Public Safety and Emergency Preparedness Canada
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SENTENCE CALCULATION:

A Handbook for Judges, Lawyers and Correctional Officials

Third Edition

Canada

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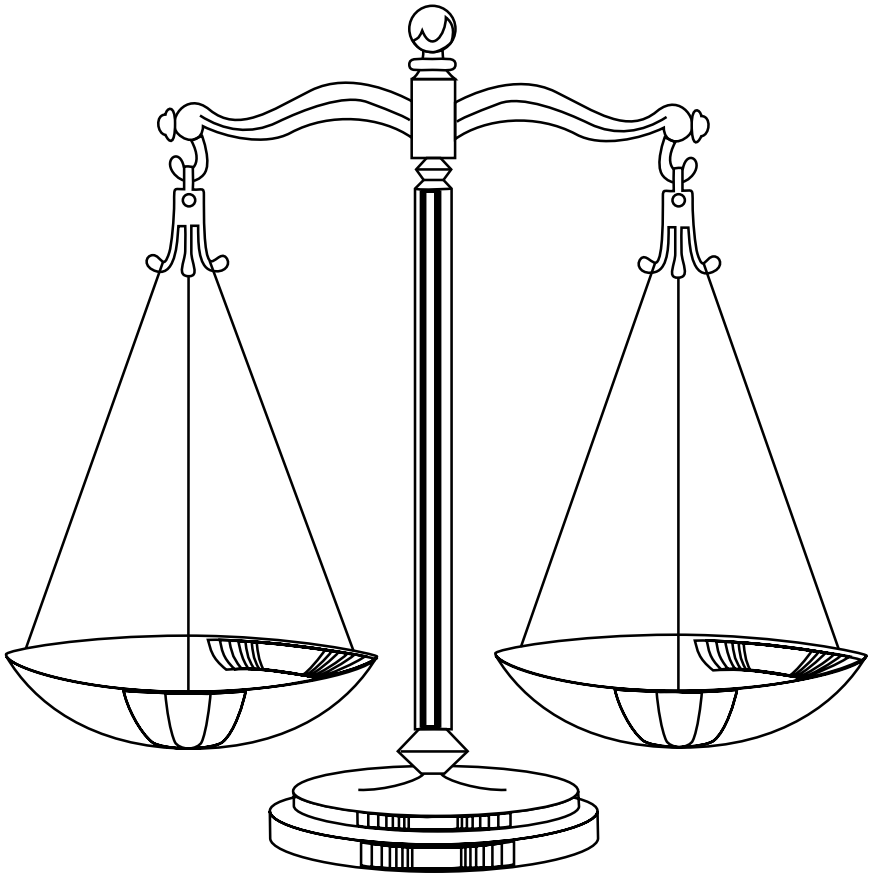

Third Edition

PS4-17/2005E
0-662-39488-7

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PREFACE

Many regard the legislative provisions for sentence calculation of penitentiary sentences to be complex. This comes as no surprise given that the majority of federal offenders are serving multiple sentences, with some receiving new sentences while they are under conditional release. To address this reality, federal legislation must be sufficiently sophisticated to deal equitably with all possible combinations and permutations of sentences in a manner consistent with the Court's intent.

This is no simple and straightforward matter to most in the criminal justice system. How does one determine the full duration of a combination of sentences when some are consecutive and some concurrent, of varying lengths and imposed on different dates? How are conditional release eligibility dates established in these cases? When should the offender's eligibility for parole be delayed? And when should the offender be automatically returned to custody as a result of having received a new sentence?

The answers to these and other questions may be found in this handbook. It is intended to provide a reference document for judges and Crown Attorneys as well as other criminal justice personnel who wish to broaden their knowledge of the administration and calculation of penitentiary sentences. Through step-by-step explanations of sentence calculation methods and practical examples, the handbook attempts to clarify the effect of sentencing in individual cases.

It should be noted that principles of sentencing and how and when various sentences should be imposed are beyond the scope of this handbook.

Sections A – E of the handbook address the legislative authority and principles governing sentence calculation, including conditional release eligibilities applicable to penitentiary sentences which come under federal jurisdiction. Legislative changes to the *Corrections and Conditional Release Act* brought about by the passage of Bill C-45 and Bill C-55 are explained. The conditional sentence scheme, introduced by Bill C-41, is also described in these sections.

This third edition of the handbook includes the effect of sentencing measures introduced in 2001 by Bill C-36, the *Anti-Terrorism Act*, and in 2002 by Bill C-24, which amended the *Criminal Code* and other Acts to fight organized crime. As well, Section F has been added to provide information on Bill C-16, the *Sex Offender Information Registration Act*. Section G has been added to provide information on sentence calculation issues related to the *Youth Criminal Justice Act*.

To promote effectiveness and efficiency in sentence management, Section H describes the most common "trouble spots" encountered within the federal correctional system with a view to encouraging practical solutions that can be realized through the assistance of the judiciary.

A selected bibliography of the relevant case law relating to the sentence calculation principles described in this handbook is provided in Appendix A.

Should you have further questions or wish to obtain any additional information about sentence calculation, Appendix B provides a list of offices that may be contacted in each region.

A. SENTENCING OPTIONS

1) The Rule: Two Years or More vs. Two Years Less a Day

The "two-year rule" refers to the general jurisdictional split between sentences of two years or more and sentences less than two years. Sentences of two years or more are served in federal penitentiaries and are administered pursuant to the provisions of the federal *Corrections and Conditional Release Act*. Sentences less than two years are served in provincial prisons. The federal *Prisons and Reformatories Act,* certain provisions of the *Corrections and Conditional Release Act* and relevant supporting provincial legislation apply in these provincial cases.

2) The Authority for the "Two Year Rule"

Section 743.1 of the *Criminal Code* provides the authority for the "two-year rule." An offender falls under federal jurisdiction and serves his or her sentence in a federal penitentiary in the following situations:

- if sentenced to life;
- if sentenced to an indeterminate sentence;
- if sentenced to a term of imprisonment for two years or more;
- if sentenced to two or more terms of less than two years each that are to be served one after the other and that total two years or more;
- if while serving a penitentiary sentence, is sentenced to a term of less than two years; or
- if while serving a sentence elsewhere than in a penitentiary becomes subject to two or more terms of imprisonment, which are to be served one after the other and each of which is for less than two years, the offender shall be transferred to a penitentiary if the total of the unexpired portions amounts to two years or more.[1]

When these criteria are not met, an offender serves his or her sentence in a provincial prison.[2]

[1] Sections 743.1 and 753 of *Criminal Code* (CC).
[2] Subsection 743.1(3) of CC.

It is also worth noting that a sentencing judge has specific authority to direct that the sentence be served in a federal penitentiary regardless of the offender's sentence length, when the offender has been convicted of escape, unlawfully at large, breach of prison, etc.[3]

Moreover, an offender found to be a long-term offender who receives a new sentence of imprisonment while under a long-term supervision order must serve the sentence, regardless of its length, in penitentiary.[4]

Examples of a Penitentiary Sentence:

- person receives a life sentence for second degree murder
- person is declared a Dangerous Offender and receives an indeterminate sentence
- person is found to be a long-term offender and receives a new sentence while under a long-term supervision order
- person is sentenced to a single term of imprisonment for 6 years
- person receives two terms of imprisonment on the same day, one for 18 months and the other for 12 months consecutive to the first term (total is 2 years, 6 months)
- person is already serving a 3 year sentence and receives a new 6 month consecutive sentence
- person has served 6 months of a 1 year sentence and receives two new sentences on the same day, 1 year consecutive to the current sentence, and 1 year consecutive to the new sentence (total of unexpired portions is 2 years, 6 months)

Examples of a Prison Sentence:

- person receives a term of imprisonment of 18 months
- person receives 3 terms of imprisonment to be served consecutively to each other, one term for 3 months, one for 6 months and the other for 4 months (totaling 13 months)
- person has served 6 months of a 1 year sentence and receives three new terms to be served consecutively to each other: 2 months, 3 months and 1 year (total of unexpired portions is *23 months* – even though the total sentence is 2 years, 5 months, the offender remains incarcerated in a provincial prison)

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[3] Section 149 of CC.
[4] Subsection 743.1(3.1) of CC.

3) Applicable Legislation

a) For a Penitentiary Sentence – Two Years or More

The *Criminal Code* and the *Corrections and Conditional Release Act* provide authority for the administration and management of penitentiary sentences of federal offenders. The *Corrections and Conditional Release Act* includes provisions outlining sentence calculation and the eligibility criteria for the various forms of conditional release. Parole eligibilities for lifers and dangerous offenders are set out in the *Criminal Code*.

b) For a Prison Sentence – Up to Two Years Less a Day

Three federal statutes – the *Criminal Code*, the *Corrections and Conditional Release Act* and the *Prisons and Reformatories Act* – regulate aspects of provincial corrections and release of offenders from provincial prisons. In addition, each province has its own legislation for the management of its correctional facilities.

c) Federal/Provincial Exchange of Services Agreements

Notwithstanding the "two-year rule", some offenders are transferred from one jurisdiction to the other under federal/provincial agreements. Usually these agreements permit a federal offender to be incarcerated in a provincial prison for the sake of being close to family, social support networks, or programs. A provincial offender may also be transferred to a federal penitentiary for similar reasons as well as for security purposes (e.g., a provincial inmate is in need of a higher security environment which a federal penitentiary can provide).

Examples of Federal/Provincial Exchange of Services Agreements:

Example 1:

The federal government and a province execute an agreement to provide a minimum of 30 guaranteed provincial beds for the custody of federal male offenders in exchange for a federal capital contribution toward the construction of a provincial facility.

EXAMPLE 2:

The federal government and a province sign an agreement to authorize females sentenced in the province to more than two years to be housed in the province's correctional centres for the purpose of bringing them closer to their home communities.

EXAMPLE 3:

An agreement between the federal government and the Province of New Brunswick provides for the transfer to federal penitentiaries of sex offenders serving sentences between six months and two years less a day, and other offenders serving sentences between one year and two years less a day. The agreement is in force from 1998 to 2003 and may be extended by both parties for a further term of five years.

B. TIME CREDITED TOWARD SENTENCE

In general, a sentence commences when it is imposed[5] and federal authorities have no authority to reduce a sentence to reflect time spent in pre-sentence custody. Each day served in custody after sentencing or while under conditional release counts toward the sentence.[6] An exception to this principle lies in terms of parole eligibility for life sentences.[7] In these cases, the parole eligibility date is calculated from the date the offender was arrested and taken into custody. Any time spent unlawfully at large or on judicial interim release does not count as time served toward the sentence.[8] In this instance, the sentence resumes once the offender is returned to custody.

[5] Subsection 719(1) of CC.
[6] Subsections 128(1) and 135(10) of the *Corrections and Conditional Release Act* (CCRA).
[7] Section 746 of CC.
[8] This principle is reflected in subsection 719(2) of CC.

C. MULTIPLE SENTENCES

Many offenders are serving sentences for more than one offence. It is the calculation of multiple terms where sentence calculation is most complex.

1) Consecutive and Concurrent Sentences

Offenders convicted of multiple offences are subject to:

- consecutive sentences,
- concurrent sentences (which include sentences with clear direction from the Court that the sentence is to be served "concurrently" and when no direction is given by the Court, i.e., sentence is "silent"), or
- a combination of both.

Generally, consecutive sentences are separate sentences imposed for two or more offences that are to be served in succession. The combined length of the sentences is the sum of the individual sentences added together. Occasionally, a judge will impose a sentence consecutive to certain sentences. For example, a judge handing down a 12 month sentence and two 6 month sentences at the same sentencing hearing may order that all sentences shall be served consecutively to one another. Hence, the offender would serve a total sentence of 24 months. Or, the judge may order that the 12 month sentence shall be served consecutively to one of the 6 month sentences. Hence, the offender would serve a total sentence of 18 months, as the two 6 month sentences would be concurrent.

Concurrent sentences are sentences imposed for separate offences which run simultaneously. Where concurrent sentences are imposed at the same time, the total time served by the offender for all the offences is not more than the longest individual sentence imposed. A concurrent sentence begins from the date it is imposed. For example, a judge handing down two 12 month sentences at the same sentencing hearing may say nothing or specifically order that both sentences be served concurrently. In either case, the offender would serve a total sentence of 12 months. Moreover, if one of the sentences was 18 months and the other, 12 months, the total sentence would be 18 months, the duration of the lengthier sentence.

The Criminal Code implicitly provides that all sentences shall be served concurrently unless:[9]

- *legislation expressly requires that they are to be served consecutively (e.g., subsection 85(2) of the Criminal Code for offences involving the use of firearms, section 467.14 for criminal organization offences and section 83.26 for terrorism offences); or*
- *a sentencing judge directs that a sentence or sentences are to be served consecutively.*

Consecutive sentences can be imposed only under the following circumstances:

- the offender is already under a sentence of imprisonment;
- the offender is sentenced to imprisonment and to pay a fine with a term of imprisonment if the fine is defaulted; or
- the offender is convicted of more than one offence before the same court at the same sittings and multiple sentences of incarceration are imposed.[10]

The warrant of committal and the Criminal Code provide the basis for sentence managers to establish which sentences are to be served consecutively or concurrently with others. Consequently, it is extremely important that the warrant accurately reflect the relationship between all sentences. Failure to specify whether a particular sentence is consecutive or concurrent, and to which other sentences, may result in the sentence being treated as concurrent to one or more of the other sentences. This can result in a total sentence which is anomalous and inconsistent with the intentions of the sentencing judge.

[9] In the absence of explicit direction by the judge pursuant to subsection 718.3(4) that sentences are to be served consecutively, concurrent sentences are assumed. Subsection 719(1) stipulates that as a general rule, a sentence commences when imposed (i.e., at the time of sentencing rather than after the termination of a current sentence). In the case of *Paul v. R.* (1982), 67 C.C.C. (2d) 97, the Supreme Court of Canada held that "if in construing a statute there appears to be any reasonable ambiguity, it [is to] be resolved by giving the statute the meaning most favorable to the persons liable to penalty" (at C.C.C. 106).

[10] Subsection 718.3(4) of CC.

2) Merger of Sentences

Where an offender serving a custodial sentence becomes subject to another custodial sentence, the old and new sentences are combined and become one sentence. The merged sentence begins from the date of imposition of the first of the sentences to be served and ends on the date of expiration of the last of them to be served.[11] The consecutive or concurrent direction of the individual sentences is respected in determining the total merged sentence.

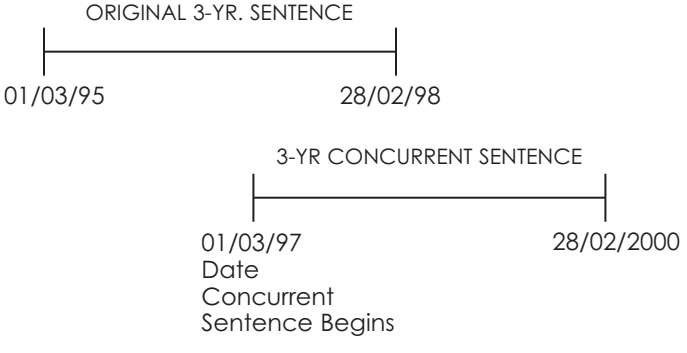
The merged sentence serves as the basis for calculating conditional release eligibility dates in the sentence, including parole eligibility, statutory release, and warrant expiry dates.

Examples of a Merged Sentence:

Example 1: Original Sentence Merged with a Concurrent Sentence (s. 139, CCRA)

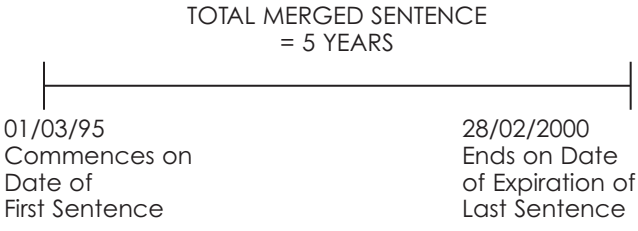
March 1, 1995 – Sentenced to three years, expiring on February 28, 1998 *(the sentence ends one day before the anniversary date)*

March 1, 1997 – Convicted of new offence and sentenced to three years concurrent to the first sentence



[11] Section 139 of CCRA.

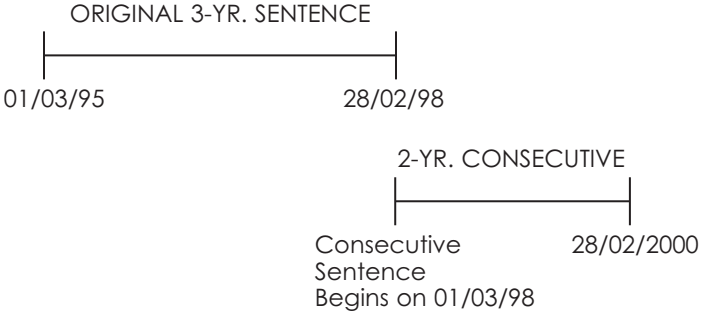
Offender is now serving a total merged sentence of five years beginning on March 1, 1995 and ending on February 28, 2000.



