Federal Court of Appeal | Cour d'appel fédérale

Date: 20150520

Docket: A-518-14

Citation: 2015 FCA 129

CORAM: **STRATAS J.A.**
SCOTT J.A.
BOIVIN J.A.

BETWEEN:

ROBBIE RICHARD ERASMO

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on May 6, 2015.

Judgment delivered at Ottawa, Ontario, on May 20, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Mr. Erasmo, the appellant, asks this Court to set aside the judgment dated November 19, 2014 of the Federal Court (*per* Justice Manson): 2014 FC 1096.

[2] The appellant is an inmate at the Stony Mountain Institution in Manitoba. He committed an offence as a youth, was convicted for it, and received a sentence under the youth offenders'

regime. He also committed an offence as an adult, was convicted for it, and received a sentence to be served consecutively under the adult offenders' regime.

[3] The two regimes are different. To ensure that an offender is subject to only one regime, Parliament has passed merger provisions, subsection 743.5(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 and subsection 139(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. Together, these two provisions convert the remaining portion of the youth sentence into an adult sentence and merge the two sentences together. The offender is then eligible for various forms of conditional release from prison at certain times under various provisions of the *Corrections and Conditional Release Act*.

[4] The Sentence Manager at the Stony Mountain Institution calculated the appellant's period of incarceration and the times when he was eligible for various forms of conditional release from prison. In her calculation, she used the merger provisions and the relevant provisions of the *Corrections and Conditional Release Act*. She advised the appellant of the dates.

[5] This was a decision for which the appellant could seek review under the *Federal Courts Act*, R.S.C. 1970, c. F-7. The appellant did just that. He submitted that the merger provisions offended his rights under the *Canadian Charter of Rights and Freedoms* and, thus, were of no force or effect.

[6] The Federal Court found that the merger provisions did not offend the Charter. It dismissed the appellant's application for judicial review. The appellant now appeals to this Court.

[7] Like the Federal Court, I find that the merger provisions do not offend the Charter. Therefore, I would dismiss the appeal.

A. The basic facts

[8] When he was seventeen-and-a-half years old, the appellant committed second degree murder. Just after he turned eighteen, the appellant conspired to commit robbery. Soon afterward, he was arrested and charged with both offences.

[9] Those who are alleged to commit offences while they are under eighteen are tried as youths under the *Youth Criminal Justice Act*, S.C. 2002, c. 1. Once eighteen, they are adults and the *Criminal Code*, with all its procedures and substantive dispositions, applies full force to any new offences.

[10] Accordingly, the charge of second degree murder proceeded as a youth matter and the charge of conspiracy to commit robbery proceeded as an adult matter.

[11] In youth court, the appellant pleaded guilty to the second degree murder charge. Under subparagraph 42(2)(*q*)(ii), he received a seven-year sentence: four years in custody, with regular reviews, and three years in the community under supervision.

[12] Subparagraph 42(2)(*q*)(ii) provides as follows:

42. (2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this 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:	42. (2) Sous réserve des autres dispositions de la présente loi, dans le cas où il déclare un adolescent coupable d'une infraction et lui impose 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,
(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	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,
(B) a placement under conditional supervision to be served in the	d'autre part, en la mise en liberté sous condition au sein de la collectivité conformément à

community in accordance with section 105;	l'article 105;

[13] Roughly two-and-a-half years into the custodial portion of his youth sentence, the appellant pleaded guilty to the charge of conspiracy to commit robbery. He received a four-year consecutive adult sentence.

[14] However, due to various provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the appellant need not serve all of those four years in custody. Under that Act, he is eligible for forms of conditional release from prison such as unescorted temporary absence, day parole or full parole.

[15] In circumstances such as these, where the offender receives a youth sentence and before the offender has fully served the youth sentence the offender receives an adult sentence, what happens?

[16] Subsection 743.5(1) of the *Criminal Code* and subsection 139(1) of the *Corrections and Conditional Release Act* apply. They convert the remainder of the youth sentence into an adult sentence and merge the two sentences together. For the purposes of any future conditional release from prison, the *Corrections and Conditional Release Act* applies, not the *Youth Criminal Justice Act*.

