

Public Perceptions of Parole

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The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.¹

A. Overview

The National Parole Board ("NPB") is an independent administrative tribunal responsible for making conditional release decisions for federal offenders and offenders in those Provinces and Territories which do not have their own parole boards.² The Board operates under the authority of the *Corrections and Conditional Release Act*,³ which came into force on November 1, 1992. While NPB also has the authority to make recommendations to the Governor-in-Council with respect to the exercise of the Royal Prerogative of Mercy, which grants clemency to an offender, this form of release which has existed since Confederation is not commonly used.

Since parole was first instituted in Canada in 1899, with the broad Ministerial discretion conferred by the *Ticket of Leave Act*, the reasons for parole have been as varied as to show mercy, to assist in rehabilitation and to provide for forced, supervised transition to the community from the penitentiary. The modern day purpose of parole is to rehabilitate and reintegrate; the CCRA provides that the paramount guiding principle of parole is the protection of society.⁴

The relationship between NPB and the Correctional Service of Canada ("CSC") is an important one. NPB is a "stand-alone" administrative agency, independent of CSC, with a mandate to make conditional release decisions. NPB does not manage the case of an offender within the community; this is the responsibility of CSC. However, NPB relies on CSC for most of the information it receives which relates to offenders, such as information regarding institutional behaviour prior to release and information regarding community supervision after release.⁵ While the basis of the relationship is obviously one of a partnership, where the opinions of both agencies are expressed and considered, NPB has the ultimate decision-making authority to release inmates.

Jurisdictionally, however, CSC still has a significant role to play in the release of certain offenders. Effectively, there are three "types" of jurisdiction : (a) NPB has ultimate releasing authority in respect of parole and unescorted temporary absences; (b) detention cases, where a serving offender may be detained by NPB until warrant expiry, past his

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1. *Corrections and Conditional Release Act*, R.S.C. 1992, c. 20 s. 100 [hereinafter CCRA].
 2. Presently, provincial parole boards exist in Quebec, Ontario and British Columbia.
 3. *Supra* note 1.
 4. CCRA, s. 101(a).
 5. CSC is responsible under ss. 23-25 of the CCRA to obtain information for the National Parole Board on such issues as an offender's criminal behaviour, including young offender records and mental health history.

Statutory Release,⁶ but this is activated by a detention referral made by CSC, after which the hearing and risk assessment are conducted by NPB but *only where the referral has first been made by CSC*; and, (c) statutory release, where the offender is released in any event without the involvement of either CSC or NPB.⁷

The job of making conditional release decisions is carried out by 45 full-time and a number of part-time Board members in the five regions, Atlantic, Quebec, Ontario, Prairies (Alberta, Saskatchewan, Manitoba, NWT) and Pacific. In making decisions, Board members are supported by staff and analysts, who ensure that CSC staff are consulted to provide the required information and reports; share reports with offenders within the prescribed time-frames; properly interpret policies; inform victims; schedule hearings; informs observers (where applicable) of their right to attend hearings; and, communicate decisions to offenders and interested parties.

The jurisdiction of the National Parole Board is conferred by section 107 of the CCRA, which authorizes NPB to make the following decisions :

- grant or deny parole;
- terminate or revoke an offender's parole or S.R.;
- cancel a decision of parole, suspension, termination or revocation;
- review and decide whether to detain certain offenders past their S.R. date; and,
- authorize or cancel Unescorted Temporary Absences ("UTAs").

In 1992-1993, NPB made 34,555 conditional release decisions, of which 19,067 were made at panel hearings in institutions with inmates appearing. The remaining decisions were rendered in office reviews, known as "paper" decisions.⁸ There are approximately 14,000 offenders in federal institutions at any given time, of whom the vast majority are male.⁹ Even without conditional release, between 80% and 90% of these

6. Formerly known under the *Parole Act*, R.S.C. 1985, c. P-2 as "Mandatory Supervision", Statutory Release ("S.R.") is provided for in s.127 of the CCRA and describes the automatic release of an offender after having served two-thirds of sentence.

7. The Board may impose certain conditions to reduce an offender's risk while on S.R., but if he is not referred for detention within the time limits set under the CCRA, the Board loses jurisdiction and the offender must be released.

8. Evaluation, Audit & Statistics Branch, NPB, 1992-1993.

9. In 1992-1993, 97.8% of all on-register offenders were male. (*Offender Population Profile System, Statistical Information Services*, CSC, March 1993) and for this reason the use of masculine pronouns is deliberate.

offenders would return to the community within six years.¹⁰ On average, the Board grants full parole to approximately 36% of federal offenders whose cases are being reviewed.