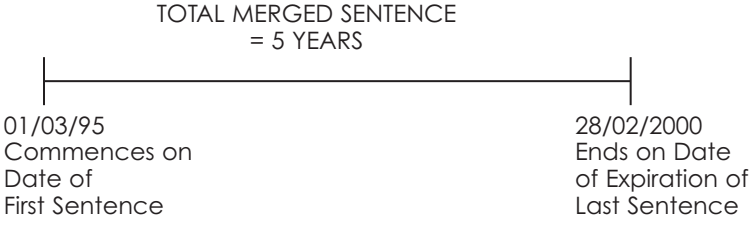
EXAMPLE 2: ORIGINAL SENTENCE MERGED WITH A CONSECUTIVE SENTENCE (S. 139, CCRA)

March 1, 1995 – Sentenced to three years, expiring on February 28, 1998

February 18, 1998 – Convicted of new offence and sentenced to two years consecutive to the first sentence (*new consecutive sentence begins the day after the first sentence expires*)

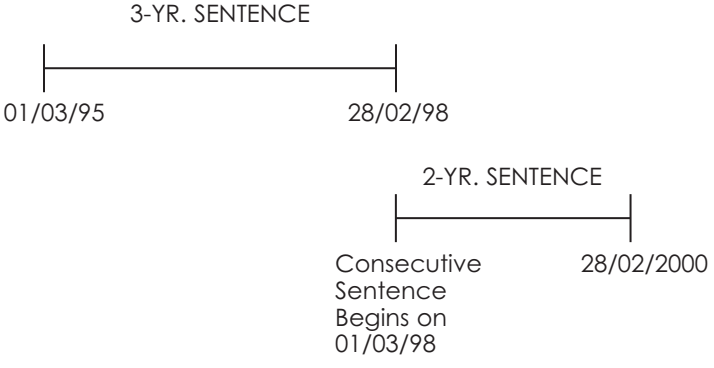


Offender is now serving a total merged sentence of five years beginning on March 1, 1995 and ending on February 28, 2000.

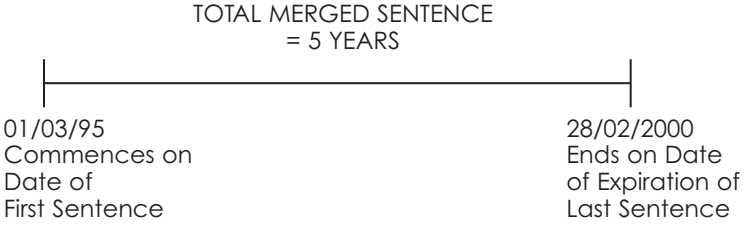


EXAMPLE 3: MERGING MORE THAN ONE SENTENCE (S.139, CCRA)

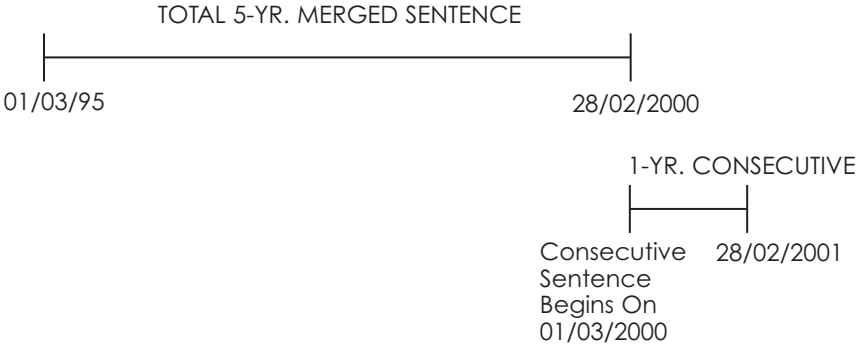
March 1, 1995 – Sentenced to three years, expiring on February 28, 1998 – Sentenced to two years consecutive to the sentence imposed on the same day



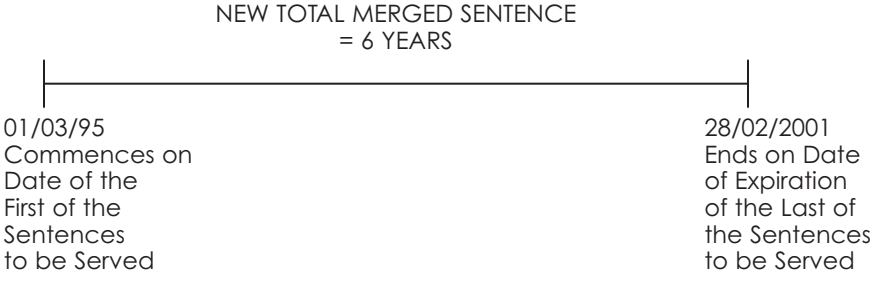
The offender is serving a total merged sentence of five years beginning on March 1, 1995 and ending on February 28, 2000.



On March 1, 1996, the offender receives a new one-year sentence "consecutive to the sentence now serving." Sentence managers interpret "the sentence now serving" to mean the total five-year merged sentence above as opposed to either of the individual sentences originally imposed on March 1, 1995.



As a result of the new consecutive sentence, the offender is now serving a total merged sentence of six years beginning on March 1, 1995 and ending on February 28, 2001.



D. FORMS OF CONDITIONAL RELEASE

Schedules I and II of the *Corrections and Conditional Release Act*

Before describing the various forms of conditional releases under which an offender may be released into the community and their corresponding eligibility dates, it is important to provide a brief explanation of the Schedules of the *Corrections and Conditional Release Act*.[12] The purpose of Schedules I and II, which respectively set out personal injury offences and serious drug offences, is threefold.

First, where an offender is sentenced to two years or more for an offence listed in either Schedule that is prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offences and the objective of specific or general deterrence so requires, set full parole eligibility at the lesser of one-half of the sentence or ten years.[13]

Second, offenders convicted of a Schedule I offence, or a Schedule II offence in respect of which an order has been made for parole eligibility at one-half of the sentence are automatically excluded from accelerated review (explained in F. 3) below) for day parole and full parole.

Third, the Correctional Service of Canada may refer to the National Parole Board for detention until expiry of sentence (explained in D. 1) f) below) the case of an offender convicted of a Schedule I or II offence.

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[12] A schedule of offences was first added to the *Parole Act* in 1986. In 1992, the *Corrections and Conditional Release Act*, which replaced the *Parole Act* and the *Penitentiary Act*, created Schedule I which listed personal injury offences and included sexual offences against children. It also created Schedule II to respond to concerns about serious drug offences and related organized crime. Bill C-45, which came into force in January 1996, expanded Schedule I to include impaired driving and criminal negligence causing bodily harm or death, criminal harassment, conspiracy to commit a serious drug offence and break, enter and commit a violent offence. Bill C-8 (*Controlled Drugs and Substances Act*), which came into force in May 1997, further expanded Schedule II to include trafficking, importing, production, possession of property obtained by certain offences and laundering proceeds of certain offences.

[13] Section 743.6 of the CC.

1) Types of Conditional Release

There are various forms of conditional release which serve the dual purpose of facilitating the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.[14] These forms of release are described below.

a) Work Release

A work release is a structured release program allowing a penitentiary inmate to work for a specified duration in the community on a paid or voluntary basis while under supervision. The purpose of the program is to promote safe gradual reintegration into society. The institutional head has authority to grant a work release under specified circumstances.[15]

Generally, the eligibility date for a work release is the same as that for an unescorted temporary absence, i.e. once the inmate has served one-sixth of the sentence or six months, whichever is later.[16]

b) Temporary Absence

Temporary absences include both occasional and intermittent releases intended to safely return inmates to the community on a temporary basis where appropriate.

Temporary absences are granted for one of the following reasons: medical, administrative, community service, family contact, personal development for rehabilitative purposes or compassionate reasons.[17]

An inmate may be granted one of two forms of temporary absence: an escorted temporary absence (ETA) or an unescorted temporary absence (UTA).

Escorted Temporary Absence (ETA)

An ETA is a short-term release to the community under escort. An inmate is eligible for such an absence at any time during the sentence. The duration of an ETA varies from an unlimited

[14] Section 100 of CCRA.
[15] Subsection 18(2) CCRA.
[16] Subsection 18(2) of CCRA.
[17] Paragraphs 17(1)(b) & 116(1)(b) of CCRA.

period for medical reasons to not more than 15 days for any other specified reason.[18] The institutional head may authorize an ETA.[19] In certain instances involving lifers, National Parole Board (NPB) approval is required.[20]

Unescorted Temporary Absence (UTA)

An UTA is a short-term release to the community without an escort.

Most inmates in the penitentiary system are eligible for UTAs at one-sixth of the sentence or six months into the sentence, whichever is later.[21] Exceptions are lifers (for first or second degree murder) and inmates serving indeterminate sentences who are eligible for UTAs three years before full parole eligibility date.[22] Offenders serving a life sentence for first or second degree murder committed while they were under the age of eighteen are eligible for an UTA when four-fifths of their full parole ineligibility period has been served.[23] Any inmate classified as maximum security is not eligible for an UTA.[24]

An UTA can be for an unlimited period for medical reasons and for a maximum of sixty days for specific personal development programs.[25] UTAs for community service or personal development can be for a maximum of 15 days, up to three times per year for a medium security inmate, or four times per year for a minimum security inmate, as the case may be.[26] The duration of other types of UTAs ranges from a maximum of 48 hours per month for a medium security inmate to 72 hours per month for a minimum security inmate.[27]

NPB, the Commissioner of Corrections and the institutional head have authority to grant UTAs in specified circumstances.[28]

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[18] Paragraphs 17(1)(e) and (f) of CCRA.
[19] Subsection 17(1) of CCRA.
[20] Section 746.1 of CC.
[21] Paragraph 115(1)(c) of CCRA.
[22] Paragraphs 115(1)(a), (b.1) & (b) of CCRA.
[23] Paragraph 115(1)(a.1) of CCRA.
[24] Subsection 115(3) of CCRA.
[25] Subsections 116(3) & (6) of CCRA.
[26] Subsection 116(4) of CCRA.
[27] Subsection 116(7) of CCRA.
[28] Sections 116 and 117 of CCRA.

c) Parole

Parole is a form of conditional release which allows some offenders to serve part of their sentence in the community, provided they abide by certain conditions. It is a privilege rather than a right and NPB has discretion on whether or not to grant parole. In arriving at a decision, the Board considers the protection of society and the risk posed by the offender.

There are two types of parole: day parole and full parole. *Note that all references to parole in the Corrections and Conditional Release Act include both day and full parole.*

Day Parole

Day parole is more limited than full parole in that it requires the offender to return to the institution or halfway house each evening unless otherwise authorized by NPB.

The eligibility date for applying for day parole is also earlier than for full parole. Most federal inmates can apply for day parole at either six months into the sentence or six months before full parole eligibility, whichever is later.[29] Day parole is normally granted up to a maximum of six months.[30] Lifers (for first and second degree murder) and inmates serving indeterminate sentences are eligible for day parole three years prior to the full parole eligibility date.[31] Whereas offenders serving a life sentence that is not imposed as a minimum punishment are eligible for day parole six months prior to full parole eligibility. Offenders serving a life sentence for first or second degree murder committed while they were under the age of eighteen are eligible for day parole when four-fifths of their full parole ineligibility period has been served.[32]

Day parole provides inmates with the opportunity to participate in community-based activities to prepare for full parole or statutory release.

[29] Subparagraphs 119(1)(c) of CCRA.
[30] Subsection 122(5) of CCRA.
[31] Paragraph 119(1)(b) & subsection 119(1.1) of CCRA.
[32] Subsection 119(1.2) of CCRA.

Full Parole

Full parole does not normally require nightly return to a halfway house or institution, nor does it normally require return after a specified period. If the offender is functioning successfully in the community, full parole may continue for the remainder of a sentence under supervision, with conditions in the community where appropriate.

Generally, an inmate serving a definite sentence is eligible for full parole at one-third of the sentence or seven years, whichever is less.[33]

d) Accelerated Day Parole and Full Parole Review

"Accelerated review" provides a streamlined process of review for day parole and full parole, prior to the day parole and full parole eligibility dates, for a first-time penitentiary offender. Offenders convicted of the following offences are excluded from accelerated review:

- murder,
- being an accessory after the fact to murder,
- a life sentence imposed otherwise than as a minimum punishment,
- a Schedule I offence,
- an offence for attempting to commit or being an accessory after the fact to a Schedule I offence,
- a Schedule II offence where an order has been made for parole eligibility at one-half of the sentence,
- a terrorism offence, or, in some cases, a criminal organization offence.

Any offender whose day parole has been revoked is also not eligible for accelerated review.[34] An offender who is eligible will be released on day parole or full parole on the established eligibility date unless NPB has reasonable grounds to believe that the offender is likely to commit a violent offence before the expiration of the sentence.[35]

The purpose of accelerated review is to ensure timely release of less serious offenders who are considered unlikely to commit a violent offence.

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[33] Subsection 120 to 120.3 of CCRA.
[34] Subsection 125(1) of CCRA.
[35] Subsection 126(2) of CCRA.

e) Statutory Release

Statutory release is an inmate's legal entitlement to be released into the community at two-thirds of the sentence. Unlike parole, statutory release is a right rather than a privilege.

Inmates exempted from this entitlement are lifers, inmates serving indeterminate sentences, inmates detained to warrant expiry by NPB following a detention hearing,[36] and inmates for whom NPB has imposed one-chance statutory release or lifted their detention orders and their statutory release has been subsequently revoked.[37]

f) Detention

Upon a referral by the Correctional Service of Canada, the National Parole Board reviews for detention the case of any offender serving a sentence of two years or more that was imposed for an offence listed in Schedule I (personal injury) or II (serious drug) of the *Corrections and Conditional Release Act*.[38] Moreover, the Board reviews for detention the case of any offender referred by the Commissioner of Corrections where the Commissioner believes that the offender will (before the end of sentence) commit an offence that causes death or serious harm, a sexual offence involving a child, or a serious drug offence.[39]

If satisfied that if the offender is released in the community, he or she is likely to commit before end of sentence an offence that causes death or serious harm, a sexual offence involving a child or a serious drug offence, the Board may order the offender detained until the expiry of the sentence.[40]

If the Board is not satisfied as above, but is satisfied that at the time of the review the offender was serving a scheduled offence and that, in the case of a Schedule I offence, it caused death or serious harm or was a sexual offence involving a child, the Board may order that the offender be released on "one-chance" statutory release.[41] This means that should the offender's release be revoked the offender will not be entitled to statutory release for the rest of the sentence.

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[36] Sections 129 – 132 of CCRA.
[37] Subsections 130(4) and (6) of CCRA.
[38] Subsections 129(1)&(2) &130(1) of CCRA.
[39] Subsection 129(3) of CCRA.
[40] Subsection 130(3) of CCRA.
[41] Subsection 130(4) of CCRA.

If the Board is not satisfied the offender warrants detention or "one-chance" statutory release, the offender is released on statutory release.

The Board reviews the cases of detained offenders annually. At that review, the Board may confirm their previous order to detain the offender or the Board may order that the offender be released on statutory release with or without a condition to reside in a community based facility.[42] This release is subject to the "one-chance" rule.[43]

g) Long-Term Offender Designation

Bill C-55, which came into force in August 1997, added a new sentencing category to the *Criminal Code* called long-term supervision order. The procedure is similar to the Dangerous Offender process.[44] The procedure applies to offenders convicted of sexual assault, sexual interference, invitation to sexual touching, sexual exploitation, exposure, aggravated sexual assault and sexual assault with a weapon or causing bodily harm. The procedure is also applicable to an offender who committed another offence with a sexual component: for example, break and enter with the intent of sexually assaulting the occupant.[45]

An offender designated as a long-term offender at a special sentencing hearing will be sentenced to a penitentiary sentence and a period of long-term supervision of up to a maximum of ten years which starts when the sentence of incarceration expires.[46] A court may impose long-term supervision where in its judgement the risk presented by the offender can be managed in the community through appropriate supervision.[47]

It should be noted that, although long-term offender status was apparently intended to apply only to offenders who receive a penitentiary sentence (i.e., 2 years or more), there have been cases where courts have attached long-term supervision orders to sentences that amounted to less than two years after the offender was given credit for time served awaiting trial and/or sentencing.[48]

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[42] Subsection 131(3) of CCRA.
[43] Subsection 130(6) of CCRA.
[44] Section 753.1 of CC.
[45] Section 753.1(2)of CC.
[46] Section 753.1(3) & 753.2(1) of CC.
[47] Section 753.1(1) of CC.
[48] For example, see *R. v. H.P.W,* (2001) 159 C.C.C. (3d) 91 (Alta. C.A.).

