Remission, Ticket of Leave and Parole

ARTHUR E. MALONEY *
Toronto

I

Remission, ticket of leave and parole are the processes by which an offender secures his release from confinement before the sentence imposed upon him at his trial has run its full course. By virtue of their operation the sentence of the tribunal may be abbreviated. Officials who are charged with the important responsibility of administering them are vested with a sacred trust, because on their deliberations and the resulting decisions depends the right of a great many of their fellow men to be free and at large. These processes are an integral part of any penal system and their operation in Canada has been the target of a good deal of criticism from persons and organizations interested in the broad subject of prison reform.

The problem of remission, ticket of leave and parole is in a state of confusion in Canada, due largely to the decentralization of our penal system. In order to understand the problem, students of it are required to distinguish between penitentiaries, provincial gaols and reformatories, between remission, ticket of leave and parole, and, in the Province of Ontario and British Columbia, between determinate and indeterminate sentences of imprisonment.

Offenders who are sentenced to prison for life or for a term of years not less than two must serve their sentences in a federal institution, that is in a penitentiary, of which there are presently seven in Canada.[1] Offenders who are sentenced to prison for a determinate period of less than two years — even though it be by one day — must serve their sentences in an institution operated under the jurisdiction of the provincial, municipal or county authorities of the province in which they are convicted. Offenders convicted in Ontario or in British Columbia may by reason of special statutory authority be given, not only a determinate

* Of Edmonds and Maloney, Barristers and Solicitors.
[1] The Penitentiary Act, 1939, Statutes of Canada 1939, c. 6, s. 46.

period of imprisonment in a provincial institution of less than two years, but as well an additional indeterminate period of imprisonment of not more than two years less one day.[2]

As will appear later in this article, the term "remission" embraces two separate things — the one being the reduction in his sentence that an offender may earn in any penal institution, provincial or federal, by virtue of good conduct and obedience to prison rules, and the other being the unconditional release that he may secure by way of the royal prerogative. Remission earned by reason of good conduct is statutory in origin, whereas remission by way of the royal prerogative of mercy is a common law right — and a right that is not exercised frequently. A prisoner who is serving a term in a penitentiary or a determinate period of imprisonment in a provincial institution can in certain cases secure his release by way of ticket of leave. Parole is only available to a prisoner in a provincial institution who is serving an indeterminate period of imprisonment. Under our present system the term "ticket of leave" should be considered in conjunction with a definite or determinate period of imprisonment and the term "parole" only with reference to an indeterminate period of imprisonment. Ontario and British Columbia are the only two provinces whose courts have power to impose indeterminate periods of imprisonment and who, therefore, have Boards of Parole.

II. *Remission*

Statutory remission

Offenders do not ordinarily serve every day of the sentence that was originally imposed upon them. This is because they succeed in earning "statutory remission" or what is sometimes spoken of as "good conduct time". In federal institutions, penitentiaries, authority for remission is given by section 69 of The Penitentiary Act, 1939.[3] The provisions of the section are as follows:

> (1) The Commission, subject to the approval of the Minister, may make regulations, under which a record may be kept of the daily conduct of every convict in any penitentiary, noting his industry and the strictness with which he observes the prison rules, with a view to permit such convict to earn a remission of a portion of the time for which he is sentenced to be confined, not exceeding six days for every month during which he is exemplary in conduct and industry.

---

[2] Prisons and Reformatories Act, R.S.C. 1927, c. 163, s. 46; Statutes of Canada 1948, c. 26.

[3] Statutes of Canada 1939, c. 6 (proclaimed Sept. 1st, 1947).

(2) When any convict has earned and has at his credit seventy-two days of remission, he may be allowed, for every subsequent month during which his conduct and industry continue satisfactory, ten days' remission for every month thereafter.

(3) If any convict, by reason of sickness or any other infirmity, not intentionally produced by himself, is unable to labour, he shall be entitled, by good conduct, to such portion of the remission from his sentence to which he would otherwise be entitled as the warden, with the concurrence of the Commissioner, deems proper.

(4) Every convict who escapes, attempts to escape, breaks prison, attempts to break prison, breaks out of his cell, or makes any breach therein with intent to escape, or assaults any officer or servant of the penitentiary, or being the holder of a licence under the *Ticket of Leave Act*, forfeits such licence, shall forfeit the whole of the remission which he has earned.

