**Early Release From Jail - The Line of Responsibility**
**Judge Peter Ross**
**Nova Scotia Provincial Court**
**September 2003**

## Introduction

A previous article appearing on this page concerned the “conditional sentence” , a form of punishment enacted in 1996 which permits courts to sentence certain offenders to non-institutional imprisonment. The following is intended as a brief commentary on another aspect of incarceratory sentences - the release of offenders from provincial jails or federal penitentiaries before the full expiration of the sentence imposed by the court. It is central to this discussion to understand that judges who impose incarceratory sentences have no control over the timing of the actual release of the offender from the institution. Once an offender is sentenced to a term of incarceration the management and release of the offender is in the hands of the legislative/executive branch of government. As with conditional sentences, this is another example of the interface between the courts, on the one hand, and the legislative/executive branch of government on the other. There has been considerable public debate about how each is, or should be fulfilling its responsibilities. The following commentary concerns the delineation of roles under current Canadian law. It is not meant to be a full-fledged discussion of how well those roles have been assumed.

Early release is such a common feature of jail sentences, almost to the point of predictability. An obvious question arises. Should a judge who sentences an offender to jail not take account of the near certainty of some form of early release, and, in appropriate cases, increase the term of imprisonment to ensure that a certain portion of it is indeed served behind bars? Judicial opinion has been divided. For example, in a 1974 case in the Ontario Court of Appeal the majority held that it was proper, in determining the length of sentence, to take into account that the offender need only “serve” two-thirds of his sentence before qualifying for mandatory release1. It also noted that the offender would be eligible for parole after one-third of his sentence, and thus upheld a six year jail term imposed by a lower court.

1R. v. Pearce 16 C.C.C. (2d) 369

Justice Dubin, in dissent, stated that he would have imposed a four year sentence. Having first concluded that four years was of sufficient length to give effect to the principle of deterrence, given the young age of the accused and the lack of any prior record, he disagreed with making the term higher only because the time actually served in prison may be reduced by remission or parole. The weight of case authority now appears to favour Justice Dubin’s view. Therefore, certain extracts from his judgement (and from other cases which he cited) are reproduced below.

The question of whether that sentence must be served in a penal institution or may be served while released from the institution and subject to the conditions of parole is

altogether a decision within the discretion of the Parole Board as an administrative matter and is not in any way a judicial determination.

A longer sentence should not be imposed than warranted by the particular circumstances of the case and according to the well-established principles merely because of the existence of the Parole Board.

It is to be emphasized that the effect of a grant of parole is not to alter the length of a sentence imposed by a court upon an offender. Parole provides that the offender serves his sentence outside the prison, not as a free man, but under supervision and subject to terms and conditions imposed. The grant may be revoked ... and the offender recommitted.

Availability of parole is not of the past like a man's record, nor of the present like his conduct at trial, but is for the future and being a product of legislation, it is a constant factor open to all, although contingent on the adaptability of the individual to reform and rehabilitation. Availability of parole is an instrument providing relief in deserving cases from the necessary rigidity of sentences arising from the limitation of the powers of a court to modify sentences once imposed.

**The Legislative Backdrop**

Jail sentences under two years are spent in a provincial prison, while anything two years and longer is served in a federal penitentiary.

For sentences of less than two years, in Nova Scotia, the provisions regarding early release of prisoners are found in the Corrections Act and the Correctional Facilities Regulations. While a full and accurate discussion of the various forms of release (medical, humanitarian, etc.) are beyond both the scope of this paper and the knowledge of the author, it appears that such inmates are credited with one day's remission for every two days served with good behavior. At the same time, an inmate who has broken the rules of the institution may have his or her earned remission forfeited in whole or in part by the Superintendent. If an offender given a six month sentence is released after four (as most are) the sentence then expires. The person has no conditions hanging over him. He cannot be recommitted for behaving badly in the community over the course of the next two months (although he could, of course, be charged for any criminal conduct and dealt with accordingly).

Referring to sentences of two years or more, the regime established for federal inmates is more complex. It is found in the Corrections and Conditional Release Act, a federal statute enacted in 1992. It did away with remission in the federal system. Instead, it declares that an offender is "entitled to be released" on "the day on which the offender completes two-thirds of the sentence". In addition to this so-called "statutory release" (formerly referred to as mandatory release), an offender becomes eligible for full parole after serving "the lesser of one-third of the sentence and seven years". Day parole may

be granted at an even earlier date, calculated according to formulas set out in the statute. As well, there are various provisions governing temporary absences.

The CCRA states that the National Parole Board has “exclusive jurisdiction and absolute discretion” to grant parole and to terminate or to revoke the parole or statutory release of an offender. An offender who is so released “continues, while entitled to be at large, to serve the sentence until its expiration according to law”. The Board may impose any conditions it considers necessary “in order to protect society and to facilitate the successful reintegration into society of the offender”. A person serving the balance of a sentence at large may , on account of bad behavior in the community, have his or her release suspended temporarily, or revoked entirely. Moreover the Board is empowered to hold hearings before the statutory release date and, where certain criteria exist, order the offender detained until the full expiration of a sentence.

Very occasionally, a person may be forced to serve his of her entire sentence in jail, and then upon release be called to court under the so-called “peace bond” provisions of the Criminal Code. Where such an application is made (usually by a peace officer with the assistance of Crown counsel, pursuant to s.810.1 or 810.2 of the Criminal Code) a provincial court judge is empowered to place conditions and restrictions on the person for up to 12 months, and imprison the person for that same length of time for refusing to be bound by such order. In a recent instance before the writer, the person argued that the police were using these provisions to extend the state’s control over him beyond the expiration date of his original sentence (he had been denied statutory release by the Parole Board and thus forced to serve every day of his jail sentence behind bars) From his point of view, he had “paid his price” and the order sought was an unwarranted extension of his original sentence. Psychiatric assessments done within the institution were important evidence at the hearing.

**More Recent Cases**

It has been argued that an early release program under which offenders are released from jail after serving only a small portion of their term of imprisonment undercuts the sentences of the courts, shaking public confidence in the administration of justice and its faith in the effective enforcement of the criminal law? Such words were used by the Saskatchewan Court of Appeal to describe the reasoning applied by a lower court which added 69 days to a 6 month sentence in order to offset the reduction resulting from that province’s early release program 2. The Appeal Court noted however that “Courts generally have long adhered to the view that post-sentence practices ought not to be considered in determining a fit and just sentence”. It cited with approval the British Columbia Court of Appeal which said, in reference to parole, that “Heavier sentences must not be imposed for collateral purposes in the professed interests of society or of the prisoner ... to extend the minimum time the prisoner must serve before obtaining parole “. It added that if a person has been the beneficiary of early release, but gotten into further trouble, such might be considered an aggravating factor at the subsequent sentencing.

2 R. v. Ross [1989] S.J. No. 201 (QL)

The foregoing is consistent with the view that a sentencing court should concern itself with the past and present, i.e. with established facts and indicators presenting at trial. Courts should not speculate on future possibilities, including the possibility of parole or early release.

Closer to home, the Newfoundland Court of Appeal also dealt with a case in which the Provincial Court judge “expressed understandable frustration in light of what is perceived as the use of a discretionary power by correctional officials to countermand the order of the court” 3. The first extract below puts the question squarely; the second gets to the nub of the matter addressed by this paper:

3 R. v. Oliver [1997] N.J. No. 10

Enforcement of the orders of the courts is essential to the administration of justice...This principle imposes upon the executive a duty to enforce the courts’ decisions and refrain from frustrating them by legal actions or omissions...The importance of this principle should not be underestimated ... (Weighed against this is the idea that) it is inappropriate to adjust sentences on the assumption that they will not be carried out or to foil the impact of programs sanctioned by Parliament or the Legislature

This case simply involves who is to do what under the Canadian Criminal Justice system. Judges do not decide what is a crime in this country - the people, through Parliament, do. Those same citizens, through Parliament, have dictated who is to sentence offenders - judges; what the objectives of sentencing are, and what options judges have in arriving at appropriate sentences... The sentence is determined by a judge who has knowledge of the particular crime, its impact on the victim and the circumstances of the offender. Even with this knowledge, sentencing is far from a science...The enforcement of sentences has been given to correctional services. The powers of correctional officials, both Federal and Provincial, are specified in legislation. It is correctional officials, not the courts, who determine in which prison a sentence is to be served... and are given, within limits, a great deal of discretion in the management of sentences”.

The Nova Scotia Court of Appeal has discussed the issue in part 4. While the case does not directly deal with the issue at hand, the judgement contains the following comment, consistent with the pronouncements of appellate courts of other provinces -
4 R. v. Hamilton 54 N.S.R. (2d) 81; [1982] N.S.J. No. 513 (QL)

...an early release from prison can only be resolved by those authorities responsible for such actions. A court may pass what it considers to be a fit and proper sentence, taking into account all of the proper principles of sentence, but in carrying out this duty the court can give no assurance that the individual sentenced will serve even a small fraction of the total sentence in custody. The Parliament of Canada ... has delegated to the National Parole Board wide and exclusive jurisdictional powers “to grant, refuse or

revoke parole" and if unfairness does arise...then it is to the Parole Board which he must look for its resolution.

The Supreme Court of Canada touched on the evolution of the parole system in its judgement in R. v. C.A.M. 5. The case dealt specifically with whether courts should adopt a 'rule' limiting fixed-term sentences to no more that 20 years (because of the mechanics of parole eligibility meant that an offender sentenced to life imprisonment was eligible for parole before an offender sentenced to a numerical term beyond 20 years). The Court however spoke more generally about the parole system and the interplay between the sentencing decisions of judges and the release decisions of executive bodies like the Parole Board:

5 [1996] 1 S.C.R. 500; [1996] S.C.J. No. 28 (QL)

The realities of the conditional release system reinforce the argument that parole is an alteration of the conditions of sentence, rather than a reduction of sentence...An offender on parole is subject to strict limits on his or her freedom...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. ..The deterrent and denunciatory purposes which animated the original sentence remain in force...the offender remains under the shadow of re-incarceration.

This language is reminiscent of that used by the Supreme Court to explain the theoretical basis of a "conditional sentence of imprisonment".

**Comment**

The Supreme Court of Canada has said that a judge who considers the conditional sentence option for a particular offender may properly make it for a longer term that a standard jail sentence would have been had that option been chosen. One might think, by extension or analogy, that courts ought to be able to lengthen prison sentences to compensate for the likelihood of early release. Is it not true that in both instances the court would simply be adjusting the length of sentence to account for the fact that it (or a portion of it) will be served in the community on conditions? Legal authority, however, does not support this reasoning.

The line drawn between respective roles - between the function of the court in fixing an appropriate sentence, and the function of correctional officials in determining "a change in the conditions under which a judicial sentence must be served" (in the words of the Supreme Court) is not a barrier to the observation of one by the other.

For instance, the law now requires that whenever a person is sentenced to a penitentiary, transcripts of the judge's remarks and copies of court records be sent to federal authorities for use at parole hearings. Courts do not always turn a blind eye to the conditions under which certain prisoners are held. For example, on sentencing, courts will give a deduction from sentence for time served on remand (where fewer

privileges are accorded inmates), often by twice the actual amount or more. This practice was endorsed by the Supreme Court of Canada 6.

6 R.v.Morrisey [2000] 2 S.C.R. 90; [2000] S.C.J. No. 39 (QL) where the Court approved of one year's credit for 5 months on remand.

While decisions on early release are "for the future" and hence, on this reasoning, not for the court at the time of sentencing, it is undoubtedly true that criminal courts must sometimes look ahead and, in a sense, make predictions. For example the common case of a bail hearing, and the scarcer case of a dangerous offender application both involve an assessment of risk to public safety in the near or long term future.

Recently a nationally circulated newspaper has criticized a Parole Board decision to grant parole release to a particular offender, editorializing to the effect that savings could be effected, and the spirit of punishment better served, by limiting some of the amenities now enjoyed by federal inmates. While we often associate U.S. jurisdictions with a strict "law and order" approach to punishment, a competing publication has reported that the State of Ohio is considering releasing low risk offenders from prison as a cost saving measure.

Those who question of the exercise of power by executive officials to alter the nature of a sentence may count among their concerns the lack of uniformity and predictability this brings. Some are concerned that such decisions are not made with the same transparency one finds in court proceedings. This, in turn, raises the following questions - Would the protection of the public, and the better administration of justice, be better served if all offenders were required to serve jail sentences in full, their future release dates etched in stone, with no period of supervision in the community while the sentence is still hanging over their heads? Should release dates be inviolate for all offenders serving prison sentences, even though this might tie the hands of legislators who see a need to act upon changing social circumstances, or new social science insights, or fiscal considerations, to reduce inmate populations? Should release dates be inflexible such that all inmates serve all their jail time no matter how much improvement they may show inside the institution?

**An Aside**

It bears mention that at the time of sentence for second degree murder, the court may fix a parole ineligibility period. In addition the Criminal Code permits a sentencing judge, for certain categories of crimes, to increase the parole ineligibility period to one half of the sentence. Any discussion of these topics is beyond the scope of this article, but two decisions from the Supreme Court of Canada which would serve to introduce the interested reader to the proper use of these provisions are R. v. Shropshire [1995] 4 S.C.R. 227 (second degree murder) and R. v. Zinck [2003] S.C.J. No. 5 (QL) (delayed eligibility until one half served)

**Conclusion**

The Court in Oliver suggested that “no judge who has struggled with sentencing can object to more innovative measures to encourage rehabilitation and continued re-examination of the premises upon which sentences are to be served”. Such re-examination has arguably occurred with the creation of the so-called “conditional sentence of imprisonment”, referenced above and in an earlier paper on this site. Here, judges are specifically empowered to order that a sentence of imprisonment be served in the community subject to conditions. Is this not akin to “early release”? Are not the same considerations at play - that it not endanger the public, that it promote rehabilitation of the offender? Why shouldn’t judges be deciding which inmates get released back into the community, and when, and on what conditions? This power does in fact exist, within defined limits, where young persons are concerned. Both the old Young Offenders Act and the new Youth Criminal Justice Act contain express provision for judges to release a young person from custody into the community on conditions, in appropriate cases. However, where adults are concerned, the division of responsibility is as outlined above.

So long as this remains the situation, it is for each player in the system to fulfill its respective role, cognizant of the principles set out in legislation and case authority, being mindful of the societal context in which its decisions are made. It for the public to maintain an informed view of this aspect of criminal justice, and to effect any changes or improvements it believes are needed through legal and democratic means.

**Endnotes**

Access the Corrections and Conditional Release Act .

Statistical and other information is posted on the Correctional Service of Canada website.

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