Court of Queen's Bench of Alberta

Citation: R v Byron, 2021 ABQB 883

Date: 20211108
Docket: 200160786Q1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Justin David Byron

Accused

Ruling on Sentencing Voir Dire
of the Honourable Madam Justice Tamara L. Friesen

BACKGROUND

[1] On May 18, 2021, Justin David Byron pleaded guilty to six criminal charges arising from one attempted bank robbery and one completed bank robbery. In both instances, explosive devices were detonated in an effort to rob GardaWorld security guards while they were in the process of loading large amounts of cash into ATM banking machines. The details of these robberies are set out in my companion sentencing decision cited as ***R v Byron***, 2021 ABQB 884.

[2] Mr. Byron was arrested on March 4, 2019 and was placed on remand at the Edmonton Remand Centre (ERC) on March 5, 2019. He has been on remand ever since.

[3] On January 4, 2021, Mr. Byron filed an application alleging that his rights guaranteed under *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the

Charter) had been breached in numerous different ways during the investigation, his arrest, and while he has been in custody. After entering guilty pleas, he moved forward with the aspect of the *Charter* application alleging breaches of his ss 7 and 12 rights. He argued that he should be entitled to either a stay of proceedings, or a reduction in sentence as a remedy for those breaches, which included, but were not limited to the overly restrictive and harsh conditions imposed as a result of the COVID-19 pandemic and the treatment he has received while on remand.

[4] The Crown opposed the *Charter* application, arguing that Mr. Byron's *Charter* rights had not been breached at any point during his time in custody, and he was therefore not entitled to a stay, or to any reduction in sentence above and beyond the 1.5 to 1 allowable remand credit set out in s 719(3.1) of the *Code*. The Crown argued that if the Court saw fit, the severe restrictions put on Mr. Byron during his pre-trial detention as a result of COVID-19 could be addressed by granting a small, global reduction in overall sentence, in excess of the 1.5 to 1 credit.

[5] The blended *Charter voir dire* and sentencing hearing took place over the course of 8 days: June 28 – 30, July 2, and July 7 – 9, and September 13, 2021. At the conclusion of argument, I adjourned the matter to consider my decision. On October 22, 2022 I rendered my sentencing decision orally and indicated that written reasons with respect to both the sentencing and *voir dire* decisions would follow. These are my reasons on the *Charter voir dire.*

THE EVIDENCE

[6] Mr. Byron testified on his own behalf during the *voir dire*. The Crown called three witnesses: Mr. John Hagen, Deputy Director of Security at the Calgary Remand Center (CRC); Ms. Tammy Harris, a senior Correctional Services Worker responsible for programming at the ERC; and Mr. Jason Robson, Director of the Edmonton Young Offender Centre (EYOC).

[7] The correctional representatives testified about institutional processes and policies, which differed somewhat from institution to institution, including pre- and post-COVID-19 pandemic. Those processes and policies included: intake and processing, assignment to units, provision of exercise and activities, cell searches, strip searches, cleaning protocols, and many other things.

[8] By consent, the parties relied on two sets of materials gathered and produced by the three Remand Centers, which I will refer to as the "Corrections Records," Binder 1 and Binder 2. Those records included such things as: housing history, video visitor records, contemporaneous notes taken by various corrections officers, copies of "Requests for Interview" submitted by Mr. Byron, work orders, incident reports, as well as various other documents the parties thought might be of relevance in the *voir dire*. Most of the Corrections Records were specific to Mr. Byron, although some related more generally to institutional events that occurred during the time period when Mr. Byron was in custody.

[9] Additional correctional documents were entered into evidence during the course of the *voir dire,* including: a package of documents from the Alberta Correctional Services Division, Adult Centre Operations and Branch Policies and Procedures that included general policies and procedures dealing with food service, dental service and sanitation, as well as policies, procedures and internal memoranda dealing specifically with the impact of the COVID-19 pandemic on institutional practices; a copy of the ERC's "Inmate Manual," revised as of May 2019; the "Inmate Manual" from the EYOC operating as the Edmonton Remand Centre – Annex; the EYOC's "New Admission Package" as updated June 2021; Standing Operating Procedures of the ERC dealing with inmate searches; and the ERC's "New Admit Info Guide."

[10] Mr. Byron also entered as an exhibit a very detailed set of notes that he recorded between the dates of August 21, 2020 and November 10, 2020 while housed at the ERC. He reviewed and expanded on those notes in the course of his oral testimony.

[11] The following issues were raised with respect to my consideration of the evidence in the *voir dire*: first, Mr. Byron's credibility as a witness; second, the ability of the Crown witnesses to testify to events they did not personally witness based on their interpretation of the Corrections Records; and third, the admissibility of certain portions of the Corrections Records.

[12] Crown counsel challenged Mr. Byron's credibility, arguing he lied to the police following his arrest in order to minimize his responsibility. In their view, this, combined with other issues raised during cross-examination, amounted to evidence that Mr. Byron is willing to lie or mislead the Court if he thinks it is to his advantage. The Crown argued he was not a fair witness, exaggerating things when it suited him, and refusing to acknowledge examples where correctional staff had attempted to respond reasonably to issues brought to their attention.

[13] The Crown submitted that where Mr. Byron's evidence was at odds with the contemporaneously recorded Correctional Records, the Records should be believed. Further, the fact that Mr. Byron failed to bring most of the issues complained of on the *voir dire* to the attention of correctional staff, indicates they were not issues that truly concerned him, but rather, things he wished to hold onto until sentencing for the purpose of seeking a sentence reduction.

[14] Defence counsel argued that Mr. Byron was a credible witness: his testimony was internally consistent, he was not shaken on cross-examination, and his evidence was largely corroborated by the Corrections Records. He submitted that in any case where Mr. Byron's testimony conflicted with the Corrections Records, the Court should draw an adverse inference against the Crown for not calling any firsthand witnesses to testify, citing Marceau J's decision in ***Trang v Alberta (Edmonton Remand Centre)***, 2006 ABQB 824 [***Trang***]. Defence counsel further submitted that as per 30(10)(s)(i) of the *Canada Evidence Act*, RSC 1985, c C-5, any record relating to the investigating of an incident is inadmissible. He did not specify which of the Corrections Records this argument related to.

[15] Crown counsel properly took issue with the fact that Defence counsel offered no such qualification or objection at the time the Corrections Records were entered as exhibits. The first time this submission was made was in the course of Mr. Byron's written submissions to the Court. The Crown argued that regardless, hearsay is admissible in sentencing hearings unless one of the parties invokes s 724 of the *Code*, which did not occur in this case.

[16] With respect to the latter argument, I note that the first seven days of the sentencing hearing were properly part of a *voir dire* dealing with alleged breaches of ss 7 and 12 of the *Charter*. The real problem is that the parties (and the Court) should have, at the time of the agreement to put the Corrections Records in as exhibits by consent, specifically articulated what use was to be made of them: were they all going to be submitted for the truth of their contents? If not, then which documents were going to be challenged for accuracy and on what basis? This did not occur. In contrast, Marceau J's decision in ***Trang*** was issued in response to a formal application by the Crown for admission of records, which was contested and fully argued before the Court. All parties, and the Court, had an opportunity to speak to the issue of admissibility fully, on the record, prior to entering them as exhibits.

[17] Whether Defence counsel can be taken to have consented to having these records entered for the truth of their contents is not ultimately determinative. I agree with the Crown's submission that the evidence in question is admissible for the truth of its contents pursuant to the common law business-records exception to the hearsay rule: see ***R v Crate***, 2012 ABCA 144, ***R v Monkhouse***, 1987 ABCA 227 [***Monkhouse***] and ***Trang*** at paras 5 - 7. The Corrections Records were made in the normal course of business by a recorder or recorders with personal knowledge who had a duty to make the record and no motive to misrepresent, and the relevant materials were reviewed in advance, and confirmed by institutional representatives during the course of the *voir dire*: ***Monkhouse*** at paras 23 - 24.

[18] As for the reliability and credibility of the Crown witnesses, I found each of them to be forthright and well-informed as to their particular institution's policies, procedures, and actions. They admitted that guards do not always follow policy, and were agreeable in cross-examination on the rare occasions when something in the Corrections Records appeared to contradict something they had testified about. In each case, they deferred to the Corrections Records.

[19] While I agree with the Crown's observations with respect to Mr. Byron's credibility in a general sense, I concur with Defence counsel in finding that Mr. Byron's testimony was largely consistent with the Corrections Records and the evidence of the institutional witnesses. This fact seems to make the admissibility disagreement somewhat of a tempest in a teapot.

[20] That said, there were some notable areas of factual disagreement between the parties, including:

1. Whether Mr. Byron was "falsely charged" with an institutional offence while at the CRC;
2. How much time he spent in "lock up";
3. Whether he went five weeks without a change of clothing between April and June of 2020; and
4. Whether his handwritten notes and observations documenting alleged institutional COVID policy violations by corrections officers are credible and reliable.

[21] I will deal with those disputes, and other factual issues specifically, as I move through my review of the evidence.

[22] The Court heard seven days of testimony with respect to Mr. Byron's *voir dire* application, and was presented with over a thousand pages of evidence, argument, jurisprudence, and legislation to review and consider. As such, what follows is merely a summary of the evidence and argument most relevant to the *Charter* breaches as they were articulated in closing submissions.

General Evidence applicable to all three institutions:

Intake procedures and RFIs

[23] Mr. Hagen testified that all inmates go through general admission on intake. They are interviewed, strip searched, pass through medical, get their clothing, and are assigned to their living units. Pre-COVID-19, they would have been assigned to a general population unit to begin with, and then within 24 hours, they would be seen by a classification officer to discuss their current situation. At that point, they would be classified to the right unit and, if it was their first time in the center, offered the inmate manual to familiarize themselves with it.

[24] The default placement is general population; however, inmates need to sign a waiver acknowledging the risks associated with mixing with other prisoners, or else request protective custody.

[25] Each institution has an "Inmate Handbook" or something similar setting out general rules and regulations. For example, the ERC has a "New admit info guide." These documents set out general information including what types of supports are offered, how to deal with money, canteen, visits, etc.

[26] Mr. Byron indicated that it was possible he was given the Manual, or something similar, on his admission in March of 2019 because he recognized the schedule.

[27] One of the topics dealt with in the "Inmate Handbook" that is of particular importance to Mr. Byron and other inmates is the process for requesting assistance from the institution. Inmates are provided with the ability to make a "Request for Interview" [RFI] via a written form that covers everything from a request to transfer to another institution, to a request for phone calls, photographs, or clean sheets. Each RFI contains a list of possible addressees, including "Director" or "Caseworker," as well as topical areas such as "Inmate Welfare" and "Inmate Property." The RFI forms contained in the exhibits each contained a note at the top indicating "Please review the Inmate Handbook prior to filling out your request – it may answer your question." Records show Mr. Byron filled out approximately 30 RFIs during his time on remand.

[28] Ms. Harris indicated that at the ERC, the RFI process is described on intake and that the form is self-explanatory, with boxes inmates can check off. RFI forms are kept at the staff station and need to be requested. Forms can be returned to staff or placed in a secure box that goes directly to the Director for review.

[29] Mr. Hagen indicated that the culture at CRC is not to make inmates resort to filling out an RFI if the request is something the guards can easily deal with. If an inmate needs new clothes or cleaning supplies they can just ask for them. He indicated that staff have no discretion with respect to forwarding RFIs to the addressee, for example the Director or a supervisor. If there is no addressee, and they can handle it at a unit level they will, otherwise, they pass it on.

[30] At EYOC, RFIs are available at the guard stations, but can also be kept by the inmates in their cells or as they are referred to at EYOC, their "dorms."

[31] Mr. Byron had no experience with the penal system prior to these events. Records indicate he completed an intake interview with a caseworker and received a unique "ORCA" number, which is the identifying number used to track inmates within the prison system in Alberta. Mr. Byron said he did not have a clear recollection of that intake interview.

[32] Mr. Byron also said he did not remember being given a copy of the "Inmate Manual" when he arrived at CRC or ERC. He did not recall coming across it on a library cart or having any other inmate every tell him about it. He said he learned about the existence of RFIs when he used it one for the first-time during lockdown at the CRC because he wanted to speak to his wife on the phone.

[33] The Corrections Records indicate that Mr. Byron was familiar with the RFI process prior to requesting a phone call with his wife, as his first RFI was dated April 19, 2019, consisting of a request that his father pick up his personal property. A few days later he filed his second and third RFIs requesting that he be allowed to call his wife who was suffering from severe

depression even though his unit was on lock down at the time. As I understood his testimony, that request was granted.

