Federal Court of Appeal | Cour d'appel fédérale

Date: 20100407

Docket: A-202-09

Citation: 2010 FCA 90

CORAM: **BLAIS C.J.**
NADON J.A.
EVANS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

J.P.

Respondent

Heard at Vancouver, British Columbia, on October 28, 2009.

Judgment delivered at Ottawa, Ontario, on April 7, 2010.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] On April 24, 2009, Mosley J. of the Federal Court, in decision 2009 FC 402, allowed the respondent's application for judicial review which challenged the National Parole Board's (the "Board") calculation of his parole eligibility dates.

[2] The main issue raised by this appeal is the interpretation of the word "sentence" found in subsections 119(1), 120(1) and 128(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "*CCRA*"). More particularly, the issue is whether the word "sentence" found in these provisions means only the custodial component of a custody and supervision order under the *Youth*

Criminal Justice Act, S.C. 2002, c. 1 (the "*YCJA*"), or whether it means both components of such an order.

The Facts

[3] A brief summary of the relevant facts will be helpful to an understanding of the issues before us.

[4] The respondent murdered his mother in 1999. At the time, he was 14 years old.

[5] On March 7, 2008, the respondent was convicted of second degree murder and was sentenced, pursuant to subparagraph 42(2)(q)(ii) of the *YCJA*, to 22 months of custody and 36 months of community supervision.

[6] Because he was 22 years old at the time of sentencing, the respondent was committed to a provincial correctional facility for adults to serve his sentence, namely, the Fraser Regional Correctional Centre in Maple Ridge, British Columbia. In July 2008, he was transferred to the Vancouver Island Regional Correctional Centre.

[7] Because of his placement in a correctional facility for adults, the Board asserted jurisdiction over him.

[8] Because of its view that the respondent was serving a sentence of 58 months and, hence, a sentence of over two years for the purpose of subsection 119(1) of the *CCRA*, the Board determined that the respondent's parole eligibility, in accordance with paragraph 119(1)*(c)*, was as follows: (i) for day parole: April 17, 2009; (ii) for full parole: October 17, 2009; (iii) warrant expiry: January 6, 2013.

[9] The respondent did not agree with the Board's calculation and sought a review thereof. In his view, the calculation of his parole eligibility was to be made in accordance with paragraph 119(1)*(d)* of the *CCRA*, as his sentence was one of less than two years, i.e. the 22 months of custody. On October 3, 2008, the Board advised him that the calculation would not be changed.

[10] With the help of legal counsel, the respondent made a further attempt to convince the Board that it had wrongly calculated his eligibility dates. By letter dated December 9, 2008, the Board advised the respondent that the calculation would stand.

[11] On January 7, 2009, the respondent filed his judicial review application in the Federal Court. Specifically, he asserted that the Board had miscalculated his eligibility date and that he was eligible for day parole after serving 1/6 of his 22-month custodial sentence and eligible for full parole after serving 1/3 of his 22-month custodial sentence.

[12] He later amended his application to seek a declaration that his parole expired at the end of his 22-month custodial sentence.

[13] On April 24, 2009, Mosley J. rendered the following Judgment:

> **IT IS THE JUDGMENT OF THIS COURT that**
>
> 1. for the purpose of calculating the applicant's eligibility for day and full parole, only the 22 month custodial portion of the applicant's sentence is to be included by the National Parole Board and the calculation shall not include the conditional supervision portion of the sentence;
>
> 2. the National Parole Board's jurisdiction to grant, terminate or revoke parole and to supervise the applicant expires at the end of the 22 month custodial portion of the applicant's youth sentence subject to the following provision;
>
> 3. should custody be continued until the end of the conditional supervision portion of the sentence or the applicant is returned to custody for the remainder of the sentence by Order of the Youth Justice Court, the Board will retain jurisdiction;
>
> 4. the applicant is awarded costs for this application according to the normal scale.

[14] On May 4, 2009, the appellant commenced the appeal now before us.

The Issues

[15] The appeal raises the following issues:

1. Whether the term "sentence" for the purpose of calculating parole eligibility under the *CCRA* includes only a portion of the sentence imposed under subparagraph 42(2)*(q)*(ii) of the *YCJA*;
2. Whether the Board ceases to have jurisdiction over an individual transferred to an adult correctional facility pursuant to the provisions of the *YCJA* once the custodial

portion of the sentence imposed under subparagraph 42(2)*(q)*(ii) ends, irrespective of whether the individual remains on full parole at the time; and

3. Whether the Board is obliged to assert jurisdiction over an individual who is committed to custody in an adult correctional facility during the conditional supervision portion of a sentence imposed under subparagraph 42(2)*(q)*(ii) of the *YCJA*.

[16] Before proceeding, I should make it clear that the issues before us are now moot in that, based on the Board's calculations of the respondent's parole eligibility, he was eligible for full parole on October 17, 2009. Consequently, our decision has no practical application in the circumstances of this case. However, in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada indicated that in certain circumstances, notwithstanding that a case raised only a hypothetical or abstract question, the Court could hear the matter. In formulating this view, the Court identified three basic policies behind the mootness doctrine:

1. The Court's capability of resolving legal disputes finds its roots in the adversarial relationship between parties who have a stake in the outcome of a case. This ensures the likelihood that the issues will be "well and fully argued by parties who have a stake in the outcome" (see. pages 358-359 of the Reasons).
2. The doctrine of mootness promotes judicial economy in that there is a need to "ration scarce judicial resources among competing claimants" (see. p. 360 of the Reasons).

3. Courts should be reluctant to adjudicate matters in the absence of a “dispute affecting the rights of the parties”, as this may be seen as an intrusion into the role of the legislative branch (see. p. 370 of the Reasons).

[17] In the present matter, I am satisfied that the promotion of judicial economy plays in favour of a determination of the issues raised by the appeal. Given the nature of parole eligibility calculations and the inherent delays in the judicial and administrative processes, cases such as the one now before us will, more often than not, be moot before reaching this Court. The issues raised by the appeal concern important aspects of the *YCJA* and the *CCRA* and I have no doubt that the question of parole eligibility for young offenders serving their youth sentence in an adult facility is bound to arise again. Thus, given that the issues were fully and vigorously argued by both sides, a determination of these issues will make better use of scarce judicial resources and will also better serve the administration of justice.

[18] I therefore conclude that we should determine the issues now before us in this appeal.