[17] Subsection 139(1) of the *Corrections and Conditional Release Act* provides as follows:

139. (1) For the purposes of the Criminal Code, the Prisons and Reformatories Act, the International Transfer of Offenders Act and this Act, a person who is subject to two or more sentences is deemed to have been sentenced to one sentence beginning on the first day of the first of those sentences to be served and ending on the last day of the last of them to be served.	139. (1) Pour l'application du Code criminel, de la Loi sur les prisons et les maisons de correction, de la Loi sur le transfèrement international des délinquants et de la présente loi, le délinquant qui est assujetti à plusieurs peines d'emprisonnement est réputé n'avoir été condamné qu'à une seule peine commençant le jour du début de l'exécution de la première et se terminant à l'expiration de la dernière.

[18] Subsection 743.5(1) of the *Criminal Code* provides as follows:

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

[19] For the appellant, the merger provisions worked as follows. At the time the appellant received his adult sentence, he had 1,644 days remaining on his seven-year youth sentence, three years of which could be served under supervision in the community. Upon his sentencing for an

adult offence, subsection 743.5(1) of the *Criminal Code* turned those 1,644 days into an adult sentence. Subsection 139(1) of the *Corrections and Conditional Release Act* added the 1,644 days to the sentence of four years (1,461 days) for conspiracy to commit robbery, creating a total sentence of 3,105 days. The 3,105 days end on August 25, 2022.

[20] With that date in hand, the appellant's eligibility for various forms of conditional release from prison under the *Corrections and Conditional Release Act* can be calculated. The appellant is eligible for statutory release on October 26, 2019 (subsection 127(3)), full parole on December 25, 2016 (subsections 120(1) and 120.1(1)), day parole on June 25, 2016 (subparagraph 119(1)(*c*)(i)) and unescorted temporary absences on July 26, 2015 (subparagraph 115(1)(*c*)(ii)). By comparison, August 16, 2015 is the date that the appellant would have begun his three years of supervision in the community had his youth sentence been left in place.

[21] With these basic facts in place, I wish to offer a couple of observations. These form part of the context surrounding the appellant's submissions that the merger provisions leave him worse off and infringe his constitutional rights.

[22] First, as can be seen from the above calculation, the merger provisions make the appellant eligible for unescorted temporary absences from prison three weeks earlier than his release under supervision in the community. In other words, the merger provisions can actually reduce the appellant's time in full custody. Other such quirks may exist in other cases depending on the type of disposition the youth court has made and the length of the adult sentence.

[23] Second, when the appellant turned eighteen, he had already committed an offence as a youth. From his eighteenth birthday, he was at risk of the merger provisions applying to him if he committed a new offence. In this case, he did so, and the merger provisions ended up applying to him. To the extent the merger provisions disadvantaged the appellant, the disadvantage was triggered by his own misconduct as an adult.

B. The Federal Court

[24] The Federal Court rejected the appellant's Charter submissions and dismissed his application for judicial review. I do agree with much, but not all, of the reasoning of the Federal Court and will refer to it in the course of these reasons.

C. The standard of review

[25] In an appeal from an application for judicial review, our task is to assess whether the Federal Court correctly selected the standard of review and then properly applied it: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47.

[26] In the Federal Court, the parties agreed that the standard of review of the decision of the Sentence Manager at the Stony Mountain Institution is correctness. The Federal Court demurred, finding (at paragraph 12) that administrative law standards of review did not apply. Nevertheless,

the Federal Court found that the matter before it was one of constitutional law, so it applied the correctness standard.

[27] Before us, the parties once again agree that the standard of review is correctness. However, the agreement of the parties on the standard of review does not bind us: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 at paragraph 6. We must assess the matter for ourselves. Here, I agree with the parties, but for reasons different from the Federal Court.

[28] This is an administrative law matter – we are reviewing the decision of the Sentence Manager – and so administrative law standards of review apply.

[29] The first step is to characterize precisely what is in issue: *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraph 26. Here, no one takes issue with the mechanical calculation of the Sentence Manager in accordance with the provisions of the legislation. Rather, the appellant says that the Sentence Manager should have disregarded the merger provisions because they contravene the Charter and are of no force or effect.

