PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In its decision below, the Court of Appeal for Ontario held that trial courts are entitled to impose longer sentences on individuals with mental disorders and intellectual disabilities than on otherwise identical offenders. The justification for this difference lies not in the wrongfulness of the disabled offender's conduct, but because: 1) it could take them longer to complete programming in custody; and/or 2) they have spent part of their pre-sentence incarceration in a forensic hospital. If widely applied, the reasoning of the Court of Appeal will result in consistently longer sentences for the most vulnerable offenders in the justice system; those who, like J.W., are impoverished, Indigenous, experiencing significant mental and cognitive disorders, marginally fit, and unable to obtain bail. Leave should be granted because such a result is inconsistent with this Court's jurisprudence, the sentencing principles of parity and proportionality, and the values of equality at the heart of s. 15 of the *Charter*.

2. After spending nearly four years in pre-sentence custody, the applicant pleaded guilty to a very serious sexual assault. The sentencing judge concluded that a sentence of 7 to 8 years could satisfy the primary objectives of denunciation and deterrence. She imposed a 9-year sentence though because it would likely take the applicant longer than non-disabled offenders to complete institutional rehabilitative programming. The sentencing judge also denied the applicant 1.5:1 credit for the over 600 days of pre-sentence custody he spent in a forensic hospital because: 1) the applicant delayed the proceedings by resiling from earlier agreements to plead guilty and changing lawyers; and 2) the living conditions at the hospital were better than those in jail and at the applicant's home in the community. The Court of Appeal found no error and, aside from fixing a calculation error, dismissed the applicant's sentence appeal.

3. Intervention from this Court is required to affirm that, outside the dangerous offender regime, sentence length cannot be increased solely to account for the anticipated time needed for rehabilitative programming. Further, this case provides an opportunity for the Court to clarify what kind of "wrongful conduct" justifies the denial of 1.5:1 credit for pre-sentence custody and whether offenders with mental disorders can be deprived of that credit on the basis of a sentencing judge's views of the relative comforts of forensic hospitals.

B. Relevant facts

(i) The offender and the offence

4. The applicant is an Indigenous person, born in the Attawapiskat First Nation. He has been diagnosed with schizophrenia, Fetal Alcohol Spectrum Disorder (FASD), antisocial personality disorder, cognitive delays, and learning disabilities. IQ testing scored him in the first percentile for both performance and verbal intelligence. He was physically and sexually abused as a child and has spent most of his life moving between various group homes.[1]

5. The applicant pleaded guilty to what can only be described as a horrific sexual assault. The complainant, K.G. who is an Indigenous woman, was working alone at the applicant's group home the night of May 26-27, 2018. The applicant called K.G. up to his room, forced vaginal intercourse on her without the use of a condom, and ejaculated onto her. K.G. briefly escaped to another room but was chased and caught by the applicant, who continued his assault. The applicant told K.G. that he would kill her and leave her body in a lake. He took her phone so that she could not call for help and used his phone to make a recording of her saying that the sexual activity was consensual.[2] K.G. managed to text "911" to a co-worker, who called the police.

(ii) The trial proceedings

6. The applicant was arrested on May 27, 2018. He was detained until he was sentenced on April 14, 2022, 1,419 days later.

7. The applicant was committed to trial following a preliminary inquiry in October 2018 and shortly thereafter re-elected for the purposes of resolution. He pleaded guilty to the offences in November 2018 but that plea was struck in March 2019. Further plea dates were scheduled in September 2019 and December 2019, although both times the applicant then resiled from the proposed resolution. He discharged his first two lawyers. In the summer of 2020, his new lawyer raised concerns about his fitness to stand trial. The applicant was transferred from jail to a psychiatric hospital for a fitness assessment. He was diagnosed with schizophrenia and deemed

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[1] Pre-Sentence Report at p. 6, **Tab 3A**; Gladue Report & Update, at pp. 5-11, **Tab 3B**.
[2] Court of Appeal Reasons, at paras. 4-5, **Tab 1C**.

unfit to stand trial.[3] After briefly returning to jail, in December 2020 the applicant returned to the hospital and remained there until he was sentenced.

8. The applicant was made fit in May 2021 following a treatment order, after he had again discharged his lawyer. He continued to be detained in hospital on a keep-fit order. An assessment into his criminal responsibility was ordered by his fourth and final lawyer in July 2021. That assessment was completed in November 2021 and did not support a defence of not criminally responsible. Just over two weeks later, the applicant entered his guilty pleas.[4] The sentencing hearing took place on March 8, 2022, and sentence was imposed on April 14, 2022.