Legislation

[19] It will be useful, at the outset, to reproduce the provisions of both the *CCRA* and the *YCJA* upon which depend the answers to the questions raised in this appeal:

A. Corrections and Conditional Release Act	***A. Loi sur le système correctionnel et la mise en liberté sous condition***
2. (1) "sentence" means a sentence of imprisonment and includes a sentence imposed by a foreign	**2.** (1) « peine » ou « peine d’emprisonnement » S’entend notamment d’une peine spécifique

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

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

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

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

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

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

(ii) six months; or

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

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

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

120. (1) Subject to sections 746.1 and 761 of the *Criminal Code* and to any order made under section 743.6 of that Act, to subsection 140.3(2) of the *National Defence Act* and to any order made under section 140.4 of that Act, and to subsection 15(2) of the *Crimes Against Humanity and War Crimes*

120. (1) Sous réserve des articles 746.1 et 761 du *Code criminel* et de toute ordonnance rendue en vertu de l'article 743.6 de cette loi, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et de toute ordonnance rendue en vertu de l'article 140.4 de cette loi, et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes*

Act, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

…

128. (1) An offender who is released on parole, statutory release or unescorted temporary absence continues, while entitled to be at large, to serve the sentence until its expiration according to law.

de guerre, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est d'un tiers de la peine à concurrence de sept ans.

…

128. (1) Le délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte continue, tant qu'il a le droit d'être en liberté, de purger sa peine d'emprisonnement jusqu'à l'expiration légale de celle-ci.

B. Youth Criminal Justice Act

2. (1) "youth sentence" means a sentence imposed under section 42, 51 or 59 or any of sections 94 to 96 and includes a confirmation or a variation of that sentence.

38. (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

42. (1) A youth justice court shall, before imposing a youth sentence, consider any recommendations submitted under section 41, any pre-sentence report, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the

B. Loi sur le système de justice pénale pour les adolescents

2. (1) « peine spécifique » Toute peine visée aux articles 42, 51, 59 ou 94 à 96 ou confirmation ou modification d'une telle peine.

38. (1) L'assujettissement de l'adolescent aux peines visées à l'article 42 (peines spécifiques) a pour objectif de faire répondre celui-ci de l'infraction qu'il a commise par l'imposition de sanctions justes assorties de perspectives positives favorisant sa réadaptation et sa réinsertion sociale, en vue de favoriser la protection durable du public.

42. (1) Le tribunal pour adolescents tient compte, avant d'imposer une peine spécifique, des recommandations visées à l'article 41 et du rapport prédécisionnel qu'il aura exigés, des observations faites à l'instance par les parties, leurs représentants ou avocats et par les père et mère de l'adolescent et

young person, and any other relevant information before the court.

de tous éléments d'information pertinents qui lui ont été présentés.

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

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

(…)

(…)

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

q) l'imposition par ordonnance :

[…]

…

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

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

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

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

89. (1) When a young person is twenty years old or older at the time

89. (1) L'adolescent âgé de vingt ans ou plus au moment où une peine spécifique

the youth sentence is imposed on him or her under paragraph 42(2)(*n*), (*o*), (*q*) or (*r*), the young person shall, despite section 85, be committed to a provincial correctional facility for adults to serve the youth sentence.

…

(3) If a young person is serving a youth sentence in a provincial correctional facility for adults or a penitentiary under subsection (1) or (2), the Prisons and Reformatories Act and the Corrections and Conditional Release Act, and any other statute, regulation or rule applicable in respect of prisoners or offenders within the meaning of those Acts, statutes, regulations and rules, apply in respect of the young person except to the extent that they conflict with Part 6 (publication, records and information) of this Act, which Part continues to apply to the young person.

lui est imposée en vertu des alinéas 42(2)n), o), q) ou r) doit, malgré l'article 85, être détenu dans un établissement correctionnel provincial pour adultes pour y purger sa peine.

…

(3) Les lois — notamment la Loi sur le système correctionnel et la mise en liberté sous condition et la Loi sur les prisons et les maisons de correction — , règlements et autres règles de droit régissant les prisonniers ou les délinquants au sens de ces lois, règlements ou autres règles de droit s'appliquent à l'adolescent qui purge sa peine dans un établissement correctionnel provincial pour adultes ou un pénitentier au titre des paragraphes (1) ou (2), dans la mesure où ils ne sont pas incompatibles avec la partie 6 (dossiers et confidentialité des renseignements) de la présente loi, qui continue de s'appliquer à l'adolescent.

91. (1) The provincial director of a province may, subject to any terms or conditions that he or she considers desirable, authorize, for a young person committed to a youth custody facility in the province further to an order under paragraph 76(1)(a) (placement when subject to adult sentence) or a youth sentence imposed under paragraph 42(2)(n), (o), (q) or (r),

(a) a reintegration leave from the youth custody facility for a period not exceeding thirty days if, in the opinion of the provincial director, it is necessary or desirable that the young person be absent, with or without escort, for medical,

91. (1) Le directeur provincial d'une province peut, selon les modalités qu'il juge indiquées, autoriser à l'égard de l'adolescent placé dans un lieu de garde de la province en exécution d'une ordonnance rendue en application de l'alinéa 76(1)a) (placement en cas de peine applicable aux adultes) ou d'une peine spécifique imposée au titre des alinéas 42(2)n), o), q) ou r) :

a) ou bien un congé pour une période maximale de trente jours, si, à son avis, il est nécessaire ou souhaitable que l'adolescent s'absente, accompagné ou non, soit pour des raisons médicales, humanitaires ou de compassion, soit en vue de sa réadaptation ou de sa réinsertion sociale;

compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or reintegrating the young person into the community; or

(b) that the young person be released from the youth custody facility on the days and during the hours that the provincial director specifies in order that the young person may

(i) attend school or any other educational or training institution,

(ii) obtain or continue employment or perform domestic or other duties required by the young person's family,

(iii) participate in a program specified by the provincial director that, in the provincial director's opinion, will enable the young person to better carry out employment or improve his or her education or training, or

(iv) attend an out-patient treatment program or other program that provides services that are suitable to addressing the young person's needs.

b) ou bien la mise en liberté durant les jours et les heures qu'il fixe, de manière que l'adolescent puisse, selon le cas :

(i) fréquenter l'école ou tout autre établissement d'enseignement ou de formation,

(ii) obtenir ou conserver un emploi ou effectuer, pour sa famille, des travaux ménagers ou autres,

(iii) participer à un programme qu'il indique et qui, à son avis, permettra à l'adolescent de mieux exercer les fonctions de son poste ou d'accroître ses connaissances ou ses compétences,

(iv) suivre un traitement externe ou prendre part à un autre type de programme offrant des services adaptés à ses besoins.

