TAB 7

Pre-Sentence Custody

The Honourable Justice Mara B. Greene
Ontario Court of Justice

The Six-Minute Criminal Defence Lawyer 2011

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CONTINUING PROFESSIONAL DEVELOPMENT

PRE-SENTENCE CUSTODY

A look at Bill C-25 a year after its enactment

INTRODUCTION

On February 22, 2010, the long standing custom of crediting persons on a two for one basis for time spent in pre-trial custody was abruptly halted with the enactment on Bill C-25 – or what is more commonly known as Truth in Sentencing Act. Bill C-25, now encompassed in section 719 of the *Criminal Code*, has been in effect for just over one year. Despite this fact, there has been very little judicial consideration of this section. While on one hand this is surprising given the widespread concern about the dramatic impact this new legislation has on those detained prior to trial, on the other hand, this likely reflects the reality that cases take a long time to make their way through the criminal justice system. To date, there are no Appellate decisions lending guidance to sentencing judges on the how to interpret the new provisions and their constitutionality. This paper attempts to review section 719 and the judicial approach to it since its enactment one year ago.

WHAT IS BILL C-25

Bill C-25 amended section 719 of the *Criminal Code*. While most of section 719 remained the same, Bill C-25 dramatically changed subsection 719(3) and added subsections 719 (3.1)-719(3.4).

Bill C-25 is commonly referred to as the *Truth in Sentencing Act*. Pursuant to Bill C-25, judges no longer have complete discretion to credit for pre-trial custody as they see fit based on the evidence and information presented at sentencing. Instead, their discretion is limited to an upper cap of one and a half days for every day spent in pre-trial custody.

The new provisions provides as follows:

> 719(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).
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> (3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.
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> (3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been granted, the amount of time credited, if any, and the sentence imposed.
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> (3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

Simply put time credited for pre-trial custody is presumptively set at one day for every day spent in pre-trial custody to a maximum of one and a half days for every day spent in pre-trial custody where "circumstances justify it". This enhanced credit, however, cannot be given to persons who have been detained because of their previous criminal record or to persons whose bail has been revoked under sections 524(4) or 524(8) of the *Criminal Code*. The section also requires sentencing judges to provide reasons for granting enhanced credit for pre-trial custody.

It should be noted that the amendments to section 719 do not stand alone. They act in conjunction with changes to the bail provisions which require the justice to state if the primary reason for detention is the accused persons' criminal record. Prior to the amendments, section 515 of the *Criminal Code* (the bail provision) included a requirement that the justice granting or denying release provide reasons for making the order. Bill C-25, however, added an additional term requiring the justice presiding over a bail hearing to record in writing, in the record, if he or she detained a person based on a previous criminal record. Section 515(9.1) states:

> (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.

As Justice Hill noted in his paper Pre-Sentence Custody: A New Era, this provision is peculiar since the existence of a previous conviction alone does not stand as a basis for denying bail[i].

PURPOSE OF THE AMENDMENTS

In order to appreciate the potential arguments on how courts should interpret and apply the truth in sentencing provisions, it is important to understand Parliament's purpose in enacting Bill C-25. In putting Bill C-25 forward, its proponents made numerous comments about the purpose of the T*ruth in Sentencing* bill. As Green J. noted in *R. v. Johnson*, "there is no great challenge in generating a multiplicity of legislative goals from the Parliamentary record".[ii] The Parliamentary record makes it clear that the government was concerned with the Appellate authority that permitted and encouraged sentencing judges to grant enhanced credit for pre-trial custody and their perception that offenders were being overcompensated for their pre-trial

custody. The Parliamentary record also suggests that proponents of the bill wanted to enact legislation that would enhance crime control, increase public safety and enhance public confidence in the criminal justice system by increasing the clarity and transparency of sentences while also discouraging and reducing abuses of the sentencing process.