Every long-term offender is subject to standard conditions such as keeping the peace.[49] The National Parole Board (NPB) has authority to impose specialized conditions to ensure close supervision of the offenders.[50] The Correctional Service of Canada (CSC) provides the supervision.[51]

The NPB or CSC have authority to suspend and order the apprehension of an offender who has breached a long-term supervision order, a standard condition or a condition it has imposed or where the NPB or CSC is satisfied that the suspension is necessary or reasonable to prevent a breach of a condition or protect society.[52] Suspension of long-term supervision may be up to a maximum period of 90 days.[53] After its review of the case, the NPB may cancel the suspension and order the resumption of the long-term supervision with or without additional conditions or recommend that an information be laid charging the offender with the offence of breaching an order of long-term supervision.[54] The offence carries a maximum sentence of imprisonment of 10 years.[55]

The running of the long-term supervision of an offender who receives a new custodial sentence is interrupted until the expiration of the sentence.[56] New custodial sentences of an offender under a long-term supervision order are served in penitentiary regardless of length.[57]

New sentences other than sentences of imprisonment, such as probation or conditional sentences, are served concurrently with long-term supervision.[58]

The court that hands down a sentence of imprisonment to the offender subject to a long-term supervision order has authority to terminate or reduce the length of the long-term supervision.[59]

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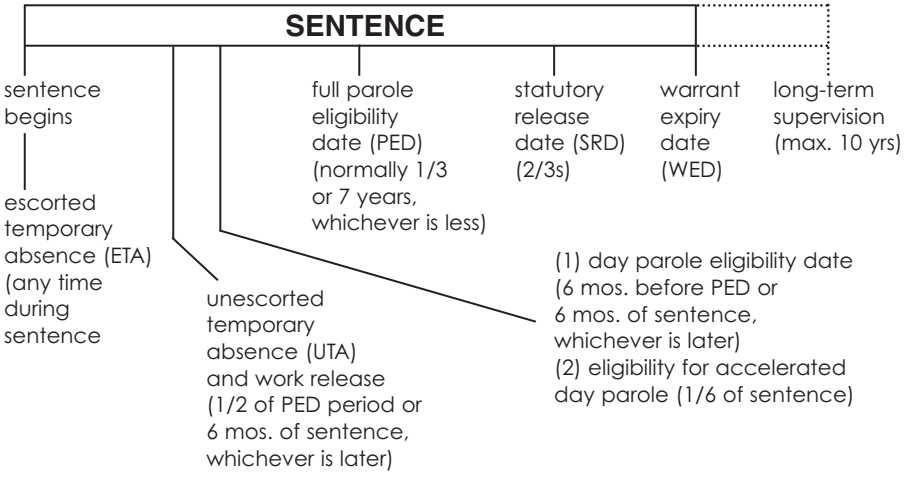
[49] Subsection 134.1(1) of CCRA.
[50] Paragraph 753.1(3)(b) of CC and subsection 134.1(2) of CCRA.
[51] Subsection 134.2(2) of CCRA.
[52] Subsection 135.1(1) of CCRA.
[53] Subsection 135.1(2) of CCRA.
[54] Subsection 135.1(6) of CCRA.
[55] Section 753.3 of CC.
[56] Subsection 754.4(1) of CC.
[57] Section 743.1(3.1) of CC.
[58] Section 753.2(2) of CC.
[59] Section 753.4(1)&(2) of CC.

h) Schematic Overview of Eligibility Dates

The following graph presents the points in the definite sentence where an offender would normally be eligible for conditional release:



2) Parole Eligibility

The basic principles for establishing the full parole eligibility date (PED) for a single sentence and a multiple sentence are as follows.

a) Single Sentence

The PED is normally one-third of a definite sentence or seven years, whichever is less.[60]

Examples of Establishing PED for a Single Sentence:

Example 1:

June 3, 1993 – Sentenced to three years
Full Parole Eligibility Date (PED) – June 3, 1994 (at 1 year point of three-year sentence)

Example 2:

August 15, 1983 – Sentenced to 24 years
Full Parole Eligibility Date (PED) – August 15, 1990 (Note: PED is 7 years since it is less than 1/3 of sentence which is 8 years.[61])

[60] Subsection 120(1) of CCRA.
[61] Subsection 120(1) of CCRA.

b) Multiple Sentence

Establishment of the PED becomes more complex when multiple sentences are involved. The general principle is to deal with each additional sentence as a single entity and merge it with the existing sentence in order to re-calculate the PED. This step is repeated as a new sentence is added.

Following are the specific methods for calculating the PED for an additional consecutive or concurrent sentence.

Additional Consecutive Sentence

General Rule: An offender who receives a new consecutive sentence will have that sentence merged with the current sentence. Before becoming eligible for parole, the offender must serve, from the date of imposition of the new sentence, the balance of the parole ineligibility period on the current sentence plus a period equal to the parole ineligibility period of the new sentence.[62]

Special Case – Lifers: Under Canadian law, any sentences imposed in addition to a life or indeterminate sentence must be concurrent rather than consecutive.[63] However, the principle of adding parole ineligibility periods also applies to these cases where the lifer receives an additional definite sentence.[64] This ensures that receipt of a new sentence has a direct impact on the offender's parole ineligibility period. There is a limit, however, on the effect of adding parole ineligibility periods: the offender's parole eligibility date cannot be later than 15 years from the date the last sentence was imposed.[65] However, any

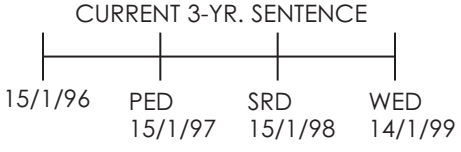
[62] Subsection 120.1(1) of CCRA.
[63] *Regina v. Sinclair* (1972), 6 C.C.C. (2d) 523 (OCA). Life imprisonment means imprisonment for life, notwithstanding release on parole, with the consequence that a consecutive sentence could not take effect until the person died.
[64] Subsection 120.2(2) of CCRA.
[65] Section 120.3 of CCRA.

parole ineligibility of more than 15 years resulting from imposition of a life sentence for murder (e.g., 20 years remaining on an initial 25 year ineligibility period) will continue to govern the PED. For more information on the scenario where an offender sentenced to life imprisonment or an indeterminate sentence receives an additional determinate sentence, see *Dimaulo v. Canada (Commissioner of Corrections et al.)*, summarized in Appendix A, Selected Bibliography of Case Law.[66]

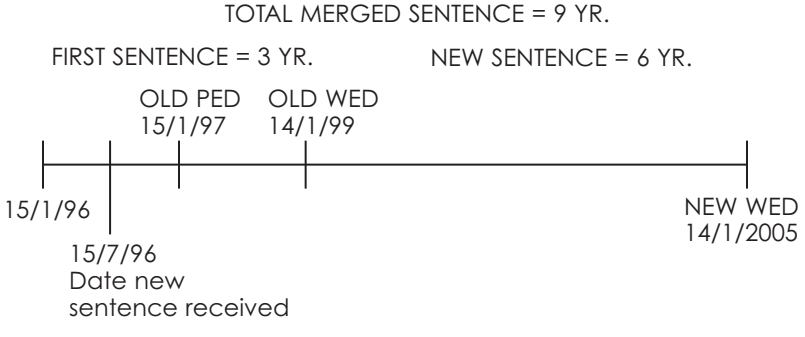
EXAMPLES OF CALCULATING PED FOR A MULTIPLE SENTENCE:

EXAMPLE 1: CALCULATION OF PED FOR ADDITIONAL CONSECUTIVE SENTENCE TO A DEFINITE SENTENCE (SS. 120.1(1), CCRA)

Mr. A is currently serving a 3-year sentence commencing on 15/1/96.



On 15/7/96, Mr. A is convicted of an outstanding charge and receives a new 6-year consecutive sentence. This is merged with his current 3-year sentence by adding the two sentences together. The new merged term begins from the date of imposition of the first sentence and ends on the date of expiration of the new sentence. Note that Mr. A had not yet reached parole eligibility on his original sentence.



[66] (2001), 160 C.C.C. (3d) 315, 212 F.T.R. 295 (T.D.).

New PED of total merged sentence = A + B as shown below:

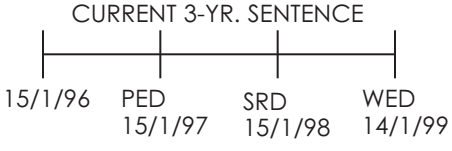
A = 6 months = The parole ineligibility period for the first sentence calculated from the date of imposition of the new sentence, i.e., the period of time between 15/7/96 (date new sentence received) and 15/1/97 (old PED)

B = 2 years = the parole ineligibility period for the new sentence which is 1/3 of the new 6 yr. sentence

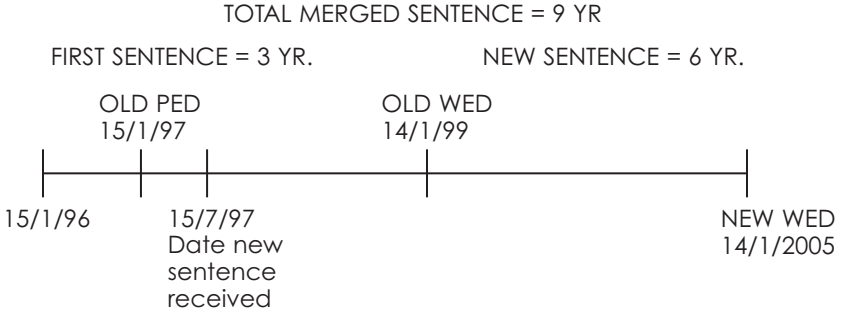
New PED = A (6 months) + B (2 years) calculated from date of new sentence at 15/7/96
= 15/1/99

EXAMPLE 2: CALCULATION OF PED FOR ADDITIONAL CONSECUTIVE SENTENCE TO A DEFINITE SENTENCE (SS. 120.1(1), CCRA)

Mr. B is currently serving a 3-year sentence commencing on 15/1/96.



On 15/7/97, Mr. B is convicted of a new offence and receives a new 6-year consecutive sentence. The new merged term begins from the date of imposition of the first sentence and ends on the date of expiration of the last sentence. Note that Mr. B has already reached parole eligibility on his original sentence.



New PED of total merged sentence = A + B as shown below:

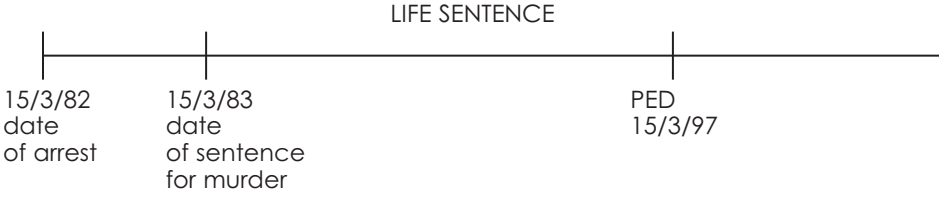
A = 0 = the parole ineligibility period for the first sentence calculated from the date of imposition of the new sentence (offender already eligible for parole)

B = 2 years = the parole ineligibility period for the new sentence which is 1/3 of the new 6 yr. sentence

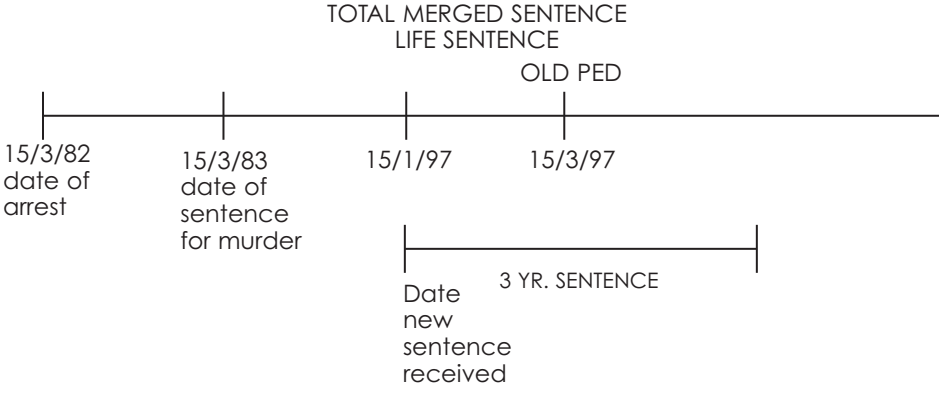
New PED = A (0) + B (2 years) calculated from date of new sentence at 15/7/97
= 15/7/99

EXAMPLE 3: CALCULATION OF PED FOR ADDITIONAL SHORT CONCURRENT SENTENCE TO A LIFE SENTENCE (SS. 120.2(2), CCRA)

Ms. C is serving a life sentence from 15/3/82 (the date of her arrest) for second degree murder. She is ineligible for parole until serving 15 years from the date of arrest (PED is 15/3/97).



On 15/1/97, Ms. C receives a new 3-year concurrent sentence which is merged with her life sentence.



New PED = A + B as shown below:

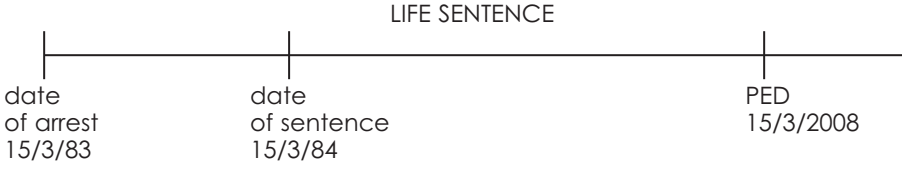
A = 2 months = the balance of the parole ineligibility period on the current life sentence calculated from the date of imposition of the new sentence, i.e. period between 15/1/97 (date new sentence received) and 15/3/97 (old PED)

B = 1 year = the parole ineligibility period of the new sentence which is 1/3 of the new 3-yr. sentence

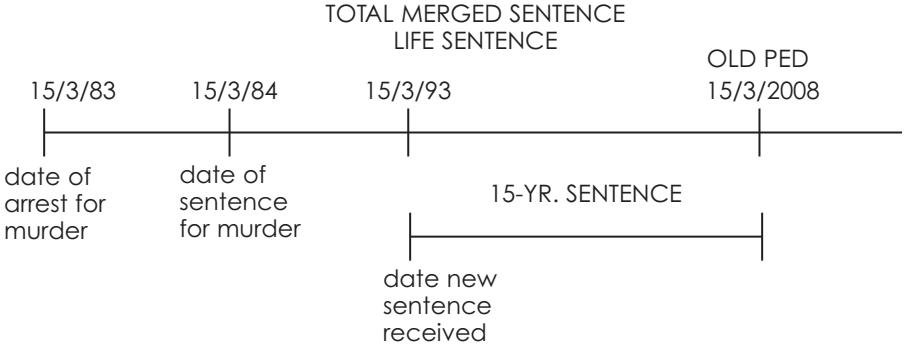
New PED = A (2 months) + B (1 year) calculated from date of new sentence at 15/1/97
= 15/3/98

EXAMPLE 4: CALCULATION OF PED FOR ADDITIONAL LONG CONCURRENT SENTENCE TO A LIFE SENTENCE (SS. 120.2(2), CCRA)

Mr. D is serving a life sentence from 15/3/83 (date of arrest) for first degree murder. He is ineligible for parole until serving 25 years from date of arrest (PED is 15/3/2008).



On 15/3/93, Mr. D receives a new 15 year concurrent sentence which is merged with his life sentence.



New PED = A + B as shown below:

A = 15 years = the parole ineligibility period on the current life sentence calculated from the date of imposition of the new sentence, i.e., period between 15/3/93 (date new sentence received) and 15/3/2008 (old PED)

B = 5 years = the parole ineligibility period of the new sentence which is 1/3 of the new 15-yr. sentence

New PED = A (15 years) + B (5 years) calculated from date of new sentence at 15/3/93
= 15/3/2008

The calculation above suggests that the new PED should be 15/3/2013. However, pursuant to section 120.3 of the *Corrections and Conditional Release Act*, it cannot be later than 15 years from the date the last sentence was imposed (i.e., no later than 15/3/2008). Hence, the PED remains unchanged in this case.

Special Case – Additional Consecutive Sentence to a Portion of the Current Sentence

Occasionally, a consecutive sentence is imposed in addition to only a portion of the current sentence (a specific sentence within the total merged sentence).[67] In such cases, three PEDs are examined to establish the new PED. The one with the latest date is the one which is operative:[68]

1. the PED of the current sentence without considering the new sentence;

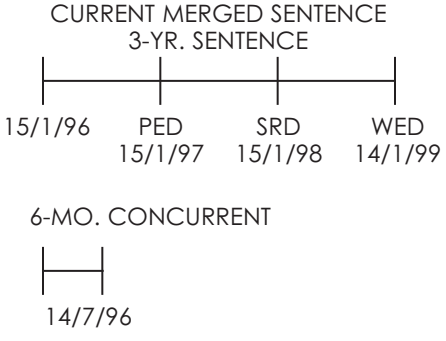
2. the PED of the new consecutive sentence from the date it was imposed; and

3. the PED of the merged sentence (i.e., the current and new sentences are blended).

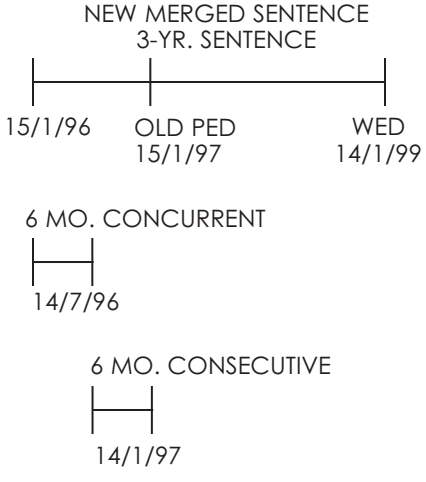
[67] Judges sometimes impose a consecutive sentence in relation to a portion of a current sentence when the new sentence is either related in substance or timing to one or more of the sentences the offender is already serving.
[68] Subsection 120.1(2) of CCRA.

EXAMPLE 1: CALCULATION OF PED FOR ADDITIONAL SENTENCE TO BE SERVED CONSECUTIVELY TO A PORTION OF THE SENTENCE (SS. 120.1(2), CCRA)

Ms. E is currently serving a total merged sentence consisting of a 3-year sentence and a 6-month concurrent sentence commencing on 15/1/96.



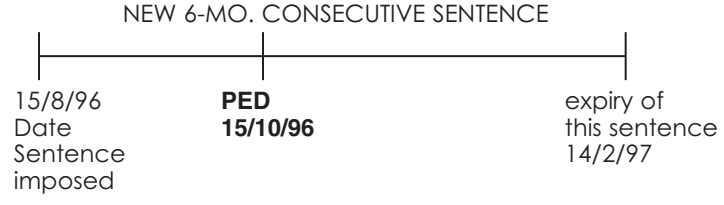
On 15/8/96, Ms. E is convicted and receives an additional 6-month sentence which the judge orders to run consecutively with the 6-month sentence. The new merged sentence begins from the date of imposition of the first sentence and ends on the date of expiration of the last sentence to be served.