104. (1) When a young person on whom a youth sentence under paragraph 42(2)(*o*), (*q*) or (*r*) has been imposed is held in custody and an application is made to the youth justice court by the Attorney General, within a reasonable time before the expiry of the custodial portion of the youth sentence, the provincial director of the province in which the young person is held in custody shall cause the young

104. (1) Dans le cas où l'adolescent est tenu sous garde en vertu d'une peine spécifique imposée en application des alinéas 42(2)o), q) ou r) et où le procureur général présente une demande en ce sens au tribunal pour adolescents dans un délai raisonnable avant l'expiration de la période de garde, le directeur provincial de la province où l'adolescent est tenu sous garde doit le faire amener devant le tribunal; celui-ci, après avoir fourni aux parties et aux père ou mère de

person to be brought before the youth justice court and the youth justice court may, after giving both parties and a parent of the young person an opportunity to be heard and if it is satisfied that there are reasonable grounds to believe that the young person is likely to commit an offence causing the death of or serious harm to another person before the expiry of the youth sentence the young person is then serving, order that the young person remain in custody for a period not exceeding the remainder of the youth sentence.	l'adolescent l'occasion de se faire entendre, peut, s'il est convaincu qu'il existe des motifs raisonnables de croire que l'adolescent commettra vraisemblablement, avant l'expiration de sa peine, une infraction causant la mort ou un dommage grave à autrui, ordonner son maintien sous garde pour une période n'excédant pas le reste de sa peine.
(2) If the hearing of an application under subsection (1) cannot be completed before the expiry of the custodial portion of the youth sentence, the court may order that the young person remain in custody until the determination of the application if the court is satisfied that the application was made in a reasonable time, having regard to all the circumstances, and that there are compelling reasons for keeping the young person in custody.	(2) S'il ne peut décider de la demande avant l'expiration de la période de garde, le tribunal peut, s'il est convaincu que la demande a été présentée dans un délai raisonnable, compte tenu de toutes les circonstances, et qu'il existe des motifs impérieux pour la prise de cette mesure, ordonner le maintien sous garde de l'adolescent jusqu'à l'aboutissement de la demande.

The Federal Court Decision

[20] Because I am of the view that Mosley J. (hereinafter "the Judge") made no error which would allow us to intervene, I will set out at length the reasons which led him to conclude as he did.

[21] First, the Judge dealt with the standard of review. He referred to the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and to its more recent decision in

Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, and concluded that the applicable standard with regard to the interpretation of the *CCRA* and the *YCJA* was that of correctness. At paragraph 15 of his Reasons, he wrote as follows:

> [15] Here, the Board interpreted its "home statute" (the CCRA) and a related statute (the YCJA) but the questions at issue in these proceedings have not arisen in the context of the Board's usual administrative regime respecting the grant of parole to adult offenders. In the particular circumstances in which this application has been brought, I have no reason to believe that the Board has any greater degree of expertise than the Court in construing the interplay between the two statutes. The questions of law that arise may be considered to be of significant importance to the youth justice system and outside the Board's expertise. Accordingly, I am satisfied that the Board's decision does not require deference and that I must be concerned with whether the Board correctly interpreted the applicable legislation in its calculation of J.P.'s parole eligibility.

[22] The Judge then turned to the issue of whether the term "sentence", found in the subsections 119(1), 120(1) and 128(1) of the *CCRA*, is a reference to the custodial portion only of a custody and supervision order under the *YCJA* or a reference to both the custody and supervision portions of the order for the purpose of calculating parole eligibility.

[23] The Judge began by reviewing the parties' submissions. He then proceeded to review the purpose of the *YCJA* and its relevant provisions. He stated at paragraph 29 that the purpose of the statute was to render young persons accountable for offences through the imposition of just sanctions that have meaningful consequences for such persons and to promote their rehabilitation into society, thus, contributing to the protection of the public (see section 38 of the *YCJA*).

[24] The Judge then pointed out that in the case of a conviction for second degree murder, the youth justice court was bound to sentence the young person to a term not to exceed seven years, comprised of a committal to custody for a period not exceeding four years and a placement under conditional supervision to be served in the community (see subparagraph 42(2)*(q)*(ii) of the *YCJA*).

[25] The Judge indicated that while the seven-year term was fixed and that a supervision term was a mandatory component of the sentence, it was possible to vary the manner in which the custodial and non-custodial portions were to be served. In this regard, the Judge gave as an example subsection 104(1) of the *YCJA*, which provides that if the youth justice court is satisfied that there are reasonable grounds to believe that a young person will likely cause the death of or serious harm to another person before the expiry of his youth sentence, the court may order that the young person remain in custody for a period not to exceed the remainder of his youth sentence.

[26] The Judge also pointed out that because the respondent was over the age of 20 when he was sentenced, he was required to serve the custody portion of his youth sentence in a provincial correctional facility for adults (see. subsection 89(1) of the *YCJA*). This led him to observe that the *CCRA*, the *Prisons and Reformatories Act*, R.S., 1985, c. P-20 (the "*PRA*"), and any other statute, regulation or rule applicable to prisoners or offenders, within the meaning of those acts, statutes, regulations or rules, applied to young persons, except where there was a conflict with Part VI (Publication, Record and Information) of the *YCJA* (see subsection 89(3) of the *YCJA*).

[27] The Judge then turned to Part II of the *CCRA*, which governs the conditional release, supervision and long-term supervision of offenders serving their sentence in an adult facility. In particular, the Judge referred to sections 119 and 120 of the *CCRA*, which provide that an offender will be eligible for full parole after serving the lesser of 1/3 of his sentence or 7 years and that he will be eligible for day parole after having served the greater of a period ending six months before the date on which he is entitled to full parole and six months. This observation led him to opine that "[e]ligibility for day parole will necessarily depend upon eligibility for full parole" (see paragraph 34 of his Reasons).

[28] The Judge then turned to the main issue before him, which he formulated as follows at paragraph 35 of his Reasons:

> [35] The issue at bar turns on the correct interpretation of "sentence" within the meaning of these provisions. The applicant's position is that only the 22-month custodial portion of his sentence can be considered "the sentence" for the purpose of calculating parole eligibility. The respondent argues that parole eligibility is based on an offender's total sentence, which in the applicant's case is 58 months.