9. Throughout the process, the applicant was detained in jail for roughly 800 days, and in hospital for over 600 days.

(iii) <u>The sentence</u>

10. The sentencing judge imposed a sentence of 9 years. She recognized the applicant's traumatic upbringing as detailed in the *Gladue* report, his diagnoses of FASD and schizophrenia, as well as his "extremely low IQ scores" and "significant cognitive deficits". She found that there were "many aggravating factors", including the violence involved, the prolonged nature of the assault, and the serious impact it had on K.G., a vulnerable, Indigenous woman. The sentencing judge found that the applicant's guilty plea was not significantly mitigating given the history of the proceedings. She further held that the applicant "put Ms. G. and her family through further, unnecessary, emotional turmoil" through his conduct throughout the proceedings and showed no credible expression of remorse. The applicant's mental illness and cognitive deficits though were found to be significant mitigating factors. She rejected the 10-year maximum sentence sought by the Crown. She noted that a sentence of 7 to 8 years "could meet the objectives of denunciation and general deterrence" but she was "not satisfied that it would ultimately work to protect society and keep women in the community safe". She wrote:

> [42] There is the real concern that, until Mr. W. obtains targeted treatment in an institution, he will continue to pose a risk of sexually re-offending when released into the community. Mr. W. will need sufficient time in a federal institution to

[3] Report of Dr. Hassan, at p. 3, **Tab 3C**; Report of Dr. Chan, at pp. 5-6, **Tab 3D**.
[4] Written Reasons for Decision on Sentencing, at paras. 1, 9, **Tab 1B**.

> complete needed programming prior to his release. It is likely that Mr. W.'s mental health issues and cognitive disabilities will result in his needing longer than may be the case for other offenders to complete the needed treatment programs.[5]

11. Finally, the sentencing judge awarded pre-sentence credit at a rate of 1.5:1 for the time the applicant spent in jail but 1:1 credit for the time he was detained in hospital. She denied enhanced credit for that approximately 20-month period because she found that the applicant caused delay by "frequently changing his mind and changing his lawyers" and concluded the conditions of custody in hospital were more comfortable than those in ordinary pre-sentence detention facilities and "may be more comfortable" than the applicant's living conditions in the community.[6]

(iv) The reasons of the Court of Appeal

12. The applicant appealed his sentence. He argued that by imposing a sentence longer than otherwise necessary to account for his mental illness and intellectual disabilities, the sentencing judge failed to adhere to the "well settled" principle that sentences cannot be increased by relying on the anticipated time needed to complete rehabilitative programming.[7] He further argued that the sentencing judge erred in denying him "*Summers* credit"[8] (credit for days spent in pre-sentence custody at a rate of 1.5:1) for the time spent in hospital.

13. The Court of Appeal held that the sentencing judge did not err and stated that its previous jurisprudence prohibited sentencing judges only from *exclusively* relying on the time needed to complete rehabilitative programs in fixing the length of a custodial sentence. The Court of Appeal held that it was appropriate for the sentencing judge to consider protection of the public and rehabilitation in considering how long the applicant would "realistically need" for programming.[9]

14. The Court of Appeal further held that the sentencing judge did not err in finding that the applicant was disentitled to *Summers* credit because he engaged in "wrongful conduct", as that

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[5] Written Reasons for Decision on Sentencing, at paras. 20-29, 39, 41-42, **Tab 1B**.
[6] Written Reasons for Decision on Sentencing, at paras. 44-51, **Tab 1B**.
[7] See *R. v. Spilman*, 2018 ONCA 551, 362 C.C.C. (3d) 415 ["*Spilman*"], at para. 40.
[8] See *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575 ["*Summers*"]; *Criminal Code*, R.S.C., 1985, c. C-46, s. 719(3.1).
[9] Court of Appeal Reasons, at paras. 16-17, **Tab 1C**.

term is used by this Court in *Summers*, by delaying proceedings by scheduling and resiling from guilty pleas and repeatedly firing lawyers.[10]

15. Finally, the Court of Appeal held that because "the qualitative rationale for *Summers* credit is to recognize the time in pre-trial detention is often more onerous than post-sentence incarceration", the sentencing judge did not err in considering "the unique facts of the appellant's living arrangements [in the community], or the accommodations available in hospital" in denying him *Summers* credit.[11]

PART II: QUESTIONS IN ISSUE

16. The applicant submits that two questions of national public importance are raised by the proposed appeal:

1. Whether, outside of the dangerous offender scheme, sentencing judges may take anticipated time to complete institutional programming into account when fixing the length of a custodial sentence; and

2. How the quantitative and qualitative rationales for enhanced pre-sentence credit apply to offenders with significant mental illness or cognitive impairments, namely:

    (i) Whether delays caused by the accused, particularly delays connected to their disorders or disabilities, are "wrongful conduct" disentitling them to enhanced credit; and

    (ii) Whether enhanced credit can be denied based on the conditions of forensic psychiatric facilities compared to remand facilities or the offender's living conditions in the community.