[34] Mr. Byron testified that while at the EYOC, he was expected to fill out an RFI every time he needed something or had any issues. At CRC or ERC, he would ask the guards directly and they would frequently say "remind me later." He said the benefit of using an RFI form was that they could not ignore it because it was filed paperwork. Mr. Byron indicated that he did not see anyone fill out an RFI with respect to new clothing until he got to the EYOC. At ERC it was "first come first serve" when new clothing came in.

[35] In cross-examination, Mr. Byron admitted he knew that RFIs were a good way to contact administration and to keep track of requests. He was less willing to admit that it was important to put important requests into written form by way of RFI.

Strip searches

[36] Mr. Byron testified that he was subjected to strip searches while in remand, but that they did not happen "as much" when he was at the CRC. He said he was strip searched when he was transferred between Centers or when he was taken to court. He did not testify about any particular strip search, or point to any conduct that he considered to be improper in conducting the strip searches. He did not say he was ever singled out from other inmates and subjected to a strip search. Mr. Byron did not make or file any formal complaints about any strip searches.

[37] All three Crown witnesses agreed that strip searches are conducted upon admission, transfer, during monthly unit searches, during random cell checks, and if there is suspicion of contraband. They explained the need for such searches to ensure safety for inmates and corrections staff.

[38] Mr. Robson testified that new transfers are strip-searched when they come in to the EYOC. Individual inmates are sometimes strip-searched again when their unit is searched, when suspected of having contraband, or for random audit purposes. Random cell and body searches are sometimes performed to maintain security. Upon return from court, inmates are also strip searched.

[39] On cross-examination, Mr. Robson was directed to Policy 6-2.2, page 5 of 9 from the sub-document entitled "Security: Searches: Inmate Searches" which described the reasons for conducting a strip search. Defence counsel pointed out that "random strip searches" are not listed on that page.

[40] Mr. Robson acknowledged that random strip searches were not provided for specifically in the policy, but observed that on page one of the same packet of materials, in the "Standard Operating Procedures" document, it indicates in the very first paragraph that searches will be conducted for the overall safety of the Center. He explained that there has to be some intention behind the search and denied the suggestion that inmates are simply identified at random and strip searched.

Cell searches

[41] Mr. Byron testified that cell searches conducted by guards, in particular at the CRC, were aggressive and intrusive and he would regularly have photos ripped from the wall and bedding tossed on the floor. He did not indicate being singled out for such treatment but suggested it was generally a problem for everyone. He said guards would joke about how badly they had

destroyed a particular room that day and for that reason he tried to be a friendly at all times with the guards.

[42] Mr. Hagen testified that cell searches are done to ensure the safety and security of everyone in the institution. The CRC security team conducted weekly searches while inmates were exchanging their laundry. He admitted that "cell tossing" was something inmates frequently complained about and explained that the institution took steps to discourage the guards from taking such actions.

[43] Mr. Robson testified that the cells at EYOC are searched by ERC staff once per month. He agreed with Mr. Byron's testimony with respect to water bottles being removed during searches, recalling that inmates had complained to him about the practice, which they thought was unfair. He indicated that after the complaint was made to him, he instructed staff to leave the water bottles in the cells, which they did.

Mr. Byron's relationship with guards and other inmates

[44] Mr. Byron was considered a good inmate. In the Corrections Records he was frequently referred to as polite and respectful, and was not subjected to any disciplinary proceeding while incarcerated at any of the remand centers.

[45] Mr. Byron also testified that the attitude of the guards at CRC and ERC was to treat inmates as numbers and that they were generally "stand offish" and less friendly than at EYOC. As described by Mr. Byron: "You're an annoying insect until they have reason to believe you are not an insect." The guards at EYOC were friendly and used first names, and would be willing to talk to inmates and help them, night and day.

Dental care issue

[46] Mr. Byron testified that he has a cracked molar and suffered with it for the duration of his time in remand. He said it was getting progressively worse. He also said he had not sought care for it while in custody because he was "told by other people" that "the only work they do is pull teeth." He thought he may have also seen this on a sign on the wall.

[47] He admitted he did not ask to be seen by a dentist or seek dental care for his tooth at any point during his time in any of the three remand centers.

Contact with family

[48] Mr. Byron indicated that he did not see his wife and children at all for the first three months he was at the CRC, but during the summer, they tried to come to see him every week for a 45 minute in person visit. Due to the expense involved, that dropped down to once every two weeks, and then once per month in the fall, with no visits in the winter. He has not seen his children in person since February of 2020.

[49] During his time at the ERC, records show that Mr. Byron had video calls with his family at least once per week, and multiple video calls from June through October of 2020. The video calls decreased in November and December of that year, but there is no indication he was denied requested visits during that time period. The evidence I received indicated that Mr. Byron has been given ample opportunity to speak with his wife on a daily basis over the phone.

Calgary Remand Center: March 18, 2019 to March 11, 2020

[50] Mr. Byron was transferred to the ERC on March 5, 2019, after his March 4, 2019 arrest at the Edmonton International Airport.

ERC staff conflict

[51] Mr. Byron was housed at the ERC until March 18, 2019, when, according to a notation in the records, he was transferred to the CRC as a result of a "staff conflict." Mr. Byron testified he thought he was moved to the CRC because ERC staff had threatened to kill him. He said he obtained that information from his wife, who heard it from his lawyer. He also testified that he never talked to his lawyer, who he was frequently in contact with, about the alleged threat.

[52] Ms. Harris explained that the ERC was concerned about conflicts of interest given that several staff members had previously worked with GardaWorld. They wanted to ensure the safety of staff and inmates. She did not think an inmate like Mr. Byron would have been told specifically of the reason for a security transfer in such a case.

[53] In cross-examination, Mr. Byron did not recall being told he was being transferred because "some guards shared similar employment history" with him in the security field.

[54] Regardless, there was no evidence before me to substantiate any allegation or even support a reasonable suspicion that an ERC staff member ever threatened Mr. Byron's safety.

Concerns with placement in the "Gang Unit"

[55] At the CRC, on admission, Mr. Byron was placed in Unit 6, a maximum-security unit which Mr. Byron said was referred to as the "Gang Unit." He remained in Unit 6 the entire time he was housed at the CRC, except for a brief time period from March 25 to March 28, 2019 when he travelled to Edmonton for the purpose of a bail hearing and was housed at the ERC. He was denied bail in April of 2019.

[56] Mr. Hagen testified that Max Units 5 and 6 are used to house inmates that the CRC considers dangerous because of the serious nature of the offences they are accused or convicted of. Staff on these units are usually more experienced and serious vigilance is expected. Mr. Hagen said the decision to place Mr. Byron on Unit 6 in this case was likely due to the seriousness of the charges he was facing.

[57] Mr. Byron, who has no prior criminal record, did not feel he belonged in Unit 6, and said he feared for his personal safety as he felt he was surrounded by violent individuals and gang members. However, he did not fill out an RFI form seeking to be moved to a different unit.

[58] Mr. Hagen explained that at the CRC, "max" units may include gang members, but they are not gang units. CRC does not assign gang members to units because they do not want to recognize gangs or allow units to be run by particular gangs. Security officers monitor gang involvement and associations within the CRC and try to limit the number of gangs or gang members in particular units or zones for safety reasons.

[59] Mr. Byron said he heard talk of threats and stabbings while in Unit 6. He also said he had witnessed "stabbings," but on cross-examination admitted it was only one stabbing, and he did not actually witness it, he just assumed it was a stabbing due to the large amount of blood and condition of the victim which he observed following the altercation.

[60] He further testified that at one point, another inmate threatened to stab him after a dispute over the phone. He considered this to be a credible threat because weapons were discovered on the Unit almost every week. He said he had seen such weapons himself on Unit 6, but he admitted he did not tell CRC staff about it. He just tried to be neutral and friendly to everyone.

[61] Mr. Hagen testified that while there were violent altercations, there were no stabbings during the time period Mr. Byron was on Unit 6 and that if there were, he would have known about it. He confirmed there was one very serious altercation involving serious facial injuries to the victim which may have been the incident Mr. Byron was referring to.

Lockdown periods

[62] Mr. Byron testified that he experienced several lockdowns while housed in Unit 6, with one or more lasting as long as seven days. He said several inmate-fashioned weapons were discovered after cells were searched during the lockdowns. Every time an incident or altercation occurred, the whole unit would be locked down for a period of time, rather than just the inmates responsible. Mr. Byron did not think this was a fair way to deal with things. He testified that the lockdowns and discovery of weapons contributed to his feelings of fear and isolation.

[63] Mr. Hagen testified that the purpose of such lockdowns was to provide for a proper investigation and possibly medical intervention. He said they usually last for the duration of an 8- hour shift, but admitted that sometimes they could extend over into the next shift. During a lockdown, the inmates are entitled to one hour out of cells.

[64] Mr. Hagen further testified that there were no 3-day lockdowns while Mr. Byron was held on Unit 6, and that he has never heard of a seven-day lockdown, even in the context of an inmate homicide investigation. Corrections Records showed, and the Crown conceded that there were two lockdowns, back-to-back, occurring around April 8, 2019, which ended up covering a three-day period, from April 6-9, 2019. During that time period, inmates were allowed showers on the 7th and 8th for 30 minutes.

Allegation of misconduct

[65] Mr. Byron testified that he was falsely charged with assaulting another inmate on November 12, 2019, and this caused him emotional distress. A fight had occurred in the cell block and the guards called him to the front and said they knew he was involved because they had him on camera. He told them they had the wrong person, that he was on he phone with his wife at the time, and he asked to speak to their supervisor.

[66] He said the charges were “withdrawn” later that day after guards reviewed the video footage of the incident in question. Mr. Byron did not make or file any formal complaint about this “false” allegation at the time. He was not subjected to any additional time in lockdown due to the accusation.

[67] Mr. Hagen did find an indication in the records that Mr. Byron had been a suspect in an incident, but also that he had been ruled out. Mr. Hagen could find no documented evidence that a charge had been issued or withdrawn against Mr. Byron. Ms. Harris later testified that institutional charge records cannot be deleted from the internal record keeping system, ORCA.

Cell conditions

[68] Mr. Byron testified that he was "double-bunked" during certain periods of time at CRC and that the cells were small and cramped. His cellmates changed regularly. The cells were generally filthy and it was difficult for inmates to clean them.

[69] Remand staff observed that the cells in question were designed to house two inmates. They did not otherwise dispute the size or layout of the cell as described by Mr. Byron. Mr. Byron also indicated that when he shared a cell, the cell contained a bunk built for two people.

[70] Mr. Byron also complained that in the winter the cell was so cold he could see his breath. While Unit 6 inmates were allowed extra blankets because it was so cold, he said the cell search teams would often take the extra blankets during searches.

[71] Mr. Hagen admitted the cells could be cold and advised inmates are given as many extra blankets as they need. When complaints about the cold are made, the heat is turned up in the cell.

[72] Mr. Hagen further testified that with respect to cleaning, inmates are expected to clean their cells in the morning and every unit has a designated unit cleaner who cleans the common areas and the showers throughout the day. Supplies are available for cleaning and unit staff oversee the cleaners. The cloths used for wiping and cleaning are cut up towels which the CRC obtains from the Spy Hill Prison program.

[73] Mr. Byron did not make or file any formal complaint about cell conditions or cleanliness at the CRC.

Lack of mental stimulation

[74] Mr. Byron testified that the reading materials provided to inmates on Unit 6 at CRC consisted of a small shelf of books that were not refreshed very often and were extremely limited – so much so that he had to read certain books more than once. He said at one point they stopped being refreshed at all because an elevator broke. Mr. Byron did not make or file any formal complaint about the lack of reading material at the time.

[75] Mr. Hagen testified that the books are stored on the same floor as Unit 6 and no elevators are required to transport them. Recreation staff are supposed to refresh the books regularly.

[76] According to both Mr. Byron and Mr. Hagen, other sources of mental stimulation included chess sets, cards, in-cell radio stations, a shared weight room, and an outside yard with a basketball hoop. Mr. Byron exercised in his own cell because he found the exercise room to be crowded and he did not like to wait for a turn on the machines. Inmates also had very limited access to newspapers – two or three copies per unit.

Broken television

[77] Mr. Byron testified that there was only one small television bolted to a walkway of the upper tier of his cellblock and that it was on approximately 4.5. hours a day. He indicated the TV was broken for a two-week period in June and July and that during that time, he and other inmates were deprived of one of their only sources of mental stimulation.