[29] He began his treatment of the issue by stating that, at first glance, the meaning of the word "sentence" found in the section 2 definition of the *CCRA* appeared to refer to both the custodial and supervisory components of the youth sentence imposed under the *YCJA*, which sentence included the sentence imposed on the respondent under section 42 thereof.

[30] However, the Judge undertook a contextual interpretation of the relevant provisions, as required by the Supreme Court's decision in *Rizzo and Rizzo Shoes Ltd. (Re.)*, [1988] 1 S.C.R. 27,

wherein the Supreme Court adopted the point of view enunciated by Professor Elmer A. Driedger in his *The Construction of Statutes* (Toronto: Butterworth, 1974) (the "*The Construction of Statutes*"), at 67, where he said:

> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[31] In conducting a contextual interpretation, the Judge referred to paragraph 83(2)*(e)* of the *YCJA*, which provides that young persons, when treated as adults, are not to be disadvantaged "with respect to their eligibility for and conditions of release". The Judge then observed that the respondent, having been placed in an adult facility, was not to be disadvantaged "in the calculation of his sentence to determine his eligibility for release" (paragraph 42 of his Reasons).

[32] The Judge then opined that the meaning of the word "sentence", found in sections 119 and 120 of the *CCRA*, could be inferred from a conceptual and purposive interpretation of the parole scheme found in the *CCRA*. He indicated that parole was a discretionary form of conditional release whereby offenders were allowed to serve the balance of their sentence outside of a correctional facility, under supervision and specific conditions, adding that parole therefore could not "attach to a sanction-like portion thereof that is already ordered to be served in the community, such as the conditional supervision portion of a sentence under subparagraph 42(2)*(q)*(ii) of the *YCJA*" (paragraph 43 of his Reasons).

[33] The Judge then referred to the definition of the word "sentence" found at subsection 2(1) of the *CCRA*, which, for ease of reference, I again reproduce:

2. (1) "sentence" means a sentence of imprisonment and includes a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the *International Transfer of Offenders Act* and a youth sentence imposed under the *Youth Criminal Justice Act*;	**2.** (1) « peine » ou « peine d'emprisonnement » S'entend notamment d'une peine spécifique imposée en vertu de la *Loi sur le système de justice pénale pour les adolescents* et d'une peine d'emprisonnement imposée par une entité étrangère à un Canadien qui a été transféré au Canada sous le régime de la *Loi sur le transfèrement international des délinquants.*

[34] The Judge pointed out that the definition used the verbs "means" and "includes", which led him to refer with approval to Hansen J.'s decision in *Hrushka c. Canada (Minister of Foreign Affairs)*, 2009 FC 69, where she wrote at paragraph at 16 of her Reasons:

> Second, the Respondent's argument runs contrary to the use and purpose of statutory definitions and recognized drafting conventions. As stated in Sullivan and Drieger on the *Construction of Statutes*, [Ruth Sullivan, Sullivan and Drieger on the Construction of Statutes (Vancouver: Butterworths, 2002), p. 51.] there are two kinds of statutory definitions, exhaustive and non-exhaustive. Exhaustive definitions are normally introduced with the term "means" and serve the following purposes: "to clarify a vague or ambiguous term; to narrow the scope of a word or expression; to ensure that the scope of a word or expression is not narrowed; and to create an abbreviation or other concise form of reference to a lengthy expression." Non-exhaustive definitions are normally introduced by the word "includes" and serve "to expand the ordinary meaning of a word or expression; to deal with borderline applications; and to illustrate the application of a word or expression by setting examples." Thus, it can be seen that a statutory definition does not typically have substantive content. Indeed, the inclusion of substantive content in a definition is viewed as a drafting error. As stated by Francis Bennion in *Statutory Interpretation*:
>
> > Definitions with substantive effect It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively and confine it to the proper function of a definition.

[Emphasis added]

[35] Adopting Hansen J.'s point of view led the Judge to opine that the expression "means a sentence of imprisonment" narrowed the scope of the term "sentence" to one of incarceration (paragraph 47 of his Reasons). As a result, it was his view that the only portion of the youth sentence under the *YCJA* included in the "sentence" under the *CCRA* was the custodial portion thereof. At paragraph 49 of his Reasons, the Judge wrote as follows:

> [49] The term "youth sentence" as defined under section 2 of the YCJA applies to a broad range of possible sentence dispositions that may be imposed. Youth sentences which involve custody will have a non-custodial portion. The inclusion of the term "youth sentence" in the definition of "sentence" in the CCRA is intended solely to ensure that the conditional release provisions of the CCRA are available to offenders serving the custodial portion of their youth sentences in adult facilities. Thus the definition has to read as referring to the custodial portion and not to the community supervision portion.

[36] Finally, the Judge turned to section 742.1 of the *Criminal Code* and noted that according to that section, "conditional sentence of imprisonment" was a "sentence of imprisonment" which an offender served in the community in lieu of in an institution. He then pointed out that in *R. v. Proulx*, [2000] 1 S.C.R. 61, the Supreme Court of Canada opined that parole did not apply to a conditional sentence of imprisonment by reason of the fact that under such a sentence, an offender was not incarcerated and therefore there was no need for reintegration into society [see paragraph 43 of *R. v. Proulx, supra*]. This led the Judge to state that, in the same way, "parole cannot be granted to … a young offender who has already been conditionally released." (see paragraph 50 of the Judge's Reasons).

[37] The Judge then further remarked that the supervision portion of the youth sentence under the *YCJA* was “an alternative to detention and is intended to be served in the community”. Recognizing that a young person’s period of custody could be extended under section 98 of the *YCJA* and that the young person could be remanded into custody under section 102 of the *YCJA* for breach of conditions, the Judge indicated that these were “exceptional procedures” (see paragraph 51 of the Judge’s Reasons), which did not detract from the principle that the young person’s reintegration into the community was a fundamental element of a custodial sentence under the *YCJA*.

[38] The Judge then turned to the second issue before him, namely, does the Board’s authority over a young person serving a youth sentence in an adult facility terminate upon the expiry of the young person’s period of custody?