[30] In such a case, especially where, as here, no findings of fact or mixed facts and law are in dispute, the standard of review is presumed to be correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 58.

D. Is this matter reviewable?

[31] The appellant raised the constitutional issue for the first time in the Federal Court. He did not raise the constitutional issue before the administrative decision-maker, the Sentence Manager.

[32] Although the Attorney General did not assert this objection, this is a preliminary matter that we must determine at the outset because it goes to our ability to proceed.

[33] The general rule is that, except in cases of urgency, constitutional questions cannot be raised for the first time in the reviewing court if the administrative decision-maker under review had the power and the practical capability to decide them: *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 38-40; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152 at paragraphs 46-55; Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on 11 May 2015), (Toronto: Carswell, 2009), chapter 13 at pages 79-81 (the idea of "practical capability" being part of the general rule).

[34] Does the Sentence Manager have the power to decide constitutional questions? That depends on whether the Sentence Manager has the express or implied power to consider questions of law: *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504.

[35] As can be seen from the above analysis, the Sentence Manager has to interpret and apply statutory provisions. If those provisions are ambiguous, the Sentence Manager has to resolve the ambiguity. Thus, it can be said that the Sentence Manager has the implied power to consider questions of law and, thus, can consider constitutional issues.

[36] Does the Sentence Manager have the practical capability to decide the constitutional questions in this case? The same idea might be put in a different way, one that is better known and well-defined in the administrative law cases: was the Sentence Manager an adequate and available forum for the appellant to raise his constitutional concerns?

[37] In the circumstances of this case, I answer that in the negative. The appellant was in custody at the time he received the Sentence Manager's decision, his ability to deal directly with the Sentence Manager was open to question, the Sentence Manager made the decision without having to call for submissions, and I am not convinced that the Sentence Manager, having decided the matter, had a power of reconsideration on legal matters.

[38] In these circumstances, the constitutional issue could be raised for the first time in the Federal Court. The preliminary objection based on the general rule in *Okwuobi*/*Forest Ethics* does not lie.

E. Analysis: the constitutional validity of the merger provisions

[39] The main thrust of the appellant's submissions against the validity of the merger provisions was that they deprived him of his right to liberty in a manner contrary to the principles of fundamental justice, contrary to section 7 of the Charter.

[40] Both in the Federal Court and in this Court, the Attorney General conceded that the merger provisions deprive the appellant of his right to liberty. The merger provisions affect the conditions under which the appellant serves the remainder of his youth sentence. Therefore, the only issue to be considered under section 7 of the Charter is whether the deprivation of liberty offends the principles of fundamental justice.

[41] The appellant submits that offenders who commit crimes as youths are less blameworthy and deserve special procedures, rights and protections, all with a view to achieving rehabilitation and reintegration rather than general deterrence. This is the policy underlying the youth sentencing regime: see, *e.g.*, *R. v. B.M.P.*; *R. v. B.V.N.*, 2006 SCC 27, [2006] 1 S.C.R. 941 at paragraph 4. He argues that this policy is not just a legislative policy, but rises to the level of a principle of fundamental justice. He adds that it is fundamentally unfair that someone in his position loses the benefit of supervision in the community because he has been sentenced to an adult term of imprisonment for a later, unrelated offence. He also adds that the merger provisions are overbroad in the sense that in achieving their objectives they cause unnecessary harm. Finally, the appellant argues that the merger provisions operate unfairly because they are applied without giving him a hearing.

[42] At the root of the appellant's submissions is the idea that a community supervision order, once granted, is constitutionally guaranteed to him regardless of what offences he might later commit as an adult.

[43] Right at the outset, the appellant's submissions on fundamental justice suffer from several weaknesses:

- A community supervision order was not statutorily guaranteed to the appellant. It could be taken away even while he was a youth if he had a propensity to commit an offence causing death or serious harm: *Youth Criminal Justice Act*, above, sections 98 and 104, subsection 130(3) and paragraphs 42(2)(*o*), 42(2)(*q*) and 42(2)(*r*).