Regulations have been passed pursuant to this section, and the following regulations on remission are now in effect:

168. With a view to encouraging good conduct and industry, and to facilitate the reformative treatment of convicts, commencing on the date of reception in a penitentiary, remission of sentence may be awarded as provided by statute, dependent upon the conduct and industry and the strictness with which a convict observes the prison rules. The number of days to be remitted for each month within statutory limits, shall be as the Warden determines.

169. Days remitted for Sundays, holidays and days on which a convict is not assigned to labour shall be based on the conduct for such days and the industry of the convict during the week or while in health, and days remitted to the sick shall be based on the conduct while so sick and the industry of the convict during the latest previous week that he was assigned to labour.

170. If a convict is unable to work due to physical inability or sickness not brought about by his own deliberate act, he shall be awarded a remission of sentence on the basis set out in regulation 169 of not more than five-sixths of the number of days that may be awarded to him if he may be awarded six days remission of sentence each month, or nine-tenths if he may be awarded ten days each month.

171. Where one term of imprisonment is consecutive to or overlaps any other term or terms, the two or more terms shall be treated as one aggregate term for the purpose of determining the remission that may be awarded to a convict.

172. The Warden is authorized to deprive a convict of not more than thirty days of earned remission for any offence against Penitentiary rules. For the forfeiture of any longer period it shall be necessary to obtain the sanction of the Minister of Justice.

173. Every convict who escapes, attempts to escape, breaks prison, breaks out of his cell, or makes any breach therein with intent to escape, or assaults any officer or servant of the Penitentiary, or being the holder of a licence under the Ticket of Leave Act, forfeits such licence, shall forfeit the whole of the remission which he has earned.

174. A convict who forfeits all or any part of his remission as a punishment for an offence against prison rules, may at once again begin to earn remission or further remission, but if the forfeiture is accompanied by another punishment of a continuing nature, he shall not again begin to earn remission or further remission until the expiration of the punishment of a continuing nature.

175. Should a convict forfeit all his remission twice during any term of imprisonment, he shall not again begin to earn remission until, in the opinion of the Warden he shall have given definite evidence of reformation.

176. No remission forfeited by a convict may be restored.

In provincial institutions, or more properly in penal institutions that are not penitentiaries, remission is possible under the authority given by section 20 of the Prisons and Reformatories Act.[4] Its provisions are:

> Every prisoner sentenced to such prison shall be entitled to earn a remission of a portion of the time for which he is sentenced, not exceeding five days for every month during which he is exemplary in behaviour, industry and faithfulness, and does not violate any of the prison rules; and if prevented from labour by sickness, not intentionally produced by himself, he shall be entitled to earn, by good conduct, a remission not exceeding two and one-half days for every such month.

An offender earns remission of this type automatically under the legislative authority referred to and appears to lose it at the whim of the warden or of the superintendent of the institution in which he is confined. These officials have power to deprive a convict of not more than thirty days of his earned remission for any offence against prison regulations. If the prisoner is to be deprived of any further period of earned remission the decision must be taken by the Minister of Justice. Remission is peculiarly a problem of prison management and discipline. The broad power to take away and to withhold remission, it is apparent, must be carefully and judicially exercised. Prison regulations, infractions of which will be punishable with loss of earned remission, ought to be conceived, not on any purely punitive basis designed to make prison life less tolerable for the offender, but with a view to maintaining order and peace within the institution.

Trials within prison for offences against its rules must be fairly conducted and, in my opinion, ought to be presided over by someone not on the prison staff, who, being quite independent of the individual prison and of the influences that prevail within it, will not suffer any sense of embarrassment by ruling against the officials at whose instance the charge has been preferred.

[4] R.S.C. 1927, c. 163.