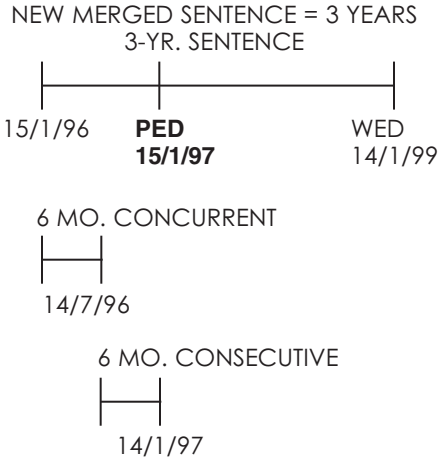
New PED of new merged sentence is established by determining A, B, and C and retaining the one with the latest date, as illustrated below:

A = 15/1/97 = PED of the current merged sentence without considering the new sentence

B = 15/10/96 = PED of the new 6-month consecutive sentence calculated from the date it was imposed, i.e., parole at 1/3 of 6-month sentence
= 2 months from 15/8/96
= 15/10/96



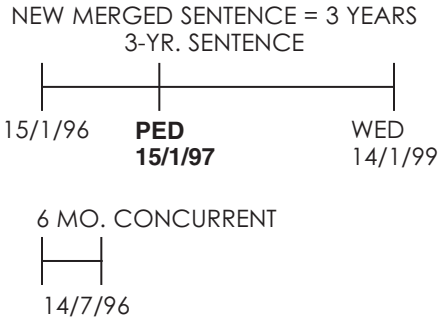
C = 15/1/97 = PED of the new merged sentence calculated from the date of imposition of the first sentence, i.e., 1/3 of 3 year sentence from 15/1/96
= 1 year from 15/1/96
= 15/1/97



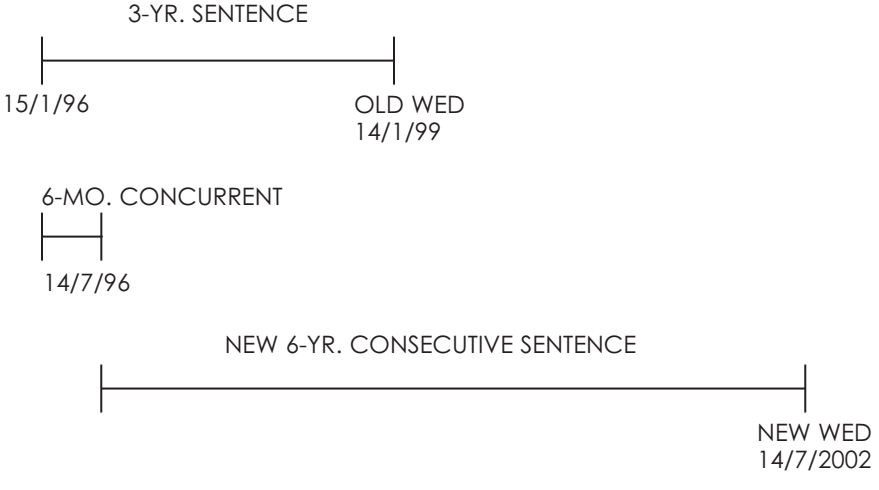
New PED is the **latest** of A, B, and C. A and C are the same (15/1/97) and have the latest PED. Therefore 15/1/97 is the new PED.

EXAMPLE 2: CALCULATION OF PED FOR ADDITIONAL SENTENCE TO BE SERVED CONSECUTIVELY TO A PORTION OF THE SENTENCE (SS. 120.1(2), CCRA)

Mr. F is currently serving a total merged sentence consisting of a 3-year sentence and a 6-month concurrent sentence commencing on 15/1/96.



On 15/5/96, Mr. F receives a new 6-year sentence which the judge orders to run consecutively to the 6-month sentence. The new merged sentence begins from the date of imposition of the first sentence and ends on the date of expiration of the last sentence to be served.

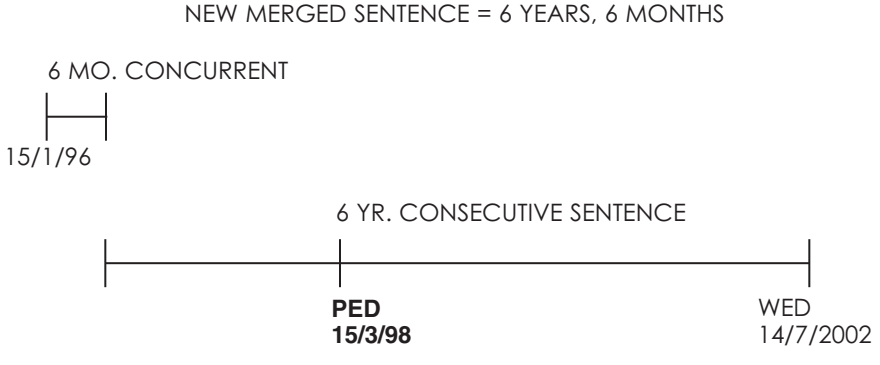


New PED of new merged sentence is established by determining A, B, and C and retaining the one with the latest date, as illustrated below.

A = 15/1/97 = PED of the current or original merged sentence above without considering the new sentence

B = 15/5/98 = PED of the new 6-year consecutive sentence calculated from the date it was imposed, i.e., parole at 1/3 of 6-year sentence
= 2 years from 15/5/96
= 15/5/98

C = 15/3/98 = PED of the new merged sentence calculated from the date of imposition of the first sentence, i.e., 1/3 of 6-year, 6 month sentence from 15/1/96
= 2 years, 2 months from 15/1/96
= 15/3/98



New PED is the **latest** of A, B and C. B (15/5/98) is the latest PED, therefore 15/5/98 is the new PED.

Additional Concurrent Sentence

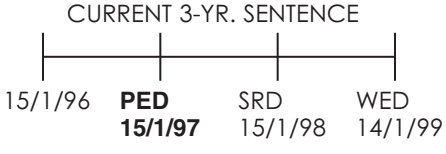
An offender who receives a new concurrent sentence will have that sentence merged with the current sentence. The new PED is determined by comparing two parole ineligibility periods and retaining the one with the latest date:

1. the PED of the current sentence without considering the additional sentence, and

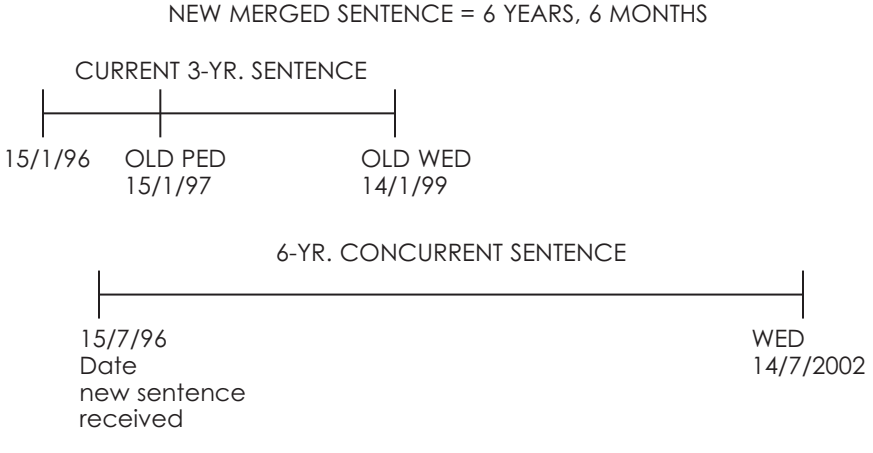
2. the parole ineligibility period on the merged sentence (i.e., the current and additional sentences are blended).[69]

Example 1: Additional Concurrent Sentence (Ss. 120.2(1), CCRA)

Ms. G is currently serving a 3-year sentence commencing on 15/1/96.



On 15/7/96, Ms. G receives a 6-year concurrent sentence which is merged with her current 3-year sentence.



[69] Subsection 120.2(1) of CCRA.

New PED of new merged sentence is established by determining A and B and retaining the one with the latest date, as shown below.

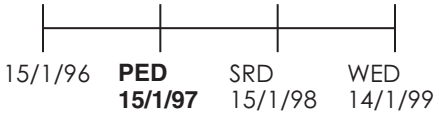
A = 15/1/97 = PED of the current sentence without considering the additional sentence

B = 15/3/98 = Parole ineligibility period on the merged sentence, i.e., 1/3 of new 6 year, 6 month merged sentence
= 2 years, 2 months from 15/1/96 (date of imposition of the first sentence)
= 15/3/98

New PED is the **latest** of A and B. B (15/3/98) is the latest PED, therefore 15/3/98 is the new PED.

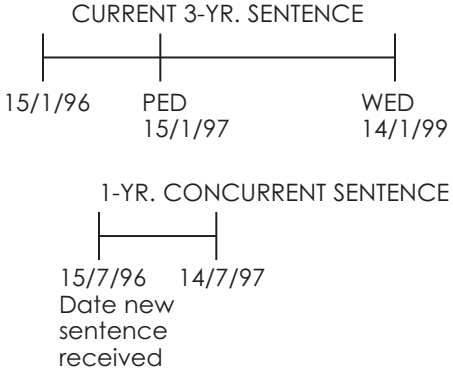
EXAMPLE 2: ADDITIONAL CONCURRENT SENTENCE (SS. 120.2(1), CCRA)

Mr. H is currently serving a 3-year sentence commencing on 15/1/96.



On 15/7/96, Mr. H receives a 1-year concurrent sentence for escape lawful custody.

NEW MERGED SENTENCE = 3 YEARS *(Note: new concurrent sentence has no effect on length of current sentence)*



New PED of new merged sentence is established by determining A and B and retaining the one with the latest date, as shown below.

A = 15/1/97 = PED of the current sentence without considering the additional sentence

B = 15/1/97 = Parole ineligibility period on the merged sentence, i.e., 1/3 of 3-year merged sentence
= 1 year from 15/1/96 (date of imposition of the first sentence)
= 15/1/97

New PED is the **latest** of A and B. In this case, A and B are the same (15/1/97), therefore 15/1/97 is the new PED.

Note: Additional complexities result when an offender receives a combination of concurrent and consecutive sentences at the same time.

c) Automatic Revocation

The CCRA provides that an offender on parole or statutory release who receives a new custodial sentence for an offence against a federal statute will be automatically revoked and returned to custody. However, in 2001, the Supreme Court of British Columbia held that the automatic revocation of an offender's statutory release without a hearing is a violation of section 7 of the *Canadian Charter of Rights and Freedoms*.[70] Accordingly, as of December 19, 2001, offenders sentenced to imprisonment while on parole or statutory release are no longer subject to automatic revocation and are dealt with pursuant to the suspension and revocation processes found in subsections 135(5) or (7) of the Act. The offender's new PED will be calculated as shown previously, depending on the nature of the new sentence.

Where the Board does not revoke or terminate an offender's current parole, but the offender's re-calculated PED is set in the future, the parole becomes inoperative and the offender will be returned to custody. If the Board does not revoke an offender on statutory release and the SRD is set in the future, the statutory release becomes inoperative and the offender will be returned to custody until the new SRD.

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[70] Subsection 135(9.1) of CCRA. See *Illes v. The Warden, Kent Institution* (2001) 160 C.C.C, (3d) 307 (B.C.S.C).

Example Demonstrating When Parole Becomes Inoperative:

Mr. I is serving a three-year sentence for robbery commencing on 15/1/94 (PED = 15/1/95, SRD = 15/1/96, WED = 14/1/97). On 15/7/95, he is released on parole. Two months later, he is charged with a robbery offence that occurred 10 years ago at about the same time as his current offence. On 15/1/96, a judge sentences him to seven years for the new offence to run concurrently with his present sentence. As a result of this additional sentence, Mr. I is now serving a total merged term of 9 years. He now has a new PED of 15/1/97, a new SRD of 15/1/2000 and a new WED of 14/1/2003.

Because his new PED is set in the future, his parole becomes inoperative and he is returned to custody. Had Mr. I been on statutory release, he would have been returned to custody as he would have been no longer entitled to statutory release, his SRD having been set in the future.

d) Exceptional Cases – Parole Ineligibility at One-Half of Sentence

An exception to the general principles for establishing the PED may occur were an offender is sentenced to two years or more on conviction for a Schedule I or II offence or a criminal organization offence prosecuted by indictment. In such cases, the Court may order that the offender serve one-half of the sentence or 10 years, whichever is less, before being eligible for parole.[71] In order to give effect to this provision, a direct order from the Court is required and must be reflected in the warrant of committal.

Another exception is where the offender is sentenced to two years or more on conviction for a terrorism offence.[72] In such case, the Court shall order that the offender serve one-half of the sentence or 10 years, whichever is less, before being eligible for parole. This measure was contained in Bill C-36, the *Anti-Terrorism Act* (2001 Statutes of Canada, chapter 41), which came into force, for the most part, on December 24, 2001.

Bill C-36 also amended the *Criminal Code* to create several new terrorism-related offences and to provide that the sentence imposed for those offences shall be served consecutively to any other punishment, other than a sentence of life imprisonment,

[71] Section 743.6 of CC.
[72] Section 743.6 of CC.

imposed for an offence arising out of the same event or series of events or to any other sentence imposed at the same time as the terrorism-related offence.[73]

Similar sentencing measures were introduced in relation to the criminal organization offences introduced in Bill C-24 (2001 Statutes of Canada, chapter 32), entitled *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts)*, which came into force on January 7, 2002. This legislation is intended to strengthen the ability of law enforcement officers and prosecutors to fight organized crime in several ways. Bill C-24 amended the *Criminal Code* to:

- introduce three new offences, with tougher sentencing, related to involvement with criminal organizations;
- introduce a new, simplified definition of "criminal organization" to the Code;
- improve the protection of persons involved in the criminal justice system and their families from intimidation;
- enhance the ability of law enforcement to forfeit the proceeds of crime and the profits of criminal organizations and to seize property that was used in the commission of an offence; and
- establish an accountability process to protect law enforcement officers from criminal liability if they commit acts that would otherwise be illegal in the course of conducting a criminal investigation.

More specifically, Bill C-24 added the following offences to the *Criminal Code*:

- participation in the activities of a criminal organization (section 467.11);
- commission of an offence for a criminal organization (section 467.12); and
- instructing the commission of an offence for a criminal organization (section 467.13).

Bill C-24 also created further exceptions to the general principles for establishing PED.[74] Where an offender receives a sentence of two years or more upon conviction for a criminal organization offence other than those in sections 467.11 to 467.13, the court

[73] Section 83.26 of CC.
[74] Section 743.6 of CC.

"may" order that the offender serve one-half of the sentence or 10 years, whichever is less, before being eligible for parole. Where the offender is convicted of an offence under section 467.11, 467.12 or 467.13, the court "shall" make such an order regarding parole eligibility unless satisfied that the standard parole eligibility period would be adequate having regard to the circumstances of the offence and the offender, the character of the offender, and the sentencing objectives of denunciation and deterrence.

The process for setting parole eligibility differs from that which existed in relation to the original criminal organization offence, section 467.1 of the Code, which was introduced in chapter 23 of the 1996-97 Statutes of Canada. That legislation also provided that the court "may" order that parole eligibility be set at one-half or ten years, whichever is less. Bill C-24 replaced the offence in section 467.1 with the offences in sections 467.11 to 467.13, and changed the process for establishing parole eligibility. The process is now akin to a rebuttable presumption, whereby the court is required to make an order delaying parole eligibility unless it is satisfied that the standard eligibility period is adequate after consideration of the factors described above.

Bill C-24 also amended the Code to provide that the sentence imposed for any of the new criminal organization offences shall be served consecutively to any other punishment imposed for an offence arising out of the same event or series of events or to any other sentence imposed at the same time as the criminal organization offence (for more on concurrent and consecutive sentencing, see Section C of this Handbook).[75]

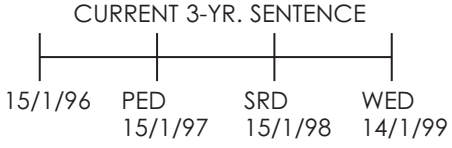
An offender may be subject to multiple sentences, some with one-third parole eligibility and some with one-half eligibility. The differing periods of ineligibility are respected in the total merged sentence.

[75] Section 467.14 of CC.

Examples of Calculating PED When Parole Ineligibility is at One-half of Sentence

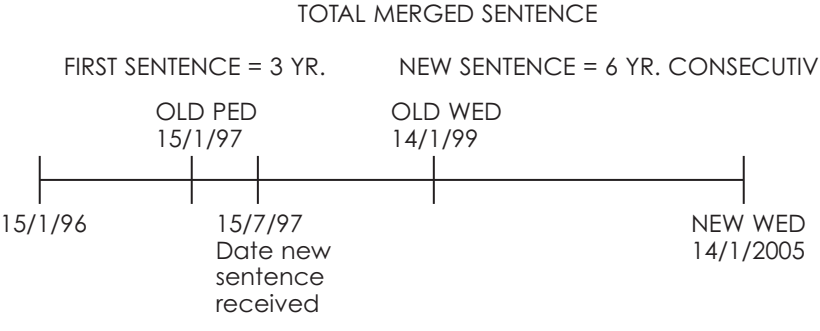
Example 1: Additional Consecutive Sentence with PED at 1/2 (Ss. 120.1(1), CCRA)

Mr. J is serving a three-year sentence commencing on 15/1/96. His PED is at 1/3 of his sentence and his WED is 14/1/99.



On 15/7/97, Mr. J is convicted of aggravated assault, a Schedule I offence, and is sentenced to six years consecutive. The judge also makes an order for parole eligibility at 1/2 of the new sentence.

Mr. J's total merged sentence is nine years.



New PED of total merged term = A + B as shown below:

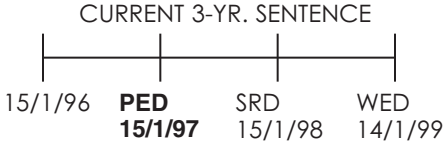
A = 0 = the parole ineligibility period for the first sentence calculated from the date of imposition of the new sentence (PED is in the past, therefore no ineligibility period remains)

B = 3 years = the parole ineligibility period for the new sentence which is 1/2 of the new 6-year sentence

New PED = A (0) + B(3 years) calculated from date of new sentence at 15/7/97
= 15/7/2000

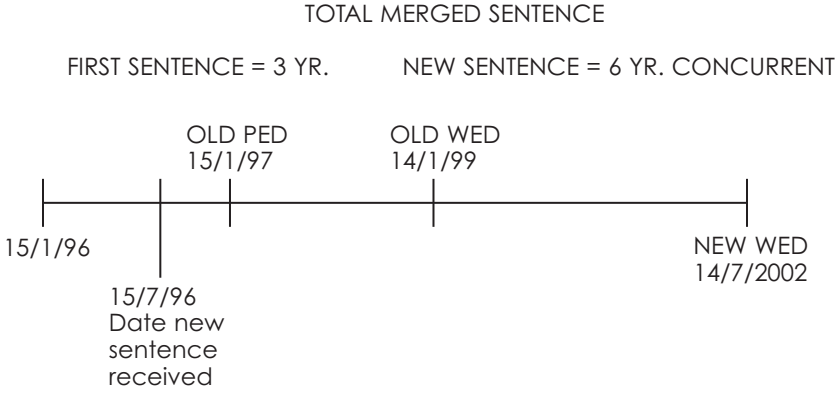
EXAMPLE 2: ADDITIONAL CONCURRENT SENTENCE WITH PED AT 1/2 (SS. 120.2(1), CCRA)

Ms. K is serving a three-year sentence commencing on 15/1/96, with PED at 1/3 of her sentence.