B. Risk Assessment : How Release Decisions Are Made

Section 102 of the CCRA requires that the Board may grant parole to an offender if, in its opinion :

- a) *The offender will not, by re-offending, present an undue risk to society before the expiration of the offender's sentence; and*
- b) *The release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.*

While the Board considers a number of factors in making a conditional release decision, two phases are used in assessing risk. Phase I, assessment occurs when the Board members, prior to the hearing, review and consider an offender's file. Included in this file are the following documents :

- ! The offender's SIR score (Statistical Index on Recidivism), which is a guide, based on like-profiled offenders, which approximates the probability of the offender not reoffending if released to the community;
- ! Major Case Specific Factors, including the details of the offense, the offender's criminogenic factors, family background, young offender and/or criminal history, vocational and educational skills, degree and nature of substance abuse (if applicable), personal issues of origin, and various factors which played a role in the offense;
- ! Current psychiatric and psychological assessments, including a risk assessment from clinicians who have examined the offender;
- ! Professional opinions relating to risk factors, such as those from the Case Management Team within the institution, comments of the sentencing judge, police comments, and the comments of any other reliable parties who have observed the offender during his sentence;
- ! Relevant information from aboriginal elders and native communities (in the case of native offenders), ethno-cultural factors, victim impact information, and any other information relevant to an examination of the case.

10. *NPB Departmental Outlook on Program Priorities and Expenditures (1995-1996 to 1997-1998)*, April 27, 1995.

- ! A recommendation from the Case Management Team to grant or deny the offender's application.

At the conclusion of the Phase I review, the Board members who will be conducting the hearing then summarize the factors which they have considered and prepare a preliminary risk assessment.

Phase II of the risk assessment is also prepared prior to the hearing but much of this information will be particularized in greater detail at the hearing when the inmate is interviewed. The Board members consider the following information in Phase II :

- ! Reports and documents outlining treatment and programming taken by the offender, with particular emphasis on the benefits derived, examples of altered behaviour and institutional reports on the offender's conduct while incarcerated;
- ! An understanding by the offender of his offense, including the factors which lead to his offending behaviour, remorse, insight, an understanding of the gravity and effect of his offense on the community, his victims, an indication of victim empathy, an appreciation for how he must alter the behaviours which lead to the criminal offenses;
- ! A detailed release plan, including a community assessment, which provides information about the individuals supporting the offender and specific details of his proposed release, his residency and employment plans, community-based programming and treatment, and the structure of the proposed release, as it will affect the reduction of risk within the community. Also, the release plan must document other significant circumstances regarding the offender's risk.

The Phase I and II risk assessments detailed above will serve as a framework for the interview with the offender. The Board will then assess the risk criteria under section 102 of the CCRA, and conclude whether the offender will present an undue risk to society and whether he will contribute to the protection of society by reintegrating as a law-abiding citizen.

Generally, most parole hearings require two members to attend and vote, with the hearing taking approximately 40 minutes and a decision being reached at the conclusion of the hearing and then being read to the offender. In the case of offenders serving life-minimum sentences, dangerous offenders and those serving one-half parole eligibility under section 741.2 of the *Criminal Code*, three Board members participate in the hearing and decision.

I. CHANGES TO CONDITIONAL RELEASE UNDER THE CCRA

The coming into force in 1992 of the CCRA resulted in the repeal of the *Parole Act*¹¹ and the *Penitentiaries Act*.¹² Now, most corrections and conditional release issues and policies are regulated by this legislation. The CCRA brought several significant amendments. We will briefly highlight three areas; the types of releases which may be authorized : a couple of anomalies regarding the timing of release; and, a new role for victims and observers of parole hearings.

A. Types of release

1. Day Parole

Under the old *Parole Act*, eligibility for day parole was one-sixth (1/6) of an offender's sentence. Under the CCRA, eligibility for day parole is the greater of six months prior to the full parole eligibility date or six months of sentence.¹³ This changes, in longer sentences, the past practice where an offender could have been eligible for day parole long before becoming eligible for full parole. For example, in the past an offender serving a nine year sentence would not be eligible for full parole until one-third of his sentence (3 years) but would be eligible for day parole at one-sixth of the sentence, or 18 months, which could result (assuming release) in the offender being placed in a community half-way house for as long as 18 months. Experience and studies in recidivism have demonstrated that prolonged periods of day parole, of more than 6 - 8 months, generally do not benefit an offender. Even now, with "lifers" who become eligible for day parole three years before full parole eligibility, it is NPB policy not to grant day parole more than one year prior to full parole eligibility.¹⁴

2. Full Parole

An offender becomes eligible for full parole at one-third (1/3) of his sentence or seven years,¹⁵ except where the offender is serving a life-minimum sentence where parole eligibility is twenty-five years in the case of first degree murder, or a judicially determined

11. *Supra* note 6.

12. *Penitentiaries Act*, R.S.C. 1985, c. P-5.

13. CCRA, s. 119(1)(c). Where a sentence is less than two years, day parole eligibility is one-half of full parole eligibility.

14. This paper will not address indeterminate sentences, which have eligibility dates for full parole, day parole and unescorted temporary absences of three years from the date the offender was first taken into custody.

15. CCRA, s. 120(1).

range of ten to twenty-five years for second degree murder. Where an offender is serving a life-maximum sentence, full parole eligibility is seven years from the time of arrest.