[39] The Judge began by noting that the respondent was seeking a declaration that the Board’s authority over him terminated at the end of his 22-month period of custody. He also took note of the respondent’s submission that if full parole was granted to the respondent by the Board and that the respondent remained on full parole at the end of his period of custody, the Board would continue to exercise jurisdiction over him for the balance of his youth sentence, i.e. for the remainder of the 58-month sentence.

[40] The Judge then pointed out that by reason of subsection 89(3) of the *YCJA*, the *CCRA* and the *PRA* applied to a young person who was serving a youth sentence in an adult facility, adding that it was unclear whether youth justice principles ceased to apply. In support of that view, he

referred to the decision of Duncan J. of the Ontario Court of Justice in *R. v. C.K.*, 2008 ONCJ 236, (2008), 233 C.C.C. (3d) 194 (Ont. C.J.), who, at paragraph 18 of his Reasons, made the following remarks:

> An offender serving a youth sentence who enters or is transferred to an adult facility enters a legal no man's land. The YOA [*Youth Offenders Act*, R.S. 1985, c. &-1, repealed in 2002 and replaced by the *YCJA*] provided for discretionary transfer at the age of 18 but made it clear that "the provisions of this Act shall continue to apply in respect of that person" (s. 24.5 of the YOA). The YCJA contains no such provision. Nor does it specifically state the opposite – that the youth statute or any parts of the sections of it cease to apply. As a consequence it is not clear whether the Act or principles of youth justice apply or whether a transferred youth is even entitled to a review.
>
> [Emphasis added]

[41] The issue before Duncan in *R. v. C.K., supra,* was whether the review provisions set out at section 94 of the *YCJA* applied to a young person serving a sentence in an adult facility. Mr. Justice Duncan concluded that they applied.

[42] After reviewing Duncan J.'s Reasons, the Judge pointed out at paragraph 61 of his Reasons that Mr. Justice Duncan had concluded that the principles found in the *YCJA* continued to apply to young persons who were serving the custodial portion of their youth sentence in an adult facility, adding that in Mr. Justice Duncan's view, the adult facility was bound to accommodate the young person in a way that complied with the principles of youth criminal justice.

[43] The Judge then turned to the facts before him and made the following statement at paragraphs 62 and 63 of his Reasons:

> [62] In the case at bar, the Board's initial reasons for refusing day parole to the applicant state that "if released on his eligibility date, he would be subject to the terms and conditions of his Full Parole through to his warrant expiry date 2013/01/06". Such a statement has significant implications. Most importantly, it means that the terms and conditions of parole set by the Board would apply for the remainder of the applicant's youth sentence. It is not clear how this would be reconciled with the supervision principles under the YCJA and the conditions imposed by the sentencing judge. It is also unclear how the Board, which is accustomed to dealing with adult offenders, would accommodate YCJA principles in supervising this offender.
>
> [63] An aspect of the legislative scheme that supports the respondent's position that Parliament intended that the Board would have jurisdiction until the end of the offender's sentence, is that, as discussed above, the custodial portion of the sentence could in exceptional circumstances be extended to "warrant expiry". In that situation, the offender would continue to be detained (or returned to custody following a review in the case of a breach of his conditions), in an adult correctional facility and would remain within the scope of the CCRA and the Board's jurisdiction.

[44] This led the Judge to conclude that unless a decision was made to continue a young person's custody period or to return him to custody for the balance of his youth sentence, the Board's jurisdiction over the young person terminated at the end of the custodial period because the young person could no longer be detained under the terms of his youth sentence. The Judge opined that such a scenario did not lead to "a jurisdictional void" because the young person would necessarily remain under the supervision of the provincial director and the youth court which had sentenced him.

Analysis

[45] At the outset, a few words should be said about the standard of review. Although neither party made any submissions in their Memoranda of Fact and Law regarding the standard of review, it is implicit in their submissions that they do not dispute the Judge's conclusion that the applicable

standard is that of correctness. Because I am satisfied that there is only one reasonable interpretation of the statutes at issue, I need not address the question 1/of whether deference to the Board was required in the present matter.

[46] The appellant makes a number of submissions as to why we should intervene. First, he takes issue with paragraph 43 of the Judge's Reasons, where the Judge states that parole cannot apply "to a sanction or a portion thereof that is already ordered to be served in the community". To do justice to the appellant's arguments, I will quote in full paragraphs 46 and 47 of his Memorandum of Fact and Law:

> 46. To the extent that the lower court in making that statement means that parole is unnecessary, as an avenue of recourse, while an offender is otherwise on release pursuant to statute or court order during his criminal sentence, the Appellant agrees.
>
> 47. If however, as it appears from its jurisdictional findings, the lower court also means that parole cannot exist or an offender cannot be on parole during the period he would otherwise be entitled by statute or court order to be on release during his sentence of imprisonment, the Appellant says the lower court is in error. Clearly, an individual who is granted parole and remains on parole as of the date he would otherwise be entitled to release by statute or court order, remains on parole until revoked or until the expiration of his sentence.

[47] These remarks lead the appellant to argue that the Judge's inference that the supervisory portion of the respondent's youth sentence is excluded from the calculation of his parole eligibility is also an error on his part. In the appellant's submission, the above inference is not in accordance with principles of statutory interpretation in that it fails to distinguish between entitlement to release and a discretionary grant of release (parole) and it fails to give effect to Parliament's intention that

release or eligibility for release be both calculated by reference to the entire length of the criminal sentence, whether the offender be an adult or a young person.

[48] The appellant further argues that the Judge's error results from his reluctance to recognize that the "sanction" imposed under paragraph 42(2)*(q)*(ii) of the *YCJA* constitutes a "single sanction" and not separate sanctions. In other words, the Judge treated the sentence imposed on the respondent as two sentences rather than one.

[49] The appellant's next submission challenges the Judge's reliance on Hanson J.'s decision in *Hrushka, supra*, where she dealt with the meaning of the words "means" and "includes", words found in the *CCRA*'s section 2 definition of the word "sentence". The Judge concluded, as I have already indicated, that the word "sentence" meant "sentence of imprisonment" and, as a result, that the youth sentence imposed under the *YCJA* meant the custodial portion thereof only.

[50] In the appellant's view, the Judge's interpretation of the word "sentence", found in section 2 of the *CCRA*, constitutes an unwarranted "reading down" of the legislation. The Judge's interpretation of the provision does not accord with the principle of statutory interpretation that the words are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of Parliament.