[78] The evidence showed that it took 17 days for CRC staff to replace the Unit 6 television: from June 22 to July 8, 2019. A new TV had to be ordered and when it arrived, it did not fit the old bracket. A new bracket then had to be ordered and installed. There was no evidence provided

that any alternative activities, past times or recreation were provided to inmates while the TV was out of commission.

Shower issues

[79] Mr. Byron testified that there were issues with the showers at the CRC and he and other inmates were forced to either go without showers, or take cold showers during the lengthy time period it took to fix them.

[80] Work orders and records from the CRC confirm that there were issues with the showers during the relevant time period. From September 20 to 23, 2019 the showers were not working, and from February 27 to 28, 2020 there was no hot water as the boiler was broken. The CRC did not provide any evidence that inmates were allowed to access alternative cleaning facilities – inmates simply did not shower during those time periods.

Food, clothing, and bedding issues

[81] Mr. Byron testified that the quality of food at the CRC was terrible. Portions were much smaller than he was used to. Upon his arrest, Mr. Byron weighed 295 lbs. Mr. Byron lost 45 lbs over 21 months of incarceration.

[82] He testified that the vegetables were often undercooked. At one point he received a piece of meat that was raw. When he complained to CRC staff, it was replaced with a cooked piece of meat. Another time, he received a dessert square that was smaller than what other inmates received. The CRC staff allegedly callously remarked "someone always gets stuck with the crappy one."

[83] Mr. Byron did not submit an RFI or file any formal complaint about the quality or food portions at the time.

[84] Alberta Corrections policy documents indicate that they follow the Canada Food Guide's assessment of nutritional requirements for the average male, and that they have procedures in place to ensure food quality and accommodate bona fide dietary accommodations. Complaints are reviewed by the CRC Director or designate.

[85] Mr. Byron also indicated that the clothing he was given to wear while at the CRC was poor. He had to wear old and re-used underwear that was washed but ratty. He further testified that bedding he received was often dirty and soiled. Mr. Hagen testified that inmates are allowed full clothing exchange on the weekend and roll change mid-week. Their "roll" consists of sheets, pillow case, and towels. Mr. Byron did not submit an RFI requesting new clothing or bedding while at the CRC.

Edmonton Remand Center: March 11, 2020 to December 11, 2020

[86] Mr. Byron was placed into the general population at the ERC when he arrived on March 11, 2020. Ms. Harris described the intake process and considerations for placement including: current charges, no-contact, incompatibles, etc. Mr. Byron has a "no-contact" order in place with respect to the four GardaWorld complainants.

[87] At the time, Mr. Byron was to be housed at the ERC for the purpose of attending court and anticipated being returned to the CRC afterwards. Shortly after Mr. Byron arrived at the ERC, on March 17th, 2020, the Canadian Government declared a Public State of Health Emergency due to the COVID-19 pandemic.

[88] Mr. Byron made several requests to be transferred back to CRC during the month of March. On April 1, 2020, he was advised that the CRC was not accepting inmates and he would not be transferred back. He was worried because he believed there were guards at the ERC who wanted to hurt him, and his wife had told him to "watch your back." He was unable to provided evidence of how his wife obtained that information, but thought it was from his lawyer.

[89] Mr. Byron was at the ERC for most of the year 2020, other than a few days spent at the EYOC from June 26 to July 3, 2020. He asked to return to the ERC when he found out EYOC would not be able to facilitate video visits with his wife and children. His request to return to the ERC was granted, and he remained there until returning to the EYOC on December 11, 2020.

COVID-19 protocols, restrictions and response

[90] All the parties agree that in response to the COVID-19 pandemic, most of the few programs and much of the limited available recreation activities at the ERC were terminated or suspended. Exercise programs were suspended, and individual access to the already limited supply of exercise equipment and exercise space became severely limited. Inmates were locked up in their cells for most of the day.

[91] From March 5 to March 27, 2020 Mr. Byron averaged about 11 hours per day spent outside of his cell. From March 27 to June 16, 2020 – about two and half months – he averaged only 1.5 hours a day spent out of his cell.

[92] An approximate breakdown of Mr. Byron's time out of cells during the entirety of his pre-guilt incarceration is set out at Schedule "A" to these reasons.

[93] At the ERC, Mr. Byron's cell dimensions were 8 x 13 feet, with one corner cut out. Mr. Byron testified that his cellmates changed regularly, with no ability for either inmate to maintain the recommended six feet of distance between them.

[94] Ms. Harris testified that cells were designed to house two inmates, and that double-bunking is primarily a financial issue that is not unique to COVID-19. If inmates can be housed on their own, they are.

[95] On April 11, 2020, Alberta issued a province-wide masking directive, and recommendations were made for corrections officers to wear masks.

[96] On June 16, 2020, in response to the Alberta Chief Medical Officer of Health (CMOH) announcement that gathering limits be increased to no more than 50 people, Mr. Byron and other inmates began to receive 5 hours out of their cell. The Unit was split into two cohorts and the rotated time out of cell. Inmates at the ERC were kept on this cycle throughout the remainder of 2020, even when units were put on outbreak status.

[97] As per a May 25, 2020 Memorandum, daily unit symptom screening was to be performed. Mr. Byron stated either a nurse or a guard would ask the questions. Sometimes they would take their temperature and other times the guards would bang on the window and ask if "everything [was] good." He said nobody wanted to admit to symptoms because they would end up in isolation at the infirmary. Their response was always "no symptoms." He indicated that "all the inmates" would lie to the nurses because no one wanted to go to quarantine as it was considered "severe punishment."

[98] In her testimony, Ms. Harris went through a number of internal Memoranda released during the relevant time period which dealt with the rapidly changing recommendations and

responses to the COVID-19 pandemic including: designation of units as quarantine, outbreak, or isolation; masking; distancing; staff eating at desks; and other internal protocols and issues. She agreed that staff compliance with masking and other protocols was not always perfect, but that in her experience, there was a high level of compliance amongst both staff and inmates.

[99] Ms. Harris testified that the unit designations were determined by Alberta Health Services (AHS). When a unit was on "outbreak" status then no new inmates would be brought in, and no inmates would be moved out of the unit unless court ordered.

[100] Ms. Harris indicated that the restrictions on daily life of inmates during the pandemic increased depending on what was going on. She said that in order to ensure inmates got sufficient stimulation, ERC staff tried to provide modular learning, activity packages, and different types of tournaments to help the inmates stay engaged while still maintaining AHS restrictions. Exercise and yard access was available but limited, and the ERC had to work with caps on numbers. They tried to engage stakeholders such as the John Howard and the Elizabeth Fry Societies to offer self-study modules, for example. Concerns with lack of addictions programming and psychological counselling had to be dealt with through AHS. Chaplains were available to talk to inmates individually through an RFI request.

[101] Ms. Harris could find no indication in the records that Mr. Byron had ever complained about inadequate exercise, inability to access a Chaplain or problems with the available reading material, including access to law books, during his time at the ERC.

COVID-19 isolation and lost clothing incident

[102] On April 22, 2020, Mr. Byron was assessed for possible COVID-19 symptoms. He testified that he reported an earache; however, records show he reported a sore throat. After speaking with a doctor over video, he was immediately placed into administrative segregation as per the ERC's COVID-19 isolation protocol. While in isolation, he was given only 30-45 minutes out of his cell per day. He said his personal items were not brought to him until the evening of the 23rd and he was not allowed to shower. He washed in the sink.

[103] On cross-examination, Mr. Byron said at the time, he did not think the steps taken by the ERC were reasonable. He was not happy with the experience and was quite sure he did not have COVID-19. He implied the course of action taken was an overreaction by the institution, and he did not like the way medical staff were "looking after him."

[104] On April 24, 2020, Mr. Byron was cleared, having no other symptoms, and having tested negative for COVID-19. Mr. Byron testified that when he returned to his regular unit he was not given any extra bedding or clothing and went for a period of five weeks thereafter without a second set of underwear or clothes. He said that as a result, he was forced to wash his clothes in his sink for a period of time.

[105] Mr. Byron said he asked different guards for help during that time and eventually someone found an extra set of clothing for him. He did not recall who he asked or who eventually helped him. He admitted that during that time period, when he was allowed out of his cell, his would go straight to the phone rather than attending to this issue.

[106] Mr. Byron did not fill out an RFI requesting clothing or raise the issue formally with anyone at the ERC.

[107] A note from April 24, 2020 indicates Mr. Byron was given new bedding and clothing on his release from the infirmary, although he did not agree with this note.

[108] Ms. Harris testified that inmates at the ERC have access to the laundry twice a week and Mr. Byron could have asked for extra clothing and bedding if they were needed. She observed he also could have asked a guard to assist him at any time. She further testified that the isolation protocol was developed by taking direction from AHS.

Bootcamp and fallout

[109] On July 30, 2020, Mr. Byron was interviewed for the "Bootcamp Unit," a special unit within the ERC which allows inmates to perform work within the institution in order to obtain additional programming and opportunities. For example, Bootcamp inmates are allowed access to tablets. They have to pay for time on the tablets which are shared between 35 – 40 people. Tablets could be used to watch movies, send emails and play games on a limited basis.

[110] The Bootcamp Unit is divided up like other units and inmates start at the bottom when they arrive. Depending on their work ethic and demeanor, inmates are then promoted to successive tiers, with different tiers doing different jobs. General cleaning is considered a lower tier job, while "biologicals" is something only top tier inmates are allowed to do. Only top tier inmates are allowed off the Unit to perform cleaning tasks.

[111] Bootcamp cleaners are not given any kind of formal training with respect to cleaning, or in particular, cleaning up biohazardous or "biological" materials such as vomit and blood. They are given a cart with various cleaning supplies on it, as well as gloves and rubber boots. Masks were given to them as they left the Unit and they were directed to wear them when out of the Unit. Inmates were paid for their work through canteen vouchers.

[112] Mr. Byron was reluctant to leave his unit to go out on cleaning jobs due to COVID-19 concerns, but he was promoted to the middle tier in August and then to the top tier in October. Inmates in his tier were sent out for an average of 4 – 6 clean-ups per week depending on the week. A clean-up could take anywhere from 5 minutes to 2 hours to complete depending on the issue. Biological clean-ups of urine, blood, and feces would take longer.

[113] In August of 2020, a staff member at ERC contracted COVID-19 and an announcement was made in the news. On August 24, 2020, the ERC released a Memorandum to staff mandating that all staff wear masks at all time except when they are eating.

[114] Mr. Byron began keeping a log of what he claimed were infraction by guards of the public health measure and policies relating to masking and distancing. Mr. Byron's detailed notes were entered as an exhibit and adopted by him at the sentencing hearing. Additional evidence was presented to the Court from the Corrections Records, in particular, copies of canteen vouchers, which supported the chronological veracity of his notes.

[115] Mr. Byron admitted that he kept the notes expressly for the purpose of obtaining *Charter* relief in his upcoming bail application. He acknowledged that he did not fill out an RFI to advise the administration of his concerns, nor did he raise his concerns with any of the guards directly.

[116] On September 29, 2020, another directive was sent out notifying staff that they are to wear masks at all times.

[117] On October 7, 2020, Mr. Byron received his 90-day Bootcamp letter, early. The 90-day letter is important to inmates because it can be used as a positive character reference for various

purposes. On October 18, 2020, a note appears in Mr. Byron's record indicating he is "a good role model, respectful, and embraces the Bootcamp program."

[118] Mr. Byron observed that there were inconsistent practices with respect to cleaning quarantine units. They were told to wear Tyvek suits depending on the guards in charge. Units at that time had three levels: quarantine, isolation, and outbreak. Outbreak units were units with positive COVID-19 cases, and signs to that affect were posted on the doors.

[119] According to his notes, on October 18, 2020, Mr. Byron was sent to the Max C and Max D Units to clean. At that time, Max C Unit was under quarantine, and Max D was on outbreak status. Mr. Byron was sent in to clean four cells with "COVID-19 isolation" posts on the doors. They had been told there were not to clean COVID-19 units, but when they arrived at the Max Units, that is what they did.

[120] Ms. Harris admitted on behalf of the ERC that this happened. When it was discovered, a Memorandum was sent out indicating it was improper and should not happen again.

[121] On October 22, 2020, Mr. Byron testified that his cleaning unit was again directed to an outbreak unit. When inmates complained they were not supposed to do this type of cleaning, they were sent somewhere else to clean.

[122] On the same day, Mr. Byron's counsel, at that time Mr. Crowther, requested that the ERC Director preserve CCTV of those occasions where Mr. Byron had noted guards to be in breach of the COVID-19 polices and directives in place at that time. That request to preserve CCTV evidence was misplaced by ERC staff and not acted upon by the ERC Director.

