Federal Court  Cour fédérale

Date: 20121211

Docket: T-671-12

Citation: 2012 FC 1463

Ottawa, Ontario, December 11, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BRENT WILLIAM VAN BUSKIRK

Applicant

and

CANADA (SOLICITOR GENERAL)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks judicial review of the calculation of his parole eligibility dates by the Chief of Sentence Management [CSM] at Kent Institution in Agassiz, British Columbia. According to the Applicant, the CSM committed an error of law by including the community supervision portion of his youth sentence in calculating his day parole, full parole, and statutory release dates [eligibility dates] under the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. The

Applicant asks this Court to order that his eligibility dates be recalculated to exclude the community supervision portion of his youth sentence.

II. Judicial Procedure

[2] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of the CSM's decision, dated February 29, 2012.

III. Background

[3] The Applicant, Mr. Brent William van Buskirk, was born in 1986 and is a first-time offender serving an aggregate sentence of 17 years, 2 months.

[4] On August 29, 2004, the Applicant (a few weeks before his 18th birthday) murdered an individual pursuant to a contract killing for profit.

[5] In December 2004, the Applicant (then aged 18) entered into a conspiracy with a co-conspirator to murder an individual. The conspiracy did not come to fruition.

[6] In January 2005, the Applicant entered into another conspiracy to kill another individual. This conspiracy did not proceed beyond the planning stage.

[7] On December 21, 2006, the Applicant received a 24 month custodial sentence for the common-law offence of contempt of court [contempt of court sentence] because he refused to be sworn and to give evidence in the trial of his co-conspirator.

[8] On November 30, 2007, the Applicant plead guilty to first degree murder and received a sentence under subparagraph 42(2)(*q*)(i) of the *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*] of 6 years in custody [custodial *YCJA* sentence] and 4 years of conditional community supervision [non-custodial *YCJA* sentence]. One year and 2 months were deducted from the custodial *YCJA* sentence for time already served.

[9] On December 10, 2007, the Applicant received concurrent sentences of 8 and 6 years for two counts of conspiracy to commit murder [adult conspiracy sentences] under paragraph 465(1)(*a*) of the *Criminal Code*, RS, c C-34, s 1 [*Code*]. The Applicant's adult conspiracy sentences were to run consecutively to his contempt of court sentence and the *YCJA* sentences. The Applicant received a credit of 1 year for pre-sentence custody towards each count of conspiracy to commit murder.

[10] The Applicant's sentences commenced on December 21, 2006.

[11] On December 13, 2007, the Correctional Service of Canada [CSC] informed the Applicant that his warrant expiry date was February 20, 2024, his statutory release date was June 1, 2018, his full parole eligibility date was December 19, 2012, and his day parole eligibility date was June 19, 2012.

[12] In calculating the Applicant's eligibility dates, the CSC had included his non-custodial *YCJA* sentence, bringing his aggregate sentence to 17 years and 2 months.

[13] On February 27, 2012, the Applicant made submissions to the CSM requesting an affidavit outlining his eligibility dates and asking if the combined sentences were considered one sentence under section 139 of the *CCRA*.

[14] On February 29, 2012, the CSM confirmed that all of the Applicant's sentences were considered one sentence under section 139 of the *CCRA* and provided the affidavit requested by the Applicant and described in paragraph 11, above.

[15] On June 13, 2012 and October 23, 2012, the *CCRA* was amended to make express Parliament's intention that non-custodial youth sentences under subparagraph 42(2)(*q*)(i) would be included in calculating an individual's eligibility dates for full parole and day parole, an individual's statutory release date, and an individual's warrant expiry date.

IV. Decision under Review

[16] The CSM determined that the Applicant's sentences had been merged under section 139 of the *CCRA*. In merging these sentences, the CSM included his 48-month non-custodial *YCJA* sentence. The CSM consequently calculated his eligibility dates according to an aggregate sentence of 17 years and 2 months.

[17] According to the CSM's calculations, the Applicant's eligibility date for day parole was June 19, 2012 and for full parole was December 19, 2012, his statutory release date was June 1, 2018, and his warrant expiry date was February 20, 2024.

V. Issue

[18] Do the recent amendments to the *CCRA* apply to the Applicant to include his non-custodial *YCJA* sentence in determining his eligibility dates?

VI. Relevant Legislative Provisions

[19] Please see Annex "A" for the relevant legislative provisions of the *CCRA* (including those provisions coming into force on June 13, 2012 and October 23, 2012 pursuant to the amendments to the *CCRA*).

[20] Please see Annex "A" for the relevant legislative provisions of the *CCRA* that applied before the amendments to the *CCRA* came into force on June 13, 2012 and October 23, 2012.

[21] Please see Annex "A" for the relevant legislative provisions of the *YCJA*.

[22] Please see Annex "A" for the relevant provisions of the *Code*.

VII. Position of the Parties

[23] In essence, the Applicant submits that his non-custodial *YCJA* sentence should not be included in determining his parole eligibility dates because parole cannot attach to non-custodial sentences.

[24] The Applicant cites *P(J) v Canada (Attorney General)*, 2009 FC 402, [2010] 3 FCR 3, aff'd 2010 FCA 90, [2011] 4 FCR 29, for the proposition that a non-custodial *YCJA* sentence does not

fall within the meaning of "sentence" under the *CCRA* for the purposes of calculating parole eligibility dates. According to the Applicant, the facts of *P(J)* parallel those in the present case, with two exceptions: (i) the Applicant was sentenced under subparagraph 42(2)(*q*)(i) of the *YCJA*; and, (ii) he also received consecutive sentences as an adult under the *Code*.

[25] The Applicant states that his sentence was converted into an adult offence under paragraph 743.5(1) of the *Code* when he was sentenced for a term of imprisonment for conspiracy to commit murder.

[26] According to the Applicant, the *CCRA* defines "sentence" to mean a sentence of imprisonment and youth sentence imposed under the *YCJA*.

[27] The Applicant acknowledges that legislative reform to *Safe Streets and Communities Act* [*SSCA*] has expanded the definition of sentence in the *CCRA* to include custodial and community supervision sentences.