3. Accelerated Review Full Parole

This is a new type of release permitted under the CCRA which affects offenders sentenced to the penitentiary for the first time and who are not serving sentences for murder, personal injury offenses prosecuted by way of indictment, or drug-related sentences in which one-half parole eligibility has been imposed by the sentencing judge.¹⁶

Accelerated Review is essentially a form of automatic release of an offender at one-third of his sentence, if violence is not likely. The initial determination of whether an offender meets the criteria of accelerated review is made by CSC, which takes into account the history of the offender, information related to his behaviour under sentence, and any information that might disclose a potential for violence. Once referred, the National Parole Board then makes a risk assessment which requires the Board to be satisfied that "if there are no reasonable grounds to believe that the offender, if released, is likely to commit an offense involving 'violence' before the expiration of the offender's sentence according to law, it shall direct that the offender be released on full parole." (Emphasis added).

This risk assessment requires the Board to be satisfied only that the offender may commit a violent offense, not whether the offender — as is the standard in regular parole reviews — may present an undue risk to society. "Violence" is interpreted under the CCRA to mean an offense including murder or one set out in Schedule I.¹⁷

4. Temporary Absences

The CCRA brought several changes to the implementation of temporary absences. There are two types of temporary absences, Escorted Temporary Absences (ETA) and Unescorted Temporary Absences (UTA).

a) ETAs

Authority to approve ETAs is given to CSC's institutional directors under section 17 of the CCRA. However, in the case of offenders serving life sentences, who are not yet

16. CCRA, s. 125(1).

17. CCRA, s. 126(7). The offenses on these Schedules I and II are discussed later in this paper and include offenses against the person, certain serious property offenses, serious drug offenses and those offenses related to the proceeds of drug trafficking. For ease of reference, these Schedules are attached to this paper.

eligible for UTAs, no escorted absence may be authorized by a warden or institutional head without the approval of NPB.

An ETA may be approved where the institutional head concludes that an inmate will not, by reoffending, present an undue risk to society during an authorized absence and that it is desirable for the inmate to be absent from a penitentiary, under escort by a staff member or another person authorized by the institutional head, for medical, administrative, community service, family contact, personal development for rehabilitative purposes or companionate reasons, including parental responsibilities. An inmate may be absent for an unlimited period for medical leave. For reasons other than medical, the leave period is not to exceed five days or, with the approval of the Commissioner of Corrections, an ETA may exceed five days but not fifteen days. Any offender who is on detention status, having been detained past his S.R. period, is not eligible for ETA's or UTA's for any purpose except medical treatment.¹⁸

b) UTAs

Most offenders become eligible for UTAs at the greater of one-half the full parole eligibility, or six months.¹⁹ NPB has the authority to authorize or cancel UTAs for any offenders serving a sentence of life-minimum, indeterminate sentence, or any sentence set out in Schedule I or II to the CCRA.²⁰ The CCRA brought considerable latitude and flexibility to this form of release. UTAs for medical purposes may be authorized at any time to an offender whose life or health is in danger.²¹

Generally, there are three types of UTAs. The first is a regular temporary absence, granted for purposes including medical, administrative, family contact, compassionate, or parental responsibility release. This will include maintaining and strengthening family ties, attending to an urgent family matter and maintaining parent-child relationships.²²

The second type of UTA is for personal development or community service, such as an offender specifically working for a non-profit institution or organization within the community, attending to specific treatment or rehabilitative activities, and/or participating in native cultural or spiritual ceremonies, and the like. In these instances, an offender may be released on an UTA for up to 15 days in duration, with at least 7 days between leaves.²³

18. CCRA, s. 130(5).

19. CCRA, s. 115(1)(c).

20. CCRA, s. 107(1).

21. CCRA, s. 115(2).

22. Maximum security inmates are not eligible for these UTAs; a medium security offender may be released for 48 hours per month; and, a minimum security offender may be released for 72 hours per month.

23. Maximum security offenders are not eligible; medium offenders may take 3 of these releases per year and minimum offenders may take 4 releases in a year.

The third type of UTA is for specific personal development programming and may be taken for up to 60 days and may be renewed. This is for specific programming initiatives such as residential substance abuse treatment, sex offender treatment programs, educational programs, technical training or family violence counselling. Again, maximum security offenders are not eligible.

The risk criteria for approving UTAs is found at section 160 of the CCRA. The Board may authorize a UTA where, in its opinion, the offender will not reoffend during the absence. In making this decision, the Board considers many of the same documents and information as in a day or full parole application. The Board must be satisfied that the purpose of the absence will advance the offender's Correctional Treatment Plan, and that the UTA provides sufficient structure, control and support.

As a personal observation, these extended UTAs are rarely, if ever, applied for. This appears to be attributable to several factors : institutional concerns continue to exist about offenders who are released into the community for extended periods of time being pressured to "pack" drugs or contraband in and out of the institutions; most offenders are unaware of these releases; and case management officers within the institutions, with significantly increased case loads, prefer not to "write up" extended UTAs given the amount of time and detail of release planning which will be required.

B. Timing

While eligibility periods for release have been discussed above, two aspects involving questions of timing have not been entirely resolved by the CCRA but will likely be cured in subsequent legislation.

The first is the anomaly of sentence calculation provisions which allow some offenders to be immediately eligible for parole after being sentenced for new offenses committed while on conditional release. Under the CCRA and its predecessor, section 14 of the *Parole Act*,²⁴ if an inmate serving a sentence is sentenced to an additional term of imprisonment, the new term of imprisonment is added to the existing term and is deemed to constitute one continuous sentence.²⁵ This often has the unintended consequence of an offender, who was released on parole and who reoffends (and receives a consecutive sentence) to be effectively eligible for parole even before he begins serving his new sentence.²⁶ It has been argued that this completely frustrates the intention of the sentencing

24. *Supra* note 6.