- Under subparagraph 42(2)(*q*)(ii) of the *Youth Criminal Justice Act*, the appellant received a youth sentence of seven years and after the merger provisions were applied, the youth sentence remained unchanged at seven years. Non-custodial portions of a sentence are merely conditions under which a sentence is to be served, not a change to the overall sentence: *R. v. C.A.M.*, [1996] 1 S.C.R. 500, 46 C.R. (4th) 269, 105 C.C.C. (3d) 327.

- An offender cannot invoke section 7 of the Charter to prevent a change to the manner in which the sentence is served. The Supreme Court has held that "[a] change in the form in which a sentence is served, whether it be favourable or

unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice": *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at page 152, 20 C.R. (4th) 57, 80 C.C.C. (3d) 492.

- The appellant has cited no case for the proposition that the principles of fundamental justice require that a youth disposition be continued, even in the face of the commission of a later crime as an adult and the imposition of an adult sentence, a sentence regulated by the *Corrections and Conditional Release Act*.

- To the extent that the principles of fundamental justice require that youth offenders be treated more benignly than adult offenders (see *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3), the appellant was so treated. As a youth, he committed second degree murder and received a seven-year sentence. As an adult, he would have been in prison without parole eligibility for a minimum of ten years. The merger provisions keep in place the more favourable seven-year sentence.

- As mentioned in paragraph 22 above, the merger provisions can work to the appellant's advantage. He is now eligible for a form of release from full custody three weeks earlier than he would have been had he not committed an adult offence.

[44] At a more general level, the appellant alleges that the merger provisions are substantively unfair. But that alone does not establish a violation of the principles of fundamental justice.

[45] The principles of fundamental justice are not collections of principles of unfairness or "vague generalizations about what our society considers to be ethical or moral": *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at paragraphs 112 (*per* Gonthier and Binnie JJ., for the majority) and 224 (*per* Arbour J., dissenting). They do not lie in the realm of general public policy: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at page 503, 24 D.L.R. (4th) 536. Nor are they "empty vessel[s] to be filled with whatever meaning we might wish from time to time": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at page 394, 38 D.L.R. (4th) 161 (*per* McIntyre J.).

[46] Instead, the principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, above at page 503, cited with approval in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, 132 D.L.R. (4th) 56 at paragraph 39; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraph 23; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, 17 C.R. (7th) 87 at paragraph 89; and many others. They are "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice": *R. v. D.B.*, above at paragraphs 46, 61, 67-68, 125, 131 and 138; *R. v. Malmo-Levine*; *R. v. Caine*, above at paragraphs 112-13; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paragraph 139. They are "the shared assumptions upon which our system of justice is grounded" that "find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at paragraph 8.

[47] The principles of fundamental justice can invalidate any legislation or actions taken under legislation. In other words, they can trump the principle of Parliamentary supremacy, a principle that has rested at the core of Anglo-Canadian constitutional arrangements for over four centuries. For this reason, only the most important, basic values rooted in our time-honoured practices and understandings can possibly qualify as principles of fundamental justice. Unfairness in the colloquial sense, freestanding policy views, or generalized views of what is proper – all matters in the eye of the beholder – cannot qualify as principles of fundamental justice, nor can they perform any part in their discernment or application. Matters such as those are the proper preserve of the politicians we elect.

[48] The appellant's submissions suffer from another flaw. The appellant views the merger provisions too narrowly, assessing them from the standpoint of his interests alone. He disregards the wider context in which the provisions sit and why they were enacted. When considering the principles of fundamental justice, the entire context must be borne in mind. As Justice Linden of this Court aptly stated:

> We cannot deal with long-term offenders as if there are no constitutional Charter rights; equally, we cannot consider Charter rights as if there are no long-term offenders. "Where the regime involves a comprehensive administrative and adjudicatory structure…it is appropriate to look at the regime as a whole. One must consider the special problem to which the scheme is directed" (*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paragraph 65). The principles of fundamental justice may be affected by this context, for it is recognized that "the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at page 361; see also *Winko*, at paragraph 66). In particular, context is important to the balancing of individual and societal interests within section 7, a consideration comprising a recognized part of the process of elucidating the content and scope of a particular principle of

> fundamental justice (*Winko*, at paragraph 66; *Malmo-Levine*, at paragraphs 98-99; *R. v. Demers*, [2004] 2 S.C.R. 489 at paragraph 45).