[28] Notwithstanding these amendments, the Applicant argues that interpreting "sentence" to include his non-custodial youth sentence is fundamentally flawed and that parole is a discretionary form of release that allows an offender to serve a portion of his custodial sentence outside the physical confines of a penal institution, it is inconsistent with and cannot attach to a sentence, or portion of a sentence that is non-custodial. The Applicant cites *R v CAM*, [1996] 1 SCR 500 for the proposition that custodial and non-custodial sentences are fundamentally different and *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 for the proposition that parole cannot apply to an offender who was

under a conditional sentence of imprisonment and not incarcerated. The Applicant, referring to *P(J)*, above, also observes that parole cannot be granted to a young offender who has been conditionally released. Finally, the Applicant refers this Court to *R v K(C)*, 2008 ONCJ 236, which held that "[t]reating a transferred youth exactly like an adult runs into an immediate difficulty in [sic] calculation of the sentence itself" because a conversion can result in a person receiving a sentence of imprisonment in excess of the 6-year period limited by the *YCJA*.

[29] The Respondent argues that the CSM did not err in calculating the Applicant's parole eligibility, statutory release, and warrant expiry dates. According to the Respondent, the Applicant's non-custodial *YCJA* sentence should be included in determining his parole eligibility due to recent amendments to the *CCRA*.

[30] The Respondent submits that Parliament introduced the *SSCA* to extend the meaning of sentence under sections 2 and 99 of the *CCRA* to include non-custodial youth sentences in response to *P(J)*, above.

[31] In particular, section 196 of the *SSCA* modifies the definition of sentence in section 2 of the *CCRA* to include a youth sentence consisting of a custodial portion and a non-custodial portion. As modified by section 197 of the *SSCA*, paragraph 99(2)(*b*) of the *CCRA* also now provides that the expiration of a sentence refers to the day on which the sentence expires, notwithstanding the non-custodial portion of a youth sentence. Finally, section 75 of the *SSCA* introduces section 119.2 of the *CCRA*, which provides that, for the purposes of section 120 to 120.3 of the *CCRA*, parole

eligibility for a youth sentence is determined on the basis of the total of its custodial and non-custodial periods.

[32] The Respondent states that section 76 of the *SSCA* came into force on June 13, 2012 and sections 196 and 197 of the *SSCA* came into force on October 23, 2012.

[33] According to the Respondent, the CSM calculated the Applicant's parole eligibility on the basis that (i) his youth sentences were converted into adult sentences under subsection 743.5(1) of the *Code* and that (ii) his youth and adult sentences were merged into one sentence under section 139 of the *CCRA*.

[34] According to the Respondent's construction, section 743.5 of the *Code* deems a *YCJA* sentence to be a sentence imposed under the *Code* where an individual receives a youth sentence under subparagraph 42(2)(*q*)(i) of the *YCJA* but receives a subsequent sentence as an adult. The Respondent reasons that section 743.5 of the *Code* brings the Applicant's youth sentence within the scope of subsection 139(1) of the *CCRA*. In the interpretation advanced by the Respondent, subsection 139(1) provides that an individual is deemed to have been sentenced to one sentence if he or she is (i) subject to a sentence that has not expired and (ii) receives additional sentences [merged sentence]; the merged sentence begins on the first of those sentences to be served and ends on the expiration of the last of them to be served.

[35] The Respondent argues that the Applicant's consecutive sentences trigger section 120.1 of the *CCRA*, which outlines how parole is calculated if additional consecutive sentences are imposed.

Pursuant to section 120.1 of the CCRA, the Applicant's eligibility for parole is calculated from December 10, 2007, the date of the imposition of his youth sentence of 8 years and 2 months and his adult sentence for conspiracy to commit murder of 7 years. The Respondent claims that the Applicant's parole eligibility is determined on the basis of a sentence of 15 years and 2 months.

[36] The Respondent argues that the Applicant's eligibility date for full parole is 1/3 of his consecutive sentence of 15 years and 2 months under subsection 120(1) and section 120.1 of the *CCRA*. Under paragraph 119(1)(*c*) of the *CCRA*, the Applicant became eligible for day parole 6 months before he becomes eligible for full parole. The effect of these provisions, the Respondent submits, is that the Applicant's eligibility dates are December 19, 2012 and June 19, 2012 for full parole and day parole, respectively.

[37] The Respondent states that section 127 of the *CCRA* entitles a person serving a determinate sentence to release after serving a period of custody of not less than 2/3 of their sentence [statutory release date]. Based on a sentence of 17 years and 2 months, the Applicant's statutory release date is June 1, 2018.

[38] The Respondent further claims that an order in the Applicant's favor will have the effect of reducing his sentence by four years. This, he argues, is inconsistent with section 743.5 of the *Code* and makes *P(J)*, above, distinguishable.

[39] The Respondent submits that the Applicant's real purpose in bringing this application for judicial review is to reduce his sentence. According to the Respondent, if the Applicant's non-

custodial *YCJA* sentence is not converted under section 743.5 of the *Code* and merged under section 139 of the *CCRA*, it will either disappear or remain as a concurrent portion of a youth sentence under the YCJA. This will reduce his sentence for first-degree murder by four years. The Respondent submits that this is not consistent with the sentencing decision of the British Columbia Supreme Court in *R v van Buskirk*, 2007 BCSC 1925, which expressly made the Applicant's sentence for conspiracy to commit murder consecutive to his sentence for first degree murder. Nor, the Respondent argues, is this interpretation consistent with a plain reading of sections 743.5 of the *Code* and 139 of the *CCRA*, which seek to treat offenders with multiple consecutive offences as adults serving a single sentence under the *Code*.

[40] *P(J)*, above, according to the Respondent, addressed the discrete issue of including non-custodial youth sentences in calculating parole eligibility. By contrast, the Applicant's consecutive adult sentence triggered the application of subsection 743.5(1) of the *Code*. The Respondent reasons that the effect of subsection 743.5(1) is that the *YCJA* no longer applies to the Applicant. Since subsection 743.5(1) deems the Applicant to having been sentenced under the *Code*, the Respondent submits that the *YCJA*'s provisions with respect to community supervision, conditional supervision, and continuation of custody no longer apply. According to the Respondent, the Federal Court of Appeal in *P(J)*, above, did not address the sentence conversion and merger provisions in sections 743.5 of the Code and 139 of the *CCRA* and, as a result, is neither guiding nor binding on this Court.

[41] The Respondent submits that, should this Court find that the amendments to the *CCRA* in the *SSCA* do not apply to the Applicant because they came into effect after he was sentenced, then it

should direct the CSC to administer the sentence in a manner consistent with the terms of the youth sentence under the *YCJA*. In particular, this Court should order the CSC to convert the supervision *YCJA* sentence of 4 years into a similar period of statutory release under the *CCRA*. The Respondent reasons that the statutory release provisions in section 127 of the *CCRA* are analogous to the community supervision provisions in subparagraph 42(2)(*q*)(i) of the *YCJA*. Such an approach would convert the Applicant's first degree murder sentence into a period of four months and two years in prison and a period of statutory release for four years.