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[10] Court of Appeal Reasons, at para. 25, **Tab 1C**.
[11] Court of Appeal Reasons, at paras. 26-28, **Tab 1C**.

PART III: STATEMENT OF ARGUMENT

A. The proposed appeal raises issues of national public importance

17. This appeal raises critical questions about how courts can equitably approach the difficult task of sentencing individuals with mental disorders and cognitive impairments. The manner in which those questions are answered will have an impact far beyond the specific circumstances of the applicant's case.

18. Canadian courts are regularly called upon to respond to criminal acts committed by those with mental illness or cognitive impairment. A 2015 study conducted by the Correctional Service of Canada found that 70% of males entering the federal prison system met the criteria for at least one mental disorder. Even omitting substance use and anti-social personality disorders, 40% of incoming federal offenders met the criteria for a mental disorder.[12] And a significant number of those individuals will spend time detained in a hospital before their sentencing – whether subject to an order for an assessment of fitness[13] or criminal responsibility,[14] a treatment or "make fit" order,[15] or a keep-fit order.[16] Lower courts need direction on how to impose fit and fair sentences in this context.

19. This appeal proposes, first, to ask whether sentencing judges can increase the length of an otherwise appropriate sentence based on assumptions about how long an offender might require to complete rehabilitative programming, having regard to their mental disorder or intellectual disability. Second, this appeal proposes to ask how the rationales for enhanced pre-sentence credit operate in the context of offenders who have spent a portion of their pre-sentence custody in a forensic hospital.

20. The applicant submits that the answers to these questions must be consistent with this Court's long history of affirming and protecting the liberty and equality rights of individuals with

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[12] National Prevalence of Mental Disorders among Incoming Federally-Sentenced Men – Research at a glance, Correctional Service Canada, retrieved online October 12, 2023.
[13] *Criminal Code*, ss. 672.12, 672.13.
[14] *Criminal Code*, ss. 672.12, 672.13.
[15] *Criminal Code*, s. 672.58.
[16] *Criminal Code*, s. 672.29.

disabilities within the criminal justice system.[17] A system that results in consistently longer sentences for mentally disordered and/or disabled offenders – not because of their moral blameworthiness or the gravity of their offence but because of their cognitive capacity or inability to obtain bail – "can hardly be said to be assigning sentences in line with the principles of parity and proportionality."[18]

B. The errors of the Court of Appeal

21. If granted leave, the applicant will submit that the Court of Appeal erred in holding that the sentencing judge was entitled to 1) increase the applicant's sentence to factor in extra time for rehabilitative programming, and 2) deny the applicant enhanced credit for pre-sentence custody spent in a forensic hospital.

(i) Anticipated programming time cannot impact a proportionate sentence

22. The Court of Appeal erred in holding that sentencing judges may increase the length of what would otherwise be a fit sentence due to the anticipated time the offender may need to complete programming given mental illness or cognitive impairment. The decision below rests on an untenable reading of the Court of Appeal's previous decision in *Spilman* and runs contrary to long-standing appellate jurisprudence, including from this Court.

23. In *Spilman*, Watt J.A. reiterated the "well settled" principle that "outside the dangerous offender environment, sentencing judges are disentitled to determine the length of a sentence of imprisonment solely by reference to the period of time necessary to complete essential or recommended rehabilitative programs".[19]

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[17] See, *e.g.*, *Ontario (Attorney General) v. G.*, 2020 SCC 38, 395 C.C.C. (3d) 277, at paras. 60-63; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 37-43, 55; *R. v. Kahsai*, 2023 SCC 20, at paras. 57-58; see generally *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 135 C.C.C. (3d) 129; *R. v. Knoblauch*, 2000 SCC 58, [2000] 2 S.C.R. 780 ["*Knoblauch*"].

[18] *Summers*, *supra*, at para. 67.

[19] *Spilman*, *supra*, at para. 40.

24. In the applicant's case, the Court of Appeal reasoned that *Spilman* prohibits only the crafting of a sentence based "exclusively" on the time needed to complete programming.[20] While it would certainly be an error to focus on a single factor, the applicant submits that a sentencing judge is also prohibited from *increasing* a term of imprisonment on the basis of rehabilitative programming or preventative detention.

25. The Court of Appeal's finding otherwise stands in stark contradiction to 50 years of jurisprudence, from both the Court of Appeal for Ontario and this Court, reasoning that a sentence cannot be extended beyond what is proportionate to the offence, even to further the goals of rehabilitation or protection of society.