25. CCRA, s. 139.

26. For example, assuming for the sake of illustration that an offender is sentenced on January 1, 1993 to three years and is released on some form of conditional release on January 1, 1994 and reoffends, he is sentenced to three years consecutive on January 1, 1995. Instead of the sentence being regarded as a "new" sentence, it is merged with the existing three year sentence for a total sentence of six years from January 1, 1993. Because parole eligibility for a six year sentence is 2 years, on the day upon which he is sentenced, January

judge and judges should take this sentence merging effect into account when passing sentence.²⁷ However, some observers have noted that it is important to remember that the issue of parole is a speculative one and "no one can know whether or not a prisoner will be released in fact."²⁸

In any event Bill C-45, which is presently before the House of Commons, proposes to amend the sentence calculation provisions of the CCRA to provide that, offenders who are sentenced for new offenses committed while on conditional release, will be automatically returned to custody, and that an offender who receives an additional consecutive sentence must serve at least one-third of the new sentence before being eligible for parole. Arguably, both the principles of sentencing and conditional release are well served by this much welcomed clarification of the sentence calculation provisions.

The second timing concern is the requirement that every offender, who has reached his parole eligibility date, be entitled to at least one hearing per year for full parole.²⁹ In the case of long-term, high risk offenders who need a significant amount of time directed toward rehabilitation, therapy and treatment goals, it is not unreasonable from a risk reduction and administrative perspective that these offenders be reviewed every two years. It is being proposed that a two year review will be included in a later Omnibus Bill on Corrections which is presently in the preparatory stages.

1, 1995, the offender is already eligible for full parole and is past his day parole eligibility date.

27. Gertz (1983), 57 N.S.R. (2nd) 279 (CA) and Bourke (1982). Unreported, 8 W.C.B. 149 (N.W.T.T.C.).

28. C. Ruby, *Sentencing*, 3d ed. (Toronto : Butterworths, 1987) at 225.

29. CCRA, s. 123 and *Corrections and Conditional Release Regulations*, DORS/92-620, C. Gaz. 1992. II. 4181, s. 158 .

C. Victims and Observers

1. Victims

Although not required to do so under the *Parole Act*,³⁰ for many years the Board has accepted victim statements and has advised victims of certain facts regarding an offender's case, as part of risk assessment. The CCRA codified this practise by directly referring to the role of victims, including requiring NPB to take into account all relevant information obtained from victims³¹ and a requirement that information shall be disclosed to a victim regarding generalities about the offender's sentence, conviction, commencement and relevant eligibility dates, upon the request of the victim. Further, the Chairperson of NPB may disclose to the victim, at the victim's request, information related to hearing dates, location of the institution in which the sentence is being served, the date when releases are to take effect, conditions on release, the destination of the offender, whether the offender is still in custody and whether the offender has appealed a decision of the Board.³²

2. Observers

Section 140 of the CCRA provides that observers are permitted to attend NPB conditional release hearings. The policy consideration for this is to further public understanding of conditional release and to increase the openness of Board proceedings and its accountability. NPB is required to permit a person who applies, in writing, to attend as an observer at a hearing, subject to conditions which the Board considers to be appropriate and after taking into account the views of the offender. In considering applications to observe at a hearing, the Board takes into account several factors listed at section 140(4) (a)-(d) which includes the likelihood of disruption or adverse effect on the hearing, protection of third parties, effective reintegration of the offender, and institutional security and good order. Observers may be present to watch the hearing as it proceeds, but are not permitted to participate in any way in the hearing or be present when the Board members deliberate.

Speaking from personal experience observers are still relatively uncommon, in the Prairie region, at all but a small number of high profile or particularly notorious cases. However, in Ontario and other regions there is increasing attendance at hearings by observers, including members of the media, victims, and in some cases, victim's rights organizations.

30. *Supra* note 6.

31. CCRA, s. 101(b).

32. CCRA, s. 142.

In a recent case before the Federal Court, Trial Division, Mr. Justice McKeown held that the presence at a parole hearing of the director of a national victims rights organization did not raise a reasonable apprehension of bias, as the offender had alleged that the only purpose for such a person to attend her hearing would be to pressure the members into revoking her release. Also, the court held that, while the victims rights advocate regularly met with executive members of NPB, this did not violate the duty to act fairly, as section 111(b) of the CCRA mandates NPB to communicate its policies to offenders, victims and groups with an interest in parole, as well as the general public, and that none of the executive members of the Board were sitting on the applicant's parole hearing in question.³³

II. THE CCRA AND THE ROLE OF JUDGES

A. Judges' Sentencing Comments

While NPB has long taken cognizance of the comments of a sentencing judge in an offender's case, the CCRA now expressly recognizes the significance of information from an offender's trial and sentencing hearing :

101. The principles that should guide the Board and the provincial parole boards in achieving the purpose of conditional release are :

- (a) That the protection of society be the paramount consideration in the determination of any case;*
- (b) That parole boards take into consideration all available information that is relevant to a case, **including the stated reasons and the recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and offenders.** [...] (emphasis added)*

It is important for this assessment of risk that Board members have an opportunity to review the sentencing comments of the judge. In applying the principles of sentencing, a judge obviously accounts for certain factors in mitigation or aggravation of sentence. Also, it is not uncommon for a judge, when passing sentence, to observe certain characteristics of the offender, the offense, or the victim which renders certain of the sentencing principles as fundamentally important, i.e. denunciation for particular brutality and degradation directed toward a vulnerable victim.