The Honourable Rob Nicholson stated during the second reading at the House of Commons on April 20, 2009,

> Explanations for the length of a sentence are usually provided in open court at the time of sentencing. However, judges are not required to explain the basis for their decision to award pre-sentence credit. As a result, they do not always do so and this deprives the public of information about the extent of the pre-sentence detention. It leaves people in the dark about why the detention should allow a convicted criminal to receive what is most often considered to be a discounted sentence. This creates the impression that offenders are getting more lenient sentences than they deserve.[iii]

He further stated that the current practice of awarding generous pre-trial custody supported an abuse of the system by offenders,

> There is a concern that the current practice of awarding generous credit for pre-trial custody may be encouraging some of those accused to abuse the court process by deliberately choosing to stay in remand in hope of getting a shorter term of imprisonment once they have been awarded credit for time served.[iv]

In this same speech, the Honourable Rob Nicholson further stated, that that the practice of giving enhanced credit also serves to erode confidence in the criminal justice system.[v]

In this same vein, the Honourable John D. Wallace stated on June 16, 2009, during the second reading at the Senate, that the new truth in sentencing legislation will serve to make sentences more consistent and provide more clarity to the public on sentencing. He also stated that the present practice of awarding two for one erodes confidence in the administration of justice.

In relation to consistency he made the following comments:

> I am sure we have all read newspaper accounts of sentences that seem to be far shorter than they should be. This situation is sometimes due to the fact that credit for time served before trial has been taken into account, but which is not always reported. The reader of that article may be left with the impression that the offender "got off" lightly.
>
> Courts have stated that credit for time served takes into account overcrowding in remand facilities and the lack of programming in remand facilities, as well as the fact that time spent in remand custody does not count toward eligibility for full parole and statutory release. In some instances, higher credit, for example, three to one, has been awarded to take into account harsh conditions of pre-trial condition such as extreme overcrowding.
>
> Courts have awarded less than two-to-one credit in some circumstances, for example, where the offender unlikely to obtain early parole due to his or her criminal record or because the time spent in remand custody was as a result of a breach of bail conditions.
>
> Bill C-25 will provide a more consistent approach to this issue....[vi]

In relation to clarity and the integrity of the justice system and protection of the public, he made the following comments:

> As I noted earlier, another concern about awarding credit for time served is the lack of clarity about the sentence imposed. Explanations for the length of the sentence imposed are usually provided orally in open court at the time of sentencing, but there is currently no requirement for judges to explain the amount of credit awarded for this pre-sentence custody. As a result, the public does not have easy access to information about the extent of pre-sentence detention or how that influenced the actual sentence imposed. The impression is that offenders are getting more lenient sentences than they deserve because it is hard to understand how such sentences comply with the fundamental purposes of sentencing, that is, denouncing unlawful conduct, deterring the offender from committing other offences and protecting society by keeping convicted criminals off the streets. The practice of awarding two-to-one or even greater credit erodes public confidence in the integrity of the justice system and undermines the commitment of the government to enhance the safety and security of Canadians.[vii]

It was also his position that the new regime will help unclog the backlog in our system by serving as an incentive for accused persons to push forward with their cases.[viii]

In *R. v. Johnson,* while considering the government's stated objectives of the legislation as highlighted in the parliamentary record, Green J. noted that the primary objective of the legislation is clearly articulated in the preamble to the bill itself, which is to limit credit for time spent in pre-trial custody in order to avoid overcompensating offenders for time spent in pre-trial custody. Green J. stated,

> [84] I think it is analytically useful to independently identify Parliament's principal concern and, as well, the mitigative impacts Bill C-25 is intended to provide. The primary legislative objective is clearly that expressed in the prologue to the Bill: "*to limit credit for time spent in pre-sentence custody*". The Bill's core rationale is the conviction that accused persons ordered detained pending their trials are overcompensated for their pre-sentence custody. This overcompensation is said to have three major realms of adverse consequence, all of which Bill C-25 is designed to remedy. First, overcompensation – or, in the government's words, the "overly generous" extension of the pre-sentence custody credit – engenders a public perception that criminals are being treated leniently which, in turn, compromises respect for the administration of justice. Second, overcompensation fails to adequately punish offenders for their crimes, particularly those who, in the view of the government, are most worthy of incarceration and are ultimately responsible for their own pre-trial detention. Third, overcompensation creates an incentive for defendants in pre-sentence custody to "abuse" the system by, in effect, ragging the puck while in remand, a pattern of conduct that leads to overcrowding in remand centres, congestion in the courts and delay in the prosecution of charged crimes. Bill C-25, by limiting pre-sentence custody, is intended to facilitate achievements of these various objectives.[ix]