- In *R. v. Luther*, a sentence imposed on an offender to "save her from herself" and ensure that she received drug treatment was overturned. Brooke J.A., concurring, held that the trial judge erred by imposing "an increased term of imprisonment" for the purpose of the offender's rehabilitation.[21]

- In *R. v. Keefe*, the trial judge imposed a life sentence on the basis that the offender "must be kept in an institution for as long as he might be dangerous".[22] The Court of Appeal overturned that sentence and substituted one of 12 years. While it was "appropriate to consider the psychiatric evidence with respect to the likelihood of the commission of further offences involving violence",[23] the Court of Appeal found that "we are not entitled to impose a sentence not warranted by the facts merely because of the accused's mental deficiencies".[24]

- In *R. v. M.B.*, the Court of Appeal overturned an open custody youth sentence because it was disproportionate and was imposed "principally" for the purpose of "dealing with a youth who had a personality problem and needed a place to go".[25]

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[20] Court of Appeal Reasons, at para. 16, **Tab 1C**.
[21] *R. v. Luther*, [1971] 1 O.R. 634, 5 C.C.C. (2d) 354, at pp. 356-357 (C.A.).
[22] *R. v. Keefe* (1978), 44 C.C.C. (2d) 193 ["*Keefe*"], at p. 197 (Ont. C.A.).
[23] *Ibid*, at p. 199.
[24] *Ibid*.
[25] *R. v. M.B.* (1987), 36 C.C.C. (3d) 573, at pp. 574, 576 (Ont. C.A.).

- In *R. v. Legere*, the Court of Appeal noted a sentencing judge cannot "impose a sentence disproportionate to the gravity of the offence on the ground that such a sentence is required to protect the public.[26]

- Finally, in *R. v. Knoblauch*, this Court stated:

> There is no mechanism in criminal law to remove dangerous people from society merely in anticipation of the harm that they may cause. The limit of the reach of the criminal sanction is to address what offenders have done. At that stage, dangerousness is but one factor to be considered in the assessment of the appropriate sentence.[27]

26. *Spilman* held that in sentencing *a dangerous offender*, a judge is not precluded from accounting for the anticipated time needed for rehabilitative programming in determining the length of the custodial portion of the sentence. This was recognized as *an exception* to the *Knoblauch* line of authority, justified by the enhanced objective of public safety that distinguishes the dangerous offender regime (Part XXIV of the *Criminal Code*) from other sentencing proceedings.[28]

27. A dangerous offender is being sentenced not only as someone who has committed the index offence but also *because he is dangerous*. The regime allows for *preventative* detention. Accounting for the offender's access to rehabilitative programming in this context is consistent with the primary purpose of the provisions of Part XXIV: protection of the public.[29]

28. Judges imposing sentences outside of the dangerous offender regime are bound by the fundamental principle of sentencing set out in s. 718.1. The sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender".[30] This principle lies at the heart of *Knoblauch*'s holding that, outside of the dangerous offender regime, the criminal law is limited to addressing what the offender has done.[31]

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[26] *R. v. Legere* (1995), 22 O.R. (3d) 89, 95 C.C.C. (3d) 555 (C.A.).
[27] *Knoblauch*, *supra*, at para. 16.
[28] See *Spilman*, *supra*, at paras. 32-34, 39-43.
[29] *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, at para. 33; *Spilman*, *supra*, at para. 43.
[30] *Criminal Code*, s. 718.1.
[31] *Knoblauch*, *supra*, at para. 16.

29. The 9-year sentence imposed in this case was not the product of a careful balancing of the various objectives of sentencing, including protection of the public and rehabilitation of the offender, to arrive at a fit sentence proportionate both to the seriousness of the offence and mitigating factors at play. Rather than responding to what the applicant had done, the sentencing judge focused on removing the applicant from society for a longer period of time "in anticipation of the harm that they may cause".[32] The Court of Appeal's approval of this line of reasoning warrants intervention by this Court.

30. The practice of accounting for institutional programming in fixing the length of a custodial sentence also offends the parity principle in a manner that undermines one of the fundamental purposes of enhanced pre-sentence credit: to achieve some measure of equality between offenders who receive bail and those who do not. In *Summers*, this Court explained that pre-sentence credit at a rate of 1.5:1 is not to be granted sparingly. Credit at this rate simply accounts for the loss of parole eligibility or earned remission. If not granted, "offenders who do not receive bail will serve longer sentences than otherwise identical offenders who are granted bail",[33] an outcome that is "incompatible with the parity principle".[34]

31. Accounting for anticipated programming time in sentencing is similarly incompatible with the parity principle. The applicant's case demonstrates this problem. The sentencing judge was concerned that a 7-to-8-year-sentence, *after accounting for pre-sentence credit*, would not leave sufficient time for the applicant to complete institutional programming. Had the applicant received bail at first instance, that concern never would have arisen. There was a direct link here between the applicant's failure to obtain bail and the extended length of his sentence.