Similarly, the particular circumstances of an offense might have moved the court to sentence with the intention that the offender should participate in particular types of

33. *Fehr v. National Parole Board* (April 10, 1995), T-149-94.

treatment, programming or therapy in order to protect the community when the offender's sentence eventually expires. For example, in all too few sexual offenses, a judge will specify that the offender's behaviour (and the resulting risk to members of the community) was sufficiently serious that the offender should not be considered for release until he has undergone detailed assessment and treatment at professional facilities such as the Regional Psychiatric Centre ("RPC") or the Phoenix Program at Alberta Hospital, Edmonton.

Similarly, a judge's comments regarding the effect of the offender's behaviour and of the offense on the community is a helpful starting point for emphasizing that the offender come to terms with a full understanding of his offense, its gravity, the effects on his victim and the need to understand the factors which lead to his offending behaviour. While this will be required in any event, it ensures that a continuum exists between sentencing, prison, professional treatment, and eventually consideration for conditional release. In all too many cases, Board members see a definite break in the chain between accounts of initial offense in the police reports, the court transcripts which are silent on the details of the offense which affected the judge's sentencing, and initial Penitentiary Placement Report on file, where the offender has had an opportunity to alter his version of the offense in an effort to minimize its seriousness and effects. When a judge makes clear the rationale for the sentence, based on the factual circumstances of the offense, an offender can be confronted with the need to understand and accept responsibility for his offense at an earlier stage and throughout his sentence.

B. One-half Parole Eligibility

Section 203 of the CCRA resulted in a consequential amendment to the *Criminal Code* by adding the section 741.2, which enables the court, in certain cases, to order that :

"The portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less."

This order, at the discretion of the sentencing judge, may be made only in cases where an offender is sentenced to a term of two years or more for offenses set out in Schedule I and II of CCRA which are prosecuted by way of indictment. Schedule I includes offenses against the person and certain serious property offenses such as arson. Schedule II includes serious drug offenses and offenses related to the proceeds of drug trafficking.

This amendment to the *Criminal Code* expressly recognizes that, having regard to the circumstances of the offenses and the character and circumstances of the offender, the one-half eligibility is an expression of society's denunciation of the offenses or required in order to fulfil the object of specific or general deterrence.

In a brief canvass of recent cases, the courts have generally reserved the one-half eligibility for either offenses or offenders requiring strong denunciation. For example, the courts appear to consider the imposition of section 741.2 of the *Criminal Code* in cases where offenders in the community on conditional release commit new and serious

offenses.³⁴ However, in the case of a young accused convicted of a brutal aggravated assault, with a poor youth record and on probation when he deliberately ran down a police officer with his vehicle, the court did not impose one half parole eligibility because of the "possibility that the accused might make an honest attempt [at] rehabilitation" while serving his sentence.³⁵

In a recent Alberta Queen's Bench case, Mr. Justice McDonald elaborated on the effect of section 741.2 of the *Criminal Code* as being a decision which must be clearly justified by the circumstances, but that the power to make such an order should not be circumscribed as being only an exceptional measure. He held that section 741.2 requires a departure from the sentencing principles of rehabilitation and the protection of society, in favour of further incapacitating the offender for longer period of time than he might otherwise be incarcerated for by NPB. Further, a sentencing judge is not required to justify the making of an order by finding special circumstances or particularly aggravating factors but that a section 741.2 order would be made as an expression of society's denunciation of the offense and to achieve the objective of specific deterrence, based on circumstances surrounding the offense and the character of the accused.³⁶

III. SENTENCING PRINCIPLES AND PAROLE : INCONSISTENT?

The court's findings of fact and law, and the sentence imposed, are the starting points which guide the National Parole Board. Whether judges are to specifically take into account the possibility of conditional release (or at least to say publicly that they do) is an issue fraught with considerable controversy. As an observation, the courts more often than not refer, in passing sentence, to the fact that assuming the accused takes steps to rehabilitate himself and to avail himself of treatment, the National Parole Board will make the appropriate decision on conditional release when it considers it appropriate. This is a similar approach to that followed by the Ontario Court of Appeal in *R. v. Robinson*.³⁷

There is scope for a sentencing judge to ensure that principles of sentencing are adhered to in situations where even the judge may feel constrained. For example, in applying the totality principle, which comes under some criticism as the criminal's "volume discount", a judge may clearly state in his or her sentencing comments that the offender's conduct was sufficiently reprehensible that parole should not be considered, for the protection of the community, until certain specific issues are addressed or programs