[42] The Respondent submits that this approach respects the intention of Parliament as expressed in sections 743.5 of the *Code* and 139 of the *CCRA* and that it maintains the integrity of the sentence, respects the principles informing youth sentences under the *YCJA*, and avoids the potential problem of subjecting the Applicant to the dual jurisdiction of the Parole Board of Canada (while on parole) and of the provincial director, youth workers, and youth justice court (while serving his non-custodial *YCJA* sentence).

[43] Finally, the Respondent argues that this application for judicial review is moot or will likely be moot at the date of the hearing of this application for judicial review. According to the Respondent, the Applicant became eligible for day parole under subsection 119(1) of the *CCRA* on June 19, 2012 and will be eligible to apply for day parole on December 19, 2012.

[44] The Respondent cites *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 for the proposition that a decision of a court is moot if it will not have the effect of resolving a controversy which affects or may affect the rights of the parties. The Respondent states that a decision on this

application for judicial review has no practical effect because (i) the Applicant will likely be eligible to apply for full parole by the time it is heard and (ii) it is unlikely that it will have any practical effect on similarly-situated applicants.

[45] The Respondent distinguishes *P(J)*, above, where this Court and the Federal Court of Appeal adjudicated a moot parole eligibility question on *YCJA* and adult sentencing because the issue would very likely arise in subsequent applications. The Respondent argues that this rationale does not extend to this application for judicial review because amendments to the *CCRA* prevent applications on similar facts from succeeding. In particular, these amendments express Parliament's intention that both custodial and non-custodial portions of sentences under the *YCJA* are included in calculating parole eligibility.

VIII. Analysis

[46] In *P(J)*, above, Justice Richard Mosley of this Court held that the interpretation of the parole eligibility provisions is the standard of correctness (at para 10).

[47] This Court follows Justice Mosley's determination of the applicable standard of review. The correctness standard is even more appropriate because the dispositive question in the application for judicial review is the temporal application of recent amendments to the *CCRA*. A question as to the temporal application of a law is a question of law that is "of central importance to the legal system … and outside the … specialized area of expertise" of the CSM. Under *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 such a question of law attracts the standard of correctness.

[48] The critical question in this application for judicial review is whether the Applicant's non-custodial *YCJA* sentence can be included in calculating his parole eligibility dates. A plain reading of paragraph 743.5(3)(*a*) of the *Code* suggests that the Applicant's non-custodial *YCJA* sentence must be included in calculating his parole eligibility under the *CCRA*.

[49] This Application represents an interesting departure from the facts underlying the Federal Court of Appeal's decision in *P(J)*, above. The applicant in *P(J)* was convicted and sentenced as a youth under the *YCJA* for second degree murder and did not receive a consecutive sentence as an adult under the *Code*. Conversely, this Applicant was convicted and sentenced as a youth under the *YCJA* for first degree murder and was subsequently convicted and sentenced consecutively as an adult under the *Code*.

[50] The facts underlying this Application attract a different matrix of statutory provisions than those underlying *P(J)*. For the purposes of this Application, the most important of these statutory provisions is paragraph 743.5(3)(*a*) of the *Code*, which provides that, where subsection 743.5(1) applies, the remainder of a youth sentence and a subsequent term of imprisonment are deemed to constitute one sentence of imprisonment for the purposes of section 139 of the *CCRA*. Subsection 743.5(1) provides that if a young person or an adult is or has been sentenced to a term of imprisonment for an offence while subject to a youth sentence imposed under paragraph 42(2)(*q*) of the *YCJA*, the remaining portion of the youth sentence shall be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under the *Code*.

[51] The dispositive issue in *P(J)* was the definition of "sentence" in section 2 of the *CCRA* and whether that definition could encompass a non-custodial youth sentence. In holding that it could not, the Federal Court of Appeal reasoned that the definition of "sentence" in section 2 of the *CCRA* was limited to custodial sentences:

> [55] To begin with, it is important to note that the definition of "sentence" found in subsection 2(1) of the *CCRA* says that it "means a sentence of imprisonment and includes ... a youth sentence imposed under the *Youth Criminal Justice Act*."
>
> ...
>
> [63] Consequently, although I found the appellant's argument regarding the unity of the youth sentence under the *YCJA* initially attractive, I do not see any merit in it given the wording of the *CCRA* and the *YCJA*. Even if it is true [that] a sentence imposed under subparagraph 42(2)(q)(ii) of the *YCJA* is a "single sanction", only the custody portion thereof constitutes a "sentence of imprisonment" …

[52] The Federal Court of Appeal in *P(J)* supported its reasoning by reading the definition of "sentence" in section 2 of the *CCRA* in conjunction with subsections 89(1) and (3) of the *YCJA*:

> [62] Subsection 89(1) of the *YCJA* provides that a young person, aged 20 or older, must be sent to an adult facility to serve his period of custody. It is therefore my view that that period is the only period to which, pursuant to subsection 89(3) of the *YCJA*, the *CCRA* and the [*Prisons and Reformatories Act*] are directed by Parliament to apply. Thus, it necessarily follows that the parole scheme of the *CCRA* can only be concerned with a young person's period of custody to the exclusion of his period of supervision.

[53] The critical distinction between this Application and *P(J)* is that subsection 743.5(1) and paragraph 743.5(3)(*a*) of the *Code* apply to the Applicant but did not apply to the applicant in *P(J)*. The Applicant is subject to the conversion provisions under section 743.5 of the *Code* because he was sentenced to a term of imprisonment for an offence while subject to a youth sentence imposed under paragraph 42(2)(*q*) of the *YCJA*. The effect of the subsection 743.5(1) of the *Code* is that his youth sentence under paragraph 42(2)(*q*) of the *YCJA* must be dealt with, for all purposes under the *Code* or any other Act of Parliament (including the *CCRA*), as if it had been a sentence imposed

under the *Code*. Since subsection 743.5(1) applies to the Applicant, paragraph 743.5(3)(*a*) also applies.

[54] Neither the Applicant nor the Respondent dispute that section 743.5 applies.

[55] The effect of paragraph 743.5(3)(*a*) of the *Code* is that the rationale underlying the Federal Court of Appeal's decision in *P(J)* cannot apply to this Application. The issue in *P(J)* was that the definition of "sentence" in section 2 of the *CCRA* had been limited to a sentence of imprisonment. By contrast, paragraph 743.5(3)(*a*) deems the Applicant's non-custodial *YCJA* sentence and subsequent terms of imprisonment to constitute one sentence of imprisonment for the purposes of section 139 of the *CCRA*.