32. Finally, allowing sentencing judges to account for the assumed time needed for programming results in longer sentences for individuals with cognitive impairments. The sentencing judge here was not concerned that four years might not be long enough for programming generally. She concluded it was not long enough for *the applicant* because of his schizophrenia and FASD. Another offender committing the same offence in the same

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[32] *Ibid*.
[33] *Summers*, *supra*, at para. 60.
[34] *Ibid*, at para. 61.

circumstances, but with greater cognitive abilities, would have received a shorter sentence and, perversely, someone with a more profound disability a potentially longer sentence. Such a result rests on unfounded assumptions about, and effectively penalizes offenders with cognitive disabilities.

33. Lengthier sentences for individuals with FASD for treatment purposes rely on an assumption that the individual can be treated to eventually present no substantial danger to the public and released, an assumption that runs "contrary to the reality of the permanent brain damage caused by FASD".[35] The actual rehabilitative programming needs of individuals with serious mental health issues and intellectual disabilities are unlikely to met in prisons. Where treatment is illusory, longer sentences for that purpose operate solely as a form of preventative detention not authorized by Canadian law.

(ii) The applicant was entitled to 1.5:1 credit for the full period of his pre-sentence custody

34. The Court of Appeal held that the sentencing judge was entitled to deny the applicant enhanced credit for the 607 days he spent detained in hospital because of his conduct in "frequently changing his mind and changing his lawyers".[36] The Court of Appeal reasoned that this was the sort of "wrongful conduct" contemplated in *Summers* as a proper basis to deny enhanced credit.[37] The Court of Appeal further held that the sentencing judge was entitled to deny this credit based on her views about the relative comforts of pre-sentence detention in a forensic hospital rather than a jail. Both of these findings present this Court with an opportunity to reaffirm the rationales for enhanced credit and offer clarification and guidance on when it can be denied.

a) Delay and denial of enhanced credit

35. In *Summers*, this Court held that "when long periods of pre-sentence detention are attributable to the wrongful conduct of the offender, enhanced credit will often be inappropriate".[38] Since then, the issue of what constitutes "wrongful conduct" has received relatively little judicial

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[35] Kent Roach & Andrea Bailey, *The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing*, (2009) 42 U.B.C. L. Rev. 1, at p. 3.
[36] Court of Appeal Reasons, at para. 24, **Tab 1C**.
[37] Court of Appeal Reasons at para. 25, **Tab 1C**.
[38] *Summers*, *supra*, at para. 48.

attention. The decisions that do exist reveal a division amongst the provincial appellate courts as to whether defence-caused delays are wrongful conduct.

36. The Court of Appeal for Ontario has squarely addressed the issue of whether delays are wrongful conduct in three cases.[39] The deciding factor in these decisions appears to be whether the Court views the delays as reasonable, or attributes some degree of moral fault to the accused. The applicant's delay was deemed wrongful conduct given the effects it had on the victim. In *Codina*, full *Summers* credit was denied because of the delay caused by numerous frivolous applications.[40] In *Schlaepfer*, on the other hand, the offender was found not to have committed wrongful conduct by pursuing a *Charter* application and then pleading guilty late in the proceedings.[41]

37. The approach of the Court of Appeal for Ontario on this issue appears to be unique. The Courts of Appeal of British Columbia, Nova Scotia, and Manitoba tend, the applicant submits correctly, to restrict "wrongful conduct" to criminal acts or acts involving punitive institutional sanction, including those that might lessen the individual's "prospects for early release".[42] A narrow interpretation of what amounts to wrongful conduct best fits with the quantitative rationale for enhanced credit, that is, ensuring some measure of parity of sentences imposed on offenders who do, and do not, obtain bail.