(*Deacon v. Canada (Attorney General)*, 2006 FCA 265, 143 C.R.R. (2d) 93 at paragraph 53.)

[49] Before the current merger provisions, a youth disposition would merge with a later adult sentence only on the Attorney General's application: see the version of section 743.3 enacted by S.C. 1995, c. 22, s. 6. Often an application would not be made. This left offenders with youth and adult sentences subject to separate and conflicting regimes. Youth offenders could not be released on probation or community supervision where they were not eligible for conditional release under the adult sentence. Conversely, adult offenders could not be released on parole or other forms of conditional release under the adult sentence unless consistent with the youth disposition. Case-by-case solutions could sometimes be fashioned, sometimes not. This state of affairs ran counter to the certainty and order that ought to surround the regulation of offenders' constitutionally-guaranteed rights to liberty.

[50] Today's merger provisions create certainty and order by applying one clear rule to all. They automatically merge the youth sentence with the adult sentence, allowing the offender to benefit from all available forms of conditional release under the *Corrections and Conditional Release Act*. True, the remaining portion of the youth disposition is treated as an adult sentence under the merger provisions, but the duration of the youth sentence remains unchanged. In this case, for example, the appellant's seven-year sentence as a youth offender remains at seven years. Only the conditions of the sentence change and, as we have seen, changes in the conditions of the sentence do not implicate the principles of fundamental justice. Indeed, as we have seen, they can reduce the amount of time an offender must spend in full custody.

[51] In this case, the appellant submits that if this Court strikes down the merger provisions, he should be released under supervision in the community following a period in custody for the youth offence and the adult offence. When does the release from custody happen? What legislation speaks to that? What legislation allows release under supervision in the community, a youth disposition, following a period in custody for an adult offence? Is supervision in the community appropriate for someone who has committed an adult offence and who is well into his adult years? What happens in the case of other adult offenders with other types of youth dispositions? We are lost in a dense forest of questions with no easy way out. Today's merger provisions prevent us from wandering into the forest.

[52] The merger provisions do more. By setting out a single rule that applies to all, they advance the idea that people in similar circumstances should be similarly treated under the law – an idea that forms part of the "rule of law" enshrined in the preamble to the Charter. In particular, the merger provisions further justice and equality among similarly-situated adult offenders without creating perverse effects.

[53] To illustrate this, consider two adults, A and B, who are being sentenced for an offence committed as adults. Offender A has a period of youth sentence remaining from an earlier youth offence. Offender B is a first-time offender. Assume A and B committed the offence together, are equally blameworthy and have the same personal characteristics. The sentencing judge gives them the same adult sentence. Is it right that A, now a multiple offender, continues to benefit from some aspects of the youth regime instead of all of the rules in the *Corrections and Conditional Release Act* while B, a first time offender, is wholly subject to those rules? To the

extent that the youth regime offers more benign ways of serving a sentence, A, the multiple offender, would be treated better than B, the first-time offender.

[54] Further, the merger provisions create certain disincentives. They apply only when a person commits an offence as an adult and is sentenced for it while serving a youth sentence. Viewed from the perspective of an adult who has committed a youth offence, the message is clear: if you commit another offence, the operation of the merger provisions may be one of the consequences you will face. This is consistent with the principle that adults of sound mind should be held responsible and accountable for their blameworthy acts.

[55] Finally, in many circumstances mitigation may be possible at the time of adult sentencing. A youth offender serving a youth sentence who is about to receive an adult sentence can ask the sentencing judge for leniency or other relief in light of any hardships the merger provisions might cause.

[56] In light of the foregoing, it cannot be said that the merger provisions are overbroad in the sense that they cause unnecessary deleterious effects while pursuing their objective: see *e.g.*, *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. The objective of the merger provisions is to administer court-imposed dispositions for offenders, who are subject to both youth and adult sentences, under the *Corrections and Conditional Release Act*. The legislative means used apply only to those offenders. I agree with the Federal Court (at paragraph 30) that the provision has been tailored to apply precisely to offenders such as the appellant precisely in circumstances such as these, minimizing perverse effects. Indeed, it is hard to see

how Parliament could achieve its objective in any other way. In his memorandum of fact and law and in his oral argument, the appellant was unable to assist.