[51] At paragraphs 78 to 81 of his Memorandum of Fact and Law, the appellant summarizes his position in the following terms:

> 78. The definition of "sentence" by virtue of s. 99 of the *CCRA* has the same meaning as that attributed to the term under s. 2 of the *CCRA*. The applicable definition is:
>
> > "sentence" means a sentence of imprisonment and includes a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the *International Transfer of Offenders Act* and a youth sentence imposed under the *Youth Criminal Justice Act*.
>
> 79. The definition of "sentence" is clear and unambiguous. Sentence means sentence and includes a "youth sentence" imposed pursuant to the terms of the *YCJA*. In turn, "youth sentence", in the context of s. 2 of the *CCRA*, includes and is, in fact, limited to a sentence imposed under s. 42(2)(n), (o), (q) or (r) of the *YCJA*.
>
> 80. Section 42(2)(q) of the *YCJA* does not parse a sentence comprised of a period of supervision and a period of custody into a sentence of custody and a sentence of supervision.
>
> 81. The provisions of the *YCJA* cited above lead to no other conclusion that the period of custody and the period of conditional supervision in the community constitute a single sanction meeting the definition of "sentence" prescribed by Parliament for the purpose of calculating parole eligibility.

[52] The appellant also submits that the Judge erred in determining the Board's jurisdiction over the respondent. He reiterates the argument which he made before the Judge with respect to the Board's jurisdiction. If the Board grants the respondent full parole and he therefore remains on full parole at the time the custodial portion of his sentence terminates, the Board continues to exercise jurisdiction over him for the remainder of his youth sentence, i.e. the 26 months of supervision. For this submission, the appellant relies, *inter alia*, on subsection 89(3) of the *YCJA* which provides for the application of the *CCRA* and the *PRA* to young offenders transferred to adult facilities.

[53] As a result, the appellant says that the Judge fell into error in concluding that the Board's jurisdiction expired when the applicant was "no longer required to be detained under the terms of the custodial portion of his sentence" (paragraph 64 of the Judge's Reasons).

[54] I now turn to the issue of interpretation. The parties submit, as they must, that the meaning of the word "sentence" must be determined by reading the word "in [its] entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (see *The Construction of Statutes*, *supra*, at 67). I therefore turn to that task.

[55] To begin with, it is important to note that the definition of "sentence" found in subsection 2(1) of the *CCRA* says that it "means a sentence of imprisonment and includes … a youth sentence imposed under the *Youth Criminal Justice Act*". The appellant argues that the reference to a youth sentence imposed under the *YCJA* can mean nothing but the entire sentence, i.e. the custodial and supervision components of the youth sentence. The respondent, on the other hand, says that such reference can only be to the custodial portion of the youth sentence.

[56] I now turn to context. More particularly, I turn to the scheme and object of both the *YCJA* and the *CCRA* and to Parliament's intention.

[57] The difficulty which arises in this case stems from the fact that Parliament decided that young persons, aged 20 or older, should serve their period of custody in an adult facility (subsection 89(1) of the *YCJA*) and that while detained therein, the *CCRA* and the *PRA* will apply to them.

[58] Thus, for example, the possibility of reintegration leave or release during the period of custody provided by subsection 91(1) of the *YCJA* is not available to young persons committed to an adult facility, as the provincial director's authority to grant to young persons either reintegration leave or release is limited to young persons detained in a youth custody facility. However, through subsection 83(2) of the *YCJA*, Parliament also decided that young persons committed to an adult facility were not to be disadvantaged "with respect to the eligibility for and conditions of release".

[59] This leads me to observe that although Parliament could have achieved the purpose set out at subsection 83(2) by granting the provincial director authority over young persons committed to an adult facility, it chose not to do so. Rather, it directed that the existing scheme for release from custody, found in the *CCRA* and the *PRA*, would be available to such young persons.

[60] The respondent submits, and I agree with him, that by choosing this course of action, Parliament exempted young persons from a major disadvantage that would have resulted by reason of their committal to an adult facility. Thus, prison and penitentiary authorities are not obliged to apply a different legislative scheme to young persons within their jurisdiction and the difficulty inherent in the application of different legislative schemes for release from custody for young persons and adult offenders is avoided.

[61] I note that the provincial director's authority in regard to reintegration leave and release during the course of a young person's custodial period does not apply to a young person's period of supervision, in the same way that the parole scheme only applies to an adult offender's committal to custody.

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

[63] Consequently, although I found the appellant's argument regarding the unity of the youth sentence under the *YCJA* initially attractive, I do not see any merit in it given the wording of the *CCRA* and the *YCJA*. Even if it is true that a sentence imposed under subparagraph 42(2)*(q)*(iii) of the *YCJA* is a "single sanction", only the custody portion thereof constitutes a "sentence of imprisonment". I also do not see any merit in the distinction which the appellant seeks to make between entitlement to release and the actual grant of release, i.e. parole. This argument is simply another way of putting forward the proposition that the youth sentence under the *YCJA* is one sentence only and not a sentence broken into two components.

[64] I note that subsection 2(1) of the *YCJA* defines the expression "custodial portion" of a youth sentence imposed under paragraphs 42(2)*(n), (o), (q)* or *(r)* as "the period of time, or the portion of

the young person's youth sentence that must be served in custody before he or she begins to serve the remainder under supervision in the community …".

[65] Thus, when subsection 89(3) of the *YCJA* and the definition of "sentence" found at subsection 2(1) of the *CCRA*, which incorporates a youth sentence within its meaning, are read together, it is my opinion that a youth sentence within the meaning of the definition can only be the custody period thereof. Hence, the reference to "youth sentence" in subsection 2(1) of the *CCRA* can only be directed to that portion of the youth sentence to which subsections 89(1) and 89(3) of the *YCJA* find application, i.e. a young person's period of custody.

[66] It is of interest to note that the French version of paragraph 119(1)*(c)* of the *CCRA* uses the expression "dans le cas du délinquent qui purge une peine d'emprisonnement …" to translate the words "where the offender is serving a sentence …". This meaning (in the French version) is the one which is clearly envisaged by the definition of "sentence" in subsection 2(1) of the *CCRA* when it makes clear that a "sentence" is a sentence of imprisonment.

[67] It is therefore my view that the Judge was correct in holding that the words "means a sentence of imprisonment" found in subsection 2(1) of the *CCRA* narrowed the scope of the word "sentence" to one of incarceration. I am satisfied that that is the only conclusion possible, taking into account the scheme of the Act, the object of the Act and Parliament's intention.