38. Denying 1.5:1 credit because of what a court determines to be unnecessary delay is something of an anachronism, based on concerns that were statutorily eliminated by the *Truth in Sentencing Act* ("*TISA*").[43] Prior to the *TISA*, accused persons could potentially "game the system"

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[39] See also the *obiter* comments in *R. v. Hussain*, 2018 ONCA 147, 140 O.R. (3d) 593, at para. 22.
[40] *R. v. Codina*, 2019 ONCA 986, at para. 3.
[41] *R. v. Schlaepfer*, 2022 ONCA 566, paras. 16-18.
[42] See *e.g. R. v. Campbell*, 2014 BCCA 235, 358 B.C.A.C. 114, at para. 41; *R. v. McBeath*, 2014 BCCA 305, 314 C.C.C. (3d) 531, at para. 20; *R. v. Kovich*, 2016 MBCA 19, 333 C.C.C. (3d) 1, at paras. 150-160; *R. v. Boutilier*, 2018 NSCA 65, 148 W.C.B. (2d) 525, at paras. 18-24; see *contra* the dissenting comments of Rowbotham J.A. in *R. v. Legerton*, 2015 ABCA 79, 599 A.R. 170, at para. 31, suggesting that wrongful conduct could include delaying one matter to await the results of an unrelated pending criminal matter.
[43] *Truth in Sentencing Act*, S.C. 2009, c. 29.

by delaying their pre-sentence detention to "bank" pre-sentence credit and shorten their sentence.[44] However, that was only possible because pre-sentence credit was regularly awarded at rates of 2:1, 3:1, or even 4:1.[45] The 1.5:1 cap imposed by the *TISA* ended this practice by bringing pre-sentence credit into alignment with the 2/3 statutory release provisions of the *Corrections and Conditional Release Act*[46] and the *Prisons and Reformatories Act*.[47] No matter the length of pre-sentence custody, an offender who receives 1.5:1 pre-sentence credit and is released at 2/3 of their sentence serves the same amount of time as an offender who receives bail at first instance and is released at 2/3 of their sentence. Pre-sentence delays now only operate to an offender's detriment because, as this Court noted in *Carvery*, if the detained offender ends up receiving parole *before* serving two-thirds of their sentence, they have still served longer than they would if released pending trial.[48]

39. The Court of Appeal for Ontario's jurisprudence regarding wrongful conduct fails to reflect this change in the law. Absent an incentive to drag-out pre-sentence custody, there is no logical or fair reason to punish offenders for pre-sentence delays by imposing longer sentences.[49]

40. This is, again, an issue that has a unique impact on offenders with significant mental illness or cognitive impairment whose disabilities may contribute to lengthier proceedings. The delays in the applicant's case are illustrative. While about half of the delays stemmed from his resiling from guilty pleas and changing lawyers (much of which occurred while he was in jail, for which he received 1.5:1 credit), the other half occurred while he was detained in hospital, undergoing fitness assessments, treatment orders, and a criminal responsibility assessment. Those processes were necessary and took time. It was not until the applicant had been assessed for fitness, found unfit, and made fit on a treatment order that his matter was able to resolve. To characterize this as

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[44] See *e.g. R. v. Safarzadeh-Markhali*, 2014 ONCA 627, 141 O.R. (3d) 35, at para. 54, aff'd on other grounds, 2016 SCC 14, [2016] 1 S.C.R. 180.
[45] See *Summers*, *supra*, at para. 31.
[46] *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 127(3).
[47] *Prisons and Reformatories Act*, R.S.C., 1985, c. P-20, s. 6.
[48] *R. v. Carvery*, 2014 SCC 27, [2014] 1 S.C.R. 605, at para. 21.
[49] Of course, a finding that an accused purposefully delayed the proceedings might well disentitle an accused to credit *beyond* 1.5:1 in recognition of particularly harsh pre-sentence detention: see generally *R. v. Marshall*, 2021 ONCA 344 ["*Marshall*"], at paras. 50-53.

"wrongful conduct" is an affront to basic principles of fairness and undermines the right – and requirement – that accused people be mentally fit to stand trial.

b) *Summers* credit is available for all forms of pre-sentence detention

41. The Court of Appeal held the sentencing judge made no error in denying the applicant *Summers* credit for time spent in psychiatric pre-sentence custody because the living conditions at the hospital were less harsh than at the detention centre and "comparable or favourable" to those the applicant experienced in the community. The Court noted "the qualitative rationale for *Summers* credit is to recognize the time in pre-trial detention is often more onerous than post-sentence incarceration".[50]

42. That holding ignores the quantitative rationale for 1.5:1 credit, misunderstands the nature of detention within forensic hospitals, and ignores an essential aspect of the reasoning in *Summers*. The quantitative rationale for *Summers* credit is in no way diminished where the accused is detained in a forensic hospital rather than a jail. Every day spent in pre-sentence custody – no matter the location of detention – is a denial of an accused's liberty. The loss of early release and parole eligibility, taken alone, warrants credit at 1.5:1.[51] No doubt the applicant was more comfortable at the hospital than in the difficult conditions he endured at the detention centre but he was not there voluntarily and, while there, could not begin the post-sentence programming that the sentencing judge viewed as essential to his rehabilitation.