Green J., in his reasons for judgment, agreed that the new provisions advanced the government's purpose of enhancing clarity and transparency. He went on to find, however, that the allegation

by the government of wide spread abuse of the system created by over generous compensation for pre-trial custody, is not supported on the evidence. He stated as follows,

> [97] The Minister relied exclusively on a very small collection of anecdotal evidence to advance the claim of "abuse" by detained offenders. Undoubtedly there are some cases of deliberate foot-dragging by accused persons in remand custody. However, there is simply no empirical evidence to support the suggestion that their occurrence is pervasive or widespread. In effect, routine application of the 1:1 (at maximum) credit regime set out in sub-s 719(3) penalizes all offenders denied bail for the "abuses" of a few. In any event, Canadian appellate courts have consistently made clear that offenders who endeavour to delay their trials or otherwise manipulate or exploit the system are to be denied enhanced pre-sentence custody credit...[x]

CONSTITUTIONALITY OF SECTIONS 719(3) AND 719(3.1)

Just last month, Green J. considered the constitutionality of these new provisions in *R. v. Johnson.* Specifically, he considered whether sections 719(3) and 719(3.1) of the *Criminal Code* violate sections 7 and 15 of the *Charter.* In a lengthy, thorough and well reasoned judgment, Green J concluded that the sections 719(3) and 719(3.1) do not violate sections 7 and 15 of the *Charter.*

In finding that there is no violation of section 15 of the *Charter*, Green J. found that the new provisions treat all offenders equally and that they do not create a distinction based on an enumerated or analogous ground. Green J. recognized that a disproportionate number of black and aboriginal persons may be captured by the new provisions, however, he found that "they do not distinguish the Applicant from other offenders on the basis of heritage, either in intent or effect". [xi]

In finding that the legislation did not violate section 7 of the *Charter* Green J. held that this finding was dependant on his interpretation of section 719(3.1). He found that capping pre-sentence custody at 1:1 does little or nothing to enhance the articulated state interest in enacting the section. This conclusion was based on his finding that the capping provisions have no "real relation to the [legislative] goal of curbing these putative abuses and thereby decongesting remand centres and the courts". He further found that the new provisions do not "afford any grounded assurance of enhanced crime control or public safety or "increase respect for the administration of justice by reasonable persons properly informed about the philosophy the legislative provisions, charter values and the actual circumstances of the case".[xii] He went on to state that if the purpose of the legislation was to afford no more than fair compensation for pre-trial custody "and thereby both purge the incentive for abuse and the public optic of overly generous dead-time credit, a discretionary credit ratio extending to 1.5:1 (reflecting a realistic calculation of lost remission), as opposed to a maximum of 1:1, would suffice".[xiii]

Ultimately, Green J. held that if under the new provisions the presumptive rule is one day credit for every day spent in pre-trial custody, then the means "are too sweeping in relation to the objective". However, Green J. found this was not how the new provisions ought to be interpreted and as such they do not violate section 7 of the *Charter*. Green J. held that properly construed sections 719(3) and 719(3.1) do not offend the proportionality and parity principles captured in ss.7 and 12 of the *Charter*.[xiv] He further held that properly construed these provisions afford fair credit for the compensable losses or liabilities associated with remand custody.[xv]

JUDICIAL INTERPRETATION OF SECTION 719(3.1) OF THE *CRIMINAL CODE*

Section 719(3) of the *Criminal Code* on its face, is relatively clear. It requires sentencing judges to give one day credit for every day spent in pre-trial custody. Section 719(3.1), however, is less clear. It allows a sentencing judge to provide enhanced credit in limited circumstances. Pursuant to section 719(3.1) enhanced credit is not allowed:

a) where the offender was detained primarily because of a previous conviction; or

b) where the offender was detained in custody because his/her bail was revoked as a result of a justice finding that the offender had committed a new indictable offence or had contravened or was about to contravene the terms of the original interim release order.