On 15/7/96, Ms. K is convicted of trafficking, a Schedule II offence, and receives six years concurrent to her present sentence and an order for parole eligibility at 1/2 of her sentence.

Ms. K's total merged sentence is six years, six months.



New PED of total merged sentence is established by determining A and B and retaining the one with the latest date, as shown below:

A = 15/1/97 = PED of the current sentence without considering the additional sentence

B = Parole ineligibility period on the merged sentence
(Note: Because the two sentences making up the total merged sentence have different parole ineligibility periods, these periods must be determined separately and added together.)

= Parole ineligibility period for the part of the total merged sentence subject to 1/2 ineligibility
New 6-year concurrent sentence is subject to 1/2 ineligibility, therefore parole ineligibility = 1/2 of 6 years

= 3 years

+ Parole ineligibility for the part of the total merged sentence not subject to 1/2 ineligibility
6 months from 15/1/96 (commencement date of total merged sentence) is not subject to 1/2 ineligibility, therefore parole ineligibility = 1/3 of 6 months

= 2 months (See diagram below)

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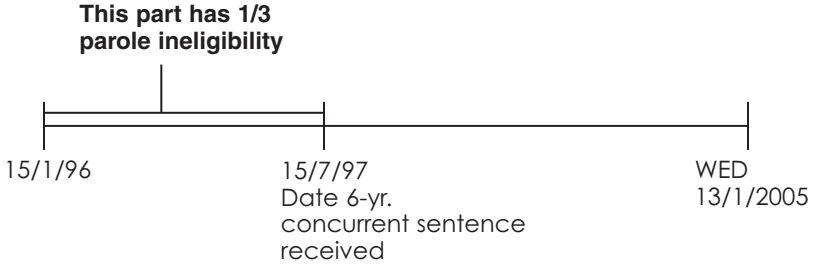
3 years + 2 months from 15/1/96 (date of imposition of first sentence)

= 15/3/99

Parole ineligibility for the part of the total merged sentence not subject to 1/2 ineligibility



New PED is the **latest** of A and B. B (15/3/99) is the latest PED, therefore 15/3/99 is the new PED.

e) Effect of Revocation of Parole or Statutory Release on PED and SRD When No New Sentence Has Been Imposed

On revocation of an offender's parole or statutory release, the offender is recommitted to custody to serve the remainder of the sentence.[76] Unless a new sentence has been imposed, the offender's PED remains unchanged. However, in either case, the SRD is affected. *The offender is not entitled to statutory release until after serving two thirds of the unexpired portion of the sentence remaining to be served from the date the offender was reincarcerated.*[77]

EXAMPLE:

Mr. L's statutory release is revoked by NPB on the basis that he is likely to reoffend violently in the community before the end of his sentence. When he is recommitted to custody, 24 months remain until his WED. His SRD is recalculated to be at the 2/3 point of the remaining 24 months (16 months from the date of his reincarceration). Because Mr. L did not incur a new sentence, his PED remains unchanged.

[76] Subsection 138(1) of CCRA.
[77] Subsection 127(5) of CCRA.

E. CONDITIONAL SENTENCES

The conditional sentence was introduced in September 1996 with the passage of Bill C-41. This type of sentence is predominantly administered in the provincial correctional system. Under this scheme, the court may order that an offender serve his or her sentence in the community where it imposes a term of imprisonment of less than two years (but not where a minimum sentence is required, such as for second or subsequent drunk driving offences). The court must also be satisfied that the safety of the community would not be endangered and that permitting the offender to serve the sentence in the community would be consistent with the fundamental purpose and principles of sentencing. In addition to compulsory conditions set out in the *Criminal Code*[78], the court may impose conditions that it considers necessary to secure the good conduct of the offender.[79]

Provincial correctional authorities provide the supervision. In the event of a breach of a condition, the court can terminate the conditional sentence order and direct the offender to serve all or part of the balance of the sentence in custody.[80]

1) Powers of Arrest

Police have the same powers of arrest for breach of a condition of a conditional sentence order as they have for an indictable offence.[81] An officer can arrest a person who is observed breaching a condition of a conditional sentence order or about whom a report of a breach of a condition of a conditional sentence order has been received.

The arresting officer, the officer in charge or a justice can release the offender arrested for a breach of a condition of a conditional sentence.[82] The offender continues to bear the burden of demonstrating why he or she should be released.[83]

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[78] Subsection 742.3(1) of the CC.
[79] Subsection 742.3(2) of the CC.
[80] Subsection 742.6(9) of the CC.
[81] Paragraph 742.6(1)(b) of the CC.
[82] Paragraph 742.6(1)(e) of the CC.
[83] Subsection 742.6(2) of the CC remains with its reference to subsection [515(6)] which sets out a reverse onus release.

2) Proceedings for a Breach of a Condition

The proceedings for a breach of a condition of a conditional sentence begin with the issuance of a warrant of arrest, or on arrest without a warrant, or other means of compelling the offender's appearance as indicated in 742.6(1)(d).[84] When the offender is in detention on other matters or is to appear on a given date, the offender's appearance for the purpose of a breach proceeding may be compelled as indicated in paragraph 742.6(1)(d) of the *Criminal Code*. A judge's order may be used in such instances.

Any justice may issue a warrant or a telewarrant of arrest, regardless of the jurisdiction of the court having handed down the conditional sentence.[85] The hearing for a breach of a condition is to be commenced within the thirty day time frame "or as soon thereafter as is practicable" after the offender's arrest or the compelling of his or her appearance in accordance with paragraph 742.6(1)(d).[86] Breach hearings are to be held in the place where the breach is committed or the offender is found, arrested or in custody.[87]

Proceedings for a breach of condition of a conditional sentence may be instituted outside the province in which the breach was committed only with the consent of the Attorney General of the province in which the breach occurred or the Attorney General of Canada, if the proceedings that led to the issuance of the conditional sentence order were instituted by her or on her behalf.[88]

In addition to explicitly providing for adjournments of breach hearings[89], the *Criminal Code* also renders admissible in evidence at a breach hearing the report of an offender's supervisor.[90]

3) Suspension of the Running of a Conditional Sentence

The running of a conditional sentence is suspended from the date on which an arrest warrant is issued, the offender is arrested without a warrant or a judge or justice signs an order

[84] Paragraph 742.6(1)(c) of the CC.
[85] Paragraph 742.6(1)(f) of the CC.
[86] Subsection 742.6(3) of the CC.
[87] Subsection 742.6(3.1) of the CC.
[88] Subsection 742.6(3.2) of the CC.
[89] Subsection 742.6(3.3) of the CC.
[90] Subsection 742.6(5) of the CC.

compelling the offender's appearance for a breach of a conditional sentence.[91] However, the conditional sentence of the offender will begin running again on the making of an order to detain him or her under subsection 515(6) unless the offender is imprisoned for a sentence for another offence.[92]

Where an offender is released under paragraph 742.6(1)(e) pending breach proceedings, the conditions of the original conditional sentence order and any variations made to that order continue to apply (as if they are part of the judicial interim release).[93] The court may also impose conditions applicable for judicial interim release.[94] Any further or continued breach of the conditions of the conditional sentence order may result in further allegations of breach made under section 742.6. The running of the conditional sentence of an offender released under paragraph 742.6(1)(e) remains suspended from the date of issuance of the arrest warrant, the arrest without warrant or the compelling of his or her appearance under paragraph 742.6(1)(d) until completion of the breach proceedings.[95]

4) Crediting of Time Towards Completion of Sentence

Where there is a finding of a breach of a conditional sentence, the court has authority to count, as time served under the conditional sentence, some or all of the time between the issuance and execution of a warrant during which the sentence was suspended, if there was an unreasonable delay in the execution of the warrant.[96] Moreover, in spite of a finding of a breach, the court may, in exceptional circumstances and in the interests of justice, deem as time served, the time during which the running of the conditional sentence was suspended.[97]

Where an allegation of a breach of a conditional sentence is stayed, withdrawn or dismissed or the offender is found to have had a reasonable excuse for the breach, each day from the date of arrest without warrant, the issuance of an arrest warrant or the compelling of the offender's appearance under paragraph 742.6(1)(d) will count towards completion of sentence. For example, where an offender was released pending breach

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[91] Subsection 742.6(10) of the CC.
[92] Subsection 742.6(12) of the CC.
[93] Subsection 742.6(11) of the CC.
[94] Paragraph 742.6(1)(a) of the CC.
[95] Subsection 742.6(11) of the CC
[96] Subsection 742.6(14) of the CC.
[97] Subsection 742.6(16)&(17) of the CC.

proceedings, every day spent on release is counted toward completion of the sentence. An offender who was detained receives, in addition to a one day credit for each day spent in detention, an additional day for every two days served in detention (similarly to remission).[98] However, where a breach allegation is stayed, withdrawn or dismissed or there is a finding of a reasonable excuse for a breach but the offender was subject to a sentence of imprisonment during suspension of the running of the conditional sentence, the time spent in detention under the new sentence does not count towards completion of the conditional sentence.[99]

5) Imprisonment for Breach of a Conditional Sentence

Where there is a finding of a breach of a conditional sentence, the court may direct that the offender serve in detention all or a portion of the remaining sentence.[100] The remainder of the sentence is served consecutively to any other sentence of imprisonment that the offender is serving unless the court orders otherwise.[101] The custodial portion of the conditional sentence is merged with any other sentence of imprisonment to which of the offender is subject.[102] The running of the conditional sentence resumes upon the offender's release on parole, on statutory release, as a result of earned remission or at the WED of the other sentence.[103]

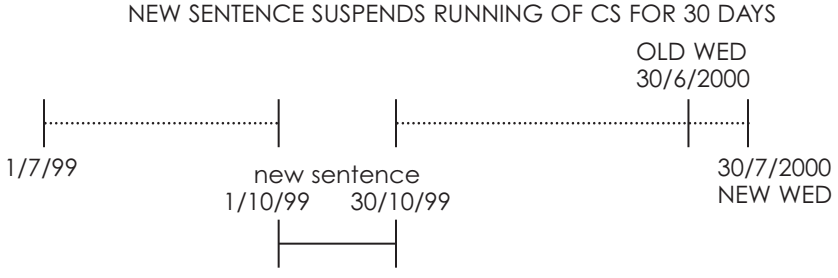
6) Examples of the Application of Sentence Calculation Rules to Conditional Sentences

Example 1: Conditional Sentence and New Sentence of Imprisonment

Mr. M is serving a 12 month conditional sentence (CS) which begins on July 1, 1999, and ends on June 30, 2000.

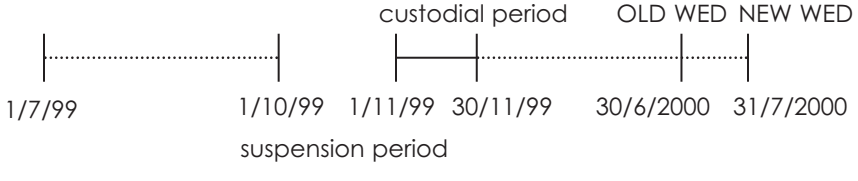
[98] Subsection 742.6(15) of the CC.
[99] Subsection 742.7(1) of the CC.
[100] Subsection 742.6(9)(c)&(d) of the CC.
[101] Subsection 742.7(2) of the CC.
[102] Subsection 742.7(3) of the CC.
[103] Subsection 742.7(4) of the CC.

On October 1, 1999, Mr. M receives a 30 day sentence of imprisonment for an offence committed before the conditional sentence. As a result of the new sentence, the running of the conditional sentence is suspended for 30 days beginning on October 1, 1999. The WED of the conditional sentence is placed 30 days in the future: July 30, 2000. Because Mr. M has earned remission for every 2 days served in custody, he will serve 20 days of his 30 day sentence. He will resume serving his conditional sentence in the community on October 21, 1999. As a result of the 10 days remission, Mr. M will no longer be subject to the conditional sentence as of July 21, 2000, 10 days before the new WED.



EXAMPLE 2: CUSTODIAL PERIOD FOR A BREACH OF A CONDITION OF A CONDITIONAL SENTENCE

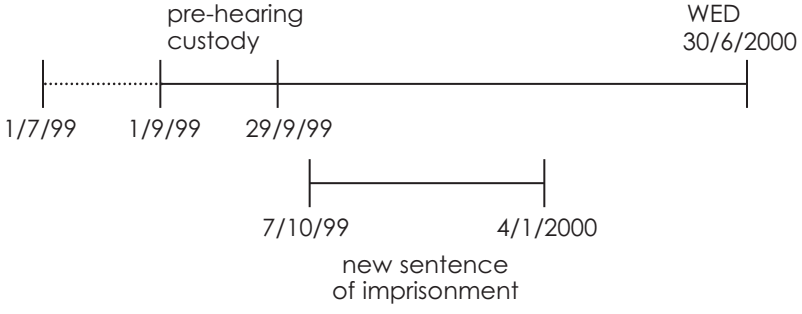
Mr. N receives a 12 month conditional sentence which begins on July 1, 1999 and ends on June 30, 2000. Mr. N breaches a condition of his conditional sentence, and he is arrested without a warrant on October 1, 1999, which triggers a suspension of the running of the conditional sentence. On November 1, 1999 the court orders that Mr. N serve a 30 day custodial period from November 1, 1999 until November 30, 1999. The court does not order that any period of the suspension (October 1-31, 1999) should be counted as time served under the conditional sentence, so the WED of the conditional sentence is placed 31 days in the future to July 31, 2000. Because Mr. N has earned remission for every 2 days served in custody, he will serve 20 days of his 30 day custodial period, and will no longer be subject to the conditional sentence as of July 21, 2000, 10 days prior to the WED.



Example 3: Termination of a Conditional Sentence Order for a Breach of a Condition of a Conditional Sentence followed by a New Sentence of Imprisonment

Mr. O is serving a 12 month conditional sentence beginning on July 1, 1999 and ending on June 30, 2000. Mr. O breaches a condition of his conditional sentence. A warrant for his arrest is issued and executed on September 1, 1999. During a bail hearing held on that same date, the court orders Mr. O detained. On September 29, 1999, the court under section 742.6(9)(d) of the *Criminal Code* terminates the conditional sentence order and directs that Mr. O serve the remaining portion of his sentence in custody. On October 7, 1999, Mr. O receives a 90 day sentence of imprisonment for a new offence.

The custodial period and the new sentence are served concurrently unless the judge orders otherwise.[104] They are merged to constitute a term of imprisonment of 276 days that begins on September 29, 1999 and ends on June 30, 1999.[105] In this case, although Mr. O earns no remission from the date of the making of the detention order until the conclusion of the breach hearing on September 29, 1999, the 28 days in custody will count towards completion of his sentence.



Because Mr. O has earned remission for every 2 days served in custody, he will serve 184 days of his 276 day term of imprisonment. As a result of the 92 days of remission he has earned, Mr. O will be no longer subject to the sentence as of March 31, 2000.

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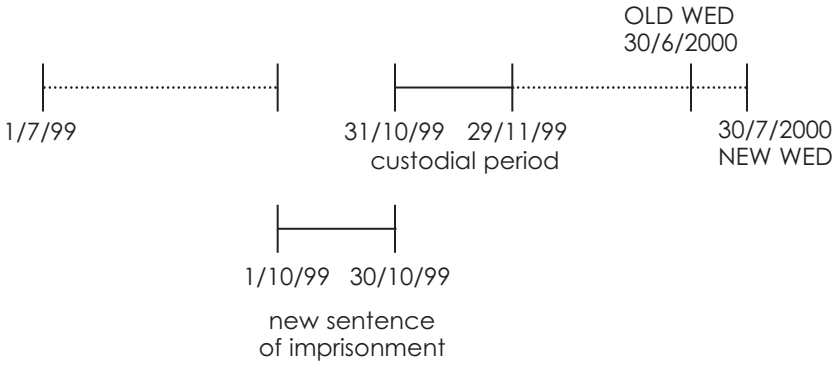
[104] The court could order that the 90 day sentence be served consecutively to the custodial period under subsection 718.3(4).
[105] As the two sentences are served concurrently, the 90 day sentence will be subsumed by the remaining portion of the 12 month sentence. Hence, the WED remains unaltered.

Example 4: New Sentence of Imprisonment followed by a Custodial Period for a Breach of a Condition of a Conditional Sentence

Mr. P is serving a 12 month conditional sentence beginning on July 1, 1999. On October 1, 1999 Mr. P receives a 30 day sentence for a new offence. On October 8, 1999, the court directs that he serve a 30 day custodial period for a breach of a condition of his conditional sentence. The new sentence suspends the conditional sentence from October 1, 1999 to October 30, 1999, which places the WED of the conditional sentence 30 days in the future, to July 30, 2000. The new sentence of imprisonment and the custodial period are served consecutively unless the judge orders otherwise. They are merged to constitute a sentence totaling 60 days that begins on October 1, 1999 and ends on November 29, 1999.



Because Mr. P has earned remission for every 2 days served in custody, he will serve 40 days of his 60 day term of imprisonment. As a result of the 20 days remission he has earned, Mr. P will no longer be subject to the conditional sentence as of July 11, 2000.