43. Moreover, the conditions of custody do not have to be *as bad* as they are in traditional detention facilities to warrant 1.5:1 credit. This Court in *Summers* recognized that enhanced credit is not reserved for *only* particularly harsh conditions. The statutory 1.5:1 cap means that sometimes credit for pre-sentence custody will be "insufficient to compensate" for the deplorable conditions

[50] Court of Appeal Reasons, at para. 27, **Tab 1C**.
[51] *Summers*, *supra*, at para. 71.

frequently experienced in remand custody.[52] As this Court held in *Summers*, that reality should not lead judges to restrict credit in less egregious cases.[53]

44. The denial of enhanced credit for pre-sentence custody on grounds that the conditions of detention are preferable to an accused person's living arrangements in the community is, as far as the applicant is aware, unprecedented. The applicant submits there is a good reason for this absence of authority: such a comparison is offensive. It imagines that the denial of bail is somehow a windfall for impoverished and marginalized accused people and functionally punishes them by imposing a barrier to *Summers* credit that does not exist for those with greater finances.

45. There is a direct link between the applicant's "unique living arrangements" and the legacies of colonialism. As detailed in the *Gladue* report, he was born on Attawapiskat First Nation – an infamously chronically underfunded and underserviced First Nations community – with FASD and severe cognitive limitations, began using substances at age 7, was sexually and physically abused, and apprehended by the Children's Aid Society.[54] That is the chain of events that led to him living in the poor conditions of a group home when out of custody. Using those conditions as a justification to deny him *Summers* credit is antithetical to the *Gladue* principles long laid down and reaffirmed by this Court.[55]

46. The reasoning in this case, if widely followed, will produce profoundly unfair results: Individuals living in extreme poverty and accused people who are detained within a forensic psychiatric facility before sentencing will serve longer sentences than those who are less

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[52] *Summers*, *supra*, at para. 72; NB: Since *Summers*, a practice has developed in Ontario of accounting for exceptionally harsh conditions of pre-sentence custody as a potential mitigating factor or collateral consequence in sentencing: see *e.g. R. v. Duncan*, 2016 ONCA 754, at para. 6; *Marshall*, *supra*, at paras. 50-53.

[53] *Summers*, *supra*, at paras. 31, 72.

[54] Gladue Report & Update, at pp. 5-11, **Tab 3B**.

[55] See generally *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207; *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. Hilbach*, 2023 SCC 3.

marginalized, less ill, or less disabled. This again offends both the parity principle and the values of equality captured by s. 15 of the *Charter*.

47. There are also sound policy reasons not to deny enhanced credit for pre-sentence custody spent in a hospital setting. Providing *Summers* credit is important to incentivize – or at minimum, to not *dis*incentivize – accused persons with mental disorders obtaining necessary assessments and treatment. As in the applicant's case, orders requiring the accused to be detained in hospital – especially keep-fit orders – can result in very lengthy periods of psychiatric pre-sentence detention. Such orders are discretionary. A court *may* – not *shall* – make such an order where there are reasonable grounds to believe the accused will become unfit if not hospitalized.[56] If enhanced credit is regularly denied for time spent in hospital, an accused person could rationally resist a keep fit order to avoid a longer sentence. Incentivizing mentally disordered accused people to stay in detention centres ill-suited to respond to their mental health challenges benefits no one in the criminal justice system.

c) Inconsistent treatment of hospital-based pre-sentence custody

48. The credit to be assigned for time spent in a hospital during pre-sentence custody has divided the lower courts across Canada. Direction is needed from this Court.

49. The Court of Appeal's decision is, to the applicant's knowledge, the only appellate decision since *Summers* to address this issue.[57] Before *Summers*, the Alberta Court of Appeal held in *Schira* that the sentencing judge had erred in finding that "...pre-trial custody spent in a hospital setting should not attract the same level of credit as does time spent in a remand facility. It is not as onerous." The Alberta Court of Appeal held that "there is no such principle".[58] In *Ambrose*, the

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[56] *Criminal Code*, s. 672.29.

[57] In *R. v. Anthony-Cook*, 2015 BCCA 22, 367 B.C.A.C. 96, at paras. 33-38, rev'd on other grounds, 2016 SCC 43, [2016] 2 S.C.R. 204, the British Columbia Court of Appeal addressed a related issue of time spent in a psychiatric facility pursuant to a bail condition and concluded the time should be treated as a mitigating factor rather than as pre-sentence credit under s. 719(3.1).