A trial Judge may only give enhanced credit at a rate of 1.5 days for every day spent in pre-trial custody where "circumstances justify it".

I have already briefly addressed the prohibitions in granting enhanced credit where an accused person is detained primarily because of his or her criminal record. The second prohibition is, in my view, clear on its face and does not require further discussion at this point. What is more problematic is the interpretation of the phrase where "circumstances justify it". There has been little judicial commentary and interpretation of this phrase. Green J. provides the most thorough interpretation of this phrase.

As previously stated Justice Green's conclusion that the new provisions do not violate section 7 of the *Charter* is based on his interpretation of what the phrase "if circumstances justify it" means. In his reasons for judgment in *R. v. Johnson*, Green J. held that enhanced credit is not limited to exceptional cases. In fact, one might suggest that on his interpretation the maximum enhanced credit should be granted in most cases. This is because, according to Green J., enhanced credit may be granted by trial judges to address the loss of remission and delayed parole eligibility arising from the pre-trial custody. In almost every case, those detained in pre-trial custody will suffer the loss of remission and delayed parole eligibility. In reaching this conclusion, Green J. stated,

> The constitutionally graceful reading is simply one that recognizes that the loss of remission is a "circumstance" that justifies eligibility for enhanced credit. The loss of remission calculation most closely (if not perfectly) translates, as said by Professor Doob and many others, into a pre-sentence custody ratio of 1.5:1. While the metric may not entirely compensate for the quantitative loss of all remand prisoners (particularly for that very small proportion who are likely to secure early parole and for whom a higher credit ratio may be more appropriate), it does track the condition of the vast majority of detained offenders – reliably, predictably and, in most cases, with arithmetic integrity.[xvi]

Green J., in *R. v. Johnson*, further found that in addition to the above mentioned quantitative considerations to pre-trial custody, courts have historically also provided enhanced credit for pre-trial custody for qualitative reasons. These reasons include onerous prison conditions and the lack of programming in pre-trial detention centres. Green J. held that these "qualitative" concerns are not circumstances that justify enhanced credit under section 719(3.1). Instead, he found that trial judges ought to a take into account these qualitative concerns in assessing the mitigating factors and the appropriate sentence,

> Sentencing judges retain a further discretion, in addition to and independent of s.719, to consider as a mitigating feature any particularly onerous conditions suffered by remand offenders as they await the disposition of their cases. While any quantitative credit authorized by s.719 is, at the end of the sentencing exercise, deducted from an otherwise fit sentence, the assessment of a qualitative claim to hardship or oppression for which the state is said to be responsible is one of the many considerations, mitigative and aggravating, that factor into the calculus of crafting a just, appropriate and individualized sentence in any and every case.[xvii]

It is important to note, and as Green J. points out in his reasons for judgment in *R. v. Johnson*, the historical rationales for the custom of granting two days credit for every one day spent in pre-trial custody remains today. This was made clear by LaForme J.A. speaking for the Court in *R. v. Monje*, 2011 ONCA 1,

> ...that, to the extent that the recently legislated "new rules" [the Bill C-25 amendments] concerning credit for pre-sentence custody limit an offender's entitlement to credit on a 2:1 basis, the reality of what "dead time" is remains. That is, pre-sentence custody continues to be "dead time" for the same reasons Laskin J.A. noted in *Rezaie* and remains as one of the most punitive forms of imprisonment in Canada.[xviii]

While Green J.'s judgment is to date the most exhaustive on the subject and the only case to deal with the constitutionality of the section there are a few other judgments that must be kept in mind.