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34. *R. v. Turko* (April 15, 1994), No. 9303-1752-C2 (Q.B.) : Paroled bank robber committing potentially violent bank robbery. See also : *R. v. Smith* (1995), 37 C.R. (4th) 360 (Ont. Gen. Div.) : s. 741.2 not invoked, notwithstanding violent assault on an elderly woman, because accused had not been a parole violater in the past and there was no evidence that he was an ongoing danger to the public.
35. *R. v. Beaudry*, (June 27, 1995), DOC. Edmonton 40411563-P1-0101, Marshall Prov. J.
36. *R. v. Doerksen*, (June 28, 1995), DOC. Edmonton 9403-3435-C5 (Q.B.).
37. *R. v. Robinson* (1974), 19 C.C.C. (2nd) 193.

taken. While the Board will assess risk on a number of bases, as mentioned, the sentencing comments of the judge often carry particular weight. Also, as discussed above, a judge may invoke the one-half parole eligibility under section 741.2 of the *Criminal Code*, assuming that the offenders qualify.

From a theoretical perspective, it is important that judges and parole boards acknowledge their different roles. Without entering the debate over the relative merits of the moral or utilitarian schools, clearly judicially imposed sentences are designed to deter, both generally and specifically, and may include denunciation. While this does not obviate an emphasis on rehabilitation and reform, the court must be careful to balance the principles being applied.³⁸ On the other hand, as an administrative tribunal deriving its jurisdiction from statute, NPB must ensure that protection of society is paramount, but its express purpose is to facilitate the "rehabilitation of offenders and their reintegration into the community as law-abiding citizens." The courts and parole boards would do well to ensure that sentencing principles and the policies under parole legislation are applied with an acceptance of their conceptual distinctiveness.

Another concern which has been raised in regard to parole is the independence of the courts from the executive. This was discussed as early as 1950 in the case of *Switlishoff*, where the British Columbia Court of Appeal cautioned that the courts should not attempt to transfer their judicial functions to the Minister in matters of parole :

*The Minister has important functions to perform, but he is entitled first to be satisfied that the Judges have exhausted their functions, and are not simply avoiding a critical or distressing decision to pass it on to him.*³⁹

It can be safely assumed that tension will continue to exist about whether judges can or should completely disregard the parole system in passing sentence, and whether certain judges will continue to view parole as frustrating judicial intent. It is the writer's submission that parole is, or ought to be, *part* of the intent of sentencing. Judicial sentencing intent must surely have an operational aspect as well as a theoretical aspect. The operational reality of sentencing must contemplate the reality of parole, just as it should surely contemplate how jails work, the types of institutions in which an offender will be housed, the types of programmes available, and what these institutions and programs do to and for an inmate. Parole is not a hidden or unknown process and, with greater judicial understanding of its procedures and requirements, judicial intent in sentencing should not be frustrated by a known entity.

IV. PUBLIC PERCEPTIONS OF PAROLE

To reiterate, the National Parole Board is guided by six principles, which are found in section 101 of the CCRA.

38. In *R. v. Sack* (1994), 153 N.B.R. (2nd) 58, the Court of Appeal held that the trial Judge had erred in imposing a penitentiary sentence for the express purposes of treatment only.

39. *R. v. Switlishoff* (1950), 97 C.C.C. 132 at 139 (B.C.C.A.).

The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

- (a) that the protection of society be the paramount consideration in the determination of any case;*
- (b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and the recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and offenders;*
- (c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;*
- (d) that parole boards make the least restrictive determination consistent with the protection of society;*
- (e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and*
- (f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.*

It is difficult to assess, with any objective measurement, whether parole is working or falling short. Arguably, most public perceptions of parole are shaped by observers outside of NPB and the immediate corrections aegis. Suffice it to say that the public tends to react strongly to particularly tragic or sensational cases which involve individuals who are either on some form of conditional release or whose sentences have recently expired. Informed by the media and observers, often within the political forum, the public dialogue is all too often characterized by a reactive outcry during the media coverage of particular controversy. What is different recently, however, is that there has been a growing public sentiment — obviously beyond the scope of this paper — that certain high-risk offenders should be detained past the expiry of their sentence on some form of retrospective dangerous offender designation, or some type of state-imposed continuing supervision past their warrant expiry.

The statistics involving conditional release are well established and — to the critics — still not convincing. Approximately three-quarters ($\frac{3}{4}$) of offenders on full parole successfully complete their release. During the ten year period, ending in March 1988, 17,444 offenders were released on full parole. In 12,841 of these cases (73.6%) the offenders had successfully completed their term of supervision, 26.4% were revoked, of

whom 12.1% were revoked for committing a new offense (2,110 cases) and 14.3% were revoked for violating conditions of release (2,493 cases).

During the same period there were 29,458 offenders released on Statutory Release. Of these cases, 46% were revoked, 29.3% for violating conditions (8,627 cases) and 17.1% were revoked for committing new offenses (5,029 cases).⁴⁰ Clearly, it ought to be beyond dispute that high risk offenders who continue to pose a continuing danger to the community, should not be released. However, for the number of offenders who can be released into the community and whose risk is manageable, the benefit of gradual and supervised release (and the costs) would suggest that conditional release be supported.⁴¹

Can NPD Do a Better Job?