F. THE *SEX OFFENDER INFORMATION REGISTRATION ACT*

1) BACKGROUND

Bill C-16, *the Sex Offender Information Registration Act* (SOIRA), which came into force on December 15, 2004, establishes authority for the creation of a national database of convicted sex offenders to be maintained by the RCMP for the exclusive use of police for the investigation of crimes of a sexual nature. The registry is designed to be searchable by local police by specific criteria (i.e. geographical area, postal code area, physical attributes of offender, etc.), producing instant lists of previously convicted suspects matching the facts of a specific offence. The legislation was developed in response to the unanimous requests of the provinces and territories in 2001 to establish a national Sex Offender Registry.

The responsibility of the registry's administration lies with the provinces/territories and local police agencies. Under the scheme, provinces and territories are responsible for: 1. obtaining the initial court order requiring convicted offenders to register, 2. administering and regulating offender registration at local police stations, 3. prosecuting for non-compliance and 4. overseeing police use of the registry.

2) INTRODUCTION

The SOIRA will allow police to determine whether convicted sex offenders reside in the vicinity of the offence, to determine who they are and where they reside, and to decide if further investigation is warranted or if they can be eliminated as suspects.

The SOIRA also ensures that the profile of the offender in this database is kept up to date, otherwise the information in the database is of little value. Section 4 of the Act requires that an offender convicted of certain designated sex offences must report to a registration centre within fifteen days of being sentenced or released from custody. The offender will have to

re-register annually or after any change of address. Section 5 lays out the information that the offender must provide when he or she reports to a registration centre. The most important piece of data in the system is the offender's current address: he or she must provide their home address, any secondary address and the address of his or her place of employment or education.

To complete the link between the offender providing this information and the new sex offender databasemanaged by the RCMP, the Act provides for provincial authorities to designate "registration centres". In effect, this is likely to mean a police station and the authorities who enter the data will likely be police officers. Thus, the connection is made between the obligation on the offender to provide accurate data and the police agencies that will be collecting and using the information for investigation purposes.

3) The Registration Process

Following conviction and sentencing, or a finding of not criminally responsible on account of a mental disorder, for an offence referred to in paragraphs (a), (c), (d) or (e) of the definition of "designated offence" in subsection 490.011(1) of the *Criminal Code* such as sexual assault, child pornography or sexual exploitation, the Crown can apply to the court for a Registration Order. Where appropriate, a Registration Order will occur for sexual offences.[106] For other offences where there is clearly a sexual component referred to in paragraphs (b) or (f) of the definition of "designated offence" in subsection 490.011(1) of the *Criminal Code*, registration will occur when the Crown proves beyond a reasonable doubt the act was committed with the intent to commit one of the designated 'sexual' offences.[107] The judge hearing the application will order the offender to comply with the SOIRA unless the offender is able to satisfy the judge by applying the same "grossly disproportionate" test. The offender has the right to appeal the order.[108]

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[106] An Act respecting the registration of information relating to sex offenders, to amend the Criminal Code and to make consequential amendments to other Acts (*the Sex Offender Information Registration Act* (SOIRA)), 2004 Statutes of Canada, chapter 10, section 20 (subsection 490.012 (1) of CC).
[107] Subsection 490.012 (2) of CC.
[108] Section 490.014 of CC.

Registration is possible for those offenders subject to a sentence for a prescribed offence that is sexual in nature (listed under subsections 490.011(1)(a), (c), (d) and (e) of the *Criminal Code*) as of the date of proclamation, namely December 15, 2004. Registration of offenders eligible for this retrospective scheme is triggered by the provincial Attorney General causing personal service to be effected on those offenders. Service also includes Notice to the Offender of his or her right to file an Application within one-year of service for a judicial hearing of his or her status as a registered offender.

Once a court has ordered registration or a Notice to Offender has been served, the offender will be required to register in person at a designated registration centre within 15 days after the order is made or release from custody.[109] The registration period begins on the day the order is made and re-registration is required once per year as well as within 15 days of a change of name or residence.[110] If the offender is absent from his or her home address for more than 15 continuous days, the registration centre must be notified.[111]

Sex offenders will be required to remain registered for one of three periods; these periods are geared to the maximum penalty available for the offence of which they were convicted and begin to run on the date of sentencing: **10 years** for summary conviction offences and offences with 2 and 5 year maximums; **20 years** for offences carrying a 10 or 14 year maximum sentence, and **lifetime** for offences with a maximum life sentence or when there is a prior conviction for a sex offence.[112] If the offender receives more than one registration order, the most recent order determines the reporting dates and overrides previous orders.[113]

As a rule, offenders are eligible to make an application for termination of the order not before five years for orders lasting 10 years, 10 years for orders lasting 20 years and 20 years for lifetime orders.[114] If more than one order is made against an offender, he or she may make an application no earlier than 20 years after the most recent order was made.[115]

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[109] Subsection 4(2) of SOIRA.
[110] Section 4.1 of SOIRA.
[111] Subsection 6(1) of SOIRA.
[112] Subsection 490.013(2) of CC.
[113] Subsection 4.2(2) of SOIRA.
[114] Paragraph 490.015(1)(a), (b), or (c) of CC.
[115] Subsection 490.015(2) of CC.

Offenders are required to provide to local police and to keep current certain information such as addresses, telephone numbers, date of birth, given name, surname, alias(es) and identifying marks and tattoos.[116] On subsequent occasions when they attend at the registration centre, they are obligated to update any of the information about them that is contained on the registry.[117]

Pursuant to section 490.031 of the *Criminal Code*, every person who, without reasonable excuse, fails to comply with a Registration Order or a Notice to Offender is guilty of an offence. In the case of a first offence, the offender is liable, on summary conviction, to a fine of not more than $10,000, or to a term of not more than six months' imprisonment, or both. In the case of a second or subsequent offence, the Crown may proceed by way of summary conviction or on indictment. On summary conviction, the offender is again liable to a fine of not more than $10,000, or to a term of not more than six months' imprisonment, or both. If convicted on indictment, the offender is liable to a fine of not more than $10,000, or to a term of not more than two years' imprisonment, or both. As well, under section 17 of the SOIRA, every person who knowingly provides false or misleading information for input to the Registry is guilty of an offence, on summary conviction or on indictment, and is liable to the same penalties.

Under the legislation, persons authorized to register information must collect only the information pertaining to the offence and resulting order.[118] Information should be registered in the sex offender database without delay and treated confidentially.[119] The sex offender can request correction of information in the case of error or omission.[120]

[116] Subsection 5(1) of SOIRA.
[117] Subsection 5(1) of SOIRA.
[118] Paragraph 8(1)(a) of SOIRA.
[119] Section 10 of SOIRA.
[120] Subsection 12(1) of SOIRA.

Sex offender information will remain on the database indefinitely except for final acquittal on appeal or free pardon under the Royal Prerogative of Mercy, section 748 of the *Criminal Code* or an exemption order under subsection 490.023(2) of the *Criminal Code* – in these cases information is permanently removed.[121] Offenders will also have the entitlement to apply for a termination order after receiving a pardon under the *Criminal Records Act*.[122]

Access to registry data, except by authorized persons for authorized purposes, is prohibited. Public protection, which is the central purpose of the registration scheme, is provided by police use of the information. Police will have access to personal information about sex offenders for at least 10 years and, in many cases during their natural life.

[121] Subsections 15(2) and (3) of SOIRA.
[122] Paragraph 490.015 (1)(d) of CC.

G. *YOUTH CRIMINAL JUSTICE ACT*: SENTENCE CALCULATION

1) INTRODUCTION

The *Youth Criminal Justice Act* (YCJA) requires that youth sentences be calculated and administered in accordance with a set of rules or principles. Most of these rules are found in the YCJA or in consequential amendments to the *Criminal Code* (CC), *Corrections and Conditional Release Act* (CCRA) or *Prisons and Reformatories Act* (PRA). Some are found in case law. In many cases the rules are not the same for youth as they are for adults. In most cases the rules are the same as they were under the former *Young Offenders Act* (YOA).

Youth can be sentenced under the YCJA or in some cases may be sentenced as adults under the *Criminal Code*. Where youth are sentenced under the YCJA, it is possible that after becoming eighteen years of age the remainder of his or her sentence might be served in a provincial correctional facility for adults or a penitentiary. The YCJA contains special rules for when that can happen and for how those sentences are dealt with by the provincial or federal correctional authorities.

Where youth are sentenced as adults, they may serve all or a portion of their prison sentence in a youth facility, provincial correctional facility for adults or a penitentiary. The YCJA sets out when this can happen and the effect these placement decisions have on the calculation and administration of these special adult sentences.

These rules are described in this section of the Handbook and are broken into two categories: rules that apply to youth sentences and rules that apply to youth who receive adult sentences. The rules are an interpretation of a section or sections of an Act or case law. In some cases more than one interpretation is possible. In those situations, the different possible interpretations are outlined and an interpretation recommended.

2) Young Persons serving a Sentence in Adult Facilities

a) When Youth Sentences May Be Served in an Adult Facility

A young person can serve his or her youth sentence in an adult facility. This can happen for a number of reasons as a result of age:

- The young person is 20 years of age or older when he or she receives a custodial sentence (section 89 of the YCJA): In this situation the young person will be committed to a provincial correctional facility for adults and once he or she is serving the youth sentence, the provincial director can then apply to a youth justice court for authorization to direct that the remainder of the sentence be served in a federal penitentiary. This option is only available if at the date of the application the remaining portion of the sentence is two years or more.

- Where the young person turns 20 years of age while serving a youth sentence, he or she will be transferred to a provincial correctional facility for adults unless the provincial director orders that he or she remain in a youth custody facility (subsection 93(1) of the YCJA): In this situation the young person will be automatically transferred unless the provincial director orders the young person remain in the youth custody facility. Once the young person is in the provincial correctional facility for adults the provincial director can apply to a youth justice court for authorization to direct that the young person be transferred to a penitentiary, provided that the remaining sentence is, at the time of application, two years or more (subsection 93(2)).

- Where the young person turns 18 years of age while serving a youth sentence, the provincial director applies to a youth justice court for authorization to transfer the young person to a provincial correctional facility for adults (subsection 92 (1) of the YCJA). Once the young person has been placed in a provincial correctional facility for adults, the provincial director can apply to the youth justice court for authorization to direct that the sentence be served in a penitentiary if the remaining sentence is, at the time of the application, two years or more (subsection 92(2)).

b) Determination of Where The Sentence is Served When a Youth Sentence is Converted to an Adult Sentence

- Where the young person is required to serve more than one sentence, at least one of which is to be served in a youth custody facility and at least one of which is to be served in an adult facility, the entire sentence will be served in an adult facility. In this situation the total sentence length at time of transfer determines whether the young person serves the sentence in a provincial correctional facility for adults or in a penitentiary. If the remaining sentence is 2 years or more, it will be served in a penitentiary (subsection 92(4) of the YCJA).

- When a person is sentenced to an adult term of imprisonment and at that time he or she is serving a youth custodial sentence, both sentences will be served in an adult facility (subsection 92(4), section 184, and the consequential amendment to section 743.5 of the *Criminal Code*). The length of the sentence determines where it is served.

- When a person receives a youth custodial sentence while serving an adult sentence of imprisonment, the youth sentence is served in an adult facility. (subsection 92(4), section 184, and the consequential amendment to section 743.5 of the *Criminal Code*). The length of the sentence determines whether it is served in a provincial correctional facility for adults or in a penitentiary.

- Where the young person is serving an adult sentence in a youth custody facility and he or she receives a new youth custodial sentence, the provincial director can direct that the sentence will be served in an adult facility (see section 92(5)). In this case, the provincial director determines where the sentence will be served.[123] The provincial director can only direct that the sentence be served in a penitentiary where the unexpired portion is 2 years or more.

[123] Where a young person is serving a youth sentence and is placed in a youth custody facility to serve an adult sentence, the provincial director does not have this same discretion.

It is important to track the birth date of the young person and flag the date on which the young person becomes 18 years of age for potential transfer and 20 years of age for automatic transfer to a provincial correctional facility for adults.[124] It is also be important to identify if the young person is serving an adult sentence of imprisonment and to determine if the existing youth sentence(s) will be served in adult facilities.

c) Rules That Apply to a Youth Custodial Sentence Being Served in an Adult Facility

RULE: Unless a youth sentence is served in an adult facility it is treated the same as all other youth sentences, even where the young person has turned 18 years of age (subsection 42(17) of the YCJA).

It is the "transfer" to an adult facility, and not "attaining adult age (18 years)" that governs the rules applicable to sentence calculation.

RULE: When a youth sentence is served in an adult facility, as a result of the operation of sections 89, 92 or 93 of the YCJA, the Prisons and Reformatories Act (PRA), the Corrections and Conditional Release Act (CCRA) and any other statute, regulation or rule applicable in respect of prisoners or offenders apply, except to the extent that they conflict with the records, publication and information provisions of the YCJA (see subsections 89(3), 92(3) and 93(3)).

The rules applicable to adult sentences govern the administration and calculation of the sentence subject to the exceptions set out below. Consequently, the rules with respect to youth justice court reviews do not apply to these sentences since the parole reviews are available under the adult system. However, the provisions of the YCJA which require the young person to be released to the community under supervision and the continuance of custody applications under sections 98 and 104 continue to apply to young persons who have been transferred to a provincial correctional facility for adults pursuant to section 89, 92 or 93.[125] (See section 197 of the YCJA, which adds subsection 6(7.3) to the PRA). This allows for the enforcement of the community portion of a custody and

[124] Subsections 92(1) and (2) of YCJA and section 93.
[125] These same provisions due not apply with respect to sentences being served in a penitentiary.

supervision order after the release of the young person as a result of remission. It also allows for the continuation of custody past the release date established pursuant to subsection 6(7.1) and (7.2) of the PRA – remission release date or release date established pursuant to paragraphs 42 (2)(o), (q), or (r).

RULE: Where a youth sentence is converted, as a result of the operation of section 743.5 of the Criminal Code, to an adult sentence of imprisonment, the sentence is, for all purposes, dealt with as if it were a sentence imposed under the Criminal Code.

Subsections (1) and (2) of the new section 743.5 of the *Criminal Code* (consequential amendments made by the YCJA) both state, in part:

> *...the disposition or youth sentence shall be dealt with, for all purposes under this Act (Criminal Code) or any other Act of Parliament, as if it had been a sentence imposed under this Act.*

Section 743.5 of the *Criminal Code* provides for the automatic conversion to an adult sentence where the young person or adult is serving a youth custodial sentence and then receives an adult sentence of imprisonment or where the young person is serving an adult sentence of imprisonment and then receives a youth custodial sentence.

Pursuant to section 743.5 of the *Criminal Code*, when an adult sentence of imprisonment is imposed while the offender is serving a youth custodial sentence, the youth custody and supervision sentence is automatically converted to an adult sentence of imprisonment and treated as if it were a sentence imposed under the *Criminal Code*.[126] Consequently, the administration of the converted sentence is governed by the *Criminal Code*, the *PRA* and *CCRA*, and in the same manner as any other adult sentence. The provisions of the YCJA with respect to "community supervision", "conditional supervision" and "continuation of custody" do not apply to the converted sentence. The place where the sentence is served is governed by the placement rules noted above.

[126] It is the whole youth sentence (both custodial and community/conditional supervision portions) that get converted, and ***not*** just the remainder or unexpired portion of the sentence.

Where section 743.5 of the *Criminal Code* applies, Part VI of the YCJA (Publication, Records and Information) does not apply, because the sentence has been converted to an adult sentence of imprisonment.[127]

RULE: Where a youth custodial sentence in converted to an adult sentence by operation of s. 743.5 of the Criminal Code, the following procedural steps are to be followed:
- ***The youth sentence is converted to an adult sentence;***
- ***The two adult sentences are then merged into one sentence, pursuant to s. 139 of the CCRA; and***
- ***The consequences of the merged sentence are then determined (i.e., CCRA/PRA application, placement, release date, parole eligibility, entitlement to remission, etc.).***

RULE: Where a youth sentence is served in a federal penitentiary, the CCRA applies to determine eligibility for release and the setting of conditions for release into the community (subsections 89(3), 92(3) and 93(3)).

The rationale for this rule is that all youth sentences, even when served in adult facilities, will have a community supervision component. The CCRA provides for federal inmates to serve part of their sentence in the community. The PRA does not and thus the following rules are applicable.

Pursuant to subsections 89(3), 92(3) and 93(3) of the YCJA, it is a prerequisite for a transfer to a penitentiary that the young person has first been transferred to a provincial correctional facility for adults. Consequently, at the time of transfer to penitentiary, the young person's youth sentence will already have been dealt with as an adult sentence under the PRA. The transfer to penitentiary will then result in the meshing of the remission credits of the young person at the time of transfer and the maximum remission that could have been earned by the young person pursuant to the PRA, to establish a statutory release date.

RULE: Where a young person is transferred to a provincial correctional facility for adults from a youth facility, he or she is credited with full remission for the portion of the sentence that was served in the youth facility.

[127] Paragraph 110(2)(a) of the YCJA.

Section 197 of the YCJA made a consequential amendment to the section 6 of the PRA, adding subsection (7.1):

> (7.1) When a prisoner is transferred from a youth custody facility to a prison under section 89, 92 or 93 of the *Youth Criminal Justice Act* or as the result of the application of section 743.5 of the *Criminal Code*, the prisoner is credited with full remission under this section for the portion of the sentence that the offender served in the youth custody facility as if that portion of the sentence has been served in a prison.

Young persons transferred to a provincial correctional facility for adults pursuant to sections 89, 92 and 93 of the YCJA, or pursuant to section 743.5 of the *Criminal Code*, are credited with full remission for the portion of the sentence that was served in a youth facility. They also earn remission pursuant to section 6 of the PRA, in the same manner as any other adult prisoner, under the PRA (see definition of "prisoner" at section 196 of the YCJA, which amends subsection 2(1) of the PRA).

The only circumstance where a young person can be transferred directly to penitentiary is where the young person is subject to both a youth custody sentence and an adult sentence of imprisonment (see subsection 92(4) and (5) of the YCJA).