In *R. v. Campbell,*[xix] Hill J. granted enhanced credit under section 719(3.1) for time spent in pre-trial custody. Mr. Campbell was granted bail on the criminal charge but nonetheless remained in custody because of an immigration detention order. In deciding that the circumstances justified enhanced credit, Hill J. considered the fact that Mr. Campbell was "separated from his family in England, the conditions of the local remand detention, and the ineligibility of PSC days

in parole calculation".[xx] It appears from this decision, that Hill J. considered both qualitative and quantitative factors under section 719 (3.1) of the *Criminal Code.*

In *R. v. Brenton*[xxi], Gorman J. summarized what he found are the applicable principles in the new legislation:

> [16] the applicable principles can be summarized as follows:
>
> 1. the court "may" consider any period spent in pre-sentence custody by an offender in determining an appropriate sentence;
>
> 2. the court is not required to provide a credit for such pre-sentence custody when imposing a period of imprisonment
>
> 3. if a credit is given for pre-sentence custody, then the maximum allowed is one day of credit for every day spent in pre-sentence custody. I would describe this as the general rule. Thus, in the vast majority of cases an offender who has spent a period of time in presentence custody will receive a one for one credit;
>
> 4. this general rule is subject to one exception: the credit can be raised to one and one-half days for each day spent in custody, but only if the "circumstances justify it". Since this is an exception to the general rule, evidence in support of an enhanced credit will normally be required. The presumption that pre-sentence custody deserves an enhanced credit no longer exists and a two for one credit is no longer an option.
>
> 5. if any credit is given to an offender for time spent in pre-sentence custody, the Court must indicate why it has been given; and
>
> 6. When imposing sentence in a case in which there has been a period of pre-sentence custody, the Court must indicate the following:
>
> i. the period of time the offender spent in pre-sentence custody
>
> ii. the period of imprisonment which would have been imposed, but for the pre-sentence custody;
>
> iii. the amount of the credit given; and
>
> iv. the sentence imposed[xxii]

It appears that Gorman J. takes a somewhat different approach than Green J. in *Johnson* on the interpretation to the phrase "if circumstances justify it". Gorman J. held that there is no presumption of enhanced credit and that as it is an exception, evidence to support the request will generally be required. In *R. v. Brenton,* Gorman J. ultimately credited Mr. Brenton one day for every day spent in pre-trial custody as there was no basis, in his view, to grant enhanced credit.

In *R. v. Hindmarch*,[xxiii] Fisher J. of the British Columbia Superior Court appears to have taken the same approach as Gorman J. - that evidence is required in order to justify an increase in credit for time spent in pre-trial custody. In sentencing Mr. Hindmarch, Fisher J. stated,

> Mr. Hindmarch has been in custody for 71 days which is approximately two and a half months. There is no evidence before me to justify an increase in credit for time served so he will be given a credit of 2.5 months for an effective sentence of 18.5 months.

CONCLUSION

Section 719, as amended, is still in its infancy with conflicting case law from the trial Courts across the country about its interpretation and application. We can expect that in the next few years, as cases wind their way through the system, there will be more trial court decisions and appellate guidance on the constitutionality of the new provisions, their interpretation and their application.

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[i] Justice C. Hill, "Pre-Sentence Custody Credit – The New World", in The Six Minute Criminal Court Judge (2010)
[ii] *R. v. Johnson*, [2011] O.J. No. 822 (O.C.J.)
[iii] House of Commons, Sponsor's speech, April 20, 2009 at 1220)
[iv] *Supra,* endnote iii
[v] *Supra,* endnote iii
[vi] Senate, Sponsor's speech, June 16, 2009
[vii] *Supra,* endnote vi
[viii] *Supra,* endnote vi
[ix] *R. v. Johnson, supra note* ii at ¶84

[x] *Supra Johnson,* at ¶ 97
[xi] *Supra, Johnson,* at ¶130
[xii] *Supra, Johnson,* at ¶155
[xiii] *Supra, Johnson,* at ¶156
[xiv] *Supra,* Johnson, at ¶¶158-159
[xv] *Supra Johnson,* at ¶198
[xvi] *Supra,* at ¶172
[xvii] *Supra Johnson* at¶199
[xviii] *R. v. Monje*, 2011 ONCA 1 at ¶18 and *R. v. Johnson, supra*, at ¶41
[xix] *R. v. Campbell,* [2010] O.J. No. 5500 (S.C.J.)
[xx] *Supra,* at ¶37
[xxi] *R. v. Brenton,* [2010] N. J. No. 120 (Nfld and Labrador Prov. Crt.)
[xxii] *Supra* at ¶16
[xxiii] *R. v. Hindmarch,* [2010] BCJ No. 1773 (BCSC)