[123] Crown counsel did not take significant issue with the notes recorded by Mr. Byron, other than to point out that some of the more egregious alleged violations he recorded were based on information he apparently obtained from other inmates rather than being things he himself observed.

[124] If Mr. Byron had been inflating or lying about his firsthand observations, I do not believe he would have requested CCTV footage, as it would have contradicted him. The fact of the request, in my view, contributes to the reliability and credibility of the firsthand observations recorded in this document.

[125] On October 26, 2020, Mr. Byron was told by guards that someone had complained about his group of cleaners and they were demoted to the bottom tier and taken off cleaning duties.

[126] The canteen records provided roughly coincided with the notes Mr. Byron had kept regarding the work he performed on the Bootcamp Unit. The vouchers stop on October 18, 2020; however, he indicated he performed work after that date.

[127] On November 1, 2020, a note appears in Mr. Byron's record indicating he had demonstrated a poor work ethic and reluctance to mentor new cleaners. He was removed from the Bootcamp Unit entirely on November 2, 2020.

Post-Bootcamp

[128] Mr. Byron applied for bail in November of 2020. He sought release in part, on the compassionate basis that his brother was dying of kidney failure and he was a likely and willing donor. He was denied bail on all three grounds on November 16, 2020.

[129] On November 20, 2020, a directive was issued that all inmates and staff mask in all areas. Inmates were exempted within their own cells, even if shared with another inmate.

[130] Records show that on December 1, 2020, Mr. Byron told staff he was threatened by another inmate and feared for his safety. The inmate who threatened him was then listed as an "incompatible," which had repercussions for the other people on his unit as it affected the unit rotations. Mr. Byron said he thought it would be easier to leave the Unit than to stay, but that he did not realize they would not be able to move him out of the Unit because it was on outbreak status at the time.

[131] As a result, Mr. Byron ended up in administrative segregation from December 1 to December 8, 2020. During that time period, Mr. Byron was housed alone and exercised alone until they were able to move him to a different unit on December 8, 2020. He averaged about one hour a day out of his cell.

Cleanliness and sanitation

[132] Aside from the cells on the Boot Camp unit, Mr. Byron testified that every cell he was transferred into was filthy, with hair, sometimes old food, sometimes dry mucus on the walls, and dirt and debris built up around the mattresses.

[133] When transferred to a new cell, he said he did not have any access to cleaning supplies until after his first period of lockup in that cell, which could last up to a full day. They were not given cleaning cloths so would use torn up towels. Inmates were not given access to hand sanitizer.

[134] Ms. Harris testified that inmates are responsible for the cleanliness of their own cells and given an opportunity every day to clean at around 9 AM. They are provided with cleaning supplies that are stored on the unit including chemicals, rags, toilet brush, etc. If an inmate refuses to clean his cell, progressive discipline is used to enforce cleanliness.

[135] Mr. Byron complained that cleaning of the communal areas was done by inmate cleaners, who did not regularly wipe down handrails and telephones.

[136] The ERC had a recommendation posted on the wall directing inmates to sanitize the communal telephones between users. Mr. Byron stated they were frequently ripped off and used as spare paper. He said cleaning supplies were not made readily accessible: "Guards would give you wipes if you asked but you'd lose your turn with the phone it you stopped to ask."

[137] Ms. Harris could not find any record of Mr. Byron filing an RFI addressing concerns with double-bunking, cell cleanliness, or any other related issues.

[138] As of November 2020, inmates had to wear masks when outside of their cells, but not when they were inside. Blue medical masks were provided by the ERC. Mr. Byron testified that the masks handed out to inmates did not fit him properly because of his beard, implying this put him at a greater risk for contracting COVID-19. He said the institutions could have offered him a specialty mask, but agreed that he had not asked for such a mask and had not raised the issue of mask fit with anyone. He agreed he had not sought permission from the administration to change his appearance by shaving his beard, stating that he would not shave his beard in any event because "it's who I am."

[139] Ms. Harris agreed that the blue masks do not fit well over beards. She agreed that masks exist that are specifically designed for people with beards, but that no specific accommodations with respect to masks for inmates with beards were made.

Edmonton Young Offender Center

[140] On December 11, 2020, Mr. Byron was moved to the Annex at the EYOC, where inmates were locked up on a half and half rotation. This rotation allowed him about 4.5 hours out of his cell each day.

[141] He testified that in general, the guards at the EYOC were nicer and treated him more respectfully than in the other institutions. He was given more food to eat than at the CRC or the ERC as the kitchen followed the Canada Food Guide recommendations for youth, which meant more calories in each meal. He regained some of the weight he lost over the past year and a half.

[142] With respect to time out of cells, from December 11, 2020 to mid-January 2021, he averaged about 5.5 hours. This went down to 4 hours out of his cell from January 2021 to the time of the sentencing hearing.

[143] Mr. Byron's cell at the EYOC did not have a toilet or sink. He and other inmates had to request bathroom access from guards when they were in their cells, which they were granted on a "first come, first serve" basis. He shared a cell for a brief period of time, but was in a single occupancy cell for the majority of his time at the EYOC, although most cells at the EYOC are set up for double occupancy. The beds are "youth sized" and Mr. Byron said his feet hang off the edge of the mattress. The cells have windows to the outside so they can see the small courtyard and have a view of the sky.

[144] On March 11, 2021, Mr. Byron's brother died. Records indicated that a psychologist was called in to speak with him about it.

[145] According to Mr. Robson, activities potentially available to Mr. Byron at the EYOC included: TV, courtyard, basketball, books, newspapers, colouring, word games, cards, ping pong table, a recreation room with treadmills and bikes and workout bands, as well as a yoga detox program, Chaplain program, NorQuest self-study school, and support for addictions.

[146] As of May 10, 2021, as a result of pandemic restrictions, Mr. Byron and other inmates at the EYOC were unable to access the gymnasium, Chapel or any group programming. Those restrictions were lifted at some point during the summer of 2021. It is unknown if they are back on restricted status at the present time.

[147] In May of 2021, Mr. Byron began to access institutional programming including the Terra parenting program, "Courage to Change" self-study.

[148] Mr. Byron remained at the EYOC as of the date of closing submissions on sentence, and apparently was moved back to the ERC some time prior to the October 22, 2021 sentencing date.

COVID-19 Protocols

[149] Mr. Robson testified that as of April 2021, every inmate that transfers to the EYOC Annex has already completed their 14-day quarantine at the ERC.

[150] He indicated that no in-person family visits have been allowed across the province during the pandemic, and that includes the EYOC. If an inmate wants to have a family video visit they

have to return to the ERC to do so. Once the COVID-19 pandemic is over, in-person visits are expected to resume.

[151] With respect to COVID-19 health measures, he said that the EYOC takes recommendations from AHS because "they are the health experts." This includes health orders related to group sizes. The Executive Director meets with AHS and provides operational advice, but ultimately, "they listen to pandemic specialists who are doctors, and taking care of staff and inmates informs their decision making."

ALLEGED CHARTER BREACHES

[152] Mr. Byron argued that his ss 7 and 12 *Charter* rights were breached as a consequence of the above-detailed treatment he received while on remand, including being subjected to enhanced COVID-19 related restrictions. He further argued that the most appropriate remedy to address the breaches in this case, would be to issue a stay of proceedings. In the alternative, he sought a reduction in sentence.

[153] The *Charter* breaches alleged by Mr. Byron were described and categorized by his counsel generally as follows:

A) **Failure to adequately respond to change**:

   a. The CRC failed to provide inmates with alternatives when the TV and showers broke at the CRC, and

   b. ERC and EYOC's failed to consider or provide alternatives when programming and recreational restrictions were implemented during the pandemic.

B) **Unlawful and unreasonable strip searches**: (all three institutions).

C) **Cell searches and cell trashing by guards**: (primarily in the CRC but also in the other institutions).

D) **Poor Living conditions**:

   a. arbitrary and unreasonable placement in the Max Unit at CRC, which housed dangerous inmates and experienced more lockdowns than other units;

   b. excessive periods of lockup with nothing meaningful to do;

   c. cramped and unhygienic cell conditions and unhygienic communal areas;

   d. no access to the outdoors or view of the outside world;

   e. no access to exercise equipment and almost no access to television;

   f. limited access to reading material;

   g. denial of bedding and clothing;

   h. denial of showers and lack of hot water in showers;

   i. no access to certain types of programming;

   j. inadequate, dirty and ill-fitting clothing; and

   k. limited access to the telephone and lack of privacy.

E) **Failure to provide adequate food and nutrition**: (primarily at CRC and ERC).

F) **Failure to provide adequate dental care**: (all three institutions).

G) **Failure to adhere to COVID-19 protocols**:

a. inability to physically separate from other inmates due to double bunking and remand conditions;

b. cleaning of communal areas was poorly done by inmate cleaners;

c. cleaning supplies were not made accessible to inmates;

d. staff failed to adhere to masking protocols;

e. failed to provide him with a mask specifically designed for bearded people; and

f. inmates in Bootcamp Unit were improperly sent to quarantine units to clean.

H) **Interference with contact with legal counsel**: (while at CRC, failure to pass on messages from his lawyer, lack of privacy during phone calls with his lawyer).

I) **False institutional charges**: (while at the CRC).

[154] Mr. Byron submitted that these breaches should be considered both individually and cumulatively in determining whether he was subjected to cruel and unusual treatment contrary to s 12 while remanded and also in considering whether his s 7 rights were breached.

[155] With respect to the conditions and restrictions occurring in the course of the COVID-19 pandemic, Mr. Byron argued that there was no evidence provided that the deprivations he experienced were in furtherance of any legitimate interest in managing a correctional facility or any legitimate interest in managing a correctional facility, during a pandemic or otherwise.

ANALYSIS

Nature of these proceedings

[156] In his written submission, Mr. Byron made broad allegations, arguments and references to the various remand institutions' compliance with international, national, and provincial legislation, standards, and policies. I note, as Clackson J did in ***R v Adams***, 2016 ABQB 648 [***Adams***], (aff'd 2019 ABCA 149), when presented with similar arguments, that this is not a civil trial and the institutions are not respondents (at para 68). As Clackson J observed, "whether the system is generally good, bad or indifferent, is of no assistance in this proceeding" (para 16).

[157] I agree. It is not my function in this application to rule on the general experiences of all remanded prisoners. Conversely, it would not be proper for me to conclude that no *Charter* breach has occurred simply because Mr. Byron was treated the same as everyone else.

[158] While proof of "arbitrariness" has a significant role to play in the analysis that follows, equality of treatment is not a sufficient test for whether someone's *Charter* rights have been violated: see ***Andrews v Law Society of British Columbia***, [1989] 1 SCR 143.

[159] The task before me is to determine whether Mr. Byron's *Charter* rights were violated during his pre-guilt incarceration period based on the facts that were before me in the hearing. Where legislation, standards, and policies are relevant to that specific task, I will reference them.

Section 12 jurisprudence

[160] Section 12 states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[161] The majority of the Supreme Court of Canada in ***R v Smith***, [1987] 1 SCR 1045 [***Smith***], set out the criterion to be applied in determining whether treatment or punishment is cruel and unusual. The test was most recently summarized by the Supreme Court of Canada in ***R v Boudreault***, 2018 SCC 58 at para 126:

> This Court has recognized that treatment or punishment will rise to the level of being cruel and unusual where it "is so excessive as to outrage standards of decency" (*R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680). In *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, McLachlin C.J. explained that a sentence will offend s. 12 only where it is "grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender" (para. 39). It is therefore not sufficient that a sentence be "merely excessive"; to be cruel and unusual, it must be disproportionate to the point of being "abhorrent or intolerable", such that it is incompatible with human dignity (*R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24; Smith, at p. 1072; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26).

[162] This is a high bar to meet. The punishment or treatment complained of must be "abhorrent or intolerable" or so excessive that it would "outrage standards of decency": ***Ogiamien v Ontario (Community Safety and Correctional Services)***, 2017 ONCA 667 at paras 9 and 57 [***Ogiamien, CA***]; ***R v Olson*** (1987), 62 OR (2d) 321 (Ont CA) at para 40 (Westlaw Canada) [***Olson***]; ***R v Prystay***, 2019 ABQB 8 at para 12 [***Prystay***].

[163] In Alberta, this test has been applied a number of times to allegations of breaches involving prison conditions and treatment, most notably in the epic case of ***Trang v Alberta (Director, Edmonton Remand)***, 2010 ABQB 6 at paras 985 and 986 [***Trang***]. See also, for example: ***R v Chan***, 2005 ABQB 83, ***R v Munoz***, 2006 ABQB 901 [***Munoz***]; ***R v Walters***, 2012 ABQB 83 and ***Prystay***.

