

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Chief Justice Richard J. Chartier  
Mr. Justice William J. Burnett  
Madam Justice Karen I. Simonsen

***BETWEEN:***

<b><i>HER MAJESTY THE QUEEN</i></b>	)	<b><i>A. J. Synyshyn</i></b>
	)	<i>for the Appellant</i>
	)	
<i>Respondent</i>	)	<b><i>R. N. Malaviya</i></b>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Joint written submissions filed:</i>
<b><i>ANTHONY JAMES HOULE</i></b>	)	<b><i>February 19, 2019</i></b>
	)	
<i>(Accused) Appellant</i>	)	<i>Judgment delivered:</i>
	)	<b><i>March 8, 2019</i></b>

**CHARTIER CJM** (for the Court):

[1] This is a sentence appeal.

[2] The accused received a six-year custodial sentence after pleading guilty to two counts of break and enter with intent to commit indictable offence, one count of disguise with intent to commit indictable offence and one count of possession of a firearm while prohibited. On the day of sentencing, the accused had accumulated 563 days of pre-sentence custody. Regrettably, counsel’s submissions made no mention of those pre-sentence custody days. As a result, the sentencing judge did not consider whether the accused should be given credit for those days of pre-sentence custody.

[3] On appeal, the accused seeks to correct this oversight. The accused also moves for the admission of fresh evidence. The fresh evidence is the affidavit of counsel for the accused at sentencing explaining that the accused pled guilty pursuant to the terms of a plea agreement between the accused and the Crown and confirming that pre-sentence credit, at the rate of 1.5:1, was part of that agreement. The affidavit also confirms that counsel's failure to mention to the sentencing judge the accused's situation with respect to the pre-sentence custody days was an oversight.

[4] The accused argues that, had the sentencing judge been made aware of the pre-sentence custody situation, the sentencing judge would have given credit to the accused for his time in custody. The Crown agrees. Both parties submit that the accused should be credited with time in custody of 563 days, calculated at a rate of 1.5:1, for a total credit of 845 days and that those 845 days should be deducted from the accused's custodial sentence (see section 719(3.1) of the *Criminal Code*).

[5] The Crown does not oppose the accused's motion for the admission of fresh evidence. It also adopts the history, facts and argument set out in the accused's factum in their entirety. Finally, the parties consent to conducting this appeal in writing, without an oral hearing.

[6] We are all of the view that the interests of justice require that the fresh evidence be admitted. Moreover, it is our view the accused should be given credit for the 563 days he spent in pre-sentence custody at a rate of 1.5:1.

[7] Accordingly, leave to appeal sentence is granted and the appeal is allowed only to the extent that the sentence is varied to reflect a pre-sentence

custody credit of 845 days. This credit will be applied to his existing six-year custodial sentence. All other aspects of the sentence remain the same.

Chief CJM

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Burnett JA

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Simonsen JA

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