custody to persons refused bail primarily on the basis of their existing criminal record.
10. Finally, the *effect* of the provision is to impose longer periods of custody on all persons who receive an endorsement indicating they were denied bail primarily on the basis of a previous conviction.
    1. Is the Law Overbroad?
11. It is a principle of fundamental justice that a law that deprives a person of life, liberty, or security of the person must not do so in a way that is overbroad. In other words, the law must not go further than reasonably necessary to achieve its legislative goals: *Bedford*, at para. 101.
12. The Court explained the substance of the principle against overbreadth in *Bedford*, at paras. 112-13:

Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. . . .

Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law’s purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*. [Underlining added.]

1. The denial of enhanced credit for pre-sentence custody to offenders who are denied bail primarily because of a prior conviction is overbroad because it catches people in ways that have nothing to do with enhancing public safety and security.
2. First, the provision’s ambit captures people it was not intended to capture: offenders who do not pose a threat to public safety or security. Section 515(9.1) is broadly worded. It catches any person denied bail primarily for a criminal record, without specifying or even broadly identifying the nature or number of offences that would warrant a s. 515(9.1) endorsement. The section may therefore ensnare persons whose imprisonment does not advance the purpose of the law. For example, a person with two or three convictions for failing to appear in court might be subject to a s. 515(9.1) endorsement, even though he or she did not pose any real threat to public safety or security. And even if such a person receives greater access to rehabilitative programming and benefits from it, the consequence is not necessarily to improve public safety and security. In short, a s. 515(9.1) endorsement is an inexact proxy for the danger that an offender poses to public safety and security. The Crown says the law casts the net broadly because targeting all offenders with a criminal record is a more practical option than attempting to identify only offenders who pose a risk to public safety and security. But practicality is no answer to a charge of overbreadth under s. 7: *Bedford*, at para. 113.
3. Second, regardless of the types of offenders the challenged provision was meant to capture, the provision suffers from overbreadth because, as the intervener the Criminal Lawyers’ Association (Ontario) notes, the limited availability of judicial review means that persons wrongly tagged with an endorsement will be without recourse to have the error remedied. There is dispute about precisely when if ever review for an endorsement is available. But the Crown concedes that if the reviewing judge finds that the detention order was properly made, he or she is powerless to vacate an endorsement and that the sentencing judge has no choice under the challenged provision but to give effect to an endorsement in computing an offender’s sentence. This absence of review and discretion renders the challenged provision overbroad for at least two categories of individuals: (1) persons who erroneously received the endorsement because their detention is not warranted primarily because of their criminal record, and (2) persons who, during the period between the bail hearing and sentencing, successfully appeal the conviction that drew the endorsement. In both cases, the effect of the provision is to strip persons of liberty even though their detention does not obviously advance public safety and security.
4. I conclude that the challenged provision seeks to advance the objective of enhancing public safety and security in a manner that is overbroad.
   1. Is the Infringement Justified Under Section 1 of the Charter?
5. The Crown contends that if the challenged provision violates s. 7 of the *Charter*, the infringement is justified under s. 1. I cannot accept this submission.
6. It is difficult, but not impossible, to justify a s. 7 violation under s. 1. Laws that deprive individuals of liberty contrary to a principle of fundamental justice are not easily upheld. However, a law may be saved under s. 1 if the state can point to public goods or competing social interests that are themselves protected by the *Charter*: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 95. Courts may accord deference to legislatures under s. 1 for breaches of s. 7 where, for example, the law represents a “complex regulatory response” to a social problem: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 37.
7. An infringement of the *Charter* is justified under s. 1 where the law has a “pressing and substantial object and . . . the means chosen are proportional to that object”: *Carter*, at para. 94. A law is proportionate where the means adopted are rationally connected to the law’s objective, minimally impairing of the right in question, and the law’s salutary effects outweigh its deleterious effects: *R. v. Oakes*, [1986] 1 S.C.R. 103.
8. The main objective of the challenged provision in this case is, as noted, enhancing public safety and security with longer and more rehabilitative sentences for violent and chronic offenders. This objective is pressing and substantial.
9. The real issue is whether the means chosen here are proportionate to this objective. For reasons much the same as those discussed in the overbreadth analysis, I conclude that this has not been established.
10. The challenged provision is rationally connected to its purpose of enhancing public safety and security. The denial of enhanced credit gives rise to longer periods of custody. It is therefore likely to increase the opportunities of some offenders to access rehabilitative programs.
11. However, the law is neither minimally impairing nor proportionate in the balance it achieves between salutary and deleterious effects.