[164] In his dissenting decision in ***Smith***, McIntyre J suggested that prison conditions include, but are not limited to: solitary confinement, frequency and condition of searches within prisons, denial of contact with those outside the prison, and imprisonment at locations a far distance from home, family, and friends. See also: ***Olson*** at para 36.

[165] The Supreme Court of Canada in ***Smith*** articulated a number of factors to be taken into consideration when determining whether the punishment at issue is cruel and unusual. Marceau J in ***Trang*** adapted these factors when determining whether "treatment"- specifically, pre-guilt prison conditions - meets the s 12 threshold (at para 1017). See also: ***Prystay*** at paras 13-14.

[166] The factors, as set out in ***Smith***, are as follows:

> (1) Is it such that it goes beyond what is necessary to achieve a legitimate penal aim?

(2) Is it unnecessary because there are adequate alternatives?

(3) Is it unacceptable to a large segment of the population?

(4) Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards?

(5) Is it arbitrarily imposed?

(6) Is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution?

(7) Is it in accord with public standards of decency or propriety?

(8) Is it of such a character as to shock general conscience or as to be intolerable in fundamental fairness?

(9) Is it unusually severe and hence degrading to human dignity and worth?

[167] These factors cannot be applied in a vacuum and must be considered in the context of the inmate's background, personal circumstances, and institutional situation, which may include the fact that the inmate has not yet been proven guilty: see ***Trang*** at paras 1018 and 1019; ***Munoz*** at para 78). See also ***Ogiamien v Ontario***, 2016 ONSC 3080 [***Ogiamien***] at para 209, overturned on appeal by ***Ogiamien, CA***.

[168] At the same time, the individual's specific circumstances need to be contextualized within the framework of the corrections system more generally, and the need for such institutions to consider that the health and safety of *all* inmates and prisoners: see ***Adams*** at para 74 and ***Chan*** at para 32.

[169] In ***Maltby v AG Saskatchewan***, (1982), 2 CCC (3d) 153 (QB), one of the earliest *Charter* challenges to conditions of incarceration, Sirois J observed at para 5:

> The lawful incarceration of the applicants as remand inmates bears with it necessarily reasonable limitations on their rights previously enjoyed in a free and democratic society. These restrictions are no doubt the sort of reasonable restrictions that the framers of the Canadian Charter of Rights and Freedoms envisioned when they included in section 1 the words ... "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law ..." (emphasis mine). The institution may and certainly must place restrictions and limitations on the rights of the applicants so that sufficient security will ensure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff.

Section 7 jurisprudence

[170] Section 7 of the *Charter* protects the right to life, liberty, and security of the person.

[171] The Supreme Court of Canada in ***R v Malmo-Levine***, 2003 SCC 74 at paras 159-160, advised that the standard for assessing disproportionality of a prisoner's treatment is the same whether assessing a potential breach under ss 7 or 12 of the *Charter*. If a s 12 breach is found, it is not necessary to consider whether there was a s 7 breach: ***Prystay*** at para 10.

[172] The Supreme Court explained:

> To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

[173] In para 956 of ***Trang***, Marceau J commented:

> In keeping with the Supreme Court's decision in ***Malmo-Levine***, ss. 7 and 12 must be read in a complementary manner. An arbitrary rule or condition that engages an inmate's life, liberty or security of the person will only be contrary to s. 7 if that arbitrary rule or condition is grossly disproportionate. Since the same test applies, it is not necessary to consider s. 7 where s. 12, the more specific provision, is engaged. In my opinion, s. 7 in this context applies only to decisions related to classifications, placements, and the disciplinary process.

[174] Mr. Byron, in his written submissions, argued that Marceau J erred by finding that the rule or condition must be *both* arbitrary and grossly disproportionate, as these are separate and distinct principles of fundamental justice. He argued that an arbitrary rule or condition - if it deprives and person of their life, liberty or security of the person- *could* breach s 7 of the *Charter* even if it was not also grossly disproportionate.

[175] Our Court of Appeal in ***Trang v Alberta (Edmonton Remand Center)***, 2007 ABCA 263 [***Trang, CA***] at para 35 stated that

> [a] finding of a breach of s 7 depends on the identification of an impact on the life, liberty or personal security of the applicant by state action. If that impact arose from state action within the sphere of a fundamental principles of justice, and that state action was arbitrary or irrational, then a breach of the s 7 right could be shown.

[176] Justice Marceau's observation in ***Trang*** does not stand for the proposition that s 7 sets a different or lower standard for assessing a prisoner's treatment while in custody than what is required under s 12.

[177] In ***R v Blanchard***, 2017 ABQB 369 [***Blanchard***], Macklin J concluded at para 223 that Mr. Blanchard's ss 7 and 12 *Charter* rights had *both* been breached, and it was unnecessary to distinguish between the two sections.

[178] Many of the breaches as alleged by Mr. Byron are best considered as allegations of cruel and unusual treatment contrary to s 12 of the *Charter*. If I find that any of the allegations or complaints made by Mr. Byron do not constitute "treatment" *per se*, then it may be necessary to consider those allegations or complaints in the context of s 7.

Unfounded allegations

[179] Some of the alleged breaches can be dealt with efficiently at the outset, based on my assessment of the evidence. I have categorized these as "unfounded allegations."

Allegation of inadequate health care

[180] The corrections officials who testified indicated that emergency dental care is available to inmates who need it and who ask for it. Mr. Byron testified that he never asked for any assistance. Having never sought any assistance, it is not surprising none was provided.

[181] The evidence shows that when Mr. Byron showed signs of illness in April of 2020, the medical staff at the institution gave him prompt and personally directed care. No other evidence was presented on the issue.

[182] Arguments about the general availability and provision of healthcare and practitioner of choice in the remand centers were not properly before me.

[183] As there is a no evidentiary basis for the assertion that Mr. Byron was denied adequate health or dental care, no *Charter* breach is made out.

Allegation of abusive strip searches

[184] The pros and cons of the strip search policy followed by the various remand centers is also not properly in issue before me. I am concerned only with whether Mr. Byron himself experienced any arbitrary or abusive strip searches.

[185] Mr. Byron did not identify or testify as to any particular strip search he experienced that he felt was unfair, or that caused him any physical or emotional distress. He did not complain that he had experienced any abusive strip searches.

[186] The only evidence I had about the conduct of strip searches came from Mr. Robson, who explained when and why Mr. Byron would have been strip searched. It was a reasonable explanation, and in my view, appeared to balance institutional needs to ensure safety and security with individual inmate's right to bodily integrity and autonomy.

[187] There is no evidentiary basis for asserting that Mr. Byron was personally subjected to cruel and unusual punishment in the form of abusive strip searches.

Allegation of being subjected to a false institutional charge

[188] I accept that Mr. Byron, while at the CRC, was accused of being involved in an altercation. After he objected, and the guards reviewed the evidence available to them, they withdrew the accusation.

[189] There was some dispute between the parties as to whether formal charges had ever been laid against Mr. Byron, but even if they had been laid, they were obviously not pursued once the exonerating evidence was received. This is not evidence of a "false institutional charge" as in: a charge concocted and pursued by the authorities against a prisoner they knew to be innocent.

[190] In my view, the guards at the CRC did what they were duty bound to do in the situation: they acted quickly to protect all the guards and inmates in the area following an altercation. Thereafter, they investigated the incident and either took no further action, or proceeded against someone other than Mr. Byron.

[191] The actions taken by the guards in the circumstances, on Mr. Byron's evidence, were reasonable and cannot possibly be construed as cruel and unusual treatment or a violation of his s 7 rights.

Interference with legal counsel

[192] Mr. Byron testified, based on information he received from his family members who said they received it from his lawyer, Mr. Beresh, that phone messages from Mr. Beresh were not being passed on to him while he was at the CRC. The Crown properly objected to the nature of this evidence as being unreliable hearsay.

[193] Considered in the context of what Mr. Hagen said about complaints of missed messages at the CRC, I believe it is possible that some messages from Mr. Beresh did not get through. It is unlikely those messages would have contained substantive legal advice; rather, they would likely have indicated that Mr. Byron needed to call his lawyer.

[194] The admissible evidence contained in the Corrections Records illustrates that Mr. Byron had frequent contact with his lawyer throughout his time at the CRC, and indeed, throughout his time at the ERC and the EYOC. As the allegation that the CRC wrongfully interfered with his right to counsel has not been proven, no *Charter* breach arises.

Placement in the Max Unit with dangerous inmates

[195] I accept that Mr. Byron had reason to be fearful about being placed in the Max Unit (Unit 6) as a first-time offender with no prior experience in jail. His specific experiences only served to amplify that fear. I also accept that the CRC made a reasonable decision when they placed him in the Max Unit based on their assessment of the seriousness of the offences for which he had been charged: using an explosive to cause bodily injury to a security guard during the course of an armed, premeditated bank robbery.

[196] Mr. Byron did not request a reclassification when he was at the CRC. He was eventually reclassified, but as per the Corrections Records, that reclassification appears to have occurred organically, after he had served a period of time on remand without incident.

[197] Whether considered in the context of ss 12 or 7, the initial classification decision in this case appears to have been reasonable, despite the fact that it brought Mr. Byron into contact with dangerous inmates. In any event, Mr. Byron did not challenge or complain about his classification at the time, either through the RFI process or through his experienced legal counsel at the time, Mr. Beresh. The authorities cannot respond to issues and concerns that they are not aware of. No *Charter* breach arises with respect to this issue.

Complaints about general remand conditions

[198] Many of the factual assertions and complaints Mr. Byron made with respect to general remand conditions were proven during the course of the *voir dire*.

Double-bunking and cell size

[199] The institutional witnesses agreed that at times, prisoners will share a cell with one other person. Ms. Harris testified that all “double-bunk” cells are designed to house two inmates and the reason prisoners are “double-bunked” usually has to do with a lack of available space. The beds are either bunk-beds or they are on the floor on opposite sides of the shared cell.

[200] There is no evidence that Mr. Byron ever complained about double bunking, or that the particular cells where he experienced double-bunking were not big enough or appropriate for that use. Furthermore, he appears to have spent large periods of time, particularly while at the EYOC,

in a single cell. When Mr. Byron complained about incompatibility with one of his roommates, the authorities responded immediately.

[201] It would be preferable, but it is not practical for all inmates to have spacious single cells. The fact that remand centers in Alberta cannot or do not accommodate single cell bunking in all cases is proof that remand time is "hard time." It is not proof of a *Charter* breach.

Failure to provide adequate bedding and clothing

[202] I accept that following his release from isolation, Mr. Byron was not given a change of clothing, despite what is indicated on the release form. There is no explanation for this, other than the obvious one, which is: a mistake was made by the institution. It was the kind of mistake that could have been quickly rectified had Mr. Byron taken the time to focus his efforts on resolving the issue.

[203] The choices Mr. Byron made during that time period resulted in a bad set of circumstances which worsened over time. But the institution is not solely to blame. If Mr. Byron did not get the results he needed by making a casual request to the guards, then Mr. Byron should have filled out an RFI asking for an extra set of clothing and bedding. The corrections authorities cannot help with issues they are not aware of.

[204] This complaint does not rise to the level of cruel and unusual treatment. Mr. Byron's role in the perpetuation of the problem challenges the notion that it constituted "treatment" at all.

Other complaints

[205] Mr. Byron also complained about the following:

a. his cell at the CRC was excessively cold (he was given extra blankets);

b. his clothing and bedding were often stained and soiled (inmates were given frequent opportunities to exchange their clothing and bedding rolls for new, clean ones);

c. his cell being "tossed" or "wrecked" during cell searches as evidenced by his wall photos being ripped off and tossed on the floor (Mr. Robson agreed this happened sometimes and it was against procedure);

d. the food was poor quality and consisted of a "one size fits all" diet which caused him to lose a lot of weight (the institutional witnesses testified that they follow the Canada Food Guide recommendations for portions and nutrition);

e. the reading materials at the CRC were not expansive and not refreshed very often, newspapers at the ERC were difficult to obtain since copies were shared (Crown witnesses testified as to availability of reading materials at the ERC and the CRC including books, newspapers, magazines, legal texts including the *Criminal Code*);

f. there was a general lack of mental stimulation (Crown witnesses, and Mr. Byron, testified that in addition to limited reading materials, inmates could access card, board games, unit televisions, workout equipment, and had radios in their cells and on some units, could access tablets);

g. when the unit TV broke at the max unit at the CRC, it took 17 days to fix it during which inmates were deprived of one their only sources of entertainment (Mr. Hagen

admitted this had occurred, although in my view, he himself was surprised with how long it had taken when he applied his mind to the issue); and

h. at the CRC, the showers were out of commission or lacked hot water (Mr. Hagen admitted this occurred and indicated the problems were fixed promptly).