[68] The conclusion which the Judge reached, with which I agree, is also consistent with the scheme and object of parole, in that there can be no doubt that the parole scheme finds application only insofar as an offender is committed to custody.

[69] In *R. v. Proulx, supra*, the Supreme Court held that the parole scheme did not apply to an offender serving a conditional sentence in the community. In its view, that approach was inconsistent with the scheme and object of parole because the offender, at that point in time, was not incarcerated and thus did not need to be reintegrated into society. At paragraphs 42 and 43, Chief Justice Lamer wrote as follows:

> 42. Moreover, the conditional sentence is not subject to reduction through parole. This would seem to follow from s. 112(1) of the Corrections and Conditional Release Act, S.C. 1992, c. 20, which gives the provincial parole board jurisdiction in respect of the parole of offenders "serving sentences of imprisonment in provincial correctional facilities" (*R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.), at p. 33).
>
> 43. I would add that the fact that a conditional sentence cannot be reduced through parole does not in itself lead to the conclusion that as a general matter a conditional sentence is as onerous as or even more onerous than a jail term of equivalent duration. There is no parole simply because the offender is never actually incarcerated and he or she does not need to be reintegrated into society. But even when an offender is released from custody on parole, the original sentence continues in force. As I stated in *M. (C.A.), supra*, at para. 62:
>
> > In short, the history, structure and existing practice of the conditional release system collectively indicate that a grant of parole represents a change in the conditions under which a judicial sentence must be served, rather than a reduction of the judicial sentence itself. . . . But even though the conditions of incarceration are subject to change through a grant of parole to the offender's benefit, the offender's sentence continues in full effect. The offender remains under the strict control of the parole system, and the offender's liberty remains significantly curtailed for the full duration of the offender's numerical or life sentence. [Emphasis in original.]
>
> The parolee has to serve the final portion of his or her sentence under conditions similar to those that can be imposed under a conditional sentence, perhaps even under stricter conditions, as the parolee can be assigned to a "community-based residential facility":

> see s. 133 of the *Corrections and Conditional Release Act* and s. 161 of the *Corrections and Conditional Release Regulations*, SOR&92-620.

[70] Thus, if the parole scheme does not apply to an adult conditional sentence served in the community, which section 742.1 of the *Criminal Code* defines as a "sentence of imprisonment", it must follow that the supervisory period of a young person's youth sentence, which clearly is not a sentence of imprisonment, cannot be subject to the parole scheme.

[71] In concluding on this point, I would like to briefly address the submissions made by the appellant regarding the consequences of the Judge's decision. The appellant says that the Judge's decision creates a distinction between the youth criminal justice system and the adult criminal justice system that was neither intended by Parliament, nor warranted. The appellant also says that by reason of the Judge's decision, the period that individuals in situations similar to those of the respondent must wait before being considered for parole will be reduced and that the decision creates an incentive for young persons to be transferred to adult correctional facilities, contrary to the principles of the youth criminal justice system.

[72] First, it is clear that it is not the Judge's decision that creates a distinction between the youth and the adult criminal justice systems. If a distinction exists, it is the result of the existing legislation, the *YCJA*, which, *inter alia*, provides at paragraph 3(1)*(b)* that one of the guiding principles of the Act is that "the criminal justice system for young persons must be separate from that of adults" and that it must emphasize, *inter alia*, rehabilitation and reintegration. In that regard,

the words of Mr. Justice Fish of the Supreme Court of Canada in *R. v. R.C.*, [2005] 3 S.C.R. 99, at paragraph 41, are apposite:

> [41] In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons. In keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections, and to interfere with their personal freedom and privacy as little as possible: see the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, incorporated by reference in the *YCJA*.

[73] Second, the appellant's suggestion that individuals such as the respondent will spend less time in detention before being paroled appears to be premised on a comparison of young persons detained in an adult facility to other inmates (adult) in that same facility. The fact of the matter is that young persons do not cease to be "a young person" within the meaning of the *YCJA*, because they are being held in an adult facility. They are still young persons serving a youth sentence within the meaning of subsection 2(1) of the *YCJA*.

[74] The better comparison is one between young persons detained in an adult facility and young persons who are being held in a youth facility. In keeping with paragraph 83(2)(*e)* of the *YCJA*, the former should not be disadvantaged on the basis of the location where they are being held in custody.

[75] The appellant also suggests that the Judge's decision creates an incentive for young persons to be transferred to an adult facility. In that regard, the appellant says that a youth held in a youth facility is only eligible for review after 12 months, pursuant to section 94 of the *YCJA*, while a young person, such as the respondent, would be eligible for parole after only seven months. There

does not appear to be any basis for the appellant's assertion. The application of section 94 of the *YCJA* is not limited to young persons held in a youth facility. Rather, it applies to all young persons, including those committed to custody in an adult facility. Consequently, the respondent was entitled to and did receive a review under section 94 of the *YCJA*. Moreover, as I have already indicated, only young persons held in youth facilities get the benefit of subsection 91(1) of the *YCJA* which provides for reintegration leave and various other forms of leave which can be authorized by the provincial director.

[76] I have not been persuaded that the Judge's decision creates an incentive for young persons to be transferred to an adult facility or that it reduces the period of custody that individuals in circumstances similar to those of the respondent must wait before being considered for parole. Both sides attempted to provide examples which, in their view, demonstrated that their interpretation was the correct one and that the other side's interpretation led to an absurd result. I see no useful purpose in dealing with these examples since I am satisfied that the Judge reached the correct interpretation of the word "sentence". If this interpretation gives rise to problems of the type suggested by the appellant, Parliament will no doubt be in a position to correct the matter by amending the legislation.

[77] I now turn to the second and third issues before us which pertain to the Board's jurisdiction over young persons serving the custody portion of their youth sentence in an adult facility.

[78] The appellant submits that the Judge's decision confuses rather than clarifies the jurisdiction of the Board within the youth criminal youth justice system. In particular, the appellant says that the Judge's finding that the Board does not have authority over the respondent once the 22-month period of custody terminates is inconsistent with his finding that the Board will resume jurisdiction if the respondent is later recommitted during the conditional portion of his youth sentence.

[79] To this, the respondent replies that as a matter of principle, all orders of custody, as sentences of imprisonment, should be treated similarly for the purposes of the *CCRA*. Consequently, a young person recommitted to custody will have to reapply for parole when eligible.