[56] This statutory matrix neutralizes the impact of the definition of "sentence" in section 2 of the unamended *CCRA* that was so critical in *P(J)*. By virtue of paragraph 743.5(3)(*a*) (which was in force when the Applicant was sentenced), the Applicant's non-custodial *YCJA* sentence was deemed a single sentence of imprisonment for the purpose of the sentence merger provisions in section 139 of the *CCRA*. Under section 139, his non-custodial *YCJA* sentence merged with his other sentences into a single sentence for the purpose of calculating his parole eligibility dates under sections 119 and 120.1 of the *CCRA*. This single sentence began on the first day of the first of his sentences to be served and ends on the last day of the last of them to be served.

[57] In sum, this Application engages a provision (paragraph 743.5(3)(*a*) of the *Code*) that did not arise on the facts in *P(J)* and therefore could not have influenced the Federal Court of Appeal's

determination. In this Application, the conversion provisions in section 743.5(3) of the *Code* merged the Applicant's non-custodial *YCJA* sentence with his other sentences of imprisonment into a single sentence of imprisonment for the purpose of applying the merger provisions of the *CCRA*. In *R v C(A)*, 2008 ONCJ 613, Justice Paul Robertson of the Ontario Court of Justice came to a similar conclusion in interpreting the conversion provisions of the Code: "[The effect of section 743.5 is that a young offender] has now been sentenced on the adult matters and is therefore presently serving [a] sentence, any youth sentence that I impose will be treated as if it was imposed under the *Criminal Code* as opposed to the *YCJA* and that the sentences will be treated as a single sentence, pursuant to s. 139 of the *Corrections and Conditional Release Act*" (at para 18).

[58] The undersigned member of this Court observes, *in obiter*, that if paragraph 743.5(3)(*a*) had not applied, this Court would have had to consider whether the amendments to the *CCRA* apply to the Applicant. To answer this question, this Court would have been required to assess the temporal application of section 2 "sentence", paragraph 99(2)(*b*), and section 119.2 of the *CCRA*.

[59] Before proceeding, it is helpful to consider the distinction that Professor Ruth Sullivan draws between legislation of retroactive, retrospective and immediate application. While legislation of retroactive application operates to "change the past legal effect of a <u>past</u> situation" and legislation of retrospective application operates to "change the <u>future</u> legal effect of a <u>past</u> situation", legislation of immediate application operates to "change the *future* legal effect of an <u>on-going</u> situation" [Emphasis added] (Professor Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 669).

[60] *Gustavson Drilling (1964) Ltd v Canada (Minister of National Revenue – MNR),* [1977] 1 SCR 271 holds that there is a presumption that legislation is not construed to have retrospective effect unless "such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior it its enactment. In those instances the statute operates retrospectively". In the present case, section 119.2 of the *CCRA* came into force on June 13, 2012 and the amended definition of "sentence" in section 2 and the amended version of paragraph 99(2)(*b*) came into force on October 23, 2012. The Orders-in-Council giving effect to the *SSCA* did not specify whether the amendments to the *CCRA* would be deemed to come into force before this date (SI/2012-48 (2012) C Gaz II, 1627; SI/2012-40 (2012) C Gaz II, 1410). Consequently, the presumption against retroactivity is not rebutted.

[61] Even though paragraph 743.5(3)(*a*) is determinative of this Application and the Respondent did not specifically address the presumption of retroactivity, this Court finds that it may be worthwhile to consider if the *CCRA* amendments would have been of immediate or retroactive application if the Applicant were not subject to section 743.5.

[62] In *Quebec (Attorney General) v Quebec (Expropriation Tribunal),* [1986] 1 SCR 732, Justice Julien Chouinard of the Supreme Court of Canada held that a "distinction must be made between the retroactivity of legislation and its immediate effect" (at p 744). Justice Chouinard reasoned that new legislation cannot apply to immediate effects already produced or that occurred over an extended period of time before that new legislation came into effect because that would give

retroactive effect to the new legislation. Nonetheless such new legislation "will apply to future effects arising out these legal situations, which have not yet occurred at the time it came into effect" (*Quebec (Expropriation Tribunal)*, citing Louis Baudouin, *Les aspects généraux du droit public dans la province de Québec* (Paris: Dalloz, 1965) and that it "applied to all future effects of both pending and future legal relations" [Emphasis added] (citing Professor Pierre-André Côté, The Interpretation of Legislation in Canada (Cowansville: Éditions Yvon Blais, 1984)).

[63] *Québec (Expropriation Tribunal)*, concerned the application of a statute that came into force in 1973 [1973 statute] to an expropriation that began in 1970 but was discontinued in 1979. The 1973 statute required the Québec government to seek the authorization of an expropriation tribunal before discontinuing an expropriation but the predecessor statute only required the government to file a unilateral discontinuance. Justice Chouinard rejected the Québec government's argument that the 1973 statute did not apply because the appropriation began before its enactment. Even though the underlying legal situation occurred before the 1973 statute came into effect, Justice Chouinard reasoned that its application was immediate rather than retroactive. This was because the underlying situation was of an on-going nature and the effect of the 1973 statute was to change the future legal effect of that on-going situation. Indeed, Justice Chouinard accepted the respondent's argument that the 1973 statute "intended to remove for the future the right to file a unilateral discontinuance previously enjoyed by the appellant. That section has no effect on the right in so far as it was exercised before [section] 55 came into effect" [Emphasis added].

[64] Are the amendments to the *CCRA* of retroactive or immediate application? If section 743.5 of the *Code* had not applied, would these amendments have operated to change the past legal effect

of the Applicant's past parole eligibility or would they have changed the future legal effect of his on-going parole eligibility?

[65] A plain reading of paragraph 119(1)(*c*) and section 120.1 of the un-amended *CCRA* suggests that the amended *CCRA* would have operated to change the past legal effect of the Applicant's on-going eligibility for full parole and day parole if section 745.3 of the *Code* had not applied.

[66] Section 120.1 of the un-amended *CCRA* provides that an offender who receives an additional consecutive sentence is not eligible for full parole until the day on which he or she has served, commencing on the day on which that additional sentence was imposed: (i) any remaining period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed; and, (ii) the period of ineligibility in relation to the additional sentence. Section 120 of the un-amended *CCRA* provides that an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of 1/3 of the sentence and seven years. Under paragraph 119(1)(*c*) of the un-amended *CCRA*, the portion of a sentence that must be served by an offender serving a sentence of two years or more before he or she may be released on day parole is, subject to non-applicable exceptions, the greater of (i) the portion ending six months before the date on which full parole may be granted, and (ii) six months.