[206] Mr. Byron, although obviously familiar with the RFI process, did not file any formal complaint with respect to any of the above issues. This tells me that he was likely able to resolve at least some of the more particularized complaints informally through discussions with the guards. For example, he testified that on one occasion, when he received a piece of raw, stringy meat, he complained about it and guards gave him a new piece.

[207] With respect to the issues raised regarding excessively cold rooms, broken and cold showers, and a broken unit TV at the CRC, these are indeed unfortunate issues in a setting like this, where creature comforts are very few and far between. However, they were time-limited problems which were not deliberate or arbitrary, and which the CRC addressed in due course. These are not *Charter* infringing state actions. That said, the CRC should take further steps to assess their infrastructure to ensure such incidents do not occur in the future or can be rectified more promptly.

[208] With respect to the more general complaints about food and laundry and cleanliness and lack of reading materials: remand time is hard time. That is why s 719(3.1) of the *Code* recognizes enhanced credit. As noted by the Supreme Court of Canada in ***R v Summers***, 2014 SCC 26 [***Summers***]: "conditions in remand centres tend to be particularly harsh; they are often overcrowded and dangerous, and do not provide rehabilitative programs" (para 2).

[209] These are allegations and complaints which have been made many times before in Alberta courts and elsewhere with respect to pre-guilt incarceration conditions. Having considered them carefully and with fresh eyes in the context of this application, I find that they do not amount to treatment that would "outrage standards of decency," whether considered individually or in combination: see ***Prystay*** at para 12. Proof of abhorrent conditions that are "incompatible with human dignity" is a very high bar to meet. The treatment Mr. Byron experienced in this case does not rise to that level.

[210] My conclusion that the general remand conditions complained of do not constitute treatment which violates the *Charter* should not be taken as signalling approval of any of the aforementioned CRC, ERC or EYOC practices. In my view, there is room for improvement with respect to how remand institutions in Alberta treat incarcerated individuals. I agree with much of what Macklin J expressed in ***Blanchard*** to the same effect at para 230.

[211] Again: the present application is not about the general policy or treatment of prisoners. It is about Mr. Byron's experiences.

Allegations of treatment beyond what is generally considered "hard time"

[212] The following allegations deal with issues that arose during Mr. Byron's post-COVID-19 incarceration period. As such, they do not fit within the category of common complaints that would normally be addressed by giving enhanced credit for pre-guilt time served. The question is whether the allegations constitute *Charter* breaches when considered separately, or collectively.

1. COVID-19 restrictions and protocols: significant reduction of time out of cells and lack of access to exercise equipment, and programming

[213] Schedule "A" to these reasons sets out a more detailed, although still only approximate, breakdown of Mr. Byron's time out of cells from his first date of incarceration, to the date of the sentencing hearing.

[214] Commencing in March 2020, in an effort to combat the spread of COVID-19, the ERC employed a six-cell rotation schedule. From March 27, 2020 to June 16, 2020, Mr. Byron was confined in his cell for as much as 22.5 hours per day.

[215] During this period of time, Mr. Byron reported symptoms of illness including a sore throat, and based on COVID-19 protocols, ERC staff separated him from his Unit and placed him in isolation at the infirmary from April 22-24, 2020. For two days, Mr. Byron was kept alone in a cell and given only 30-45 minutes out of his cell. His COVID-19 test was negative, and he was returned to his Unit sometime on April 24, 2020.

[216] As indicated above, Mr. Byron was formally placed in administrative segregation from December 1 to December 8, 2020, a period of eight days.

[217] In 2007, a task force of international experts in the areas of solitary confinement, prisons and tortures drafted *The Istanbul Statement on the Use and Effects of Solitary Confinement* (*Istanbul Statement*). The *Istanbul Statement* defines "solitary confinement" as "the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day."

[218] An inmate's placement in solitary confinement or segregation is "treatment" that engages s 12 of the *Charter*. However, Canadian appellate courts have held that segregation is not intrinsically cruel and unusual treatment in violation of s 12. For example, the Nova Scotia Court of Appeal considered whether the periods the accused spent in segregation violated his section 12 rights in ***R v Marriott***, 2014 NSCA 28 [***Marriott***]. At paragraph 34, Oland J on behalf of the Court of Appeal explained:

> It appears that the appellant is equating the fact of segregation with *prima facie* cruel and unusual punishment, contrary to s. 12 of the *Charter*. But segregation is not an automatic breach of that *Charter* right. In *R. v. Olson* (1987), 1987 CanLII 4314 (ON CA), 38 C.C.C. (3d) 534 (Ont. C.A.), aff'd 1989 CanLII 120 (SCC), [1989] 1 S.C.R. 296 (S.C.C.), the appellant inmate submitted that his confinement to his cell for 23 hours each day amounted to cruel or unusual punishment. Brooke, J.A. writing for the Ontario Court of Appeal stated at ¶ 41 that "[s]egregation to a prison within a prison is not, *per se*, cruel and unusual treatment … [but] it may become so if it is so excessive as to outrage standards of decency."

[219] Oland JA went on at para 35 to observe that since *Oland* was decided, "several cases from trial courts across Canada have found that segregation does not constitute a breach of s. 12 of the *Charter* [citations omitted]."

[220] When determining whether there has been a *Charter* breach due to placing an offender in segregation, the conditions, duration, and reasons for segregation must all be considered, and a proper evidentiary record must be established (***Marriott*** at para 38).

[221] The Nova Scotia Court of Appeal ultimately dismissed the appellant's claim that his s 12 *Charter* rights had been breached. Mr. Marriott was denied leave to appeal to the Supreme Court of Canada in ***Aaron Gregory Marriott v Her Majesty the Queen***, 2015 CanLII 8564.

[222] Gray J in ***Ogiamien***, acknowledged the courts were not inclined to find a violation of the *Charter* where the institution provided a rational explanation for the use of solitary confinement or segregation. After considering the relevant case law, Gray J observed at paragraph 234:

> The point that is made in these cases is that the conditions of incarceration must be judged based, at least in part, on the reasons why they are imposed. In cases where they are imposed because of legitimate safety and security considerations, the imposed condition cannot be said to be cruel and unusual. However, in other circumstances, that may not be so.

[223] In ***Prystay***, Pentelechuk J, as she then was, concluded Mr. Prystay's placement in administrative segregation constituted cruel and unusual punishment for the following reasons (para 17):

> the excessive length of his placement (13.5 months); the adverse effects AS had on his physical and psychological health; and finally, because Prystay was not afforded procedural fairness and his indefinite placement was not imposed in accordance with ascertainable standards.

[224] In ***R v Gordey***, 2020 ABQB 425 [***Gordey***], Gates J was faced with a similar application for a *Charter* remedy based on an assertion that increased restrictions placed on prisoners as a result of COVID-19 constituted cruel and unusual punishment. In support of that application, he heard evidence about the reduction in time out of cells and other treatment experienced by ERC prisoners after the onset of COVID-19: at para. 52 – 55. After addressing him mind to the ***Smith*** factors, Gates J found that he was "not persuaded that the evidence of the Accused supports a finding that his s 12 right not to be subjected to cruel and unusual punishment has been violated in this instance" (para 70)

[225] Mr. Byron proposes that the imposition of additional restrictions on time out of cells and recreational and other activities constitutes arbitrary conduct by the state that infringed on either or both his s 12 or s 7 rights. He argues that the conditions faced as a result of COVID-19 restrictions caused Mr. Byron and other prisoners to suffer additional deprivations through no fault of their own. He asserts he can prove a breach of s 7 in this case because the state's actions in imposing COVID-19 restrictions were arbitrary.

[226] "Arbitrary" means, in its simplest terms, to act without logic or reason. That is not what happened here.

[227] I am satisfied, as per the Mr. Robson and Ms. Harris' testimony, that the remand authorities acted quickly and on the advice of the CMOH and AHS. All the inmates at the ERC were initially placed in conditions akin to administrative segregation not because of their behaviour, but for their health, safety, and protection. As the "fourth wave" of the pandemic was ongoing at the time of writing these reasons, those conditions are presumably still implemented in certain situations.

[228] The institutional standards and conditions for determining when prisoners are "locked down" as a result of COVID-19 are not arbitrary: they are ascertainable, available for review in the form of internal Memoranda, they are not indefinite, and they are not, simply by virtue of

being similar to administrative segregation, cruel and unusual. Mr. Byron has failed to prove that his s 12 rights were breached in this case.

[229] That said, the COVID-19 pandemic has been ongoing since March of 2020. We do not know when it will end. In my opinion, the remand centers should be taking steps, in addition to those outlined by Ms. Harris in her testimony, to ensure that inmates like Mr. Byron are provided with enhanced individual programming to ensure their physical and mental well-being during this difficult time. One way to improve the welfare of inmates who are subjected to lengthy lock-up periods due to COVID-19 quarantine, would be to install televisions in their cells, or at a minimum, more than one television in a unit, or give them better access to tablets. It seems to be a warranted expense in the circumstances, and as Macklin J said in ***Blanchard***, would provide inmates with a more humane environment.

2. Failure to follow health protocols and Bootcamp experience (Crown page 42)

[230] This allegation should properly be considered under s 7 rather than s 12, as it relates not to Mr. Byron's treatment, per se, but to the risks posed to his personal health by state actions.

[231] As I indicated earlier, I believe Mr. Byron's account of lapses in PPE and mask wearing by guards. He also detailed concerns he had with his ability to stay "socially distanced" and with the availability of cleaning supplies, in addition to other related complaints. He complained of ill-fitting masks, given that he is a person with a large beard.

[232] It is obvious that there would be issues with "social-distancing" in a closed, close-quarters environment. The remand centers had to work with what space they had available, while still maintaining the safety and security of the inmates and guards. I note that Mr. Byron was sent to the EYOC for the latter part of his pre-guilt incarceration, as it was being used as an Annex to the ERC.

[233] There was no evidence that Mr. Byron ever sought an accommodation for his beard, or complained about the fit of his mask. The Crown conceded that Mr. Byron had been improperly sent out to clean COVID-19 outbreak and/or quarantine units, but emphasized that the ERC acted quickly to ensure it did not happen again.

[234] These concerns, taken cumulatively, indicate that the actions of particular guards in contradiction of ERC policies, may have put Mr. Byron and other inmates at risk of becoming infected by COVID-19. No expert evidence was offered on that point and I was, essentially, asked to take judicial notice of the risk, which I feel comfortable doing at this point in the pandemic: see ***R v Morgan,*** 2020 ONCA 279 at para 8 [***Morgan***].

[235] I was concerned when I heard that the ERC was using prisoner cleaning crews, who had not been given any particular training in cleaning in biohazardous situations, to clean up after prisoners in quarantine and outbreak units who may have been infected with COVID-19. I was pleased to hear that the ERC had quickly acted to stop the practice once higher-level management heard about it. But it should never have happened in the first place. It was a clearly unreasonable and risky thing to ask inmate cleaners to do.

[236] It is ironic that the actions taken by guards within the institution caused a risk to Mr. Byron's personal health and safety by exposing him unnecessarily to a very risky, potential COVID-19 transmission situation after they had subjected him, for many months, to severe restrictions on his time out of cells, recreational, and learning opportunities in avoidance of that

risk. Luckily, Mr. Byron did not become infected with COVID-19 as a result of the guards' actions.

[237] In ***Trang, CA***, the Court of Appeal found that the increased risk of injury posed to prisoners by the ERC's chosen method of transport did not constitute an infringement of their s 7 rights. The Court observed that *Charter* law is not intended to replace the law of torts (at para 28).

[238] The complaints raised by Mr. Byron with respect to adherence to COVID-19 protocols within the ERC are concerning, but they do not constitute a violation of his s 7 rights considering all the circumstances.

The totality of the conditions of incarceration

[239] In considering the totality of the conditions in this case, I attempted to keep Mr. Byron's particular experiences and context at the forefront of my considerations. He has never been incarcerated before, and his first experience was placement in the Max Unit at the CRC. This was not easy for him. Even so, I note that he did not describe the conditions he was in as intolerable, or cruel, or even harsh.

[240] He expressed anger at some of the treatment he experienced. In particular, he was deeply aggrieved by situations where he felt a particular action by the guards or the institution had resulted in unfair treatment. For example, he did not feel he was treated fairly with respect to his dismissal from the Bootcamp program. Other than that experience, he did not indicate he was ever singled out for negative or differential treatment. He was singled out for positive treatment when he was moved *into* the Bootcamp Unit in recognition of his good behaviour and potential.