The YCJA does not have a specific provision that deals with the determination of the date that the community portion of a custody and supervision order, imposed pursuant to paragraph 42(2)(n), starts. Consequently, the remission will be calculated in accordance with section 6 of the PRA and the offender will be released to community supervision on that date. In calculating remission the offender will receive credit for full remission earned on any part of the sentence that had been served in the youth custody facility (section 6(7.1) of the PRA).

RULE: **Where a young person serving a youth sentence under paragraph 42(2)(o), (q) or (r) is transferred to a provincial correctional facility for adults, he or she is entitled to be released on the earlier of the date he or she is entitled to release under the PRA and the date on which the custody portion of the sentence expires under the YCJA.**

Section 197 of the YCJA made a consequential amendment to the section 6 of the PRA, adding subsection (7.2):

> (7.2) When a prisoner who was sentenced to custody under paragraph 42(2)(o), [youth sentence for listed presumptive offences] (q) [sentence for murder] or (r) [intensive rehabilitative custody and supervision order] of the *Youth Criminal Justice Act* is transferred from a youth custody facility to a prison under section 92 or 93 of that Act or is committed to imprisonment under section 89 of that Act, the prisoner is entitled to be released on the earlier of (a) the date on which the prisoner is entitled to be released from imprisonment in accordance with subsection (5) of this section [that is, section 6 of the PRA], and (b) the date on which the custody portion of his or her sentence under paragraph 42(2)(o), (q) or (r) of the *Youth Criminal Justice Act* expires.

The method for calculating the release date for these sentences when served in a provincial correctional facility for adults is different than that used when calculating the release date for custody and supervision orders under paragraph 42(2)(n). This is due to the fact that the periods served in custody and in the community are set by the youth justice court at the time of sentencing, and are not set in accordance with the 2/3 – 1/3 formula applicable to custody and supervision orders under paragraph 42(2)(n). The release date can change as a result of the loss of remission under the provisions of the PRA.

RULE: **When a young person serving a youth sentence is transferred to a provincial correctional facility for adults and is entitled to be released he or she will be released:**

- **To community supervision if serving a custody and supervision order under paragraph 42(2)(n).**
- **To conditional supervision if serving a custody and supervision order under paragraph 42(2)(o), (q) or (r).**

A consequential amendment to section 6 of the PRA, found at section 197 of the YCJA, states:

> (7.3) When a prisoner is committed or transferred in accordance with section 89, 92 or 93 of the *Youth Criminal Justice Act* and, in accordance with subsection (7.1) or (7.2) of this section [that is, section 6 of the PRA], is entitled to be released, (a)if the sentence was imposed under paragraph 42(2)(n) of that Act, sections 97 to 103 of that Act apply, with any modifications that the circumstances require, with respect to the remainder of his or her sentence; and (b) if the sentence was imposed under paragraph 42(2)(o), (q) or (r) of that Act, sections 104 to 109 of that Act apply, with such modifications that the circumstances require, with respect to the remainder of his or her sentence.

This means that the original expiry date of the sentence continues. Upon release the young person will serve the community portion of his or her sentence.[128]

3) Young Persons Who are Sentenced as Adults

In some cases young persons will be sentenced as adults. When that happens the young person can receive any sentence that could be imposed upon an adult.

If the young person is sentenced to a term of imprisonment, the youth justice court will hold a placement hearing. The court can place the youth in a youth custody facility, a provincial correctional facility for adults, or if the sentence is for more than 2 years, in a penitentiary. Regardless of where the sentence is served the following rules apply to these sentences:

RULE: ***Adult sentences of imprisonment imposed on a young person are administered and calculated in accordance with the rules respecting adult sentences. If the duration of the sentence is two years or more, the CCRA applies. If the duration is less than two years, the PRA is applicable*** **(subsections 77(2), 78 (1) and (2)).**

[128] Correctional authorities will make arrangements to set the conditions of release prior to releasing the young person. This does not apply, however, to sentences automatically converted pursuant to section 743.5 of the Criminal Code. In that situation the sentence is dealt with as if it were an adult sentence.

The rules applicable to adult sentences imposed upon a young person are the same as those applicable to any other adult. The length of a sentence of imprisonment determines whether the CCRA or PRA applies.

RULE: ***When a young person receives an adult sentence of life imprisonment for murder, the parole eligibility is dependent upon the young person's age on the day the offence was committed:***

- ***If the young person was under 16 years of age at the time the offence was committed, between 5 and 7 years as stated by the court, or 5 years if not stated;***
- ***If the young person was 16 years of age or over at the time of the offence, 7 years for second degree murder and 10 years for first degree murder.***

See section 745.1 of the *Criminal Code*.

H. TROUBLE SPOTS

Sentence managers face a variety of challenges in interpreting sentences handed down by the Court. This is because many inmates are serving multiple sentences, often imposed at different times and by different Courts. More difficult challenges are presented where the sentencing judge's intentions are unclear, or the warrant of committal is at variance with the sentencing transcript or incompatible with statutory authority. A summary of these key trouble spots is provided below. It is intended to enhance awareness of these issues among correctional authorities, lawyers and the bench to assist in promoting more effective and efficient calculation and administration of sentences.

1) Discrepancies Between Warrants and Sentencing Transcripts

Warrants of committal are at times worded differently from the judge's direction as set out in the sentencing transcript. This may happen because the judge's direction is summarized or is otherwise modified when the warrant of committal is prepared. Sometimes such modifications serve to clarify how one sentence relates to another, but at other times, they may unintentionally change the way the sentence is to be served by the offender.

When such variances occur, the long-standing position of federal authorities is that the warrant of committal provides the legal authority for the administration of the offender's sentence. The transcript is used only for clarifying how the warrant of committal is to be interpreted. When discrepancies are significant enough to affect the actual time to be served, offenders are notified and sentence managers will request the Court to provide an amended warrant.[129]

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[129] The preparation of a warrant of committal is an administrative act. In the case of *Ewing v. Mission Institution* (1994) 92 C.C.C. (3d) 484 (B.C.C.A.), the court held that "While it is not an order of the court, a warrant of committal, unless it is invalid on its face, must be considered valid until it is set aside... When the error in the warrant of committal was brought to the attention of the Court, the clerk had the power to amend the warrant to conform with the sentence as it was imposed by the trial judge" (at C.C.C. 486). When a determination is required as to whether the trial judge has the power to vary the sentence after pronouncement, distinctions must be made between judicial acts which relate to the substance of the sentence, and administrative acts, which relate to the recording and implementation of the sentence. The doctrine of *functus officio* applies after the judge has pronounced the sentence. This means that the judge does not have the power to amend the substance of the sentence once it was pronounced in open court. See also *Pochay v. Canada (Commissioner of Corrections)* (2002) 170 C.C.C. (3d) 274 (Ont. C.A.) and, for a further discussion of this issue, see Cole and Manson, Release from Imprisonment, Carswell, 1990, pp. 357-361; Clayton C. Ruby, *Sentencing* (6th ed.), Butterworths, at pp. 459-462 ; Hélène Dumont, *Pénologie: Le droit canadien relatif aux peines et aux sentences,* Les Édition Thémis, pp. 214-216.

Examples of Discrepancies Between Warrant and Sentencing Transcript

Example 1:

A warrant of committal contains the following wording:
11 Jan. 98 – 3 years

A second warrant of committal contains the following wording:
10 Feb. 98 – 1 year;
– 9 months

Because it is not clear how the sentences imposed on Feb. 10, 1998 relate to each other and to the Jan. 11, 1998 sentence, they can only be interpreted by sentence managers as being concurrent to the Jan. 11, 1998 sentence. The total sentence is therefore 3 years from Jan. 11, 1998.

A copy of the sentencing transcript is subsequently obtained and shows that the judge intended the one year sentence handed down on Feb. 10, 1998 to be "consecutive to any term of imprisonment to which [the accused] is already subject", and the 9 month sentence "to run consecutively with the 1 year sentence." This is inconsistent with the direction set out in the Feb. 10 warrant of committal, resulting in a total merged sentence of 4 years, 9 months as opposed to the 3 years based on the warrant of committal.

The Clerk of the Court and the inmate are advised of the discrepancy.

Example 2:

A warrant of committal reads as follows:
11 Jan. 98 – 2 years

A second warrant of committal contains the following wording:
10 Feb. 98 – 3 months concurrent;
– 1 year consecutive;
– 6 months consecutive;
> Total = 21 months

In the absence of explicit direction as to how the sentences imposed on Feb. 10, 1998 relate to each other and to the Jan. 11, 1998 sentence, the two consecutive sentences imposed on Feb. 10, 1998 are interpreted as being consecutive to the concurrent term imposed on that date, and thus the entire Feb. 10th package is treated as having to be served concurrently with the 2 years imposed on Jan. 11, 1998. The total sentence is, therefore, 2 years from Jan. 11, 1998.

A copy of the sentencing transcript reveals that the sentencing judge intended the 1 year sentence imposed on Feb. 10 to be "consecutive to the sentence now being served", and the 6 month sentence to be "consecutive to the 1 year sentence". The judge made no reference to the "total" number of months to be served. This was therefore an assumption of the Court Clerk in preparing the warrant. The result intended was a total merged sentence of 3 years, 6 months which is inconsistent with the direction set out in the Feb. 10 warrant.

The inmate and the Court Clerk are advised of the discrepancy.

2) Sentence Consecutive to What?

Sometimes both the wording on the warrant and the sentencing transcript are unclear as to which sentences are to be served consecutively with others. A classic example is where more than one sentence is imposed on the same day, with each sentence being "consecutive to the sentence now being served." Other examples of unclear wording include the following: "consecutive to term now serving" and "consecutive to previous term." In the absence of information about the specific relationship between each sentence, sentence managers must assume that the longest consecutive sentence governs with the others running concurrent to it. This may be at odds with the judge's intent if he or she intended each new sentence to be served consecutively to the one immediately preceding it.

EXAMPLES OF WARRANTS WITH AMBIGUOUS WORDING

EXAMPLE 1:

A warrant of committal contains the following wording:
11 Jan. 98 – 3 years

A second warrant of committal reads as follows:
10 Feb. 98 – 3 months consecutive to sentence now serving;
– 1 year consecutive to sentence now serving;
– 9 months consecutive to sentence now serving

The judge intended each sentence imposed on Feb. 10, 1998, to be consecutive to the one immediately preceding it (i.e., 3 months consecutive to 3 years handed down on Jan. 11, 1998, 1 year consecutive to 3 months imposed on Feb. 10, 1998, and 9 months consecutive to 1 year sentence imposed on the same date), resulting in a total merged sentence of 5 years. Because this is not clear from the wording on the Feb. 10 warrant, the sentence manager must interpret the effect of the sentences to be as follows: the "sentence now serving" on Feb. 10, 1998 is the three years imposed on Jan. 11, 1998. Therefore, each of the three sentences imposed on Feb. 10, 1998 are independently consecutive to the three years imposed on Jan. 11, 1998. The longest consecutive sentence will therefore govern (1 year), and the others are concurrent to it. The total merged sentence is, therefore, four years from Jan. 11, 1998.

EXAMPLE 2:

A warrant of committal reads as follows:
11 Jan. 98 – 3 years

A second warrant of committal contains the following wording:
10 Feb. 98 – 3 months consecutive to any term of imprisonment to which he is already subject;
– 1 year consecutive to any term of imprisonment to which he is already subject;
– 9 months consecutive to any term of imprisonment to which he is already subject

In this example, the opposite is true. The judge intended the sentences handed down on Feb. 10, 1998 to each be consecutive to the three-year sentence imposed on Jan. 11, 1998, but concurrent to each other (as was clearly expressed

in the transcript). The effect intended was that all of the consecutive sentences should be consecutive to each other, resulting in a total merged sentence of four years. However, when interpreting the wording on the Feb. 10 warrant of committal, the sentence manager determines that each sentence imposed on that date is consecutive to the term of imprisonment immediately preceding it (i.e., 3 months imposed on Feb. 10, 1998 is consecutive to 3 years handed down on Jan. 11, 1998; 1 year imposed on Feb. 10, 1998 is consecutive to 3 months imposed on that date; and 9 months imposed on Feb. 10, 1998 is consecutive to one year sentence imposed on that date). The total sentence is, therefore, five years from Jan. 11, 1998 as opposed to four years intended by the judge.

Ambiguities in this area may be avoided through express references to the relationship between sentences. Some examples providing clear direction are provided as follows.

Examples of Warrants with Clear Direction When There Are No Pre-Existing Sentences

Example 1:

After a prison break, a series of 4 sentences was handed down in the following manner:

Count 1 – 10 Jan. 98 – 2 months
Count 2 – 10 Jan. 98 – 2 months to run consecutively to (1)
Count 3 – 10 Jan. 98 – 2 months to run consecutively with (2)
Count 4 – 10 Jan. 98 – 2 months to run consecutively with (3)

The wording on the warrants of committal leaves no doubt that the Court intended counts (1) through (4) to all run consecutively (i.e., total of 8 months to be served).

Example 2:

A person is convicted and sentenced on the same day for three indictable offences as follows:

1. Sept. 15, 1998 2 years
2. Sept. 15, 1998 2 years consecutive to any other sentence
3. Sept. 15, 1998 2 years consecutive to any other sentence

Sentences 2 and 3 are consecutive to each other as well as to the two years for a total term of six years. The wording on the warrants of committal "to any other sentence" leaves no doubt that the Court intended those sentences to be served consecutively to whatever existed in the step by step order they were imposed.

In both examples, the wording clarifies how the sentences relate to each other. However, if there were any pre-existing sentences when these were imposed, clear direction on their linkage to those sentences would be required as the following examples illustrate.

Examples of Warrants With clear linkages to pre-existing sentences

If the intent is for sentences imposed on the same day to be consecutive to each other and to any pre-existing sentence (single term or total merged sentence), the wording "consecutive to any other sentence" will express this relationship as illustrated below.

Example 1:

A person who is serving a 3-year sentence is convicted and sentenced on the same day for three new indictable offences as follows:

1. Sept. 15, 1998 2 years consecutive to any other sentence
2. Sept. 15, 1998 2 years consecutive to any other sentence
3. Sept. 15, 1998 2 years consecutive to any other sentence

The result is that the three new sentences are consecutive to each other and to the pre-existing 3 year sentence, yielding a total merged sentence of 9 years.

If the intent is for sentences imposed on the same day to be consecutive to the pre-existing sentence (single term or total merged sentence) but not to each other, the wording "consecutive to sentence now being served" will express this relationship, as illustrated in the following example.

EXAMPLE 2:

A person who is serving a 3-year sentence is convicted and sentenced on the same day for three new indictable offences as follows:

1. Sept. 15, 1998 2 years consecutive to sentence now being served
2. Sept. 15, 1998 2 years consecutive to sentence now being served
3. Sept. 15, 1998 2 years consecutive to sentence now being served

The result is that the three new sentences will all be consecutive to the pre-existing 3-year sentence, yielding a total merged sentence of 5 years.

To express any other possible linkages between several sentences, clarity can be achieved by numbering the sentences (e.g., from counts 1 to 5) and expressing their specific linkages to each other and to any pre-existing sentence. An illustration is provided below.

EXAMPLE 3:

A person who is serving a 3-year sentence is convicted and sentenced on the same day for five new indictable offences as follows:

Count 1 – Sept. 15, 1998 – 1 year consecutive to sentence now being served
Count 2 – Sept. 15, 1998 – 2 years consecutive to Count 1
Count 3 – Sept. 15, 1998 – 2 years concurrent to Count 2
Count 4 – Sept. 15, 1998 – 2 years consecutive to Count 3
Count 5 – Sept. 15, 1998 – 1 year concurrent to Count 4

The result is a total merged sentence of 8 years.

3) Parole Eligibility Date (PED) Set at One-Half of Sentence Contrary to Statutory Authority

Occasionally, a Court will order that an offender serve one-half rather than one-third of the sentence before being eligible for parole where the *Criminal Code* does not provide this authority (i.e. offence is not on Schedule I or II to the *Corrections and Conditional Release Act* pursuant to section 743.6 of the *Criminal Code*). This situation gives rise to the dilemma as to whether the warrant should be enforced as written, or whether the *Criminal Code* should be adhered to. Historically, federal authorities have taken the position that the warrant should be enforced as written, while at the same time, the inmate should be informed so that he or she may seek legal advice.

Examples of PED Set at One-Half for Non-Schedule Offences

Example 1:

A person is convicted of fraud and receives a four year sentence with an order requiring him to serve one-half of the sentence before becoming eligible for full parole.

Section 743.6 of the *Criminal Code* authorizes the Court to impose 1/2 parole ineligibility in cases where the offender is sentenced to a term of imprisonment of two years or more for an indictable offence set out in Schedule I or II to the *Corrections and Conditional Release Act*. Fraud is not a Schedule offence, but since the judge directed that 1/2 parole ineligibility be applied, the sentence manager must respect the order indicated in the warrant of committal.

Example 2:

A person is convicted of attempt to commit sexual assault and sentenced to three years with an order to serve 1/2 of the sentence before parole eligibility.

Attempt to commit sexual assault is not on Schedule I or II (notwithstanding the fact that sexual assault is on Schedule I), making the order inconsistent with the sentencing provisions of section 743.6. However, the sentence manager must respect the direction contained in the warrant of committal and the inmate's PED is calculated at 1/2 as opposed to 1/3 of the sentence. The inmate is immediately notified of the problem.

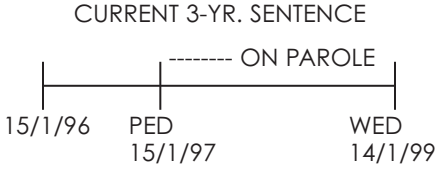
4) Intermittent Sentences and Merger

Pursuant to paragraph 732 of the *Criminal Code*, intermittent sentences can be imposed up to a maximum of 90 days and are served intermittently at such times as are specified in a probation order. At all times, when the offender is not in custody, the offender must comply with the conditions in the probation order. In practice, most intermittent sentences are served on weekends, with the offender in the community on probation status on weekdays.