[67] Before the amendments to the *CCRA* came into force on June 13, 2012 and October 23, 2012, the un-amended definition of "sentence" in section 2 of the *CCRA* applied to the Applicant. In *P(J)*, above, Justice Marc Nadon held that, under this definition, the non-custodial portion of a

YCJA sentence could not be included in determining the Applicant's parole eligibility dates (at para 65 and 67).

[68] If section 743.5 had not applied to this Application, the past legal effect of the un-amended *CCRA* (as interpreted by Justice Nadon in *P(J)*, above, would have been that the Applicant would become eligible to apply for full parole and for day parole before section 119.2 of the *CCRA* came into force on June 13, 2012 and before the amended definition of "sentence" in section 2 and paragraph 99(2)(*b*) of the *CCRA* came into force on October 23, 2012.

[69] The amendments to the *CCRA*, if section 743.5 had not been engaged, would have changed the past legal effect of the Applicant's ability to apply for full parole and day parole by delaying the date on which he became eligible to apply for full parole to December 19, 2012 and to apply for day parole to June 19, 2012. Since the Applicant would (but for section 743.5) have already been eligible to apply by the time the amendments to the *CCRA* came into force, applying those amendments to his circumstances would have had the effect of changing the past legal effect of this situation. Consequently, applying the amendments in such circumstances would have resulted in an impermissible retroactive application of the law.

[70] Having disposed of the question of the Applicant's full and day parole eligibility dates by applying paragraph 743.5(3)(*a*), it is not, of course necessary to consider the issue of retroactivity for the purposes of disposing of this Application. The undersigned member of this Court stresses that paragraph 743.5(3)(*a*) is dispositive of this Application and that the discussion of the temporality of the amendments to the *CCRA* is *in obiter*.

[71] Pursuant to paragraph 743.5(3)(*a*) of the *Code* and section 139 of the *CCRA*, the Applicant's non-custodial *YCJA* sentence must also be included in calculating the Applicant's statutory release date. Section 743.5 and section 139 merged the Applicant's non-custodial *YCJA* sentence with his other sentences into a single sentence of imprisonment for the purpose of calculating his statutory release date under section 127 of the *CCRA*.

[72] Even if paragraph 743.5(3)(*a*) had not been engaged, the amendments to the *CCRA* would have been of immediate rather than retrospective application to the Applicant's statutory release date. Consequently, the amended definition of "sentence" in section 2 of the *CCRA* would have applied to the determination of the Applicant's statutory release date under section 127 of the *CCRA* and the Respondent's concern that the Applicant's real purpose in bringing this Application is to reduce his sentence would have been unwarranted.

[73] Before the amended definition of sentence in section 2 of the *CRRA* came into force on October 23, 2012 and in the absence of paragraph 743.5(3)(*a*), *P(J)*, above, would have applied to exclude the Applicant's non-custodial *YCJA* sentence from the meaning of sentence and, thus, from the calculation of statutory release date under section 127. Under this framework and pursuant to subsections 127(1) and (3) of the *CCRA*, the Applicant would have been entitled to be released on the day on which he completed 2/3 of his sentence [statutory release date].

[74] The Applicant, however, did not reach his statutory release date before the amended *CCRA* came into force on October 23, 2012. At that point, the Applicant had the possibility, but not an actual entitlement to, a statutory release date determined by excluding his non-custodial *YCJA*

sentence. Such an entitlement was subject to the condition precedent that the Applicant had completed 2/3 of his sentence. Until that condition precedent had been satisfied, it cannot be said that the past legal effect of the Applicant's situation is changed by the inclusion of his custodial *YCJA* sentence in calculating his statutory release date. Consequently, section 2 of the amended *CCRA* would have been of immediate application to the Application, if paragraph 743.5(3)(*a*) did not already apply to include his non-custodial *YCJA* sentence in calculating his statutory release date. That is to say that it would have changed the future legal effect of his previous sentencing situation.

[75] This Court adds that, even if a law is of immediate application, it may interfere with a vested right (*Québec (Expropriation Tribunal)*, above, at p 746). The Applicant would not have met the conditions precedent to establish his entitlement to an earlier statutory release date before the amended *CCRA* came into force. It follows that he would have had no vested right to have the previous definition of "sentence", as interpreted by *P(J)*, above, applied in his circumstances.

[76] This Court has decided to exercise its discretion to hear this Application even though it will not have the effect of resolving a controversy which affects or may affect the rights of the parties because the Applicant became eligible for day parole under subsection 119(1) of the *CCRA* on June 19, 2012 and for full parole under section 120.1 of the *CCRA* on December 19, 2012.

[77] *Borowski*, above, holds that the following factors ought to be considered in exercising the discretion to hear an Application notwithstanding its mootness: (i) the existence of an adversarial

relationship; (ii) the concern for judicial economy; and (iii) the court's proper function to adjudicate and not legislate.

[78] The factor of judicial economy militates highly in favor of hearing this Application. The issues of whether paragraph 743.5(3)(*a*) already applies to include a non-custodial *YCJA* sentence in calculating parole eligibility dates and whether the amendments to the *CCRA* have an immediate or retrospective effect on the calculation of the day and full parole of individuals is very likely to arise in other applications. As Justice John Sopinka stated in *Borowski*, above, "[t]he economics of judicial involvement are weighed against the social cost of continued uncertainty in the law" (at para 37).

IX. Conclusion

[79] For all of the above reasons, as this matter is not moot as discussed above, the Applicant's application for judicial review in regard to the calculation of the Applicant's parole eligibility under section 120.1 of the *CCRA* and under paragraph 119(1)(*c*) of the *CCRA* is denied on the basis of paragraph 743.5(3)(a) of the *Code*.

[80] The question in the Application of the Applicant to this Court is in respect of the calculation of parole eligibility. The derivation of that calculation stems from the recognition that the Applicant's sentence under the *Youth Criminal Justice Act* is to be interpreted as if the sentence had been under the *Criminal Code*.

JUDGMENT

THIS COURT ORDERS that review be denied with respect to the calculation of the Applicant's eligibility dates for full parole under section 120.1 of the *CCRA* and for day parole under paragraph 119(1)(*c*) of the *CCRA*.