As with any organization committed to improvement, the answer should be "yes". Several areas have been identified over the years by the Board as being critical to good decision making. I will briefly address three. First, and as mentioned earlier, NPB depends to a great extent on information sent to it from CSC, police agencies, the courts, and from a variety of sources. As with any informed decision, the Board's ability to assess risk is only as good as the information which it receives. While this is not an attempt to relieve the Board of responsibility for its decisions, as a proper determination of risk is the responsibility of each Board member, the extent to which the Board is in full possession of timely and accurate information is critical. This continues to be a high priority for the Board and the agencies with which it works.

Second, the Board has addressed for many years, and continues to address, the importance of appropriate training of its members in risk assessment and the conduct of administrative hearings. The Board, in reply to several concerns raised, has indicated that training and professional development are high priorities.

Third, the Board and many of the other participants in the criminal justice system are constantly re-evaluating the way we determine risk, the criteria which are applied and the assumptions underlying correctional treatment and incarceration. For example, the Board often receives progress summaries from the institutional case management teams, with recommendations to grant release to offenders, particularly long-term and high risk offenders nearing the end of their sentences because "doing something" (granting some form of release) is better than "doing nothing" (leaving the offender in jail). While this is not necessarily always an illogical proposition, it is frequently advanced by the professionals upon whose expertise the Board is asked to rely. Other assumptions abound and must be carefully examined, such as : being involved in treatment will necessarily

40. *Evaluation, Audit & Statistics*, NPB 1993.

41. Average annual costs of supervising an offender on parole or statutory release is approximately \$9,422.00, significantly less than the average annual cost of incarcerating an adult offender in a federal institution, which is approximately \$48,000.00 : *1994 - 1995 estimates, Part III, Expenditure Plan of CSC*.

reduce risk; treatment changes behaviour; and, offenders will persevere with treatment (and will derive benefit from it) in the community when they have not done so in the institution.

CONCLUSION

The public perception of parole — often shaped around highly negative and sensational incidents — is moving the conditional release decision making process into an increased level of public accountability. In the past 10-15 years, the application of the duty to act fairly has shifted parole from written decisions made without interviewing inmates to full panel hearings, albeit private and beyond public observance. Even with offenders present, the community had no way of "buying into" the process. Now, with public observers permitted at hearings, a decision registry which can be publicly accessed, and through an increasing focus on accountability for decisions, the government, National Parole Board and CSC are responding.

True ownership of conditional release decisions is ultimately a community responsibility. Parole is made more effective in the context of a broader public understanding of how decisions are arrived at, how risk assessment is undertaken, and why certain offenders return to the community. Crime prevention is predicated on groups of individuals taking some responsibility to ensure that their communities are safe. So it is with corrections. For nearly 100 years, the Canadian community has accepted, as a policy choice, that certain offenders should be released before the expiration of their sentences if they are rehabilitated. It is more effective from the perspective of risk reduction that communities have in place broadly-based resources and supports, as well as the necessary monitoring and enforcement, to manage risk and prevent crime.

APPENDIX

Corrections and Conditional Release Act, R.S.C. 1985, c. C-44.6.

SCHEDULE

1. An offence under any of the following provisions of the *Criminal Code*
 - (a) paragraph 81(2)(a) (causing injury with intent);
 - (b) section 85 (use of firearm during commission of offence);
 - (c) subsection 86(1) (pointing a firearm);
 - section 144 (prison breach);
 - (e) section 151 (sexual interference);
 - (f) section 152 (invitation to sexual touching);
 - (g) section 153 (sexual exploitation);
 - (h) section 155 (incest);
 - (i) section 159 (anal intercourse);
 - (j) section 160 (bestiality, compelling, in presence of or by child);
 - (k) section 170 (parent or guardian procuring sexual activity by child);
 - (l) section 171 (householder permitting sexual activity by or in presence of child);
 - (m) section 172 (corrupting children);
 - (n) subsection 212(2) (living off the avails of prostitutes by a child);
 - (o) subsection 212(4) (obtaining sexual services of a child);
 - (p) section 236 (manslaughter);
 - (q) section 239 (attempt to commit murder);
 - (r) section 244 (causing bodily harm with intent);
 - (s) section 246 (overcoming resistance to commission of offence);
 - (t) section 266 (assault);
 - (u) section 267 (assault with a weapon causing bodily harm);
 - (v) section 268 (aggravated assault);
 - (w) section 269 (unlawfully causing bodily harm);
 - (x) section 270 (assaulting a peace officer);
 - (y) section 271 (sexual assault);
 - (z) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
 - (z.1) section 273 (aggravated sexual assault);
 - (z.2) section 279 (kidnapping);
 - (z.3) section 344 (robbery);
 - (z.4) section 433 (arson - disregard for human life);
 - (z.5) section 434.1 (arson - own property);
 - (z.6) section 436 (arson by negligence); and
 - (z.7) paragraph 465(1)(a) (conspiracy to commit murder).