The public generally do not have access to our penal institutions, much less do they have any access to their records, and I am aware of no member of the public (with the exception of the members of the Archambault Commission) who has ever witnessed a prison trial, either in a federal or provincial institution. The public trial has deep roots in our system of jurisprudence. Trials are fairer by reason of it. Judges and judicial officers who preside over trials in which they have occasion to pass judgment on their fellow man and have power to punish him are — after all — only human. If their conduct of trials and the disposition they make of offenders is open to the scrutiny of counsel and of the press it is inevitable that greater care will be exercised and that the result will be more satisfactory. No reason occurs to me that would make public trials for breaches of prison rules inadvisable. When I say "public trials" I use the term in a very limited sense because obviously it would not be practicable, and in many cases would be physically impossible, to accommodate the public generally at such trials. I do feel that the prisoner should be entitled to legal counsel and that the press should be admitted. There is no doubt that the present form of prison trial is the subject of much justifiable complaint, and if the two suggestions I have made would bring about an improvement then the inconvenience that might be caused by giving them practical effect ought not to be advanced as the excuse for our failure to do so.

The irritating nature of some pointless prison regulations and the character of prison trials were considered by the Royal Commission to Investigate the Penal System of Canada. The need for devising a system of prison rules and regulations of a sane and purposeful nature is apparent from the following quotation taken from the Commissioners' report:

> The regulations provide so many trivial offences that may be punished in a drastic manner that it is almost impossible for prisoners to avoid committing some punishable breach of the rules. It is, therefore, necessary for them to exercise constant vigilance and to evolve methods of avoiding punishment. They soon become expert in the practice and, on release from prison, carry with them a habit of concealment. Dealing only for the moment with those who are reformable, as opposed to incorrigible and habitual offenders, the present prison system is bound to result in a gradual demoralization of those subjected to it. They become spiritually, as well as physically, anaemic, lazy, and shiftless, physically and mentally torpid, and generally ineffective and unreliable.[5]

[5] Report of the Royal Commission to Investigate the Penal System of Canada (1938), p. 54.

The best information available is that subsequent to the publication of their report, and more recently under the guidance of Major-General Gibson, the regulations have been so revised and amended as to remove some of the abuses complained of by the Commissioners.

In connection with prison trials I desire to refer again to the report of the Commissioners, who give a fascinating description of what transpired at a trial they had occasion to observe and who then express their opinion of its unfairness:

> A typical case was tried before us in one of the penitentiaries. An inmate, accused of smoking while travelling in the small tramway which runs to a quarry two miles from the prison, emphatically denied having done so. When cross-examined through the warden, the complaining officer was not prepared to swear that he had actually seen the inmate with a cigarette or pipe, or even that he had seen smoke coming out of his mouth. His evidence was to the effect that he had seen smoke coming from the side, or behind the head, of the accused inmate, who was sitting in company with five others on one of the tram benches. In spite of the insufficiency of this evidence the inmate was found guilty and punished. One of your Commissioners remarked to the warden that there was at least a doubt in that case, and that certainly the inmate would not have been convicted on such evidence in a court of law. The warden replied that he believed in his officer, knew the inmate, and, from this, considered the latter to be guilty. A few minutes afterwards, at the hour for hearing requests, and after the trials were over, another inmate came forward and stated that he had come to take the punishment inflicted upon the first inmate because it was he who had been smoking and not the man convicted. The confession was coldly received by the warden, who later informed your Commissioners that he did not believe it, and, although sentence was suspended on the first inmate and punishment inflicted on the second, your Commissioners came to the conclusion that a prisoner had little chance of fair or impartial treatment in that prison court.
>
> Undoubtedly a prisoner usually finds it advisable to plead 'guilty' because of the fear that, if he does not do so and yet is found guilty, the punishment inflicted will be much more severe than if he had pleaded 'guilty' in the first instance. Your Commissioners realize that little else can be expected under the system at present in force. Whatever the guard reports the warden must believe, unless the whole system of discipline within the prison is to be undermined. Even if a warden suspects, or even knows, that the guard is lying, he has no choice but to take the guard's word against that of the prisoner.[6]

The warden or the superintendent of the individual institution continues to preside over prison trials. I saw fit to recommend earlier that they should be presided over by someone who is not a member of the prison staff. My reason for doing so ought to be apparent from the quotation set out immediately

[6] *Ibid.*, p. 63.

above. Exercising important judicial functions, it is essential that the presiding officer at such a trial should be thoroughly trained and should approach his task without bias and with the completest independence. Concerning prison trials the Commissioners in their report made five recommendations. I propose to refer to the fourth and fifth. The following appears in the report:

> fourth, trials should not be held before the wardens alone, but rather before a tribunal of three, composed of the warden, deputy warden or chief keeper, and the physician. This would tend to ensure that the trial would be impartial and the decision just; fifth, and the most important of the recommendations of your Commissioners with respect to this problem, an appeal should lie from prison court sentences to the board of visitors, which your Commissioners recommend in chapter XXX of this report as being necessary to a proper reorganization of the penal system. This is in accordance with the practice in Great Britain, where the inmates have a right of appeal to the visiting committee or the official Board of Visitors. The results obtained by this provision are that the prisoners feel they have full access to a fair administration of justice, false and exaggerated accusations are discouraged, and unfair punishments eliminated. In England, where this right of appeal is permitted, it has been found that sentences given by the prison court are very seldom reversed. The officers, the guards, and even the governors, are held in check by the supervision of the Board of Visitors. The consensus of opinion there, including that of the governors, is overwhelmingly in favour of this right of appeal. One of the governors told your Commissioners that he regarded this right of appeal as essential to the administration of discipline, and that he felt it supported his authority rather than diminished it.
>
> The right of appeal to such a board would also give the inmate an outlet for grievances and a vent for emotions, which is necessary in any penal institution, because it is important that the prisoner should not feel that he is absolutely removed from the protection of his fellow men in the outside world, and utterly secluded from them.[7]

Notwithstanding these recommendations, I continue to believe that the prison trial should be presided over by an official completely independent of the institution concerned. If effect were given to my recommendation, we could perhaps avoid the inconvenience and the delay that would undoubtedly be involved in the appeal procedure approved by the Commissioners. No appeal would then be necessary although in rare cases provision could be made for one direct to the Minister of Justice or the Solicitor General.

It is essential that earned remission should not be lost except deservedly. Whether it deserves to be lost cannot be determined except by a *fair trial* for a *proved breach* of a *just prison rule.*

---

[7] *Ibid.*, p. 65.

Remission by royal prerogative

Remission of this type is quite different from statutory remission and the use of the same term to describe both is unfortunate. Remission of the kind we are now to consider amounts to an exercise of the royal prerogative of mercy, which is a common law right that is expressly preserved by the provisions of the Criminal Code.[8]

The royal prerogative is exercised in Canada by the Governor General in respect to the inmates of both federal and provincial institutions. The Governor General may remit a sentence but he does not technically reverse it or pronounce it wrong. The act of pardoning is one of pure clemency and is not the exercise of a judicial power.[9] The principles that are applicable in the exercise of the pardoning power were briefly stated by Wurtele J. in *Ex parte Armitage*:

> The prerogative of mercy is simply the exercise of a discretion on the part of the Sovereign to dispense with or to modify punishments which the criminal or penal law required to be inflicted. It is exercised by commutation or by a free or conditional pardon; but it should not interfere with or infringe private rights. It must not be anticipatory, and it should not do more than relieve the offender from the punishment imposed by the sentence of the Court or magistrate, and must not secure him in the advantage derived from his wrong doing, and for instance relieve him from the liability to vacate an office corruptly acquired.

The power to commute a sentence of death imposed in a capital case to one of life imprisonment or to a briefer term is closely related to the royal prerogative of mercy, although special provision is made in the Criminal Code enabling the Crown to commute the sentence of death.[10]

In respect of penalties imposed for the infraction of the provisions of provincial statutes the royal prerogative is exercised by provincial and not by dominion or federal officials.[11]

An offender who is at large under the authority of remission by royal prerogative has been excused from serving the balance of his term of imprisonment — he is released unconditionally. In this respect it differs from release obtained by way of ticket of leave. An offender who is released in this latter way is deemed to be still serving his sentence, although at large, and he may be required to return to prison for the unexpired portion of his term for a breach of one of the conditions of his release.

[8] Criminal Code of Canada, s. 1080.
[9] *Ex parte Armitage* (1902), 5 C.C.C. 345.
[10] Criminal Code, s. 1077.
[11] *Attorney-General for Canada* v. *Attorney-General for Ontario* (1894), 23 S.C.R. 458.

Because of the statutory power to release an offender by way of ticket of leave and because of the greater safeguards that are involved in granting him his freedom under the provisions of the Ticket of Leave Act, the royal prerogative of mercy is not commonly exercised.