"Michel M.J. Shore"
Judge

ANNEX "A"

Relevant Legislative Provisions

The following legislative provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] (including those provisions coming into force on June 13, 2012 and October 23, 2012 pursuant to the amendments to the *CCRA* are relevant:

2. (1) In this Part,	**2.** (1) Les définitions qui suivent s'appliquent à la présente partie.
…	[...]
"sentence" means a sentence of imprisonment and includes	« peine » ou « peine d'emprisonnement » S'entend notamment :
(*a*) a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the *International Transfer of Offenders Act*, and	(*a*) d'une peine d'emprisonnement infligée par une entité étrangère à un Canadien qui a été transféré au Canada sous le régime de la *Loi sur le transfèrement international des délinquants*;
(*b*) a youth sentence imposed under the *Youth Criminal Justice Act* consisting of a custodial portion and a portion to be served under supervision in the community subject to conditions under paragraph 42(2)(*n*) of that Act or under conditional supervision under paragraph 42(2)(*o*), (*q*) or (*r*) of that Act;	(*b*) d'une peine spécifique infligée en vertu de la *Loi sur le système de justice pénale pour les adolescents*, laquelle comprend la partie purgée sous garde et celle purgée sous surveillance au sein de la collectivité en application de l'alinéa 42(2)*n*) de cette loi ou en liberté sous condition en application des alinéas 42(2)*o*), *q*) ou *r*) de cette loi.
…	[...]
99 (2) For the purposes of	**99** (2) Pour l'application de

this Part, a reference to the expiration according to law of the sentence of an offender shall be read as a reference to the day on which the sentence expires, without taking into account

(*a*) any period during which the offender could be entitled to statutory release;

(*b*) in the case of a youth sentence imposed under the *Youth Criminal Justice Act*, the portion to be served under supervision in the community subject to conditions under paragraph 42(2)(*n*) of that Act or under conditional supervision under paragraph 42(2)(o), (*q*) or (*r*) of that Act; or

(*c*) any remission that stands to the credit of the offender on November 1, 1992.

la présente partie, la mention de l'expiration légale de la peine que purge un délinquant s'entend du jour d'expiration de la peine compte non tenu :

(*a*) de la libération d'office à laquelle il pourrait avoir droit;

(*b*) dans le cas d'une peine spécifique infligée en vertu de la *Loi sur le système de justice pénale pour les adolescents*, de la partie de la peine purgée sous surveillance au sein de la collectivité en application de l'alinéa 42(2)*n*) de cette loi ou en liberté sous condition en application des alinéas 42(2)*o*), *q*) ou *r*) de cette loi;

(*c*) des réductions de peine à son actif en date du 1er novembre 1992.

…

[...]

119. (1) Subject to section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, the portion of a sentence that must be served before an offender may be released on day parole is

(*a*) one year, where the offender was, before October 15, 1977, sentenced

119. (1) Sous réserve de l'article 746.1 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la semi-liberté est :

(*a*) un an, en cas de condamnation à la détention préventive avant le 15

to preventive detention;

(*b*) where the offender is an offender, other than an offender referred to in paragraph (b.1), who was sentenced to detention in a penitentiary for an indeterminate period, the longer of

(i) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with section 761 of the *Criminal Code*, less three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

(b.1) where the offender was sentenced to detention in a penitentiary for an indeterminate period as of the date on which this paragraph comes into force, the longer of

(i) three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

octobre 1977;

(*b*) dans le cas d'un délinquant — autre que celui visé à l'alinéa b.1) — condamné à une peine de détention dans un pénitencier pour une période indéterminée, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément à l'article 761 du *Code criminel* ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

(b.1) dans le cas d'un délinquant condamné, avant la date d'entrée en vigueur du présent alinéa, à une peine de détention dans un pénitencier pour une période indéterminée, trois ans ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

(*c*) where the offender is serving a sentence of two years or more, other than a sentence referred to in paragraph (*a*) or (*b*), the greater of

(i) the portion ending six months before the date on which full parole may be granted, and

(ii) six months; or

(*d*) one half of the portion of the sentence that must be served before full parole may be granted, where the offender is serving a sentence of less than two years.

(*c*) dans le cas du délinquant qui purge une peine d'emprisonnement égale ou supérieure à deux ans, à l'exclusion des peines visées aux alinéas *a*) et *b*), six mois ou, si elle est plus longue, la période qui se termine six mois avant la date d'admissibilité à la libération conditionnelle totale;

(*d*) dans le cas du délinquant qui purge une peine inférieure à deux ans, la moitié de la peine à purger avant cette même date.

…

[...]

119.2 For the purposes of sections 120 to 120.3, the eligibility for parole of a young person in respect of whom a youth sentence is imposed under paragraph 42(2)(*n*), (*o*), (*q*) or (*r*) of the *Youth Criminal Justice Act* and who is transferred to a provincial correctional facility for adults or a penitentiary under section 89, 92 or 93 of that Act shall be determined on the basis of the total of the custody and supervision periods of the youth sentence.

119.2 Pour l'application des articles 120 à 120.3, l'admissibilité à la libération conditionnelle de l'adolescent qui a reçu une des peines spécifiques prévues aux alinéas 42(2)*n*), *o*), *q*) ou *r*) de la *Loi sur le système de justice pénale pour les adolescents* et est transféré dans un établissement correctionnel provincial pour adultes ou dans un pénitencier au titre des articles 89, 92 ou 93 de cette loi est déterminée en fonction de la somme des périodes de garde et de surveillance de la peine spécifique.

120. (1) Subject to sections 746.1 and 761 of the *Criminal Code* and to any order made

120. (1) Sous réserve des articles 746.1 et 761 du *Code criminel* et de toute ordonnance

under section 743.6 of that Act, to subsection 140.3(2) of the *National Defence Act* and to any order made under section 140.4 of that Act, and to subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

rendue en vertu de l'article 743.6 de cette loi, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et de toute ordonnance rendue en vertu de l'article 140.4 de cette loi, et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est d'un tiers de la peine à concurrence de sept ans.

…

[...]

120.1 (1) A person who is not serving a sentence and who receives more than one sentence on the same day is not eligible for full parole until the day on which they have served a period equal to the total of

120.1 (1) La personne qui est condamnée le même jour à plusieurs peines d'emprisonnement alors qu'elle n'en purgeait aucune n'est admissible à la libération conditionnelle totale qu'après avoir accompli le temps d'épreuve égal à la somme des périodes suivantes :

(*a*) the period of ineligibility in respect of any portion of the sentence constituted under subsection 139(1) that is subject to an order under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, and

(*a*) le temps d'épreuve requis relativement à la partie de la peine, déterminée conformément au paragraphe 139(1), qui est visée par une ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale*;

(b) the period of ineligibility in respect of any other portion of that sentence.