[57] The appellant submits that the merger provisions operate without giving him a hearing, thus offending the principles of fundamental justice. The short answer is that, in the words of the Federal Court (at paragraph 25), "the process itself is a basic calculation based on sentences established in previous hearings, that themselves provided the [appellant] with adequate…procedural fairness as required by the principles of fundamental justice." To put it differently, the merger provisions contain no element of discretion that could be influenced by submissions. Rather, the merger provisions apply automatically upon the sentencing of an adult who, at the time, is serving a youth custodial sentence. A hearing would serve no useful purpose: *Cooper v. Canada (Attorney General)*, 2002 FCA 374, 295 N.R. 184 at paragraph 8; *Capra v. Canada*, 2008 FC 1212, [2009] 3 F.C. 461.

[58] The appellant also suggests that the merger provisions impose a form of absolute liability upon him contrary to the principles of fundamental justice. However, they do no such thing. In both the youth and the adult proceedings, the Crown bore the burden of proving *mens rea* in order to obtain convictions. The merger provisions are not based on any additional fault or offence. They are only an administrative means by which an offender can be dealt with under one set of rules.

[59] As in the Federal Court, the appellant submits that his rights under section 11(i) of the Charter were infringed. As part of his submission, he attacks certain amendments to the

Corrections and Conditional Release Act made after the events giving rise to this proceeding: *Safe Streets and Communities Act*, S.C. 2012, c. 1. I reject this submission for substantially the same reasons given by the Federal Court (at paragraphs 34-37).

[60] In this Court, for the first time, the appellant invokes his rights under section 11(h) of the Charter. He submits that having been found guilty of the offence of second degree murder and sentenced for it, he should not be re-sentenced. We can entertain this new submission because the evidentiary record is complete and no additional evidence would have been necessary to hear it below: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The answer on the merits to his submission is that he has not been re-sentenced. He was sentenced as a youth to seven years for the offence of second degree murder and the merger provisions left that sentence in place. Only the conditions of his sentence were changed and, as we have seen, that is not constitutionally objectionable.

[61] In his memorandum of fact and law, the appellant invokes his rights against arbitrary detention under section 9 of the Charter. This ground does not appear in his notice of appeal and so I would decline to consider it. However, were it necessary to do so, I would reject it substantially for the reasons given by the Federal Court (at paragraphs 31-33).

[62] It is not necessary to consider whether the merging provisions are saved under section 1 of the Charter. However, were it necessary to do so, I would find that the provisions are saved and would substantially adopt the Federal Court's reasons (at paragraphs 45-47).

[63] I would add that the objectives of the merger provisions – to administer the sentences under a single, clear set of rules in the *Corrections and Conditional Release Act*, to eliminate potential conflicts between the youth and adult regimes and to preserve the entirety of the youth sentence – are pressing and substantial under the justification test in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, for all the reasons set out above and for all the reasons the Federal Court set out in paragraph 45 of its reasons. Given those objectives and assuming that the merger provisions infringe rights, I cannot think of a scheme that would fulfil the objectives in a less injurious, more proportionate way. The appellant has proposed no such scheme. And having found that Parliament's objectives are pressing and substantial, it is not open to this Court to question Parliament's objectives or substitute its own objectives for those chosen by Parliament: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at paragraphs 54-55.

F. Conclusion and proposed disposition

[64] I conclude that the appellant has not demonstrated that the merger provisions infringe his Charter rights. Therefore, the Sentence Manager of the Stony Mountain Institution was right to take into account and apply the merger provisions to the appellant. Her decision must stand. Accordingly, I would dismiss the appeal with costs.

"David Stratas"

J.A.

"I agree
A.F. Scott J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-518-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON DATED NOVEMBER 19, 2014, NO. T-881-14	
STYLE OF CAUSE:	ROBBIE RICHARD ERASMO v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MAY 6, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	SCOTT J.A. BOIVIN J.A.
DATED:	MAY 20, 2015

APPEARANCES:

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