Persons interested in its historical origin and background should refer to Tremeear's Criminal Code.[12]

Chief Justice McRuer, in his interesting and informative article which appears elsewhere in this issue, discusses the royal prerogative of mercy under the heading of executive clemency. In considering the subject now under discussion I would recommend to my readers that they refer to that portion of His Lordship's article.

III. *Ticket of Leave*

Ticket of leave is the means more commonly resorted to by an offender who seeks his conditional release from confinement. This process is available to an inmate of a penitentiary no matter what his term and also to an inmate of a provincial, or non-federal, institution who is undergoing, at the time of his application for a ticket or licence, a determinate period of incarceration. It is of statutory origin, the enactment permitting it being the Ticket of Leave Act,[13] whose provisions enable the early liberation of an offender quite independently of the Penitentiary Act and its sections on statutory remission. The relevant provisions of the Ticket of Leave Act are these:

> 3. (1) The Governor General by an order in writing under the hand and seal of the Secretary of State may grant to any convict, under sentence of imprisonment in a penitentiary, gaol or other public or reformatory prison, a license to be at large in Canada, or in such part thereof as in such license shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit.
>
> (2) The Governor General may from time to time revoke or alter such license by a like order in writing.
>
> 4. The conviction and sentence of any convict to whom a license is granted under this Act shall be deemed to continue in force while such license remains unforfeited and unrevoked, although execution thereof is suspended; but, so long as such license continues in force and unrevoked or unforfeited, such convict shall not be liable to be imprisoned by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such license.

[12] (5th ed.), pp. 1386 ff.
[13] R.S.C. 1927, c. 197.

The licence by whose authority the offender serves the balance of his term at large is statutory in form and contains these conditions:

1. The holder shall preserve his license and produce it when called upon to do so by a magistrate or a peace officer.
2. He shall abstain from any violation of the law.
3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.
4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

The ability of the offender on his release to abide by the statutory conditions referred to is dependent on the degree of after-care he is given, on the assistance he receives and the supervision that is exercised over him. These are problems that are properly the subject of another article.

Before exercising the powers conferred upon him by the Ticket of Leave Act, His Excellency is advised by the Solicitor General, who in turn is advised by the Remissions Branch of the Department of Justice. As is the case in respect of most decisions arrived at by important ministers of the Crown, the decision to release a prisoner on ticket of leave is not really the decision of the Minister at all; it is the decision of the particular official of the Remissions Branch in the Department of Justice to whom has been assigned the responsibility of reviewing the prisoner's application.

The Remissions Branch arrives at its decisions with relatively little knowledge of the individual applicant.

Their first source of information is the officialdom at the prison in which he is confined. The present calibre — now I hear happily undergoing a change for the better — of the officials throughout our penal institutions is, generally speaking, low. I fear it rather suffers from a complex which affects so many untrained persons in positions of that character — the complex that an offender is no good, otherwise he would not be in prison. The opinion of officials with this attitude ought to be given very little weight.

Then some reliance is placed upon the report of the judge or magistrate by whom the sentence was imposed. This ought to be an informative source, and usually is if the report is prepared while the facts are fresh in the judicial mind and if the reasons for the opinion are stated for the guidance of those who will later have occasion to read it.

Consideration may or may not be given to representations,

written or oral, made by a variety of persons interested in the welfare of the individual applicant. Representations are often received from counsel and friends, and sometimes, where the offender has the necessary influence, from someone of important political stature. To these latter representations, there can be no doubt, considerable attention is paid.

An additional source of information, but available only with respect to inmates of provincial institutions in Ontario, is the report of the Ontario Board of Parole to the Remissions Branch of the Department of Justice. By reason of a special arrangement between the Department of Justice and the Board of Parole the members of the Board interview prisoners in Ontario reformatories who are serving determinate periods of imprisonment, not for the purpose of granting them parole, which they are powerless to do except for an indeterminate period of imprisonment, but rather for the purpose of forming an opinion on whether the prisoner is a desirable and proper subject for release on ticket of leave. The opinion, once formed, is communicated in writing to the Remissions Branch of the Department of Justice. The Remissions Branch is, of course, not bound to concur in the opinion of the Ontario Board of Parole, but there is no doubt that it carries much weight. Because of this arrangement prisoners in Ontario penal institutions are not interviewed in the ordinary course by any representative of the Remissions Branch. A similar arrangement has not been concluded in British Columbia.