[241] The situation Mr. Byron described, while obviously personally challenging, is quite distinct from what Mr. Blanchard experienced, for example.

[242] In ***Blanchard***, Macklin J found that the following treatment constituted a breach of Mr. Blanchard's s 7 and s 12 *Charter* rights:

- inadequate food and lack of appropriate utensils;
- difficulty in obtaining new eyeglasses;
- difficulty in obtaining new hearing aids;
- denial of medication on one occasion;
- lack of confidentiality in Mr. Blanchard's RFIs;
- verbal abuse by some CPOs and their condonation of verbal abuse by fellow inmates;
- provision of Mr. Blanchard's criminal record by the CPOs to fellow inmates;
- F bombing, urine dumping, and food tampering to the extent it was encouraged or condoned by the guards; and
- apparent failure by the ERC to take steps to investigate certain serious allegations made against CPOs.

[243] Mr. Blanchard had spent a significant period of his incarceration in administrative segregation. Macklin J was particularly critical of the lack of physical exercise, fresh air and mental stimulation afforded inmates in administrative segregation: ***Blanchard*** at para. 230.

[244] In ***Adams***, Clackson J rejected most of Mr. Adams' complaints – which were the same or similar to Mr. Byron's complaints, as "part of the remand experience'; however, he also concluded that other parts of Mr. Adams' experience made it "more harsh than would ordinarily be expected" (para 66). Those experiences included: being assaulted by a guard while in his cell, suffering assaults by other inmates and being threatened by other inmates "in circumstances where the guards had to be taken to know that such activities had or were likely to occur and did little to protect against such events" and well as "instances of petty discipline dished out by the guards which were irritating and retributive" (paras 75 – 76).

[245] Mr. Byron did not experience that kind of harsh treatment. Even when I look at the totality of the allegations and complaints made by Mr. Byron in this case – many of which were substantiated – I cannot conclude that his s 12 or s 7 *Charter* rights were violated by the treatment he received while in custody. As such, there is no need for me to engage in a further assessment of whether a stay should issue.

Remedy for Severe Restrictions Imposed Upon Mr. Byron

[246] While I have concluded that no *Charter* breach has been proven, the evidence before me is sufficient to illustrate that while remanded, prior to entry of his guilty plea, Mr. Byron was subjected to severe restrictions during COVID-19 lock-up periods at times akin to what prisoners experience when held in administrative segregation.

[247] Enhanced credit for time served prior to establishing guilt is a well-established method used by sentencing judges to account for factors such as reduced programming and harsh living conditions experienced in remand institutions. Previously, the quality of the pre-guilt incarceration dictated the amount of credit to be given in individual cases, with some offenders receiving 3:1 or even 4:1credit for time served: ***Summers*** at paras 27 – 31.

[248] This changed with the enactment of the *Truth in Sentencing Act*, which was assented to on October 22, 2009. Section 719(3.1) of the *Code* now sets out a maximum credit that can be given: 1.5 to 1. It is no longer within the domain of the sentencing judge to determine the ratio.

[249] The *Truth in Sentencing Act* was enacted long before the COVID-19 pandemic, at a time when the impact of such a pandemic on our jails and other institutions, and the people who live in them, could not have been predicted. Jailers have a duty to protect those in their care from the risk posed by COVID-19. Forced to enact rules that affect all inmates, it is obvious that the quality of pre-guilt incarceration changed dramatically over the past year and half, not just for Mr. Byron, but for all prisoners held in all types of institutions.

[250] The restrictive conditions Mr. Byron and other prisoners have experienced have resulted from the actions taken by the institutional authorities in response to the COVID-19 pandemic. An inmate's individual behaviour is no longer the primary determining factor when considering whether and for how long a prisoner should be confined to their cells, or what programs and privileges they might participate in. Health policy is currently driving these kinds of institutional decisions, in an unprecedented fashion.

[251] As I have already indicated, the evidence before me did not demonstrate that the actions taken by the ERC and the EYOC in response to the pandemic were arbitrary or excessive or

unreasonable. Rather, it illustrated that these institutions were attempting to abide by the area and other restrictions which the CMOH and AHS had put in place with respect to all citizens of Alberta. It has been a difficult and restrictive time for everyone. But it has been a *particularly* difficult and restrictive time for incarcerated persons.

[252] Sentencing is a highly individualized process. There must be some ability on the part of the sentencing judge to account for the impact COVID-19 restrictions have had on an inmate's quality of pre-guilt incarceration separate from the 1.5 to 1 credit contained in s 719(3.1) of the *Code*. Indeed, pre and post-COVID-19 decisions in Alberta and elsewhere have determined that the discretion and flexibility for trial courts to deal with extraordinary circumstances of pre-guilt incarceration continues to exist even where no *Charter* breach is identified. That discretion has been frequently exercised by trial courts across Canada over the past year and a half, *albeit* conceived and articulated in a number of different ways.

[253] In ***Gordey***, the accused conceded that the circumstances he had been facing at the ERC as a result of COVID-19 health-related restriction did not rise to the same level as those addressed in ***Adams***. Gates J agreed, particularly in light of the fact that there was nothing that suggested the accused was singled out for "special treatment." Rather, the majority of the adverse conditions complained of were of general application throughout the institution on account of the current health crisis (para 67).

[254] Counsel for the accused in ***Gordey*** asked the Court to afford the accused 2:1 credit for the time spent in pre-trial detention to address the "extremely difficult" circumstances confronting all of the inmates at the ERC. In addition to ***Adams***, the Defence also referred to the Supreme Court's decision in ***R v Nasogaluak***, 2010 SCC 6 [***Nasogaluak***], and to Pentelechuk J's decision in ***Prystay***.

[255] In ***Nasogaluak***, the Supreme Court held that state misconduct falling short of a breach of the *Charter* can be recognized in shaping an appropriate sentence (para 3). In ***Prystay***, the Court found that the accused's indefinite placement in administrative segregation amounted to cruel and unusual punishment within the mean of s 12 of the *Charter*. By way of remedy, Justice Pentelechuk found that while a stay of proceedings was not appropriate under the circumstances, enhanced credit at a rate of 3/75:1 for each day served was appropriate.

[256] Gates J in ***Gordey*** was not persuaded that the current restrictions that are in place in correctional facilities in Alberta, including the ERC, on account of the world-wide COVID-19 pandemic, amounts to state misconduct as that term was employed in ***Nasogaluak***.

[257] Gates J felt he was bound by the plain language employed in s 719(3.1), as interpreted by the Supreme Court in ***Summers***. Gates J opined at para 71:

> I may only grant a maximum of 1.5 days credit for every day spent in pre-trial custody. I am, however, satisfied that in the circumstances of this particular case, the severe restrictions placed on the Accused during a portion of his pre-trial detention rise to the level of a mitigating circumstance that justifies a reduction in the sentence that would otherwise be appropriate.

[258] Gates J further reduced Mr. Gordey's sentence by 112 days to acknowledge the mitigating circumstances surrounding the approximately 90 days that he was subjected to the institution's COVID-19 restrictions while on remand.

[259] Gates J's reasoning in ***Gordey*** was followed by Lema J in ***R v Leblanc***, 2021 ABQB 230 at para 32 and Renke J in ***R v Shivak***, 2021 ABQB 72 at para 11 and has been referenced in a number of other decisions from other jurisdictions and levels of court.

[260] In ***R v McDonald***, 2021 ABCA 262, at para 33, the Court of Appeal considered the ***Gordey*** decision, but declined to make a final decision on the question of whether a sentencing judge has discretion to reduce a sentence as a result of harsh remand conditions, stating:

> A further comment must be made. Typically, the decision to award enhanced remand credit beyond the statutorily prescribed 1.5 to 1 is grounded in a proven *Charter* breach. In *Gordey*, the sentencing judge dismissed the *Charter* breach and determined he was therefore precluded from granting further enhanced credit. The judge proceeded, however, to address the matter indirectly, by reducing the total sentence, in light of the "mitigating circumstances" surrounding the COVID-19 protocols. The question of whether a sentencing judge retains residual discretion to provide enhanced credit, directly or indirectly, for harsh remand conditions absent a proven *Charter* breach is best left for another day. The fact remains that the evidentiary record in *Gordey* and the present case are vastly different. Here, little more was said than a passing reference to COVID-19 and resulting periods of quarantine. The most generous interpretation of *Gordey* does not stand for the proposition that a blanket reference to COVID-19 protocols will affect sentencing.

[261] The Saskatchewan Court of Appeal in ***R v AB***, 2021 SKCA 119 similarly deferred, concluding that:

> . . . it remains a matter of debate whether, absent proof of a *Charter* breach, a sentencing judge has the discretion to directly or indirectly reduce a sentence as a result of COVID-19 protocols that have negatively impacted conditions in remand, or that will impact the conditions under which the sentence will be served. In this case, as in *McDonald*, it is not necessary to decide that question. Even if the impact of COVID-19 protocols can properly be considered in determining a fit sentence, the question of whether it should result in a reduction of the term of incarceration must turn on the evidence relating to the nature of those protocols and the extent to which they impacted the offender. Sentencing is an inherently individualized process: *R v M. (C.A.)*, [1996] 1 SCR 500 at para 92. The case law relating to the impact of COVID-19 consistently and correctly reflects that principle in this context.

[262] In so finding, the Saskatchewan Court of Appeal recognized that there is an ever-expanding body of sentencing jurisprudence dealing with the issue of COVID-19 pre-guilt "credit". Sentencing courts across Canada agree that such credit should be given, although the analytical path that lead them there differs from jurisdiction to jurisdiction. Schedule "B" to these reasons contains a summary of many of those reported decisions. There are many more decisions of a similar nature which are unreported.

[263] The common theme in all of these decisions is the recognition that while remand time has always been hard time, it has been made extraordinarily hard by the necessary institutional policy changes brought on by the pandemic.

[264] While I agree with Gates J's reasoning in ***Gordey***, in my view the basis for exercising my discretion to consider COVID-19 restrictions in mitigation of sentence is implicitly provided for in ***Nasogaluak*** and ***Summers***. See also: ***Prystay*** at para 165.

[265] In ***R v Sheppard***, 2020 ABCA 455 at para 17, the Court stated:

> . . . We acknowledge that the Supreme Court decisions in *R v Nasogaluak*, 2010 SCC 6 and *R v Summers*, 2014 SCC 26 have opened the door for courts to consider state misconduct as a mitigating factor in sentencing an offender, above and beyond the confines of s. 719(3.1). We note as well the line of Ontario cases that have recognized the possibility of a reduction in sentence for harsh conditions imposed during pretrial detention which do not amount to a breach of s. 12 of the *Charter*: *R v Duncan*, 2016 ONCA 754; *R v UA*, 2019 ONCA 946; and *R v Dockery*, 2020 ONCA 278.
>
> See also O'Ferrall J's dissenting reasons at para 65.

[266] In ***Nasogaluak*** the Supreme Court was dealing with an incident of deliberate misconduct, in the absence of a proven *Charter* breach. In the present case, the harsh treatment in question clearly arises from state conduct, not misconduct. Again: these are unprecedented times. Just as Parliament did not anticipate this situation in enacting the *Truth in Sentencing Act***,** the Supreme Court of Canada in ***Nasogaluak*** can hardly have been expected to anticipate a situation in which agents of the state – acting in *good* faith – subjected prisoners to lock-up periods tantamount to administrative segregation for months at a time.

DECISION

[267] I conclude that I have the discretion to account for the restrictions Mr. Byron has experienced while on remand due to the COVID-19 pandemic by way of a reduction to the overall sentence imposed. The evidentiary basis for granting such a reduction has been well-established.

[268] Referencing the "Housing Chronology" at Schedule "A", Mr. Byron had approximately 1.5 hours out of cells per day for a three-month period from March 27, 2020 to June 16, 2020. He also spent approximately 9 days in administrative segregation – 2 days as a result of COVID quarantine and 7 days as a result of safety issues which occurred simultaneously with a unit outbreak. While in segregation, he was allowed 35 minutes to 1 hour out of his cell.

[269] I will reduce his overall sentence by 3 months (90 days) to account for this time period.

[270] From June 16, 2020 to the time of sentencing submissions – well over a year – Mr. Byron averaged approximately 4.5 to 5 hours a day out of cells. While this was a significant improvement from the situation he experienced at the beginning of the COVID-19 pandemic, prior to the pandemic, Mr. Byron had averaged approximately 11 hours per day out of cells.