12. To establish minimal impairment, the Crown must show the absence of less drastic means of achieving the objective in a “real and substantial manner”: *Carter*,at para. 102. The Crown has not discharged that burden. Alternative and more reasonable means of achieving its purposes were open to Parliament. Strathy J.A. provided one example — a law requiring the sentencing judge to consider whether to grant enhanced credit for pre-sentence custody based on (i) the offender’s criminal record, (ii) the availability of rehabilitative programs and the desirability of giving the offender access to those programs, and (iii) whether the offender was responsible for prolonging his or her time in pre-sentence custody. Such a regime would achieve the goal of promoting public safety and security through rehabilitation, without catching chronic or other offenders who pose no risk to public safety.
13. The Crown argues that the provision is reasonably tailored to its objective because it “applies to a relatively narrow class of offenders, focusing on the most serious recidivists”: A.F., at para. 62. But the law plainly does the opposite: it makes any person with a criminal record, even for missed court dates, a potential target for restriction of enhanced credit. In my view, the challenged provision is not minimally impairing of the right to liberty.
14. Finally, I agree with Court of Appeal that the Crown has failed to establish benefits that outweigh the detrimental effect of the challenged provision on the right to liberty. The benefit to public safety by increasing access to rehabilitation programs is not trivial. But the law’s overbreadth means that offenders who have neither committed violent offences nor present a risk to public safety will be unnecessarily deprived of liberty. The Crown has failed to meet that high bar required to justify such a deprivation.
15. I conclude that the challenged provision is not saved under s. 1.
    1. The Court of Appeal’s Reliance on Proportionality of Process
16. The Court of Appeal held that proportionality in the sentencing process is a principle of fundamental justice under s. 7 of the *Charter*, and that the denial of enhanced credit for pre-sentence custody in s. 719(3.1) offends that principle. The court erred in doing so. Proportionality in the sentencing process is not a principle of fundamental justice under s. 7.
17. The content of the principle the Court of Appeal recognized is not entirely clear. Strathy J.A. stated that the principle of proportionality already finds expression in s. 718.1 of the *Criminal Code*: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” He also noted that the principle of proportionality “is informed by other sentencing principles in the Code” (para. 77), including the parity principle, found at s. 718.2(b): “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”. These statements suggest that the Court of Appeal viewed proportionality in sentencing as a comparative concept, concerned with the relationship between the seriousness of the offence committed and the sentence imposed.
18. At the same time, Strathy J.A. emphasized that proportionality is about the sentencing process, not its result. As he put it, proportionality in sentencing entitles an offender “to a *process* directed at crafting a just sentence” and “prevents Parliament from making sentencing contingent on factors unrelated to the determination of a fit sentence”: paras. 82 (emphasis in original) and 85. Proportionality in this sense is more concerned with what considerations properly belong in the sentencing process, and less with the magnitude of the sentence ultimately imposed.
19. Proportionality in the sense articulated at s. 718.1 of the *Code* — that a sentence be proportionate to the gravity of an offence and an offender’s degree of responsibility — is a fundamental principle of sentencing. As LeBel J. stated for a majority of the Court in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37, proportionality is “the *sine qua non* of a just sanction”. It is grounded in elemental notions of justice and fairness, and is indispensable to the public’s confidence in the justice system. LeBel J. went so far as to opine that “proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*”: para. 36 (emphasis added); see also *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 21. LeBel J. also, however, recognized that the “constitutional dimension” of proportionality in sentencing is the prohibition of grossly disproportionate sentences in s. 12 of the *Charter*: para. 36.
20. To say that proportionality is a fundamental principle of sentencing is not to say that proportionality in the sentencing process is a principle of fundamental justice for the purpose of determining whether a deprivation of liberty violates s. 7 of the *Charter*, notwithstanding the *obiter* comment of LeBel J. in *Ipeelee*. The principles and purposes for determining a fit sentence, enumerated in s. 718 of the *Criminal Code* and provisions that follow — including the fundamental principle of proportionality in s. 718.1 — do not have constitutional status. Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the *Charter*. Parliament can limit a sentencing judge’s ability to impose a fit sentence, but it cannot require a sentencing judge to impose grossly disproportionate punishment. It follows, then, that the Court of Appeal erred in declaring proportionality in the sentencing process to be a principle of fundamental justice under s. 7.
21. This conclusion accords with precedent. In *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160, a majority of this Court squarely rejected the proposition that there is “a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12”. The standard imposed by s. 7 with respect to sentencing is the same as it is under s. 12: *gross* disproportionality.
22. I see no reason to depart from that holding here. Proportionality, as expressed in s. 718.1 of the *Criminal Code*, is a foundational principle of sentencing. But the constitutional standard against which punishment is measured is and remains gross disproportionality. Proportionality in the sentencing process is not a principle of fundamental justice under s. 7.
23. Conclusion
24. I would dismiss the Crown’s appeal. The challenged portion of s. 719(3.1) violates s. 7 of the *Charter*, and the Crown has not justified that infringement under s. 1. It is therefore declared to be of no force and effect under s. 52 of the *Constitution Act, 1982*.

*Appeal dismissed.*

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