[58] *R. v. Schira*, 2004 ABCA 369, 357 A.R. 225, ["*Schira*"], at paras. 4-5.

same court implicitly awarded roughly 2:1 credit by reducing a sentence by 77 days because the sentencing judge failed to account for 36 days of time the accused spent in a psychiatric facility.[59]

50. The trial courts across Canada have approached the issue inconsistently. In Ontario, since the *TISA* but prior to the case at bar, the Superior Court of Justice ruled in *Fonteece* and *Pemberton* that psychiatric pre-sentence detention should receive 1.5:1 credit given that it represents a restriction on liberty,[60] but in *Slapkauskas* that 1:1 credit is appropriate given the comparatively better conditions of custody.[61] Before the *TISA*, the Superior Court of Justice in *Shepherd* granted 2:1 credit because there is no reason to treat hospitals and jails differently.[62] Meanwhile, the Ontario Court of Justice in *Gavrilovic* awarded 1:1 credit, without explanation.[63]

51. In Nova Scotia, the Provincial Court in *Lemoine* held that 1:1 credit is appropriate because the accused is receiving treatment and the conditions are better.[64] However, the Supreme Court of Nova Scotia in *Denny* held that 1.5:1 credit was appropriate because the *Criminal Code*'s use of the term "custody" incorporates both prisons and hospitals.[65]

52. Finally, the Alberta Court of Queen's Bench awarded 2.5:1 credit for time in hospital in *Laidley*, although this was less than the 3:1 credit it would have awarded if the accused spent that time in jail.[66] Conversely, the British Columbia Provincial Court in *A. (J.)* awarded 2:1 credit equally for time spent in jail and in hospital.[67]

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[59] *R. v. Ambrose*, 2000 ABCA 264, 271 A.R. 164 ["*Ambrose*"], at para. 47; see also *R. v. Sooch*, 2008 ABCA 186, 433 A.R. 270 ["*Sooch*"], at paras. 6, 8.
[60] *R. v. Fonteece*, 2010 ONSC 2075 ["*Fonteece*"], at paras. 27-30; *R. v. Pemberton*, 2019 ONSC 4206 ["*Pemberton*"], at para. 92; NB: *Fonteece* was decided after the *TISA* but before *Summers* and the sentencing judge's selection of 1.5:1 credit was still intended to represent "somewhat less than the common credit": *Fonteece*, at para. 30.
[61] *R. v. Slapkauskas*, unreported decision of Abrams J., dated January 15, 2021, currently under appeal at the Court of Appeal for Ontario (C69315) ["*Slapkauskas*"], at p. 18, **Tab 4A**.
[62] *R. v. Shepherd*, [2006] O.J. No. 2860, ["*Shepherd*"], at paras. 16-17.
[63] *R. v. Gavrilovic*, 2010 ONCJ 245, ["*Gavrilovic*"], at paras. 110-113.
[64] *R. v. Lemoine*, 2014 NSPC 49, 345 N.S.R. (2d) 19, ["*Lemoine*"], at paras. 57-59.
[65] *R. v. Denny*, 2016 NSSC 76, 371 N.S.R. (2d) 236, ["*Denny*"], at paras. 227-235.
[66] *R. v. Laidley*, 2001 ABQB 781 ["*Laidley*"], at paras. 80-83.
[67] *R. v. A. (J.)*, 2010 BCPC 208, ["*A. (J.)*"], at paras. 20, 35.

53. In sum, the lower courts have been and remain deeply divided on this question. Many of the decisions appear to recognize that some enhanced credit is necessary to ensure a measure of equality in sentencing offenders who do not obtain bail, no matter where pre-sentence detention occurs. But there is little analysis of the issue and where it is discussed, the lower courts differ in their reasoning for their respective conclusions, *e.g.* whether hospitals and jails are the same as a matter of statutory interpretation (*Denny*), whether the courts should look to comparative conditions (*Laidley*, *Lemoine*, *Slapkauskas*, *Fonteece*), or whether a restriction of liberty alone warrants enhanced credit (*Pemberton*, *Fonteece*, *A.(J.)*, *Schira*, *Sooch*, *Ambrose*).

54. Guidance from this Court is required. There is substantial disparity among the provinces and the lower courts on this issue that stands to impact a vast number of vulnerable offenders. The Court of Appeal's decision in this case unfortunately did not engage with this issue a substantive way and there is no reason to believe that the disparity will be resolved naturally absent this Court's involvement.

PART IV: SUBMISSIONS CONCERNING COSTS

55. The applicant does not seek costs and asks that no costs be ordered against him.

PART V: ORDER REQUESTED

56. The applicant requests that this Court grant leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of October, 2023.

Erin Dann
Paul Socka
Counsel for the Applicant, J.W.

PART VI – TABLE OF AUTHORITIES

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