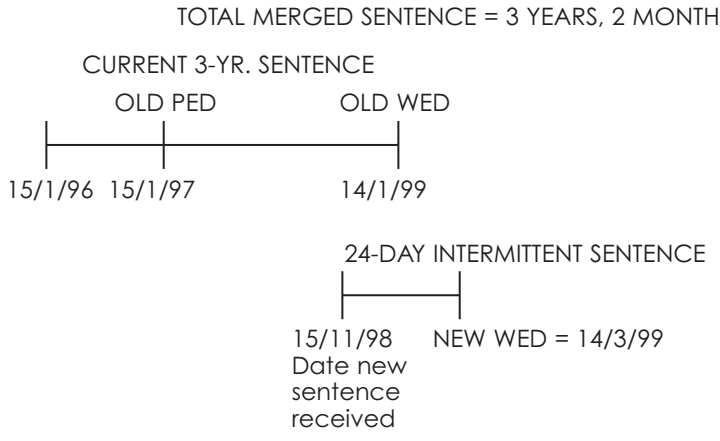
Under section 732, an offender who receives a custodial sentence while subject to an intermittent sentence will serve the remainder of the intermittent sentences on consecutive days unless the court orders otherwise. However, this rule does not apply when intermittent sentences are imposed consecutively or concurrently to existing custodial sentences. Given the differences in nature between these sentences, some administrative difficulties may be encountered when they are combined as illustrated in the following example.

Example:

Mr. Q has been on parole since he was released on his PED almost two years ago (parole can continue until WED). He is currently nearing completion of a 3-year sentence which commenced on 15/1/96.



On 15/11/98, Mr. Q receives a 24-day intermittent sentence for a minor provincial statute offence which is to be served on weekends (over a 4-month period). The intermittent sentence is merged with his original 3-year sentence. Despite having received a new sentence, Mr. Q's parole status remains intact due to the minor nature of his new offence and his excellent parole performance to date.



During the period in which the federal sentence and intermittent sentence overlap with each other (i.e., from 15/11/98 when the intermittent sentence was imposed until 14/1/99 when the federal sentence runs out), Mr. Q has both parole status and probation status at all times. However, once the intermittent sentence is the only sentence remaining (i.e., from 14/1/99 to new WED of 14/3/99), Mr. Q has probation status on weekdays and parole status on weekends. This is because of the total merged sentence. Mr. Q cannot be held in custody on weekends because his parole status remains effective until he reaches his new WED (unless it is suspended or revoked). At the same time, the conditions of his probation order must apply to the period he would not normally be required to be in custody, i.e., on weekdays.

In the event that Mr. Q breaches a parole condition on a weekday (he returns to his halfway house in an inebriated state which is in violation of his parole condition to abstain from intoxicants), federal authorities have no authority to suspend the parole.

Similar administrative problems can arise when traditional custodial sentences are merged with alternative sanctions.

5) Credit for Pre-trial and Pre-sentence custody

In determining sentences, courts take into account time spent in pre-trial and pre-sentence custody, often deducting double of this so-called "dead time" from the sentence they would have imposed because of the deprivation and punitive conditions of pre-trial and pre-sentence detention. In some cases, courts are now giving as much as four times credit for time spent in remand. Subsection 719(3) of the *Criminal Code* gives legislative sanction to this practice. In most instances, judges specify that he or she is imposing a sentence of imprisonment having factored in the "dead time" served by the offender. However, there are a growing number of cases in which judges impose more than one sentence at the same sitting and credit the offender for "dead time" without specifying to which offence the credit applies.

Example

A warrant of committal reads as follows:

21 June 1999 – (1) 15 years
– (2) 2 years consecutive to (1)

1 year credit for time in pre-trial custody

In this case, the offender sentenced to a total term of 16 years when taking into account a credit of 1 year for "dead time". However, it is unclear whether the credit applies to one or both sentences (6 month credit for each sentence) or whether it applies to the total sentence. This information becomes particularly important for sentence management purposes when a sentence is quashed or modified on appeal. For example, if sentence (1) were quashed, it is unclear what would happen to the 1 year credit that was initially granted as it is not specified how and in which proportion the credit is linked to sentences (1) or (2).

Ambiguities in this area may be avoided by deducting the "dead time" credit at the sentence determination stage and specifying, if need be, the time credited upon handing down the sentence.

APPENDIX A

SELECTED BIBLIOGRAPHY OF CASE LAW

Following is an overview of selected case law on sentence calculation and sentencing. While not exhaustive, this summary is intended to highlight some of the case law to date on the sentence calculation principles addressed in this handbook as well as to pinpoint some cases respecting sentencing that may be of interest to the judiciary.

Consecutive Sentences

A judge may order that a sentence be served consecutively to another sentence he or she has previously imposed or is at the same time imposing; but he or she cannot order that a sentence be made consecutive to that imposed by another judge unless that sentence has already been imposed at the time he or she is sentencing the offender.

Paul v. the Queen, [1982] 1 S.C.R. 621 (S.C.C.).

Consecutive Sentence to "Sentence Now Being Served"

An inmate serving a nine year term escaped and committed a number of offences while at large. He was sentenced as follows: 1) prison break – one year consecutive to sentence now being served; 2) forcible seizure – eighteen months consecutive to sentence now being served and consecutive to sentence of this date; 3) theft of car – one year concurrent to sentence now being served and concurrent to sentence of this date. On an application for *habeas corpus*, the Ontario Court of Appeal decided that the inmate should serve the sentences as follows, as intended by the sentencing judge: 1) initially, the one year for prison break; 2) then, the remnant of his nine years; 3) finally, the eighteen months for forcible seizure. The inmate argued that the eighteen-month term for forcible seizure should be consecutive only to the sentence for prison break because that was the sentence being served when the eighteen-month term was imposed. The Court of

Appeal rejected that position, arguing that in the circumstances, when the sentencing judge made the eighteen-month term "consecutive to sentence now being served", he could not mean consecutive to a sentence he had just imposed that same day.

> *Re Lauzon and The Queen* (1981), 58 C.C.C. (2d) 20 (Ont. C.A.).

Parole Eligibility Date for an Offender Who is Sentenced to Life Imprisonment, or for an Indefinite Period, and Receives an Additional Sentence for a Determinate Period.

The offender was sentenced to imprisonment for life for second degree murder with a parole ineligibility period of 10 years. Following a brief period under conditional supervision, the offender was arrested on new charges and a warrant of suspension of conditional release. The charges netted a global sentence of 12 years (8 years on each of two offences and 12 years concurrent on the other offence). Subsection 120.2(2) of the *CCRA* was applied relative to each conviction and sentence, a practice that the court viewed to be inappropriate. The Court opined that subsection 120.2(2) does not providet that concurrent sentences should have a consecutive effect. All sentences were imposed at the same time, on the same day, with emphasis that it was a "global" sentence. Nothing in the language of subsection 120.2(2) allows for the conversion of a concurrent sentence to a consecutive sentence. Correctional Service Canada was directed to re-calculate the parole eligibility date using the global sentence imposed. This principle was further clarified in *Cooper*, in which the Court indicated that the intent of Parliament was that additional sentences imposed on offenders serving a life sentence should have an impact on their parole eligibility. The Court added that Parliament did not intend that, where multiple concurrent sentences are imposed at the same time, each concurrent sentence be considered separately and end up having a consecutive effect amongst themselves.

To determine the parole eligibility of an offender serving a life sentence and who receives additional concurrent sentences, one must first determine the aggregate sentence imposed on the offender, i.e. merge the additional sentences together, and then add the period of ineligibility of this merged sentence to the period of ineligibility remaining on the life sentence.

> *Dimaulo v. Canada* (Commissioner of Corrections et al.) (2001), 160 C.C.C. (3d) 315, 212 F.T.R. 295 (T.D.) and *Cooper v. Attorney General of Canada* (2001), F.C.T 1329 (T.D.).

Conditional Sentences

The Supreme Court of Canada, in a unanimous decision, set out important principles for interpreting the conditional sentence provisions of the *Criminal Code*:

- The purpose of the provisions is to reduce incarceration and increase the use of restorative justice principles in sentencing.
- Conditional sentences should have both punitive and rehabilitative aspects – conditions such as house arrest should be the norm, not the exception.
- There is no presumption for or against use of conditional sentences for any particular offences.
- It would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences. Such presumptions would introduce unwarranted rigidity into sentencing.
- A judge must be satisfied the community will not be endangered before considering whether a conditional sentence would otherwise be appropriate.
- Conditional sentences can provide significant denunciation and deterrence.
- Conditional sentences are generally preferable to incarceration when a combination of punitive and rehabilitative objectives can be achieved.

> *R. v. Proulx* [2000] 1 S.C.R. 61

Merging Sentences/Accelerated Parole Review

An inmate was serving a two-year term and while still under custody, received a seven-day sentence, to be served concurrently with his existing sentence. The inmate argued that the concurrent sentence formed part and parcel of his "first sentence," thereby entitling him to accelerated parole review.

The Court held that section 139 of the *Corrections and Conditional Release Act* clarifies how offenders who are sentenced to an additional term of imprisonment before their original sentence has expired are to be treated for the purpose of determining eligibility for day and full parole: they are deemed to have been sentenced to one term of imprisonment. This is not tantamount to being "sentenced for the first time" for the purpose of accelerated parole review. Subsection 139(1) must be interpreted in such a manner as to provide for "one total term of imprisonment" for a potential plurality of sentences.

> *Prosyck* v. *NPB*, unreported, No. T-1716-93, November 22, 1993 (F.C.T.D.).

Calculation of Sentence Involving:

1. Time at Large Due to Administrative Error and Inmate Aware of Error

The question in this case was whether an inmate was entitled to count, as time served on a penitentiary sentence, the period when the inmate was at large due to premature release owing to an administrative error. The Court held that the mere fact that there had been an error cannot be taken to generally justify premature release. If an inmate is aware he or she is required to serve the balance of the penitentiary sentence and does not notify the authorities of this, the inmate is not entitled to relief. Therefore, the sentence is deemed to resume when the inmate is taken back into custody.

> *Re Law and The Queen* (1981), 63 C.C.C. (2d) 412 (Ont.C.A.).

2. Time at Large due to Administrative Error and Inmate Unaware of Error

Due to an error by prison authorities, the accused was released prior to the expiration of his sentence. The accused had done nothing to mislead the authorities so as to bring about his premature release and may well have believed he was entitled to parole at that time. The issue was whether, upon being taken back into custody, he had to serve the entire sentence which remained at the time of his premature release. The Court held that the time spent in the community counted toward his sentence.

R. v. Stanton (1979), 49 C.C.C. (2d) 177 (Ont. C.A.).

3. Time Spent Unlawfully at Large

An offender failed to return from a temporary absence pass and was recaptured 9 years later. The Court held that the time during which the offender was unlawfully at large did not count toward the original term of imprisonment. Although the Crown failed to convict the offender for escape because it could not be proven that he was the person named in the warrants of committal, an overwhelming inference was drawn that the offender did not return to custody when legally required to do so and therefore had not served his sentence.

Re MacDonald and Deputy Attorney-General of Canada (1981), 59 C.C.C. (2d) 202 (Ont. C.A.).

Interpretation of Ambiguous Statute

The Court considered the proper interpretation of specific provisions in the Parole Act and the Penitentiary Act (now the Corrections and Conditional Release Act) relating to the calculation of an offender's remaining term on recommitment. The combined effect of the two provisions was unclear in regard to whether the offender was entitled to remission on the sentence or rather, was required to serve more time in custody. The Court held that the further period of incarceration

could not be imposed unless the statutory provisions explicitly provided for that. Where there are ambiguities in statutes affecting the liberty of a subject, the statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.

> *Marcotte v. Deputy Attorney-General of Canada* (1974), 19 C.C.C. (2d) 257 (S.C.C.).

AMBIGUOUS WARRANT OF COMMITTAL

The offender was sentenced as follows: "7 years for robbery" and "2 years for escape." The issue was how the sentences were to be served since the sentencing court did not address this. On appeal, the Court held that if it is unclear whether a sentence is to run concurrently or consecutively to any sentence the offender is serving at the time, the new sentence is deemed to run concurrently.

> *R. v. Duguid* (1953), 107 C.C.C. 310 (Ont. C.A.).

VALIDITY OF WARRANT OF COMMITTAL

An inmate requested an investigation into the circumstances of his release after being returned to custody for new criminal charges. When a copy of the reasons for judgment for the original sentence was obtained, inconsistencies with the original warrant of committal were noted. Had the warrant been amended to correct the inconsistencies at an early date, the offender would have been subjected to a later release date.

The Court held that the Correctional Service of Canada was right in calculating the sentence as set out in the original warrant. The warrant of committal upon which prison authorities act is valid until it is corrected or set aside, unless it is invalid on its face. The warrant of committal may be corrected by the clerk at any time if it is erroneous. Where there is ambiguity or any question at all about the sentence imposed, it ought to be taken before the trial judge for clarification.

> *Ewing v. Mission Institution,* (1994) 92 C.C.C. (3rd) 484 (B.C.C.A.).

Sentencing Judge has no Jurisdiction to Designate Penitentiary

A trial judge who has imposed a sentence on an offender has no jurisdiction to designate the penitentiary in which the sentence is to be served. The trial judge had found that sending a native woman to the Prison for Women violated several sections of the Charter but the Court of Appeal ruled that the question of where the sentence is to be served is a matter of administration of the sentence and does not concern the imposition of the sentence.

R. v. Daniels (1991), 65 C.C.C. (3d)366 (Sask. C.A.)

APPENDIX B

CONTACTS FOR OBTAINING FURTHER INFORMATION

For further information, please contact sentence management staff at the following Correctional Service of Canada (CSC) locations. Should you wish to know the effect of a particular sentence, CSC will be able to respond to your request more promptly if provided with the name and FPS number of the offender.

National Headquarters

Gilles Broué
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario K1A 0P9
Phone: (613) 996-7279

Regional Headquarters

Prairie Region
Garth Sigfusson
2313 Hanselman Place
P.O. Box 9223
Saskatoon, Saskatchewan
S7K 3X5
Phone: (306) 975-4857

Atlantic Region
Nicole Robertson
Government of Canada Bldg.
2nd Floor
1045 Main Street
Moncton, New Brunswick
E1C 1H1
Phone: (506) 851-6397

Ontario Region
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Abbotsford, British Columbia
V2T 5L7
Phone: (604) 870-2501

For information about this handbook or to obtain additional copies contact: Normand Payette, Public Safety and Emergency Preparedness Canada, 10F219 – 340 Laurier Avenue West, Ottawa, Ontario, K1A 0P8, tel. (613) 991-2841, fax (613) 990-8295.

GLOSSARY

Accelerated Parole Review: A streamlined parole review process for first-time, non-violent penitentiary inmates with the objective of ensuring day parole release at 1/6 of the sentence and full parole release for approved offenders at the 1/3 of the sentence. Offenders convicted of terrorism offences, and some offenders convicted of criminal organization offences, are excluded from accelerated parole review.

Concurrent Sentence: A sentence directed by the judge to run simultaneously with another sentence previously imposed, or which the judge is currently imposing. If the judge is silent with regard to the nature of the sentence, it will be interpreted by federal correctional officials to be concurrent.

Conditional Release: A general phrase encompassing all forms of release from custody with conditions attached.

Conditional Sentence: A sentence of imprisonment imposed on an offender up of up to two years less a day which the court allows the offender to serve in the community for the entire duration of the sentence, provided that he or she abides by the conditions of a conditional sentence order. The court may only impose a conditional sentence of imprisonment where the offender is convicted of an offence that is not punishable by a minimum term of imprisonment and the court is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing.

Consecutive Sentence: A sentence directed by the judge or required by law to be served following another sentence previously imposed, or which the judge is currently imposing.

Day Parole: A form of conditional release generally granted for up to a six-month period to prepare the inmate for full parole or statutory release. The inmate must return to a penitentiary, community-based residential facility or a provincial correctional facility each night.

Detention: Holding an inmate in custody past the statutory release date until warrant expiry, at the authority of the National Parole Board, for having met specific legislative criteria, including the likelihood of committing an offence involving death or serious harm to another person, a serious drug offence or a sexual offence involving a child before the end of the sentence.

Escorted Temporary Absence (ETA): A temporary release from custody with an escort for administrative, medical, community service, socialization, personal development or humanitarian reasons.

Federal Inmate: A person who is serving a sentence in a federal penitentiary.

Federal Offender: An offender subject to a penitentiary sentence who is either in confinement or in the community under supervision.

Full Parole: Full-time conditional release under supervision normally at 1/3 of the sentence.

Intermittent Sentence: Subsection 732(1) of the *Criminal Code* allows the court to impose an intermittent sentence of up to 90 days which is usually served on weekends "having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to ensure compliance with the sentence." When the offender is not in custody, he or she is subject to the conditions of a probation order.

Merger: Combination of two or more separate sentences to form a single sentence which provides the basis for calculating conditional release eligibility dates.

Parole Eligibility Date (PED): The date on which an offender becomes eligible for release on full parole.

Parole Inoperative: Discontinuation of parole and return to custody when receipt of an additional concurrent sentence or an increase in the sentence length on appeal results in a full parole eligibility date in the future.

Penitentiary: A facility operated by the Correctional Service of Canada for the care and custody of offenders serving sentences of two years or more as well as other offenders transferred to penitentiary.

Prison: A place of confinement other than a penitentiary.

Statutory Release: Legal entitlement to release under supervision at 2/3 of sentence (SRD refers to the statutory release date).

Unescorted Temporary Absence (UTA): A temporary release from custody without an escort for administrative, medical, community service, socialization, personal development or humanitarian reasons.

Warrant Expiry Date (WED): The date on which the sentence expires.

Work Release: A structured program of release allowing a penitentiary inmate to work for a short time in the community on a paid or voluntary basis while under supervision.

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