ANNEXE 1

1. Une infraction prévue par l'une des dispositions suivantes du *Code criminel* :
 - a) alinéa 81(2)(a) (causer intentionnellement des blessures);
 - b) article 85 (usage d'une arme à feu lors de la perpétration d'une infraction);
 - c) paragraphe 86(1) (braquer une arme à feu);
 - d) article 144 (bris de prison);
 - e) article 151 (contacts sexuels);
 - f) article 152 (incitation à des contacts sexuels);
 - g) article 153 (personnes en situation d'autorité);
 - h) article 155 (inceste);
 - i) article 159 (relations sexuelles anales);
 - j) article 160 (bestialité, usage de force, en présence d'un enfant ou incitation de ceux-ci);
 - k) article 170 (père, mère ou tuteur qui sert d'entremetteur);
 - l) article 171 (maître de maison qui permet, à des enfants ou en leur présence, des actes sexuels interdits);
 - m) article 172 (corruption d'enfants);
 - n) paragraphe 212(2) (vivre des produits de la prostitution d'un enfant);
 - o) paragraphe 212(4) (obtenir les services sexuels d'un enfant);
 - p) article 236 (homicide involontaire coupable);
 - q) article 239 (tentative de meurtre);
 - r) article 244 (fait de causer intentionnellement des lésions corporelles);
 - s) article 246 (fait de vaincre la résistance à la perpétration d'une infraction);
 - t) article 266 (voies de fait);
 - u) article 267 (agression armée ou infliction de lésions corporelles);
 - v) article 268 (voies de fait graves);
 - w) article 269 (infliction illégale de lésions corporelles);
 - x) article 270 (voies de fait contre un agent de la paix);
 - y) article 271 (agression sexuelle);
 - z) article 272 (agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles);
 - z.1) article 273 (agression sexuelle grave);
 - z.2) article 279 (enlèvement, séquestration);
 - z.3) article 344 (vol qualifié);
 - z.4) article 433 (incendie criminel : danger pour la vie humaine);
 - z.5) article 434.1 (incendie criminel : bien propres);
 - z.6) article 436 (incendie criminel par négligence);
 - z.7) alinéa 465(1)(a) (complot en vue de commettre un meurtre).

2. An offence under any of the following provisions of the *Criminal Code*, as they read immediately before July 1, 1990 :

- (a) section 433 (arson);
- (b) section 434 (setting fire to other substance); and
- (c) section 436 (setting fire by negligence).

3. An offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 4, 1983 :

- (a) section 144 (rape);
- (b) section 145 (attempt to commit rape);
- (c) section 149 (indecent assault on female);
- (d) section 156 (indecent assault on male);
- (e) section 245 (common assault); and
- (f) section 246 (assault with intent).

SCHEDULE II

(Subsections 107(1) and 125(1) and sections 129, 130 and 132)

1. An offence under any of the following provisions of the *Narcotic Control Act* :

- (a) section 4 (trafficking);
- (b) section 5 (importing and exporting);
- (c) section 6 (cultivation);
- (d) section 19.1 (possession of property obtained by certain offences); and
- (e) section 19(2) (laundering proceeds of certain offences).

2. An offence under any of the following provisions of the *Food and Drugs Act* :

- (a) section 39 (trafficking in controlled drug);
- (b) section 44.2 (possession of property obtained by trafficking in controlled drug);
- (c) section 44.3 (laundering proceeds of trafficking in controlled drug);
- (d) section 48 (trafficking in restricted drug);
- (e) section 50.2 (possession of property obtained by trafficking in restricted drug); and
- (f) section 50.3 (laundering proceeds of trafficking in restricted drug);

2. Une infraction prévue par l'une des dispositions suivantes du *Code criminel*, dans leur version antérieure au 1^{er} juillet 1990 :

- a) article 433 (incendie criminel);
- b) article 434 (incendie : dommages matériels);
- c) article 436 (incendie par négligence).

3. Une infraction prévue par l'une des dispositions suivantes du *Code criminel*, chapitre C-34 des Statuts révisés du Canada de 1970, dans leur version antérieure au 4 janvier 1983 :

- a) article 144 (viol);
- b) article 145 (tentative de viol);
- c) article 149 (attentat à la pudeur d'une personne du sexe féminin);
- d) article 156 (attentat à la pudeur d'une personne du sexe masculin);
- e) article 245 (voies de fait ou attaque);
- f) article 246 (voies de fait avec intention).

ANNEXE II

(Paragaphes 107(1) et 125(1) et articles 129, 130 et 132)

1. Une infraction prévue par l'une des dispositions suivantes de la *Loi sur les stupéfiants* :

- a) article 4 (trafic de stupéfiant);
- b) article 5 (importation et exportation);
- c) article 6 (culture);
- d) article 19.1 (possession de biens obtenus par la perpétration d'une infraction);
- e) article 19.2 (recyclage des produits de la criminalité).

2. Une infraction prévue par l'une des dispositions suivantes de la *Loi sur les aliments et drogues* :

- a) article 39 (trafic de drogues contrôlées);
- b) article 44.2 (possession de biens obtenus par la perpétration d'une infraction);
- c) article 44.3 (recyclage de produits de la criminalité);
- d) article 48 (trafic de drogues d'usage restreint);
- e) article 50.2 (possession de biens obtenus par la perpétration d'une infraction);
- f) article 50.3 (recyclage des produits de la criminalité).