(*b*) le temps d'épreuve requis relativement à toute autre partie de cette peine.

(2) If an offender who is serving a sentence, or is

(2) Le délinquant dont la peine d'emprisonnement —

serving a sentence that was constituted under subsection 139(1), receives an additional sentence that is to be served consecutively to the sentence they are serving when the additional sentence is imposed — or receives, on the same day, two or more additional sentences to be served consecutively and the additional sentences are to be served consecutively to the sentence they are serving when the additional sentences are imposed — the offender is not eligible for full parole until the day on which they have served, from the day on which the additional sentence is or sentences are imposed, the total of the following periods:

peine simple ou peine déterminée conformément au paragraphe 139(1) — n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger consécutivement à l'autre ou qui est condamné le même jour à plusieurs peines d'emprisonnement supplémentaires à purger consécutivement à la peine non expirée n'est admissible à la libération conditionnelle totale qu'après avoir accompli, à compter du jour de la condamnation, le temps d'épreuve égal à la somme des périodes suivantes :

(*a*) any remaining period of ineligibility in respect of the sentence they are serving when the additional sentence is or sentences are imposed, and

(*a*) le reste du temps d'épreuve relatif à la peine qu'il purgeait au moment de la condamnation;

(*b*) the period of ineligibility in respect of the additional sentence or, in the case of two or more additional sentences, a period equal to the total of the periods of ineligibility in respect of all of the additional sentences.

(*b*) le temps d'épreuve relatif à la peine supplémentaire ou, en cas de condamnation à plusieurs peines supplémentaires, la période égale à la somme des temps d'épreuve relatifs à celles-ci.

(3) Despite subsection (2), if an offender who is serving a sentence or a sentence that was constituted under subsection 139(1) receives an additional sentence or two or more sentences that are to be

(3) Par dérogation au paragraphe (2), le délinquant dont la peine d'emprisonnement — peine simple ou peine déterminée conformément au paragraphe 139(1) — n'est pas expirée et qui est condamné à

served consecutively to a portion of the sentence they are serving when the additional sentence is imposed — or receives, on the same day, two or more additional sentences including a sentence to be served concurrently with the sentence being served and one or more sentences to be served consecutively to the additional concurrent sentence — they are not eligible for full parole until the day on which they have served, from the day on which the additional sentence is or sentences are imposed, any remaining period of ineligibility to which they are subject and the longer of the following periods:

une ou plusieurs peines d'emprisonnement supplémentaires à purger consécutivement à une partie de la peine non expirée ou qui est condamné le même jour à plusieurs peines d'emprisonnement supplémentaires dont une à purger concurremment à la peine non expirée et une ou plusieurs peines à purger consécutivement à la peine supplémentaire concurrente n'est admissible à la libération conditionnelle totale qu'après avoir accompli, à compter du jour de la condamnation, le temps d'épreuve qui correspond à la période la plus longue résultant de la somme des périodes ci-après, d'une part, le reste du temps d'épreuve relatif à la peine qu'il purgeait au moment de la condamnation et, d'autre part :

(*a*) one third of the period that equals the difference between the length of the sentence that was constituted under subsection 139(1), including the additional sentence or sentences, and the length of the sentence that they are serving when the additional sentence is or sentences are imposed; or

(*a*) soit un tiers de la période équivalant à la différence entre la durée de la peine déterminée conformément au paragraphe 139(1) qui englobe la ou les peines supplémentaires et la durée de la peine non expirée;

(*b*) the period of ineligibility of the additional sentence that is or sentences that are ordered to be served consecutively.

(*b*) soit le temps d'épreuve relatif à la ou aux peines supplémentaires à purger consécutivement.

120.2 (1) Subject to subsection (2), if an offender who is serving a sentence, or is serving a sentence that was constituted under subsection 139(1), receives an additional sentence that is to be served concurrently with the sentence they are serving when the additional sentence is imposed, they are not eligible for full parole until the day that is the later of

(*a*) the day on which they have served the period of ineligibility in respect of the sentence they are serving when the additional sentence is imposed, and

(*b*) the day on which they have served

(i) the period of ineligibility in respect of any portion, of the sentence that includes the additional sentence as provided by subsection 139(1), that is subject to an order under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, and

(ii) the period of ineligibility in respect of any other portion of that sentence.

120.2 (1) Sous réserve du paragraphe (2), le délinquant dont la peine d'emprisonnement — peine simple ou peine déterminée conformément au paragraphe 139(1) — n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger concurremment à l'autre n'est admissible à la libération conditionnelle totale qu'à la plus éloignée des dates suivantes :

a) la date à laquelle il a accompli le temps d'épreuve relatif à la peine qu'il purgeait au moment de la condamnation;

b) la date à laquelle il a accompli, d'une part, le temps d'épreuve requis relativement à la partie de la peine, déterminée conformément au paragraphe 139(1) et englobant la peine supplémentaire, qui est visée par une ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale* et, d'autre part, le temps d'épreuve requis relativement à toute autre partie de cette peine.

…

[...]

127. (1) Subject to any

127. (1) Sous réserve des

provision of this Act, an offender sentenced, committed or transferred to penitentiary is entitled to be released on the date determined in accordance with this section and to remain at large until the expiration of the sentence according to law.	autres dispositions de la présente loi, l'individu condamné ou transféré au pénitencier a le droit d'être mis en liberté à la date fixée conformément au présent article et de le demeurer jusqu'à l'expiration légale de sa peine.
…	[...]
(3) Subject to this section, the statutory release date of an offender sentenced on or after November 1, 1992 to imprisonment for one or more offences is the day on which the offender completes two thirds of the sentence.	(3) La date de libération d'office d'un individu condamné à une peine d'emprisonnement le 1er novembre 1992 ou par la suite est, sous réserve des autres dispositions du présent article, celle où il a purgé les deux tiers de sa peine.
…	[...]
139. (1) For the purposes of the *Criminal Code*, the *Prisons and Reformatories Act*, the *International Transfer of Offenders Act* and this Act, a person who is subject to two or more sentences is deemed to have been sentenced to one sentence beginning on the first day of the first of those sentences to be served and ending on the last day of the last of them to be served.	**139.** (1) Pour l'application du *Code criminel*, de la *Loi sur les prisons et les maisons de correction*, de *la Loi sur le transfèrement international des délinquants* et de la présente loi, le délinquant qui est assujetti à plusieurs peines d'emprisonnement est réputé n'avoir été condamné qu'à une seule peine commençant le jour du début de l'exécution de la première et se terminant à l'expiration de la dernière.