[271] The severe reduction in Mr. Byron's time out of cells from the start of the pandemic to date, were accompanied by a reduction in the already minimal recreational and other programming offered at the ERC and the EYOC.

[272] I will reduce his overall sentence by an additional 4 months (120 days) to account for this lengthy time period spent under continued COVID-19 restrictions.

[273] Finally, I am reducing Mr. Byron's sentence by an additional 30 days to account for the risk posed to his person, and emotional impact of the experience of being sent to clean COVID-19 outbreak and/or quarantine units with no training and little protection.

[274] The total reduction in sentence will therefore be 240 days.

[275] The Crown argued that sentence reduction as a remedy for particularly harsh remand conditions due to COVID-19 protocols offends the principle of parity by providing an advantage to individuals remanded during the pandemic not available to serving prisoners who suffer the same restrictions.

[276] Defence counsel submitted that the remedy for such a disparity, if it exists, may lie with the Parole Board: see ***Morgan*** at para 12. The Crown countered that it is not within the Parole Board's power to account for conditions of incarceration: ***Corrections and Conditional Release Act***, SC 1992, c 20 at s 102(1).

[277] I do not propose to resolve that issue in the context of this decision. The goal of parity is aspirational, not scientific: no two offenders are exactly the same, thus no two sentences are exactly the same. Achieving perfect parity is not a reasonable basis for depriving Mr. Byron of an ameliorative measure he would otherwise be entitled to.

Heard on the 26th to 30th days of June; 7th to 9th days of July; and 13th day of September, 2021.
Oral Decision given on the 22nd day of October, 2021.

Dated at the City of Edmonton, Alberta this 8th day of November, 2021.

Tamara L. Friesen
J.C.Q.B.A.

Appearances:

Thomas O'Leary
Appeals and Specialized Prosecutions
for the Crown

Eric Crowther
Engel Law
for the Accused

SCHEDULE "A"

HOUSING CHRONOLOGY

March 4, 2019	Arrested	
March 5, 2019	**Transferred to ERC**	Housed in 3-C-M-13
March 18, 2019	Transferred to CRC	Housed in 6-2-613
March 25, 2019	Transferred to ERC (temporary)	Housed in 3-C-U-9
March 28, 2019	Transferred back to CRC	Housed in 6-2-618, then 6-2-613
March 11, 2020	Transferred to ERC	Housed in 1-D-U-5
March 17, 2021	Declaration of Public State of Emergency - Covid-19	
April 22, 2020	Moved due to COVID-19 protocol	Admin Seg
April 24, 2021	Moved back into Unit	Housed in 1-D-U-1
June 26, 2020	Transferred to EYOC (temporary)	Housed in Annex CHIP Dorm 123
July 3, 2020	Transferred back to ERC	Housed in 1-D-L-28
July 5, 2020		Housed in 1-D-M-13
July 30, 2020	Admitted into Bootcamp Unit	Housed in lower tier: 1-A-L-31
August 29, 2020	First Bootcamp promotion	Housed in middle tier: 1-A-M-18
October 15, 2020	Second Bootcamp promotion	Housed in top tier: 1-A-U-3
November 1, 2020	Demoted down to lower tier	Unknown
November 2, 2020	Removed from Bootcamp Unit	Housed in Unit 4 (A and later B)
December 1, 2020	Moved due to conflict/safety	Admin Seg on 4B (unit outbreak)
December 8, 2020	Unit no longer on outbreak status	Housed in Unit 4D
December 11, 2020	Transferred to EYOC	Housed in Annex CHIP Dorm
To present		

HOUSING HISTORY

Mr. Byron's housing history was reflected in the records entered as exhibits in the trial. He did not challenge the overall accuracy of those records at trial, other than with respect to certain specific comments and observations made by remand staff. Crown counsel relied on those records, testimony of remand staff, as well as remand policy documents to provide a summary of Mr. Byron's housing history and an average of the time he spent out of cells. The summary, together with an outline of facts conceded by the Crown, was entered as Exhibit D for Identification purposes. Defence counsel did not point out any discrepancies in the Crown's summary when it was put to him for review and I accept that it a generally accurate reflection of how much time Mr. Byron spent out of cells during his lengthy remand period, before and after the COVID-19 pandemic declaration.

PRE-COVID

March 5, 2019 to March 27, 2020 – Calgary Remand Center and Edmonton Remand Center

While Mr. Byron was initially housed at the ERC following his arrest in 2019, he spent the majority of his "pre-COVID" remand time at the CRC.

Based on housing records, cross-referenced with institutional records, as well as Mr. Byron's testimony, I accept that pre-COVID, while at the CRC and later, the ERC, Mr. Byron averaged 11 hours per day out of his cell.

I also accept that during that time period, while at the CRC in Unit 6, Mr. Byron experienced several periods of lockdown where that time out of cells was greatly reduced and Mr. Byron was unable to leave his cell in order to call his wife. On at least one occasion, and possibly two, the lockup lasted for a three-day period.

POST-COVID

March 27 – April 22, 2020 – Edmonton Remand Center

On March 17, 2021 a Public State of Emergency ws declared due to the COVID-19 Pandemic. On March 27, 2020 the Chief Medical Officer of Health (CMOH) directed that social gatherings be reduced to a maximum of 15 people.
The ERC attempted to follow this direction by dividing Unit 1D, where Mr. Byron was housed at the time, into 6 cohort groups consisting of 6 cells each. Each group received equal time out of their cells on a rotating basis. This resulted in prisoners having approximately 1.5 hours of time outside their cells.

April 22 – 24, 2020

Mr. Byron reported symptoms of illness, and based on COVID protocols, ERC staff separated him from his Unit and placed him in isolation at the infirmary. For two days, Mr. Byron was kept alone in a cell and given only 30-45 minutes out of his cell. His COVID test was negative, and he was returned to his Unit sometime on April 24, 2020.

April 24 - June 16, 2020

The ERC continued with the 6 cell rotation schedule, resulting in inmates having approximately 1.5 hours of time outside their cells.

June 16 - December 1, 2020

The CMOH increased gathering limits to no more than 50 people. The ERC split Mr. Byron's Unit into two cohorts, each containing 18 cells. This resulted in prisoners being out of their cells for an average of 5 hours a day. This time period did not change when the CMOH declared Unit 1 to be on outbreak status. Prisoners' movement to and from the unit were restricted, but time out of cells remained the same.

December 1 – 8, 2020

Mr. Byron came into conflict with his roommate and expressed to guards that he felt threatened. For safety reasons, he was placed into administrative segregation within the Unit. ERC records indicated that he could not be moved out of the Unit until it was cleared from outbreak status, which occurred on December 8, 2020. During that 7-day time period, he had an average of 1 hour of time out of his cell.

December 8 - 11, 2020

Until a cell could be secured for him at EYOC, Mr. Byron was housed in Unit 4D, where presumably he went back into the rotation which resulted in inmates having 5 hours out of their cells.

December 11, 2020 to present – Edmonton Young Offenders Center

Mr. Byron moved to the EYOC on December 11, 2020. The EYOC was following a similar rotation schedule to the ERC and he initially received 5.5 hours out of his cell. Mid-January, the rotation was altered slightly, resulting in Mr. Byron and other EYOC inmates receiving 4 hours out of their cells.

SCHEDULE "B"

Alberta Cases Where Credit or Reduction of Sentence was Given due to COVID-19 Restrictions in Remand

Case Name	Time in Remand	Credit/Reduction	Charter Breach Found
R v Anderson, 2021 ABCA 135	864 days	The sentencing judge gave the accused a credit of 1384 days in total, which included credit for COVID-19 lockdown conditions. Assuming 1:1.5 enhanced credit, this results in a COVID-19 credit of 88 days (at para 2).	No
R v EF, 2021 ABQB 639.	No credit for pre-trial as EF was out on bail. This analysis concerned the period which started after the conviction and before sentencing (at para 99).	Four months credited for harsh conditions before the sentencing hearing, including conditions caused by COVID-19 (at para 105).	No
R v Gaudrault, 2021 ABQB 461	Two periods of custody - 13 days prior to trial, and 52 days after the conviction and before sentencing (at para 32).	178 days in total were credited. 1.5:1 credited for the initial custody period. 2:1 credited for the period after the verdict and before sentencing, which was during the COVID-19 pandemic (at para 48).	No
R v Gordey, 2020 ABQB 425	412 days	412 days of pre-trial custody calculated on a ratio of 1.5:1, for a total of 618 days. No direct enhanced credit due to COVID-19, but this was considered a mitigating factor to reduce the total sentence - 112 days credited for the 90 days spent in COVID-19 restrictions (at para 73).	No
R v Julom, 2021 ABPC 137	Incarcerated over the "past year" (at para 25).	No specific reduction, but COVID-19 conditions are considered "mitigating" for sentencing (at para 25).	No
R v Leblanc, 2021 ABQB 230	372 days	An additional half-day credited for each COVID-19 day, for a 2:1 presentence credit total, equaling 744 days total (at para 32).	No

Case Name	Time in Remand	Credit/Reduction	Charter Breach Found
R v Shivak, 2021 ABQB 72	978 days	978 days credited as 1,467 (at para 132). An additional 210 days total for COVID-19 (at para 133).	No

Canadian Cases Where Credit or Reduction of Sentence was Given due to COVID-19 Restrictions in Remand

Case Name	Outcome
R v Ashamock, 2020 ONSC 6774	COVID-19 was a factor in the decision to sentence the offender to a conditional sentence (at paras 12 – 14).
R v Ashton, 2021 ONSC 3994	17 days credited for harsh conditions, due in part to COVID-19 (at para 77).
R c Bah, 2020 QCCQ 2199	Direct reduction given for days served during the COVID-19 pandemic. "Under the circumstances, the Court will reduce the sentence to be imposed by 0.5 days per day served during the pandemic (between March 13, 2020, and June 10, 2020) and by 1.5 days per day of lockdown" (at para 54).
R v Bell, 2020 ONSC 2632	429 days in presentence detention credited at 1.5:1 for 645 days (at para 51). An additional 85 days credited for harsh lockdown conditions, which included lockdowns caused by COVID-19 conditions (at para 56).
R v Campbell, 2020 NUCJ 28	60 days for the harsher conditions of incarceration (at para 32).
R v Costello, 2020 BCSC 1206	Offender spent 325 days in custody, credited at 1:1.5 for 488 days (at para 32). While there was no explicit "COVID-19 Credit" for the pre-sentence custody, the Court stated that this was considered in coming to a proportionate and fit sentence (at paras 76 – 77, 82).
R v Dakin, 2020 ONCJ 202	While the Court would have sentenced the offender to an additional 52 days, it shortened this sentence to one day due to COVID-19, stating: "I find that the appropriate sentence, in these unique times, is a sentence of 1 day in addition to 8.2 months or 252 days of presentence custody (168 days enhanced at 1:1.5). This sentence will be concurrent on all charges." (at para 33).
R v GPW, 2021 NSSC 192	No direct credit for COVID-19 and related lockdowns, but this was considered a mitigating factor in sentencing (at para 39).
R v Joshua Barreira, 2020 ONSC 6558	In addition to the 1:1.5 credit for pre-trial conditions, the Court held that the offender should receive an enhanced credit of 6 months due in part to the harsh pre-trial COVID-19 conditions (at para 36).

Case Name	**Outcome**
R v Kandhai, 2020 ONSC 1611	The offender had been in custody for 30 months (at para 3). As it relates to COVID-19, the Court held that: "[t]he situation, which has led to drastic measures in society at large, is bound to increase day to day hardship in prison and the general risk to the welfare of prison inmates. Given how much time he has served thus far in custody, it is in Mr. Kandhai's interest and the public's interest as well, that he be released at this point in time" (at para 7).
R v Hearns, 2020 ONSC 2365	The Court found that the presentence custody was sufficient to warrant a time served disposition (at para 26). This analysis considered the impact of the COVID-19 pandemic (at paras 15 – 20). Offender had served 667 days in pre-sentence custody – with a 1:1.5 credit for 1001 days (at para 8).
R v KM, 2020 NSSC 278	14.72 months credit for time served, with 60 additional days credited for being incarcerated during COVID-19 (at para 65).
R v Leclair, 2020 ONCJ 260	18 months for the offences committed, with a 30-day reduction for the lockdowns and reduced services as a result of COVID-19 (at para 111).
R v OK, 2020 ONCJ 189	Enhanced credit included the recognition of the particularly harsh conditions during the COVID-19 pandemic (at paras 4 – 6). The Court granted an additional .5 day of credit for every day during the pandemic in recognition of the extra "physical and mental hardship" caused by incarceration during the pandemic (paragraphs 32 – 44).