[80] After consideration of the parties' respective arguments on this issue, the Judge concluded in the following terms:

> [64] Absent a decision to continue custody or to return the offender to custody for the remainder of the sentence, the Board's jurisdiction expires, in my view, when the applicant is no longer required to be detained under the terms of the custodial portion of his sentence. This conclusion does not lead to a jurisdictional void as he will remain under the supervision of the provincial director and the sentencing court.

[81] The appellant's submission that the Board should continue to exercise jurisdiction over the respondent, even after the termination of his period of custody, is in conflict with the principles of the *YCJA*. Indeed, section 89 of the *YCJA* transfers the custodial portion of the youth sentence only to adult correctional authorities or to the Board if parole is granted to the young person. It necessarily follows, in my view, that once the custodial portion of the sentence has been served or

has come to an end, the youth court and the provincial director retain their exclusive jurisdiction over the young person.

[82] It is clear from the Judge's decision, particularly by reason of his reference to the decision of Mr. Justice Duncan in *R. v. C.K., supra,* that he accepted the principle that adult facilities were bound to accommodate a young person "in a way that conforms to the principles of youth criminal justice" (see paragraph 61 of the Judge's Reasons). In my view, he also accepted that the boundary between the youth justice system and the adult justice system had not been clearly delineated by the existing legislation, but that the spirit and intent of the *YCJA* required that the youth justice court and the provincial director retain jurisdiction over a young offender upon termination of his or her period of custody.

[83] I have not been persuaded that, in concluding as he did, the Judge made any reviewable error. On the contrary, I am satisfied that his conclusion is the correct one. Consequently, as the Judge found, the jurisdiction of the provincial director and of the youth justice court over the respondent will resume once the custody portion of the youth sentence expires. Subsections 6(7.2) and 6(7.3) of the *PRA* provide support for that point of view. These provisions address the "effect of release" on a young person who has been transferred to an adult facility and read as follows:

6. (7.2) When a prisoner who was sentenced to custody under paragraph 42(2)(o), (q) or (r) of the Youth Criminal Justice Act is transferred from a youth custody facility to a prison under section 92 or 93 of that Act, or is committed to imprisonment in a prison under section 89 of that Act, the prisoner is entitled to be	**6.** (7.2) Le prisonnier assujetti à une peine spécifique consistant en une mesure de placement sous garde en application des alinéas 42(2) o), q) ou r) de la Loi sur le système de justice pénale pour les adolescents qui est transféré d'un lieu de garde à la prison en vertu des articles 92 ou 93 de cette loi ou qui est condamné à la

released on the earlier of (a) the date on which the prisoner is entitled to be released from imprisonment in accordance with subsection (5) of this section, and (b) the date on which the custody portion of his or her youth sentence under paragraph 42(2)(o), (q) or (r) of the Youth Criminal Justice Act expires.	prison en application de l'article 89 de cette loi, est admissible à la libération à la date déterminée pour sa mise en liberté conformément au paragraphe (5) ou, si elle est antérieure, à la date d'expiration de la période de garde de la peine spécifique visée aux alinéas 42(2) o), q) ou r) de cette loi.
(7.3) When a prisoner is committed or transferred in accordance with section 89, 92 or 93 of the Youth Criminal Justice Act and, in accordance with subsection (7.1) or (7.2) of this section, is entitled to be released, (a) if the sentence was imposed under paragraph 42(2)(n) of that Act, sections 97 to 103 of that Act apply, with any modifications that the circumstances require, with respect to the remainder of his or her sentence; and (b) if the sentence was imposed under paragraph 42(2)(o), (q) or (r) of that Act, sections 104 to 109 of that Act apply, with any modifications that the circumstances require, with respect to the remainder of his or her sentence.	(7.3) Le prisonnier détenu ou transféré en application des articles 89, 92 ou 93 de la Loi sur le système de justice pénale pour les adolescents et qui, en application des paragraphes (7.1) ou (7.2), est admissible à la libération est assujetti : a) si la peine est imposée en application de l'alinéa 42(2) n) de la Loi sur le système de justice pénale pour les adolescents, aux articles 97 à 103 de cette loi — avec les adaptations nécessaires — en ce qui concerne le reste de la peine; b) si la peine est imposée en application des alinéas 42(2) o), q) ou r) de cette loi, aux articles 104 à 109 de cette loi — avec les adaptations nécessaires — en ce qui concerne le reste de la peine.

[84] Subsection 6(7.2) of the *PRA* provides that the date of release of a young person sentenced to custody under, *inter alia*, paragraph 42(2)*(q)* of the *YCJA* is the earlier of the date on which the young person is entitled to be released, in accordance with subsection 6(5) of the *PRA* which deals with the effect of remission, and the date on which the young person's period of custody under paragraph 42(2)*(q)* expires. As to subsection 6(7.3), it provides that upon the release from custody of a young person, whose sentence was imposed under, *inter alia*, paragraph 42(2)*(q)* of the *YCJA*,

and who was committed or transferred to an adult facility in accordance with, *inter alia*, section 89 of the *YCJA*, sections 104 to 109 shall apply "to the remainder of his or her sentence".

[85] In other words, upon release from custody, a young person whose sentence was imposed under paragraph 42(2)*(q)* of the *YCJA* will be subject, pursuant to sections 104 to 109 of the *YCJA*, to the jurisdiction of the youth justice system authorities, i.e. the youth sentence court and the provincial director of the province in which the youth sentence was imposed. Thus, these provisions support the view that the Board's jurisdiction over young persons committed to adult facilities, pursuant to subsection 89(3) of the *YCJA*, is at an end when the custodial portion of their sentence terminates.

[86] I therefore conclude that the Judge made no error in concluding that the Board's jurisdiction expired when the respondent could no longer be detained under the terms of his youth sentence. I also conclude that the Judge was correct in holding that the Board would retain jurisdiction should the respondent's custody be continued until the end of the conditional supervision portion of his youth sentence or should he be returned to custody for the remainder of his youth sentence by order of the youth justice court. In such a scenario, the respondent would necessarily be committed, pursuant to subsection 89(1) of the *YCJA*, to a provincial correction facility for adults and, thus, pursuant to subsection 89(3), the *CCRA* and the *PRA* would find application. As a consequence, the Board would have jurisdiction over the respondent.

[87] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Pierre Blais C.J."

"I agree.
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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