The following legislative provisions of the *CCRA* that applied before the amendments to the *CCRA* came into force on June 13, 2012 and October 23, 2012 are relevant:

2. (1) In this Part,	**2.** (1) Les définitions qui suivent s'appliquent à la présente partie.

…

"sentence" means a sentence of imprisonment and includes a sentence imposed by a foreign entity on a Canadian offender who has been transferred to *Canada under the International Transfer of Offenders Act* and a youth sentence imposed under the *Youth Criminal Justice Act*;

…

120.1 (1) Where an offender who is serving a sentence receives an additional sentence that is to be served consecutively to the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(*a*) any remaining period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed; and

(*b*) the period of ineligibility in relation to the additional sentence.

(2) Notwithstanding subsection (1), where an offender who is serving a

[...]

« peine » ou « peine d'emprisonnement » S'entend notamment d'une peine spécifique imposée en vertu de la *Loi sur le système de justice pénale pour les adolescents* et d'une peine d'emprisonnement imposée par une entité étrangère à un Canadien qui a été transféré au Canada sous le régime de la *Loi sur le transfèrement international des délinquants*.

[...]

120.1 (1) Le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger à la suite de l'autre n'est pas admissible à la libération conditionnelle totale avant d'avoir purgé, à la fois, depuis le jour où il s'est vu infliger cette peine supplémentaire :

a) le reste du temps d'épreuve relatif à la peine que le délinquant purgeait déjà lorsqu'il s'est vu imposer la peine supplémentaire;

b) le temps d'épreuve relatif à cette peine supplémentaire.

(2) Par dérogation au paragraphe (1), le délinquant dont la peine d'emprisonnement

sentence receives an additional sentence that is to be served consecutively to a portion of the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day that is the latest of	n'est pas expirée et qui est condamné à une peine supplémentaire à purger après une partie de la peine en cours n'est admissible à la libération conditionnelle totale qu'à la plus éloignée des dates suivantes :
(*a*) the day on which the offender has served the period of ineligibility for full parole in relation to the sentence the offender was serving when the additional sentence was imposed,	*a*) la date à laquelle il a accompli le temps d'épreuve sur la peine qu'il purge au moment de la condamnation à la peine supplémentaire;
(*b*) the day on which the offender has served, commencing on the date on which the additional sentence was imposed, the period of ineligibility for full parole in relation to the additional sentence, and	*b*) la date à laquelle il a accompli le temps d'épreuve sur la peine supplémentaire, déterminé à compter de la date de la condamnation à celle-ci;
(*c*) the day on which the offender has served the period of ineligibility for full parole in relation to the sentence that includes the additional sentence as provided by subsection 139(1).	*c*) la date à laquelle il a accompli le temps d'épreuve requis par rapport à la peine d'emprisonnement déterminée conformément au paragraphe 139(1).

The following legislative provisions of the *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*] are relevant:

42. (2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this	**42.** (2) Sous réserve des autres dispositions de la présente loi, dans le cas où il déclare un adolescent coupable d'une infraction et lui impose

section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, the court shall impose a sanction set out in paragraph (*q*) or subparagraph (*r*)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:

une peine spécifique, le tribunal lui impose l'une des sanctions ci-après en la combinant éventuellement avec une ou plusieurs autres compatibles entre elles; dans le cas où l'infraction est le meurtre au premier ou le meurtre au deuxième degré au sens de l'article 231 du *Code criminel*, le tribunal lui impose la sanction visée à l'alinéa *q*) ou aux sous-alinéas *r*)(ii) ou (iii) et, le cas échéant, toute autre sanction prévue au présent article qu'il estime indiquée:

…

[...]

(*q*) order the young person to serve a sentence not to exceed

q) l'imposition par ordonnance :

(i) in the case of first degree murder, ten years comprised of

(i) dans le cas d'un meurtre au premier degré, d'une peine maximale de dix ans consistant, d'une part, en une mesure de placement sous garde, exécutée de façon continue, pour une période maximale de six ans à compter de sa mise à exécution, sous réserve du paragraphe 104(1) (prolongation de la garde), et, d'autre part, en la mise en liberté sous condition au sein de la collectivité conformément à l'article 105,

(A) a committal to custody, to be served continuously, for a period that must not, subject to subsection 104(1) (continuation of custody), exceed six years from the date of committal, and

(B) a placement under conditional supervision to be served in the community in accordance with section 105, and

(ii) in the case of second degree murder, seven

(ii) dans le cas d'un meurtre au deuxième

years comprised of (A) a committal to custody, to be served continuously, for a period that must not, subject to subsection 104(1) (continuation of custody), exceed four years from the date of committal, and (B) a placement under conditional supervision to be served in the community in accordance with section 105;	degré, d'une peine maximale de sept ans consistant, d'une part, en une mesure de placement sous garde, exécutée de façon continue, pour une période maximale de quatre ans à compter de sa mise à exécution, sous réserve du paragraphe 104(1) (prolongation de la garde), et, d'autre part, en la mise en liberté sous condition au sein de la collectivité conformément à l'article 105;

The following provision of the *Criminal Code*, RS, c C-34, s 1 [*Code*] are relevant:

743.5 **(**1) If a young person or an adult is or has been sentenced to a term of imprisonment for an offence while subject to a disposition made under paragraph 20(1)(*k*) or (*k*.1) of the *Young Offenders Act*, chapter Y-1 of the *Revised Statutes of Canada*, 1985, or a youth sentence imposed under paragraph 42(2)(*n*), (*o*), (*q*) or (*r*) of the *Youth Criminal Justice Act*, the remaining portion of the disposition or youth sentence shall be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.	**743.5** (1) Lorsqu'un adolescent ou un adulte assujetti à une décision rendue au titre des alinéas 20(1)*k*) ou *k*.1) de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des *Lois révisées du Canada* (1985), ou à une peine spécifique imposée en vertu des alinéas 42(2)*n*), *o*), *q*) ou *r*) de la *Loi sur le système de justice pénale pour les adolescents* est ou a été condamné à une peine d'emprisonnement pour une infraction, le reste de la décision prononcée ou de la peine spécifique imposée est purgée, pour l'application de la présente loi ou de toute autre loi fédérale, comme si elle avait été prononcée ou imposée au titre de la présente loi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-671-12
STYLE OF CAUSE:	BRENT WILLIAM VAN BUSKIRK v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 27, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	December 11, 2012

APPEARANCES:

Patrick M. Fullerton	FOR THE APPLICANT
Mark E.W. East	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Smart, Harris & Martland Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT