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REPORT TO THE STANDING COMMITTEE ON JUSTICE  
AND SOLICITOR GENERAL ON THE COMPREHENSIVE  
REVIEW OF SENTENCE CALCULATION PROVISIONS  
CONTAINED IN THE CORRECTIONS AND CONDITIONAL  
RELEASE ACT

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REPORT TO THE STANDING COMMITTEE  
ON JUSTICE AND SOLICITOR GENERAL  
ON THE COMPREHENSIVE REVIEW  
OF  
SENTENCE CALCULATION PROVISIONS  
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THE CORRECTIONS AND CONDITIONAL RELEASE ACT

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## INTRODUCTION

The Solicitor General is pleased to provide a report of the comprehensive review of the sentence calculation provisions undertaken by the Ministry of the Solicitor General.

During the Parliamentary review of Bill C-36 in 1992, the Standing Committee on Justice and Solicitor General heard from several individuals and organizations who expressed concern about the sentence calculation provisions contained in the proposed legislation. Because the comments of those witnesses touched on fundamental criminal justice issues, and because of the wide range of sentence combinations and permutations which any legislative framework must address, the Solicitor General proposed that a fundamental review of sentence calculation be undertaken as a separate initiative. The Solicitor General undertook to report back to the Committee on the results of such a review within one year from the spring of 1992.

## KEY ISSUE ADDRESSED BY THE COMPREHENSIVE REVIEW

Current sentence calculation provisions have resulted in real and perceived anomalies in the calculation of parole eligibility for repeat offenders that may be inconsistent with the intent of the sentence. In particular, observers have criticized the existing provisions as

- unnecessarily complex;
- resulting in some offenders being immediately parole eligible notwithstanding the imposition of a severe new sentence; and
- not well understood by judges, thus resulting in ambiguous or unintended warrants of committal.

## CONSULTATIONS

A Working Group of Correctional Service of Canada (CSC), National Parole Board (NPB) and Secretariat officials was formed, chaired by the latter. A consultation list was prepared, based largely on those persons who had expressed an interest in the issue (see list attached at Annex A). The focus of consultations was a discussion paper prepared by the Secretariat entitled Counting the Days (see Annex B). The paper outlined the history of the sentence calculation provisions, the problems which were addressed in previous legislative initiatives, the operation of the current system, and the problems which remain.

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- Annex A List of Consulees
- Annex B Discussion Paper
- Annex C Consultation Results

Current problems are focused in three areas:

- \* public perception concerns that the results of the provisions appear to undermine the intent of the sentencing court, particularly in respect to repeat offenders who may remain eligible for conditional release despite receipt of a new sentence;
- \* complexity issues resulting from the use of "interruption"<sup>1</sup>; and
- \* sentencing problems resulting from warrants of committal being at variance with sentencing transcripts, incompatibility with statutory authority, and judges not being aware of the offender's conditional release status.

In September 1992, approximately 200 copies of the discussion paper were distributed to those parties with an identified interest in the issue: groups and individuals who had presented submissions to the Parliamentary Standing Committee concerning sentence calculation, provincial corrections and justice officials, the judiciary, lawyers, police, provincial parole boards, voluntary sector organizations, related federal departments and agencies, inmate committees and recognized experts in the field. Responses were requested to be sent to the Ministry by the end of November 1992.

(In addition to this distribution, a Senator requested 800 copies of the paper for distribution to his mailing list.)

Consultation results are summarized at Annex C. In general, consultees expressed a high degree of interest in finding a balanced solution to the problems. The three principles identified in the discussion paper (equity, "crime=time", simplicity) were supported, with "crime=time" and equity viewed as the highest priorities. While all consultees were supportive of greater simplicity in the model, they did not feel that equity or public confidence should be compromised in order to fulfil that goal.

The majority of people who responded to the consultation package supported the view that in all cases an offender who receives a new

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<sup>1</sup>Interruption ensures that offenders who are on conditional release, who receive a new consecutive sentence but are not revoked by the Board, are returned to custody to serve the new sentence. The conditional release resumes upon completion of the new sentence. It is most frequently used for new sentences which are of short duration and for minor offences.

consecutive sentence should serve a portion of that sentence in custody before being eligible for parole. There was support for the notion that concurrent and consecutive sentences should be treated differently, based on the assumption that the imposition of a concurrent sentence does not carry the same expectation that additional time in custody would be served, although a number of consultees felt that there should be no distinction between the two types of sentences, particularly where they related to offences committed while on conditional release.

There was also strong support for an increased emphasis on education for both judges and crown attorneys to assist their understanding of the process.

#### **OPTIONS REVIEWED IN CONSULTATION**

Three fundamental principles were identified to which any proposed solution should respond:

Equity encompassing the notions of fairness, justice and predictability.

"Crime=Time" reflecting the premise that the imposition of a custodial sentence should result in the person serving some period of time in custody.

Simplicity of application and understanding without compromising comprehensiveness and flexibility.

With these three principles as a guide, the discussion paper suggested four options for consideration. The following summarizes each option, analyzes their strengths, and identifies the degree of support from consultees.

#### **Option 1: Status Quo**

This option would retain the current provisions and provide for non-legislative improvements such as enhanced communication and education, to ensure that the public and key players in sentencing and corrections have a better understanding of the system, its objectives and operations.

#### Analysis

Consideration of this model was predicated on the view that many of the problems relate to public perception, i.e. observers are concerned with the appearance of immediate parole eligibility, rather than with inappropriately early release decisions per se. The Parole Board does not have its hands tied in any fashion, and is still able to make appropriate release decisions. The current model also provides, through "interruption", a mechanism for the

automatic return of offenders to custody upon imposition of a new consecutive sentence.

However, many observers felt that the issue went beyond perception, and in fact caused substantial undermining of public confidence in the correctional system. As well, the amount of time served before parole eligibility varies according to irrelevant criteria such as when a new sentence is received and whether the offender is already in custody or not. In addition, the current model is quite complex, and poorly understood.

While this option contains the strengths of the current model, and would promote increased education and information initiatives, its failure to address what are considered key problems overwhelms its strengths.

This option did not receive support during consultations.

#### **Option 2: Fully Discretionary Model**

This option would provide the Parole Board with full discretion: interruption would be eliminated and offenders on conditional release who received a new consecutive sentence would be subject only to the Board's discretion as to whether they would serve additional time on the new sentence. There would be no automatic return to custody.

#### Analysis

The principal advantage of this option is that it preserves maximum discretion on the part of the Board to manage conditional release on an individual case basis. This can be important where, for example, an offender doing well on parole has re-offended in a relatively minor way. However, on the negative side, it also has the potential to appear to undermine the intentions of sentencing courts and would not improve predictability of results. It would meet the principle of simplicity in part, as the process would be easy to understand. The results however might be less well understood. Without the use of interruption there would be no mechanism to ensure that offenders would serve any portion of the new sentence.

This option did not receive support during the consultations and is not supported by the National Parole Board or provincial parole boards.

#### **Option 3: Non-discretionary Model A**

This option would drop interruption, but would include an automatic forfeiture of conditional release upon the imposition of a new consecutive sentence. The terms would continue to merge but the conditional release eligibilities would run from the date of the

new sentence based on the total remanet (the period of time remaining on the original sentence plus the new sentence).

#### Analysis

This option meets some elements of the principle of equity and would certainly meet the concern that conviction and sentence of the court not be undermined, by ensuring that a new consecutive sentence would always delay conditional release eligibility.

However, the nature of this calculation means that this option could have rather harsh results for some offenders, potentially beyond those anticipated by the courts. For example, the offender might end up serving more additional time in custody before parole eligibility than the entire length of the new sentence. The time to be served would vary according to the irrelevant consideration of when in the original sentence the new sentence was imposed.

This option did receive some support during the consultations, although there was a recognition of the inequities which could occur as a result of the use of the remanet as the basis for recalculation.

#### **Option 4: Non-discretionary Model B**

This option would also drop interruption and include the automatic forfeiture of conditional release upon the imposition of a new consecutive sentence. The terms would continue to merge but the conditional release eligibilities would run from the first day of the first sentence. The offender would be required to serve a period of time equal to the period of parole ineligibility that remained to be served on the original term plus the ineligibility period of the new sentence. (Where a concurrent sentence was imposed, conditional release eligibilities would still run from the first day of the first sentence.)

#### Analysis

This model satisfies many of the elements of the principle of equity, and all of the elements of simplicity. It also supports the principle of "crime-time". Its chief drawback is the inflexible requirement for revocation for a new sentence even where the new offence is minor or unrelated to risk. This removes the ability to manage offenders on an individualized, case-by-case basis. That factor is balanced by the competing interest of society in seeing that all custodial sentences are given meaning.

While having the same advantages as Option 3, this option would remove its harshest feature. At the same time, it would ensure that offenders on conditional release who receive a new consecutive sentence would serve some meaningful period of time in custody.

This option received the most support during the consultations and it is from this basic model that a recommended option has been formulated.

#### RECOMMENDED OPTION

1. The concept of merging of sentences would be retained, but interruption would be eliminated.

2. Automatic revocation of conditional release would occur upon the imposition of a new custodial sentence upon conviction for a federal offence.

3. The Parole Board would exercise discretion of revocation or termination under specified circumstances, such as the imposition of a concurrent custodial sentence for an offence which pre-dated the commencement of the existing term of imprisonment, and breach of conditions of conditional release.

4. Upon imposition of a new concurrent sentence, parole eligibility (PED) and statutory release (SRD) would be re-calculated on the total merged term starting from the first day of the earliest sentence. Where the re-calculation places the PED (where the person was on parole) or the SRD (where the person was on statutory release) in the future, the parole or statutory release would be rendered inoperative and the person returned to custody.

5. The basic principle for calculation of PED and SRD for a new consecutive sentence would be:

PED: the offender would serve, from the date of the new sentence, what remained to be served to PED on the existing term plus 1/3 (or 1/2 if subject to judicial determination) of the new sentence.

SRD: the offender would serve, from the date of the new sentence, what remained to be served before SRD on the existing term plus 2/3 of the new sentence.

6. For each individual sentence (excluding life sentences for first or second degree murder), there would be a cap of the lesser of 1/3 or 7 years (1/2 or 10 years for judicial determination), but the overall cap from the effective date of the calculation of any new PED would be 15 years.

7. The principle of adding consecutive ineligibility periods would also apply to life sentences so that a new sentence would have consequences on the parole ineligibility period, eg. where an offender is serving a life sentence and receives an additional definite sentence the ineligibility periods would be added together; where an offender is serving a definite sentence and

receives a new life sentence for murder, the Criminal Code parole eligibility would override the 15 year cap.

### Analysis

This model would represent a significant "tightening up" of the conditional release process. The main advantage of this model is that it would respond to public concern that "a sentence is a sentence", while at the same time does not punish the offender disproportionately to the court-imposed sentence, particularly with respect to concurrent sentences. It aligns custody with sentences but would not result in unrealistically long definite sentences that would be out of proportion to actual time served on life terms.

It is consistent with the views of many of those consulted, as well as with the theme that repeated criminal behaviour, especially when it is a breach of conditional release, should be dealt with more strictly than is currently the case. Further, it ensures that the integrity of the conditional release process is maintained, by introducing consequences that would follow as a matter of law in cases where an offender continues criminal behaviour even after conviction, sentencing and admission to prison and, in some cases, even after being released conditionally. Offences committed while an offender is under sentence, especially while on conditional release, are and must continue to be treated as serious. Where a new custodial sentence is imposed, whether to be served concurrently or consecutively, a conditionally released offender will be returned to custody. The distinction between consecutive and concurrent sentences will be reflected in a more onerous recalculation of eligibility with respect to consecutive sentences.

The model addresses the issues of undermining of the intent of the sentence, reduces some of the complexities in calculation associated with the use of interruption, and recognizes the principles of equity and "crime=time". It also responds equally well to those offenders who commit offences while in custody and those who commit new offences while in the community on conditional release.

By moving the cap on parole ineligibility from 7 years to 15, it ensures that offenders will serve "real time" without removing all hope of a rehabilitated release.

Its main disadvantage is that it cannot meet the principle of simplicity to the extent which might be preferred. Sentence calculation would remain a somewhat complex operation, however the model does ensure that potential anomalies are reduced. As well, the model relies on sentencing patterns which are informed and intentional -- to the extent that sentences are imposed which do

not meet this standard, the model would be accompanied by enhanced educational and communication efforts with Crowns and judges.

#### **ADDITIONAL MEASURES**

To support the proposed model of sentence calculation, information and education options were considered. Throughout the consultations, strong support was expressed for an enhanced information flow between corrections officials and crown attorneys and judges, to ensure that any new model would be better understood and used more effectively than are the current provisions.

Several suggestions strongly warrant further development:

- \* a software package which would permit a judge, crown attorney or other court official to enter information based on the offender's status and the sentence being considered with a resulting portrayal of the impact upon conditional release eligibility;
- \* enhanced accessibility by courts to correctional experts in sentence calculation;
- \* booklets, brochures and other communications materials which would clearly explain the sentence calculation process in simple terms, providing examples and contacts for further information;
- \* increased use of education seminars with judges and crown attorneys; and
- \* revisions to the warrant of committal form, so that the judge's intentions with respect to whether sentences are consecutive or concurrent can be made clear.

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**COUNTING THE DAYS**  
**Sentence Calculation in Canada**

**September 15, 1992**

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## I. INTRODUCTION

The sentencing stage of a criminal court proceeding marks the end of an intensive process. Starting with the initial police investigation, determination of appropriate charges, apprehension of a suspect and formal charging, through to the preparation and conduct of the trial or guilty plea -- the moment of the pronouncement of sentence appears to be the conclusion of a complex and demanding process. However, it marks only the end of a chapter, not the final point. It is also the beginning of an equally important chapter in the response of the criminal justice system to the criminal act.

That chapter really begins when the judge imposes a sentence and the offender is led from the courtroom. At that moment, observers may depart feeling satisfied that a relatively straightforward matter has been settled -- "x" number of years from that day the offender will have completed the sentence and will be returned to society.

For many observers, the certainty and predictability of that moment is shortlived. They may find that the offender is immediately eligible for parole, or indeed the offender may return to being on parole later that same day. A repeat offender may be eligible for release long before his or her co-accused who has no criminal record. The reasons for these outcomes may be difficult to explain, leading to problems in public credibility and confidence in the system, or may have (at least in the past) resulted from factors over which correctional authorities had no control.

During consultations on Bill C-36 (The Corrections and Conditional Release Act, S.C. 1992, ch. 20<sup>1</sup>), it became evident that there was mounting concern about the current model of sentence calculation and its impacts. The public, as well as persons working in the criminal justice system, criticized the model as unnecessarily complicated. As well, even where there was no allegation that an offender was being released inappropriately, it was argued that for some repeat offenders, the availability of discretionary conditional release decision-making appeared to undermine the intentions of sentencing courts.

In response to these concerns and seeking a thorough inquiry into a very complex issue, the Solicitor General undertook to conduct a comprehensive review of sentence calculation, and to report thereon to the Parliamentary Standing Committee on Justice and the Solicitor General within one year (i.e. by the spring of 1993). The purpose of this paper is to provide a focus for this review and for consultations with a broad range of interested groups and individuals.

This paper endeavours to examine how and why we calculate sentences, what previous models have attempted to accomplish, what problems still remain, and what options might respond to those problems. The "Options" section is not exhaustive at this stage: the views and creative solutions of consultees are desired and needed.

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<sup>1</sup>Received Royal Assent June 18, 1992; proclamation anticipated for Fall, 1992.

**i) Why we "calculate" sentences**

To the lay observer, the imposition of a fixed sentence of imprisonment appears deceptively simple and hardly requiring further "calculation". However, the reason for sentence calculation is, in general terms, twofold.

First, calculation is required in order to determine the precise end-point (warrant expiry date) of the sentence, as well as the intervening dates when eligibility for conditional release will arise. A formula for calculation is also required in order to take into account any termination or revocation of any conditional release, so as to be able to fix the amount of time remaining to be served on the sentence and at what point further eligibility for conditional release will arise.

Second, calculation of the sentence is necessary in order to determine where the offender will serve the sentence, i.e. in federal or provincial custody. Section 731 of the Criminal Code provides that normally a sentence of two years or more will be served in a federal penitentiary and a sentence of less than two years in a provincial correctional facility. However, the same section also provides for alterations to that scheme depending on, for example, the total length of time an offender has to serve when sentenced for a particular offence.

**ii) How sentences are calculated**

Notwithstanding the rapid "computerization" of Canadian society, sentence calculation is still done by paper and pencil. A sample calculation sheet is attached at Appendix A. The calculation commences by converting the total time to be served from months or years into days. The process thereafter is one of, in the most general terms, deducting from that grand total any credits standing to the offender's credit. For example, at the end of the first month of an offender's sentence, the sentence administrator at the institution makes a record of the number of days the offender served that month as well as any remission which he/she earned that month.

Generally, an offender receives credit for each day served in custody or while under conditional release. (Prior to 1977, offenders received no credit for time served on conditional release, if that release was not completed successfully.) Under successive remission schemes, once earned certain remission credits could be forfeited, and later re-credited if deemed appropriate by correctional authorities.

**iii) Single v. multiple terms**

Many, if not most, inmates are serving sentences for more than one offence. It is the calculation of multiple terms where sentence calculation becomes most complicated and most susceptible to unanticipated and/or unjust results. It is this calculation which is at the heart of this discussion paper.

It was noted above that sentence calculation on a single fixed term is undertaken in order to establish a set of conditional release eligibility dates, and the warrant expiry date, of the term.

But what happens when the offender is, for example, already serving one sentence and receives terms of imprisonment upon conviction for three new offences? The confusion of having four different sets of eligibility dates and four different warrant expiry dates is readily apparent, and indeed was the reality during the first 10 years of the operation of the Parole Act.

For that reason, succeeding governments have adopted the approach of merger of sentences. This approach provides that, generally, where an offender serving a custodial sentence becomes subject to another custodial sentence, the terms merge and become one sentence. This single sentence is deemed to have commenced on the first day of the original sentence and ends on the last day of the merged term. One set of conditional release eligibility dates is calculated on the single merged term, the starting point being the first day of the first sentence.

The circumstances underwhich the original sentence is being served at the time of the imposition of additional sentences (eg. in custody or on conditional release), the type of offence and when it was committed (eg. escapes; offences committed while on conditional release or prior to it), the nature of the additional sentences and their relationship to one another (eg. sentence length; consecutive or concurrent) are factors which can enormously complicate the calculation. Successive law reforms over the years have attempted to address these factors, and to eliminate unanticipated, irrational or unfair results. Perhaps the single greatest challenge in these reforms has been to identify solutions which do not themselves cause further problems.

## II. HISTORY

The following summary presents a snapshot of the key sentence calculation provisions and reforms since the Parole Act was enacted. Issues which are now of purely historical interest (eg. the often tortuous calculations associated with various now-repealed statutory and earned remission schemes) have been omitted. The purpose of presenting this summary is to provide some illumination on where we have been, how we got to where we are now, and how to avoid returning to the mistakes of the past.

### i) 1959 - 1969

The original Parole Act, proclaimed in force in February 1959, contained no general merger provision. Consequently, any offender subject to two or more terms of imprisonment at one time was subject to separate parole and remission-based release dates on each term, as well as separate warrant expiry dates.

The Act did provide for automatic forfeiture of parole, if a paroled inmate was convicted of an indictable offence committed after the grant of parole and punishable by imprisonment for a term of two years or more. Where the parole was forfeited, the inmate was required to serve a term of imprisonment equal to the portion of the original sentence which remained unexpired at the time parole was granted plus the term, if any, to which he/she was sentenced upon conviction for the offence. If the conviction was not registered until after the parole had "expired", the parole was deemed to have been forfeited on the day the offence was committed.

Offenders on parole were also subject to the discretionary decision of revocation, where the new offence did not fit within the above description or where the continuation of the release was considered inappropriate for other reasons. The sentence was calculated in the same manner as followed forfeiture.

As is clear from the above description, offenders whose parole was revoked or forfeited received no credit for the time served while on parole, and were required to "re-serve" that time in custody.

The Act did not contain any provision for termination of parole, so that even where the release came to an end through no fault of the offender (eg. the collapse of a privately-funded treatment program), the offender was subject to revocation. This feature, in combination with automatic forfeiture under certain conditions and no credit for "street time", resulted in a system with limited flexibility to respond to the circumstances of individual offenders.

### ii) 1969 - 1986

Beginning in 1969 the Parole Act was amended in a number of ways in an effort to respond

to the problems identified during the first 10 years.

Effective August 1969, a general provision for the merger of sentences was added:

"14. Where, either before, on or after the 25th day of March 1970,

(a) a person is sentenced to two or more terms of imprisonment, or;

(b) an inmate who is in confinement is sentenced to an additional term or terms of imprisonment,

the terms of imprisonment to which he has been sentenced, including in a case described in paragraph (b) any term or terms that resulted in his being in confinement, shall, for all purposes of this Act, the Penitentiary Act and the Prisons and Reformatories Act, be deemed to constitute one sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment commences and ending on the expiration of the last to expire of such terms of imprisonment."

For example:

Mar. 1, 1970 - Sentenced to 3 years  
Full Parole Eligibility Date (FPED): Mar. 1, 1971  
Warrant Expiry Date (WED): Feb. 28, 1973

June 15, 1971 - Convicted of new offence and  
sentenced to 3 years consecutive

Now serving a single term beginning on Mar. 1, 1970 and  
ending on Feb. 28, 1976, with FPED Mar. 1, 1972.

Mandatory supervision was also added to the Act at this time, and was made subject to existing provisions for revocation and forfeiture.

The Criminal Law Amendment Act, 1977 also introduced significant amendments bearing on sentence administration. First, automatic forfeiture of parole and mandatory supervision was abolished.

Second, offenders would receive credit for time served while on conditional release, if that release was later revoked.

Third, "interruption" was added for mandatory supervision. Interruption provided that where an offender on mandatory supervision received a new consecutive sentence, and the mandatory supervision was not revoked (normally because the new conviction was relatively minor or unrelated to the offender's overall risk, and/or the new sentence was relatively

short), the mandatory supervision would nonetheless be interrupted and the offender returned to custody to serve the new sentence. The mandatory supervision release would be resumed upon completion of the new sentence.

The section 14 merger provision remained unchanged.

### iii) 1986 - Reform of sentence calculation provisions

#### a) Identification of problems

While the merger formulation had responded to the obvious problems caused by its absence, its wording caused a number of very real problems of its own. On occasion, this resulted in situations where offenders who should have been returned to custody were not; indeed, authorities had no ability to end their conditional release and return them to custody, notwithstanding the imposition of a new sentence.

The following is a sampling of the kinds of problems experienced with section 14 and related calculation sections.<sup>2</sup> The problems are grouped as problems of "tied hands" (i.e. the statute, either by omission or commission, left correctional authorities with either no power or very questionable power to rectify clearly irrational situations), problems of "perception" (i.e. authorities had the authority to manage the case in accordance with public safety and "good corrections", but the appearance of the case may have lacked public confidence), and problems of sentencing resulting in difficulties in sentence calculation.

#### Problems of "tied hands"

##### Problem 1

Paragraph 14 (b) required that the offender be in confinement at the time the additional sentence was imposed, in order for the terms to merge. In fact, caselaw held that the offender must be in confinement as a result of the previous sentence, not just, for example, in confinement as a result of having been denied bail on the new charge.

The provision was therefore inadequate to cover all the situations where an offender under sentence received a new sentence. There may be several reasons why an offender who was under sentence was not "in confinement": for example, assuming he/she was on parole, the Parole Board may have decided that the new charge did not warrant termination or revocation of the release. Alternatively, the offender may have quickly entered a guilty plea on the new charge, before the NPB learned of the charge and took any action regarding the conditional release.

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<sup>2</sup>Earlier work by Robert G. Bigelow in the identification of sentence calculation problems is gratefully acknowledged. This work was contained in "Sentence Calculation in Canada - Problems and Possible Solutions", a paper prepared under contract with the Correctional Law Review, Solicitor General Canada.

The result was that the sentences in these other cases did not merge and the offender was in the pre-1969 situation: he/she was left to complete the first term (assuming the new term was consecutive to the first, which it would normally be, absent any nexus to the original offence); and at the conclusion of the release was returned to custody to begin serving the new sentence.

This sequence of events was viewed as irrational insofar as merger often depended more on happenstance than principle, and as counterproductive to the overall effective management of the offender and his/her reintegration.

### Problem 2

Situations can arise where an offender on parole is charged and convicted of an offence which was committed prior to release. Under the Parole Act prior to 1986, there was no termination power for releases other than day parole, and full parole could only be revoked on the basis of the offender's behaviour after release. Consequently, where the offence predated the release, the release could not be revoked, with the result that the offender would not be "in confinement" on the original sentence, and the new sentence would not merge.

### Problem 3

A variation on Problem 2 ultimately resulted in the infamous "Burns Ruling" ("Burns" being an inmate). In the case of Rondeau v. Commission Québécoise des libérations conditionnelles, Mr. Rondeau was originally convicted and sentenced to 6 months. Upon reaching parole eligibility, Mr. Rondeau was paroled. Whilst he was still on parole, the Crown appeal of his sentence was heard, and the sentence was increased to 2 years less a day. The provincial Parole Board then attempted to revoke the parole, since he was no longer eligible on the new term, having not yet reached the one-third point on the term.

Mr. Rondeau challenged the revocation by way of habeas corpus, arguing that the parole could not be revoked since he had committed no wrong while on the parole.

The court responded that while the parole indeed could not be revoked for the reasons cited by Mr. Rondeau, it could nonetheless be declared "inoperative" since he was no longer eligible for it.

Mr. Rondeau was returned to custody on this basis.

This ruling was later extended to cases where the offender is on release, is taken into custody under suspension, and prior to a revocation decision is sentenced to a new term of imprisonment. In these cases, the terms would merge; where the new parole eligibility date is in the future, it was held that the old parole was rendered inoperative. While this ensured that the offender was off the streets and back in custody, it meant that the parole could not be revoked, even if the offence had been committed while the offender was on parole (the "Burns Ruling").

"Parole inoperative" in the first instance (the Rondeau case) was a non-legislated practical

response to a situation where it was considered appropriate to end the parole but where the statute provided no mechanism for so doing. However it had three main drawbacks. First, the fact that the "rule" was not in the statute left it open to being "stretched" to cover slightly different situations where the fit was not as rational eg. the Burns case, where the offender had actually committed an offence while on parole). Second, because the offender's parole could not be revoked, the offender was returned to custody without the consequence of losing any of the remission which stood to his/her credit at the time of release, even if all the other circumstances of the re-committal would have made that appropriate. Finally, it resulted in disparity between like cases, with relatively irrelevant factors causing that disparity. In the example in the last paragraph, two similarly-situated offenders could end up with different mandatory supervision dates if by chance the Board had revoked one prior to sentencing on the new offence.

#### Problem 4

As noted above, from 1977 onward the Parole Act provided for the "interruption" of mandatory supervision where a new consecutive term of imprisonment was imposed while the mandatory supervision was still running.

Again, while this provision made some sense (allowing flexibility where the offender incurred a relatively minor conviction while generally performing well on release, but still ensuring that he/she served some portion of the new term in custody), it suffered from lack of clarity in the statute. As a result, the National Parole Board gave it a liberal interpretation which was not always shared by defence counsel. For example, the Board was of the view that this statutory provision over-rode the Burns Ruling in cases where the combined terms would have put the mandatory supervision date in the future (having the mandatory supervision declared inoperative could actually work to the benefit of an offender, insofar it involved no loss of remission and would thus likely have resulted in the offender's immediate re-release on mandatory supervision). Further, the Board held the view that the interruption provision did not preclude a revocation of the mandatory supervision at some later point, whereas others argued that the statute did not allow revocation once the interruption had begun. In addition, the statute was ambiguous as to whether the mandatory supervision would resume after conditional release on the new sentence or only upon warrant expiry of the new sentence.

Finally, the records are unclear as to why interruption was considered useful for MS cases, but had not been provided for in the case of parole. The most likely reason appears to have been the need to have an additional tool to manage MS releases which were remission-based rather than discretionary, and in some cases may have resulted in new sentences having little impact on custodial time in the absence of some mechanism such as interruption.

#### Problem 5

Offenders serving sentences in federal penitentiaries may also be subject to sentences imposed for breach of provincial statutes. In the absence of any specific enabling provision in the Parole Act, federal authorities took the view (based on the Constitutional division of

powers) that persons in federal custody could not be served with provincial warrants of committal. Consequently, many federal offenders were being released, only to be arrested on a provincial warrant. Federal offenders were at risk of being so arrested, even if released on a temporary absence pass or on parole. Releasing authorities were thus left with the choice of either not granting releases which were otherwise considered desirable, or granting the release but seeing the rehabilitative purposes of it frustrated by the offender's immediate re-arrest.

In some jurisdictions, informal arrangements were made with local police to not execute such warrants on conditionally released offenders. However, such ad hoc agreements were a less than desirable method of managing the situation.

Litigation on the issue commenced in Dempsey case, with a judgment in the government's favour issued by the Federal Court (Trial Division) in May 1985. Dempsey appealed to the Federal Court of Appeal.

## **Problems of "perception"**

### Problem 6

The introduction of "merger" did not guarantee that offenders would serve additional time upon the imposition of a new sentence. An offender serving a sentence, released on parole and later revoked with a new offence, might still be eligible for parole on the new merged term, even though the new offence was relatively serious.

Consider the following:

Apr. 1, 1983 - sentenced to 3 years  
Apr. 1, 1984 - released on full parole  
Apr. 1, 1985 - parole suspended  
May 1, 1985 - parole revoked  
June 1, 1985 - sentenced to 3 years consecutive  
Merged term: 6 yrs, Apr. 1, 1983 - Mar. 31, 1989  
FPED: Mar. 31, 1985

In this case, the offender was already eligible for parole on the new merged term, notwithstanding that he/she had just been sentenced to the relatively serious penalty of 3 years consecutive imprisonment.

In real terms, this problem was not of the same order as those above, as the Board had the ability to manage the case appropriately, i.e. even though the offender remained eligible for parole, the Board was free to not grant, and indeed would have been unlikely to do so given the offender's performance on the first release. However, public perception was that such a result did not appear just. This perception was exacerbated if the offender had a co-accused who was not serving a sentence at the time of the "second" offence: the co-accused would not be eligible for parole until April 30, 1986, even though he/she appeared to be a less

serious offender given that it was his/her first offence.

## **Problems of sentencing**

### **1) Escape sentences**

#### Problem 7

A special provision was added to the Criminal Code in 1977 for escape sentences. Section 137 (see now 149) allowed courts to order that an escape sentence could be ordered to be served either concurrent with or consecutive to the remanet<sup>3</sup> of the sentence the person was serving at the time of the escape.

While this appears at first glance to be an admirable provision, its wording caused anomalous results if, for example, the offender was sentenced for the escape after being sentenced for any offences committed while at large. Consider the following example:

- June 1, 1982 - sentenced to 3 years
- Dec. 31, 1982 - escape
- Dec. 31, 1983 - recaptured and charged with new offence as well as with escape
- Jan. 15, 1984 - sentenced to 3 years consecutive for new offence
  - then sentenced to 2 years consecutive for escape

The wording of section 137 required that while the escape sentence would be consecutive to the remanet, it had to be concurrent to the 3 years imposed for the new offence. This caused two problems. First, since the maximum sentence for escape was two years, in cases such as this if the sentence for the new offence was two years or greater, the escape sentence was for all practical purposes of no force or effect. Second, quite different results would be obtained simply by inadvertance on the part of the sentencing judge in imposing sentence for the "other" offence first; or similarly if the offender pled guilty to and was sentenced for the other offence, and then went to trial on the escape offence. In the example above, reversal of the sentencing order would mean the offender would serve 8 years rather than 6.

This situation did not cause a sentence calculation problem in terms of sentence management, but again tended to undermine public confidence insofar as the results occasionally seemed capricious and contrary to common sense.

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<sup>3</sup>Remanet", as defined in the current Parole Regulations, means that "portion of the term of imprisonment imposed on an inmate that remains, at any time, to be served by that inmate".

## ii) Ambiguous or contradictory warrants

Warrants of committal from trial courts or orders from Courts of Appeal may sometimes be worded in such a way that their intention is not clear to sentence administrators, or in such a way that they are difficult to implement.

### Problem 8

The interpretation of the imposition of consecutive versus concurrent sentences poses one of the major challenges for sentence administrators. This problem is heightened by the fact that many inmates are serving multiple sentences, often imposed at different times and by different courts.

a) Ambiguous warrants: Sometimes the wording of a warrant is unclear as to which sentences are to be served consecutively or concurrently with others. On occasion, the warrant may be at variance with the transcript of the the sentencing proceeding. Finally, occasionally when an appeal court varies a sentence, it is silent as to whether the varied sentence is to be consecutive or concurrent with other sentences to which the offender is still subject. In the absence of a contrary direction, sentences are to be taken as concurrent (s. 717 C.C.). On the other hand, it can be argued that the appeal court must be taken to have varied only that portion of the sentence to which it specifically refers, and therefore the consecutive/concurrent direction should remain as imposed by the trial court.

In these cases, sentence administrators must construct their own interpretations.

b) Escapes: Occasionally a court will order in a situation such as noted under Problem 7 above that the escape sentence shall be consecutive to any other term to which the offender is subject at the time of sentencing, rather than just to the remanet as allowed by the Code. Should the warrant be enforced as written, or should the Code be followed? Historically, federal authorities took the view that the warrant should be enforced as written, while at the same time advising the inmate that they should seek legal advice. The federal authorities would subsequently not contest any court action seeking to enforce the escape sentence as consecutive only to the remanet.

## iii) Information availability and flow

### Problem 9

A frequent problem for one or more parties to the sentencing hearing is the lack of reliable information regarding the offender's status. Occasionally this is due to the rapidity of the criminal proceedings, with sentencing taking place prior to any action being taken by correctional authorities. For periods of time, in some jurisdictions, various forms have been in use which provided Crowns with information for the court's use, however, this practice has not been followed in any systematic fashion.

In addition, there appears to be a lack of consensus as to whether information as to the

offender's conditional release status is appropriate at a sentencing hearing, with some courts of the view that their role is limited to sentencing for the instant offence.

**b) Resolution of problems: the 1986 reforms**

Bill C-68, enacted in July 1986, sought to resolve the sentence calculation problems identified in the previous 27 years which had seriously compromised the ability of correctional authorities to safely and rationally manage sentences. In fact, all five of the "tied hands" problems identified above were addressed.

Problem 1: Resolved.

The requirement that the offender be in confinement at the time of imposition of the new sentence was deleted. The revised wording provided that the offender simply be subject to a term of imprisonment "that has not expired".

Consequently merger would take place regardless of whether the offender was in custody or on release.

Problem 2: Resolved.

The authority to terminate parole and mandatory supervision was added to the Act. Termination carried with it no negative consequences other than ending the release and returning to custody (unlike revocation, which resulted in a loss of remission credits, and was viewed as a "black mark" on the offender's record). Termination was generally not based on any assessment of the offender's release behaviour, and therefore was considered suitable for use when the new conviction was for an offence which pre-dated the release.

Problem 3: Resolved.

The Act was amended to provide that the Board's authority to revoke a release could be exercised "notwithstanding any new term of imprisonment to which the inmate becomes subject after the release of the inmate on parole" (this authority also extended to mandatory supervision).

This amendment essentially eliminated the need for the Burns Ruling.

Problem 4: Resolved.

Interruption was extended to parole. "Interruption of interruption" was also provided for, for those cases where an offender serving an interruption received an additional sentence of imprisonment.

The wording was clarified to provide that the original sentence would not be resumed until the intervening sentence had expired.

The wording was also clarified to provide that the original release could be terminated or revoked at any time, including once the interruption had started to run.

Problem 5: Resolved.

As the Dempsey Federal Court (Trial Division) judgment was under appeal during the development of C-68, no action was taken to amend the legislation. On March 26, 1986, the Federal Court of Appeal held that section 659 of the Criminal Code (now s. 731) permitted inmates in federal institutions to serve sentences imposed for breaches of provincial statutes.

While resolving one problem, this created one of its own. The Parole Act definition of "inmate" limited the application of Parole Board authority to sentences imposed for offences under any act of Parliament. Consequently, while provincial warrants could be served, and the sentences would merge, the Board could not grant parole on the provincial portion of the sentence.

This problem was subsequently rectified in the Corrections and Conditional Release Act, in subsection 107(2):

"The jurisdiction of the Board...extends to any offender sentenced to a term of imprisonment imposed under a provincial Act that is to be served in a penitentiary pursuant to section 731 of the Criminal Code, whether that term of imprisonment is to be served alone or concurrently with or consecutively to one or more other terms of imprisonment imposed under an Act of Parliament or a provincial Act."

The definition of "offender" was also amended accordingly.

Problem 6: Not resolved.

Problem 7: Resolved in Bill C-90, given First Reading on June 23, 1992.

Section 149 will have removed from it the special rule for consecutive and concurrent escape sentences. The normal rules will therefore apply, so that the escape sentence may be made consecutive to any other sentence, not just to the remanet.

Problems 8 & 9: Ongoing.

These issues are the object of ongoing education and liaison between correctional authorities and the bench.

**iv) 1992 - Corrections and Conditional Release Act**

The Corrections and Conditional Release Act contained limited reforms to sentence calculation and related provisions. As noted above under Problem 5, the National Parole Board's authority over provincial sentences in federal custody was remedied. Remission, historically one of the greatest complicating factors in sentence calculation, was eliminated in

the penitentiary system: offenders will be entitled to release at a statutory release date (subject to detention provisions), fixed at 2/3rds of the sentence. Where a statutory release is revoked, the offender will be required to serve 2/3rds of the remanet.

The merger provisions (s.139) were not amended.

### III. CURRENT PROBLEMS

It is important to highlight that the 1986 and 1992 reforms successfully resolved all 5 of the "tied hands" problems from the previous legislation. If further legislative reform is to be undertaken, it is crucial to be absolutely clear about what the current problems are. If for example, the primary issues are ones of public perception, the responses may take the form of revised legislation but equally may take the form of greater educational and communication programs, or enhanced procedural safeguards.

#### i) Problems of "perception"

##### Current Problem 1

Consultations during the C-36 process revealed that problems of perception appear to be the leading concern with sentence calculation at this point.

The concern tends to focus on the situation where an offender on parole is convicted of a new offence and sentenced to an additional term of imprisonment, but through the merger of sentences is almost immediately parole eligible or indeed may be well past parole eligibility date. This is exemplified in an extreme case by the following:

Aug. 17, 1979	-	sentenced to 9 yrs for robbery, rape and unlawful use of firearm
Aug. 30, 1985	-	released on MS
Mar. 15, 1988	-	MS revoked, no remission re-credit
June 2, 1988	-	sentenced to 4 yrs consecutive for 2 charges robbery
Nov. 11, 1989	-	30 days consecutive for escape
Feb. 21, 1991	-	released on MS
June 4, 1991	-	MS revoked, no remission re-credit
Jan. 9, 1992	-	sentenced to 20 yrs consecutive for aggravated sexual assault

Notwithstanding the very serious new sexual assault conviction and sentence, resulting in a warrant expiry date of September 2012, the offender's parole eligibility date is August 1986, i.e. at the moment of receiving a 20 year sentence he was immediately parole eligible. It is understandable that this runs contrary to public expectations: any sentence of imprisonment should carry with it a minimum period of parole ineligibility. This divergence between expectation and reality is further exacerbated if, for example, the above-noted offender had a co-accused who was not under sentence at the time of the sexual assault conviction. While the recidivist would be immediately eligible for parole, a first-time co-offender would not be eligible until late-1998.

The traditional, and quite defensible, response to this scenario is that the sentence of the recidivist can still be managed without risk to public safety: there is confidence in the independent decision-making of the Parole Board who would give appropriate weight to the

nature of the offence, the length of the new sentence and the fact of its commission while on conditional release, in making any decision about paroling the offender again in the near future. In addition, the detention provisions enacted in 1986 could be used to prevent a subsequent release under mandatory supervision/statutory release. As well, it is not entirely productive to compare the two offenders simply on the basis of parole eligibility, as the totality of the circumstances of each should be considered.

However, to the extent that public confidence is an essential element in the successful management of the corrections process, and given that normally an offender is expected to serve one-third of any sentence in custody prior to being eligible for parole, it is worth considering whether alternatives can be developed which will not return us to the confusion of the pre-merger days, but will restore a greater degree of public trust.

**ii) Problems of "tied hands"**

No such problems have been identified since the 1986 reforms.

**iii) Problems of complexity**

**Current Problem 2:**

Since its modification in 1986, the "interruption" provision of the Parole Act has been the subject of comment from both within and outside the correctional system. It is viewed by many, as too complex to allow easy comprehension or predictability of results.

While accepting this criticism as valid, it is important to bear in mind the original purpose of interruption. It was designed for those cases where the Board has determined that a new conviction does not significantly alter the risk posed by an offender on parole or MS, and so the Board is not prepared to end the release. However, interruption requires that the offender, where the new sentence is consecutive to the one already being served, be returned to custody to serve at least the period of parole ineligibility on that new sentence.

Consequently, interruption performs two quite valuable functions: it maintains the discretion of the Board to safely manage releases on a case-by-case basis, and ensures that court-imposed sentences are respected. If it is to be amended solely for "complexity" reasons, it may be important to seek solutions which do not throw the baby out with the bathwater.

**Current Problem 3:**

A sentence may be interrupted by one or more new sentences. During the interruption, the operation of the original sentence is "suspended". Where there is only one intervening sentence, the calculation is not generally vulnerable to anomalous results.

However, this picture can change if there is more than one intervening sentence. In such cases, the order in which the new sentences are imposed can result in quite different terms for the offender.

For example:

Mar. 12, 1989	-	sentenced to 5 yrs
Nov. 12, 1990	-	released on parole
Dec. 12, 1990	-	sentenced for 2 new offences: 3 mon. consec. and 3 yrs conc.

Depending on the order in which the 2 new sentences are imposed, the total term to which the offender will be subject will vary substantially.

If the concurrent sentence is imposed first, the original sentence is not interrupted (Interruption can only be triggered by a consecutive sentence in the first instance), and will be subsumed within the portion of the original sentence yet to be served (3 yrs and 3 mon., as of Dec. 12, 1990). The 3 month consecutive sentence will interrupt the original term. The net effect would be to extend the original WED of the 5 year term by no more than 3 months.

However, if for any reason the 3 month consecutive sentence is imposed first, the situation changes. The original term would be interrupted. The 3 year concurrent term is deemed by subsection 20(1.3) Parole Act (139(4) CCRA) to be concurrent with the intervening sentence (this is because the original sentence is not operative at that point). Consequently, the interruption period would be 3 years. Thus the net effect would be to extend the original WED of the 5 year term by 3 years.

A subsequent revocation by the Board would not alter the differing scenarios. Had the Board revoked prior to the imposition of the new terms, the differing order of the new sentences would have no impact.

While this example does not pose insurmountable sentence management issues, it does demonstrate that the complexity of the interruption provisions can lead to results which are disparate and irrational.

#### iv) Problems of sentencing

##### Current Problem 4:

Sentence administrators continue to face situations where the sentencing judge's intentions are unclear or the warrant is at variance with the sentencing transcript or incompatible with statutory authority. These cases may be susceptible to a legislative response in some respects. In other respects, the resolution may lie in greater communication and liaison between correctional authorities, lawyers and the bench to ensure an accurate understanding of sentence calculation and administration.

#### **IV. GUIDING PRINCIPLES**

Before developing responses to the current problems noted above, it is worth considering what the fundamental principles behind our responses should be. What do we value, and what are we trying to achieve?

##### **Principle 1: Equity**

Equity encompasses the notions of fairness, justice and predictability. Equity must be considered in relation not only to the offender, but also to the public, the criminal justice system, and the aims of "good corrections".

Equity in the context of sentence calculation seeks to ensure that:

- \* offenders who are similarly situated are treated similarly;
- \* differences in treatment of offenders are based on rational, demonstrable differences in the situations of the offenders;
- \* the management of sentences does not undermine the conviction or sentence imposed by the court, and in particular does not disrupt the sense of fairness which arises from a balance of punishment and rehabilitation goals;
- \* public safety is not compromised through the operation of anomalous, irrelevant or unmanageable factors;
- \* offenders are not subject to harsher penalties than those contemplated by the sentencing judge;
- \* release decision-making takes place in the context of a legislative scheme designed to support the effective reintegration of individual offenders; and
- \* all persons involved in the criminal justice system, as well as the public, can predict with relative certainty the results of conviction and imposition of a custodial sentence.

##### **Principle 2: Crime = Time**

Stated in the most general terms, this principle reflects the premise that the imposition of a custodial sentence should result in the person serving some period of time in custody.

However, this principle is not absolute, for the following reasons:

- \* concurrent sentences need not be treated the same as consecutive sentences, insofar as they may be imposed where the judge is satisfied that the offence warrants a

custodial sentence but that the particular offender need not serve more time than that to which he/she is already subject;

- \* we may wish to consider whether an offender who receives a new sentence while in custody should be treated differently from one who receives a new sentence while on conditional release;
- \* we may hope for but realistically not expect that all offenders will cease criminal activity forthwith upon release -- there may be a gradual diminishment of criminal behaviour, and as a result, not all new crimes committed by offenders on release are equal nor require the same response; and
- \* where a new conviction and sentence are imposed on an offender on conditional release, we may wish to consider whether the offence was committed before or after the release; and if before, whether charges or the possibility of charges were known to and considered by the Parole Board.

### **Principle 3: Simplicity**

This is in some ways the most difficult of the three principles to realize. Admirable as it is as an objective, it must not become the enemy of comprehensiveness and flexibility. The 1959 Parole Act captured simplicity in its sentence calculation provisions, but created a host of problems.

A sentence calculation formula which reflects simplicity should be:

- \* at least moderately easy to communicate and understand;
- \* able to respond to all reasonably foreseeable situations without lengthy exceptions and permutations;
- \* sufficiently flexible to respond to anomalous and unexpected situations; and
- \* well understood by persons with an interest or stake in the correctional system, including police, Crowns, defence, judges, offenders, and the public.

## V. OPTIONS FOR CURRENT PROBLEMS 1 - 3

### 1. Status quo

#### Model:

*Retain C-36 provisions unaltered.*

#### Key Features:

- \* Would retain merger of sentences; release eligibilities calculated from first day of first sentence; interruption for new consecutive terms where Board does not revoke.
- \* Could also provide for non-legislative improvements, such as enhanced communication/education, to ensure that the public and key players in sentencing and corrections have a better understanding of the system, its objectives and operations.

#### Principles:

Because of the potential for undermining (or appearing to undermine) judges' intentions, and the lack of certainty of results, this model is seen by many as compromising some of the key elements of the principle of equity. At the same time, the model satisfies a number of important elements related to equity, including the ability to effectively manage individual cases according to individual needs.

The model is designed to strike a reasonable balance in terms of "crime=time", insofar as it does ensure that where an offender on conditional release is sentenced to a new consecutive term, at least a portion of that term will be served in custody even if the release is not revoked. At the same time, it permits sufficient flexibility to respond to a gradual diminishment of criminal activity on the part of an offender. On the minus side, the model does not meet public expectations that an offender in custody who is sentenced to a new term of imprisonment will necessarily serve any additional time in custody, should the Parole Board consider release appropriate.

Most observers would agree that the model is not the easiest one to understand, nor is it in fact well understood by all interested parties.

#### Comment:

This option is predicated on the view that the current sentence calculation provisions have not created problems where correctional authorities were unable to act in accordance with public safety or "good corrections". As well, it takes into account the fact that one of the most complicating factors in sentence calculation, the earning, loss and recrediting of remission, has been eliminated from the penitentiary system.

If the primary problems are now ones of "perception" and complexity, the responses may more appropriately lie in greater efforts to ensure that all persons involved in the criminal justice system, as well as the public, are informed of the way in which sentence calculation operates, its impacts, and the nature of discretionary decision-making.

While section 139 at first glance appears to be quite complicated, limited efforts have been made to explain the reasoning behind it (to ensure that all those given consecutive sentences are required to serve some portion of the sentence in custody), or how it operates. Communications efforts directed at the public could focus on better illuminating the purpose of calculation and interruption, and making the conditional release decision-making process more transparent. Many of the elements of C-36 will be useful in this regard: to the extent that secrecy of parole board operations is reduced, public confidence in the process should be increased.

Communications efforts directed at criminal justice professionals (eg. judges, lawyers, police) could, in addition to these matters, provide more explanation as to how particular sentences are calculated, and what the impact of various sentences will be for persons already under custodial sentences.

## **2. Fully discretionary**

### **Model:**

*139.(1) Where a person sentenced to a term of imprisonment that has not expired is sentenced to an additional term of imprisonment, the person shall, for the purposes of the Criminal Code, the Prisons and Reformatories Act and this Act, be deemed to have been sentenced to one term of imprisonment commencing at the beginning of the first of those sentences to be served and ending on the expiration of the last of them to be served.*

*(2) In this section, "term of imprisonment" includes a term of imprisonment imposed by a court of a foreign state on a Canadian offender who has been transferred to Canada pursuant to the Transfer of Offenders Act.*

*(3) This section does not affect the time of commencement, pursuant to subsection 721(1) of the Criminal Code, of any sentences that are deemed under subsection (1) to one sentence.*

### **Key features:**

- \* Would provide the Parole Board with full discretion. Interruption would be eliminated: offenders on conditional release who are sentenced to a new consecutive term would be subject only to the Board's discretion (assuming the new sentence did not render the parole "inoperative"). There would be no automatic return to custody to serve a portion of the new sentence.

- \* All sentences would merge, new release eligibility dates would lie where they fall, and the Board would have full discretion regarding the granting, terminating or revoking of any release.
- \* Similarly, offenders in custody when a new consecutive sentence is imposed would not be required to serve any additional period, if they are already past the new FPED.
- \* Could also incorporate communication/education elements regarding release decision-making, as discussed in Option 1.

Principles:

This option would provide a rather divisive form of equity: while it would preserve maximum discretion on the part of the Board to manage conditional release on an individual case basis, it would have the potential to at least appear to further undermine sentencing courts and would not assist predictability of results. It would make significant inroads on the crime=time principle, but again, would allow Parole Boards to tailor the conditional release of an offender to the particular needs of the case, which may more effectively promote public safety in the long term than a more rigid framework. It would meet the principle of simplicity in part, insofar as it would, in principle, be easy to communicate and to understand; its results, however, might be less well understood.

Comment:

While this option would respond to Current Problems 2 and 3, it would not only not respond to Current Problem 1, it would in fact worsen the situation in the eyes of critics. At least with interruption, where the Board does not revoke upon imposition of a new consecutive sentence, the offender is nonetheless returned to custody to serve a portion of that new sentence. Without interruption, there would be no mechanism to ensure that such offenders serve any portion of the new sentence.

3. Non-discretionary "A"

Model:

*135.(9.1) Where a person sentenced to a term of imprisonment that has not expired is sentenced to an additional consecutive term of imprisonment, the Board shall revoke any parole or statutory release to which the person is subject, whether or not the new term of imprisonment is in respect of an offence committed before or after the person's release on parole or statutory release.*

*139.(1) Where a person sentenced to a term of imprisonment that has not expired is sentenced to an additional term of imprisonment, the person shall, for the purposes of the Criminal Code, the Prisons and Reformatories Act and this Act, be deemed to have been sentenced to one term of imprisonment*

*commencing at the beginning of the first of those sentences to be served and ending on the expiration of the last of them to be served.*

*(2) Where an offender to whom subsection (1) applies is sentenced to a term of imprisonment to be served consecutively with the sentence the offender is then serving, sections 120 and 127 shall have effect commencing at the time the latest of any of those sentences is imposed.*

*(3) In this section, "term of imprisonment" includes a term of imprisonment imposed by a court of a foreign state on a Canadian offender who has been transferred to Canada pursuant to the Transfer of Offenders Act.*

*(4) This section does not affect the time of commencement, pursuant to subsection 721(1) of the Criminal Code, of any sentences that are deemed under subsection (1) to constitute one sentence.*

Key features:

- \* Interruption would be dropped, but the offender would automatically forfeit conditional release upon the imposition of a new consecutive sentence.
- \* The terms would continue to merge, but conditional release eligibilities would start running from the date of the new sentence, on the total remanet. The same formula could be used for persons who are in custody when the new sentence is imposed.
- \* Where a concurrent sentence is imposed, conditional release eligibilities would still run from the first day of the first sentence. This would reflect the premise that the imposition of a concurrent sentence does not carry the same expectation that additional time in custody will be served by the offender.

Principles:

This option would also meet only some elements of the principle of equity. It would certainly meet the concern that the conviction and sentence of the court not be undermined, in that it would ensure that a consecutive sentence would always alter conditional release eligibility.

This option gives more teeth to the principle of crime=time, but does not allow for flexibility in terms of gradual reduction of criminal behaviour, nor does it take into account when the offence was committed (eg. the Board may have granted the original parole knowing that the offender faced an outstanding charge of common assault but feeling that this did not significantly impact on risk).

It does appear to satisfy the principle of simplicity.

Comment:

This option would meet the concerns demonstrated in Current Problems 1 - 3. However,

because conditional release eligibility would be calculated on the remanet, it would have rather harsh results for some offenders, potentially beyond those anticipated by the court. For example, a person serving a 6 year robbery sentence may be paroled after 2 years. At year 3, he receives a 3 month consecutive sentence for common assault. He would then be automatically returned to custody to serve a further year and a month before being eligible for parole again (one-third of the remanet of 3 years and 3 months). This is a relatively harsh result, in that he would be serving over one year in custody principally because of a 3 month sentence. If the Board was satisfied that the new sentence had no substantial bearing on the offender's risk or continued reintegration, they would have no discretion to continue the release, subject to a 3 month interruption.

#### **4. Non-discretionary "B"**

##### **Model:**

*135.(9.1) Where a person sentenced to a term of imprisonment that has not expired is sentenced to an additional consecutive term of imprisonment, the Board shall revoke any parole or statutory release to which the person is subject, whether or not the new term of imprisonment is in respect of an offence committed before or after the person's release on parole or statutory release.*

*139.(1) Where a person sentenced to a term of imprisonment that has not expired is sentenced to an additional term of imprisonment, the person shall, for the purposes of the Criminal Code, the Prisons and Reformatories Act and this Act, be deemed to have been sentenced to one term of imprisonment commencing at the beginning of the first of those sentences to be served and ending on the expiration of the last of them to be served.*

*(2) Notwithstanding section 120 and subject to sections 747 and 761 of the Criminal Code, where an offender to whom subsection (1) applies is sentenced to a term of imprisonment to be served consecutively with the sentence the offender is then serving, the offender shall serve a period of time equal to the period of parole ineligibility that remained to be served on the sentence the offender is then serving and*

*(a) in the case of an offender not subject to an order made under section 741.2 of the Criminal Code, one third of the later sentence,*  
*or*

*(b) in the case of an offender so subject, one half of the later sentence, prior to becoming eligible for full parole.*

*(3) Notwithstanding section 127, an offender to whom subsection (1) applies shall serve a period of time equal to two thirds of the time referred to therein,*

*commencing at the time of the latest of any of those sentences is imposed, prior to release at the statutory release date.*

*(4) In this section, "term of imprisonment" includes a term of imprisonment imposed by a court of a foreign state on a Canadian offender who has been transferred to Canada pursuant to the Transfer of Offenders Act.*

*(5) This section does not affect the time of commencement, pursuant to subsection 721(1) of the Criminal Code, of any sentences that are deemed under subsection (1) to constitute one sentence.*

Key features:

- \* Like Option 3, interruption would also be dropped, but the offender would automatically forfeit conditional release upon the imposition of a new consecutive sentence.
- \* The terms would continue to merge. Unlike Option 3, conditional release eligibilities would continue to run from the first day of the first sentence. However, the offender would be required to serve in custody a period of time equal to 1/3 (or 1/2, if ordered by the court) of the new sentence before parole could be granted.
- \* Offenders who received a new consecutive sentence prior to parole eligibility would be required to serve a period of time equal to the period of parole ineligibility that remained to be served on the original term at the time the new sentence was imposed, plus 1/3 (or 1/2) of the new sentence.
- \* Where a concurrent sentence is imposed, conditional release eligibilities would still run from the first day of the first sentence. Again, this would reflect the premise that the imposition of a concurrent sentence does not carry the same expectation that additional time in custody will be served by the offender.

Principles:

This model satisfies many of the elements of the principle of equity, and all of the elements of simplicity. It supports the principle of crime=time, but does not bend to the legitimate exceptions to that principle: its chief drawback is the inflexible requirement of revocation for a new sentence, even where the offence is minor or unrelated to risk. This takes away from releasing authorities the ability to manage offenders on a case-by-case basis, and will in some instances work against the offender's successful reintegration (eg. the loss of employment and disruption of family life which a return to custody may occasion, where such a return would not have been considered necessary based on risk factors).

This is balanced by the competing interest of society in seeing that all custodial sentences are given meaning, and in the deterrent value which such a model may promote. In principle, it is also not a dramatic departure from interruption insofar as interruption also removes case-by-case flexibility from releasing authorities.

Comment:

While also having the advantages of Option 3, this option would remove its harshest feature, i.e. the potential to be reincarcerated for a period of time disproportionate to the new sentence. At the same time, it would ensure that offenders on conditional release who receive a new consecutive sentence serve some period of time on the new sentence.

It would also cover those cases where the offender receives a new consecutive sentence while in custody (whether they are pre- or post-parole eligibility). Where the offender was pre-parole eligibility, he/she would be required to serve whatever remained of that ineligibility plus one-third (or one-half, if subject to a judicial order) of the new sentence before being eligible for parole on the new merged term. Where the person was past PED on the first sentence when the new one is imposed (whether they are in custody or on release), the calculation would simply amount to 1/3 of the new sentence.

Again, this calculation would only apply to consecutive sentences, for the same reasons articulated in the discussion of Option 3.

This model also has the advantage that it could be adapted to apply also to persons subject to life sentences -- a consecutive sentence still couldn't be imposed, but parole ineligibility could be extended through the same calculation.

#### **OPTIONS FOR CURRENT PROBLEM 4**

Objectives for reforms with respect to ongoing sentencing issues may be two-fold:

1. Enhanced information sharing, to ensure that judges and counsel are aware in general of sentence calculation principles, and have appropriate information with respect to individual cases.
2. Greater consistency in the application of consecutive and concurrent sentences.

Strategies to attain these objectives may include the following:

- \* Legislative amendments to provide greater clarity and certainty in the imposition of consecutive and concurrent sentences.
- \* Development and use of standard forms to be provided to the Court at the time of sentencing, respecting the custodial or conditional release status of the offender.
- \* Development and distribution of a "Sentence Calculation Handbook" in an accessible format, with description of sentence calculation principles and sample calculations. Primary audience: criminal justice personnel.
- \* Development of a computerized sentence calculation program, primarily for use by

sentence administrators but also available to criminal justice personnel as an adjunct to the Sentence Calculation Handbook.

- \* Additional education and communications materials for public information.
- \* Enhanced liaison between sentence administrators and judges/counsel, eg. regional workshops on sentence calculation.

**APPENDIX A**



Correctional Service Canada / Service correctionnel Canada

**INMATE SENTENCE COMPUTATION**

NOTE: Reference document, Sentence Administration policy and Procedures Manual.

**CALCUL DE LA SENTENCE DU DETENU**

NOTE: Document de référence, Manuel de la politique et procédures de la Gestion des S.S.

PROTECTED 8 ONCE COMPLETED - PROTEGÉ 8 UNE FOIS REMPLI

PERSONAL INFORMATION BANK / RICHIER DE RENSEIGNEMENTS PERSONNELS

2. FPS number - Numéro SED / Institution - Établissement

4. Name - Nom: \_\_\_\_\_  
 5. Present expiry date - Date d'expiration de mandat: \_\_\_\_\_

6. Sentence: \_\_\_\_\_  
 7. Date sentence began - Date de début de la sentence: \_\_\_\_\_  
 8. Date arrival - Date d'arrivée: \_\_\_\_\_

**9. COMPUTATION OF SENTENCE - CALCUL DE LA SENTENCE**

Aggregate days in single term sentences (1)  
 A. LESS - MOINS  
 Earned Remission Re-credits  
 Reduction méritée-nouveau crédit

Old Earned Remission (2)  
 Earned Remission on suspension (3)  
 Remission re-credited by N.P.B. (4)  
 Other (5)  
**TOTAL (6)**

**B. DATE OF SENTENCE TO END OF MONTH**  
 From - De: (8)  
 To - À: (9)

Pro-rated Earned Remission (11)  
**TOTAL (12)**

**C. DAYS TO END OF YEAR**  
 From - De: (14)  
 To - À: (15)

Possible Earned Remission (17)  
**TOTAL (18)**

**D. DAYS IN NEXT FULL YEARS**  
 From - De: (20)  
 To - À: (21)

Possible Earned Remission (23)  
**TOTAL (24)**

**E. DAYS IN NEXT FULL MONTHS**  
 From - De: (26)  
 To - À: (27)

Possible Earned Remission (29)  
**TOTAL (30)**

**F. DAYS IN LAST MONTH**  
 Pro-rated Earned Remission (32)  
**TOTAL (34)**

**G. PROBABLE RELEASE DATE (T.A.)**  
**H. PROBABLE MANDATORY SUPERVISION DATE**  
**I. E.O.S. DATE**

TABLE 3: Calendar Days plus Earned Remission (15 days per month)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
Jan-Jan	46											
Feb-Feb	82	43										
Mar-Mar	136	89	46									
Apr-Apr	180	134	61	46								
May-May	228	180	137	61	46							
Jun-Jun	271	228	182	136	61	46						
Jul-Jul	317	271	228	182	137	61	46					
Aug-Aug	363	317	274	228	183	137	61	46				
Sept-Sept	408	362	318	273	228	182	137	61	46			
Oct-Oct	454	408	366	318	274	228	183	137	61	46		
Nov-Nov	499	453	410	319	274	228	183	137	61	46		
Dec-Dec												

**10. AUDIT OF DAYS IN SENTENCE AND EARNED REMISSION**

PERIOD	Other time counting as served	Days to serve	Remission credits	Projected E.R.	Total
A. 1st month	(1)	(2)	(3)	(4)	(5)
B. End of 1st Cal. year		(6)		(7)	(8)
C. Next full years		(9)		(10)	(11)
D. Next full months		(12)		(13)	(14)
E. Month of Release		(15)		(16)	(17)
F. Totals	(18)	(19)	(20)	(21)	(22)

TABLE - TABLEAU 1: First and incomplete months (initial) / Le premier mois et mois incomplets (initial)

Days served	Allow	For days served	Allow
1 to - 2	1 day - jour	2 to - 4	1 day - jour
3 to - 4	2 days - jours	5 to - 7	2 days - jours
5 to - 6	3 days - jours	8 to - 10	3 days - jours
7 to - 8	4 days - jours	11 to - 13	4 days - jours
9 to - 10	5 days - jours	14 to - 16	5 days - jours
11 to - 12	6 days - jours	17 to - 19	6 days - jours
13 to - 14	7 days - jours	20 to - 22	7 days - jours
15 to - 16	8 days - jours	23 to - 25	8 days - jours
17 to - 18	9 days - jours	26 to - 28	9 days - jours
19 to - 20	10 days - jours	29 to - 31	10 days - jours
21 to - 22	11 days - jours	32 to - 34	11 days - jours
23 to - 24	12 days - jours	35 to - 37	12 days - jours
25 to - 26	13 days - jours	38 to - 40	13 days - jours
27 to - 28	14 days - jours	41 to - 43	14 days - jours
29 to - 30	15 days - jours	44 to - 46	15 days - jours

TABLE 2: Calendar (days) - Calendrier (jours)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov
Jan-Jan	31										
Feb-Feb	66	25									
Mar-Mar	99	66	31								
Apr-Apr	120	88	61	30							
May-May	161	120	88	61	31						
Jun-Jun	181	159	122	61	61	30					
Jul-Jul	212	181	159	122	61	31					
Aug-Aug	243	212	184	153	122	61	31				
Sept-Sept	273	242	214	183	153	122	61	30			
Oct-Oct	304	273	246	214	184	153	122	61	31		
Nov-Nov	334	303	275	244	214	183	122	61	61	30	
Dec-Dec	366	334	308	276	246	214	184	153	122	62	31

TABLE 4: Calendar Years with E.R. / TABLEAU 4: Années civiles avec les réductions méritées de peine

Sentence	Calendar	E.R.	TOTAL	Sentence	Calendar	E.R.
1 Year	366	180	546	11 Years	4015	1980
2 Years	730	360	1090	12 Years	4380	2160
3 Years	1096	540	1636	13 Years	4746	2340
4 Years	1460	720	2180	14 Years	5110	2520
5 Years	1826	900	2726	15 Years	5478	2700
6 Years	2190	1080	3270	16 Years	5840	2880
7 Years	2556	1260	3816	17 Years	6206	3060
8 Years	2920	1440	4360	18 Years	6570	3240
9 Years	3286	1620	4906	19 Years	6936	3420
10 Years	3650	1800	5450	20 Years	7300	3600

**APPENDIX B**

## CONSULTATION QUESTIONS

1. Are there other current problems or unresolved issues than the ones identified in the paper?
2. Do you agree with the three principles that are suggested should underlie the discussion of options? Are there any other relevant principles?
3. How would you weigh the principles? Is there any one which you feel is of overriding importance?
4. Should all parolees have to return to custody if they receive a new sentence, even if the new sentence isn't serious or doesn't alter their risk to the community?
5. Should a new concurrent sentence be treated the same way as a new consecutive sentence?
6. Should an offender who receives a new sentence while in custody (for an offence committed prior to or during the custody) be treated differently from an offender who commits a new offence while on conditional release?
7. If the Parole Board granted parole to an offender knowing that he or she faced outstanding charges, should the release be ended anyway, if a new custodial sentence is imposed?
8. Are there other options than the ones identified in the paper?

## **CONSULTATION RESULTS**

### **Judiciary**

While a number of judges responded to the package, the majority of judges did not wish to comment on the provisions, feeling it was more the province of correctional authorities and outside their area of expertise. One judge did propose a model which would require an offender who received a consecutive sentence to return to custody for the period of parole ineligibility which would be served if there was no existing sentence. He proposed that concurrent sentences be treated differently, with the Board having the discretion to revoke conditional release if it felt it was necessary.

### **Crown Attorneys**

Several crown attorneys attended the National Joint Committee meetings held in Prince Edward Island, Ontario and Quebec. A separate meeting was held with one crown attorney in Winnipeg. Suggestions were made that an offence-based distinction could be useful in deciding whether a new offence while on conditional release should automatically result in a return to custody using, for example, Schedule I. All crowns agreed that concurrent and consecutive sentences should be dealt with differently, and all tended to support either Option 3 or 4. All crowns expressed support for enhanced education about sentence calculation for judges and crown attorneys. Suggestions were made that a computer software package and/or a short video presentation be prepared to assist understanding of the provisions.

### **Provincial Officials**

A concern was expressed by several provincial officials that sentence calculation should be consistent across the country. Consecutive sentences were considered to require a return to custody. They agreed that parole authorities should exercise their discretion to determine the appropriate consequences for concurrent sentences. General support was expressed for Option 4. Support was expressed for enhanced education for judges and Crown attorneys.

It was suggested that a federal-provincial conference be held on sentence administration to help reach a standardized approach to sentence calculation.

## Parole Boards

Representatives from one provincial parole board stated that there should be a difference in the manner in which concurrent and consecutive sentences were handled, reflecting the sentencing judge's due regard for the time being served and the effect of the "totality" of the sentence. A concurrent sentence suggests that the pre-existing sentence continues to satisfy the public's need for protection. The imposition of a consecutive sentence, however, reflects the public's need for added protection from the offender and the need to increase the time that the offender should be removed from the community.

They expressed the view that offenders who commit new offences while on conditional release have increased their risk factor by breaching the public trust and warrant an appropriate consequence.

They also expressed qualified support for some discretion for Parole Boards, feeling that automatic return to custody should result when risk to the community is increased by the new offence.

## Police

The majority of police, both through letters and at National Joint Committee meetings, expressed a belief that a conditionally released offender who commits a new offence which results in a new sentence should be returned to custody. They also expressed the belief that offenders on conditional release who commit offences breach the public trust.

The majority of police felt that concurrent and consecutive sentences should be treated differently, although there was some support for the two being treated the same. There were also several who expressed a view that dealing with public perception required that all new sentences result in some time served in custody.

Concern was also expressed that offenders serving life sentences feel no impact from additional sentences, as no sentence can be made consecutive to a life sentence. The belief was expressed that there should be some consequence such as a delayed parole eligibility or consecutive parole eligibilities in these situations.

There was also support expressed for a differentiation between violent and non-violent offenders, with a return to custody being the appropriate response for new violent offences.

The majority of police expressed support for Option 3 or 4. There was a view expressed that eligibility dates should be calculated from the date of the new sentence, with no merging of sentences for crimes committed after the beginning of the original sentence.

Some representatives of the police community attending the Montreal NJC Annual meeting indicated that there should always be some consequence for a new offence, while retaining some flexibility regarding an automatic return to custody.

### Voluntary Sector

Support was expressed for the guiding principles as stated in the discussion paper, as well as for flexibility and discretion as components of any new system. Some concern was expressed that public perception, which is often based on false impressions of the criminal justice system, was driving the review of sentence calculation.

### Status of Women Canada

Status of Women Canada supports a sentence calculation system based on a differentiation between violent and non-violent offenders, with resources directed toward violent offenders; and discretion within the system based on the nature of the offence.

### Victims

The views of one victims group concerning the treatment of concurrent and consecutive sentences differed from other respondents in that they suggested that concurrent sentences not be used for offenders on conditional release. They strongly support return to custody for all offenders with new convictions. Concurrent and consecutive sentences should be treated the same.

They supported Option 4, but also suggested that the statutory release date be used as the next date of release for offenders on conditional release who commit new offences rather than the full parole eligibility date.