The criticisms I will have occasion to make later about the methods used by the Board of Parole in conducting its interviews with prisoners who come before it for parole consideration apply equally to the methods used by the Board in its interviews of applicants for ticket of leave.

In addition, it always seemed unfair to me for the Board of Parole to indicate to the Remissions Branch that no action ought to be taken in the case of a particular prisoner without outlining at some length and in careful detail the reasons for its decision. Invariably the governing reason for making an unfavourable recommendation was the offender's criminal record. But this was not usually the reason advanced; actually no reason, in the vast majority of cases, was ever given at all. The Remissions Branch is already fully informed about the offender's criminal record. It follows that the Branch might very well have laboured under the mistaken impression that it was some factor other than the applicant's criminal record that influenced the

Board to take the view that the applicant was not a fit subject for release on licence.

I always had the impression when I was a member of the Ontario Board of Parole that it did not welcome the additional responsibility of interviewing applicants for ticket of leave. It seemed to think that it had enough to do to interview applicants for parole and that the sphere of its responsibilities ought not to be enlarged. Accordingly its interviews of applicants for release on licence were often unforgivably brief and it was not possible to obtain from them any information at all on which to form an opinion for submission to the Remissions Branch.

This method of dealing with applications for licence by prisoners who are inmates of Ontario institutions is unfair and should not be continued.

During the course of its deliberations the Archambault Commission, to whose proceedings I have already had occasion to refer, was told by the Chief of the Remissions Branch that the practice of the Branch in considering applications for licences, or tickets of leave, was to apply certain rules set out in a memorandum submitted to the Commission.[14] I now reproduce this memorandum:

As to Sentence:

(a) No interference in drug cases;
(b) No interference until approximately one-half a sentence has been served.

As to prisoner:

(a) No interference if a prisoner is a confirmed recidivist or an instinctive criminal;
(b) No interference if a prisoner has been previously convicted of one major crime, or two intermediate, or several minor offences;
(c) No interference if a prisoner was previously granted clemency;
(d) No interference if a prisoner is under treatment for syphilis;
(e) No interference unless reform is indicated.

As to procedure:

(a) No submission to Governor General without investigation, i.e., reports from judicial and custodial authorities in all cases, and from an attorney general, police, and other sources, as required;
(b) No investigation while a case is sub judice;
(c) No investigation unless a prisoner is in custody;
(d) No grant of clemency is made in advance;
(e) No interference unless reform is indicated;

[14] Report of the Royal Commission to Investigate the Penal System of Canada, p. 238.

(f) Advice to be tendered to the Minister upon analysis of merits in each individual case, following careful and impartial collection of necessary date.

These are, of course, rules of thumb. Rules of thumb have no place where such responsibilities as these are being discharged. Rules of thumb are designed to make less work for inert officials, to furnish them with reasons for making less inquiry than ought to be made before they determine to what extent, if any, they will interfere with the life, the destiny and freedom of a fellow man.

The memorandum goes on to state:

> Operating within the scope of these rules, it has still been possible to grant Tickets of Leave to over 100 prisoners a month 'to assist in their further reformation'. Clemency is granted in such cases, upon clear indications of reform, sufficient punishment endured, and a reasonable prospect of rehabilitation. The favourable decision is grounded upon clement features which have been weighed along with those other considerations relating principally to public interest. In isolated instances, the clement features are so strong as to warrant exception being made to the general rules.

The memorandum lists clement features as follows:

> Clement features — without reference to their importance, which varies with cases, are listed as follows:
>
> Ill-health; — impaired mentality; — youth, or great age; — sex; — assistance given to Crown; — improbability of guilt; — extenuating circumstances; — technical offence; — a lack of criminal intent, which may be linked with youthful ignorance, persuasion of evil companions, self-defence, extraordinary provocation, mere thoughtlessness, etc.; — first offence with previous good character; — public interest served by mere conviction; — uncommon views of Magistrate, and finally error at trial reported by Judge.

The Commissioners who inquired into the penal system were critical in their report of the clement features referred to in the memorandum. This is what they had to say:

> The purpose of the Act is to provide that, in proper cases prisoners who have served part of their sentence may have an opportunity to serve the remainder of it under licence at large. In order to determine which are the proper cases, the predominant consideration must be, has the prisoner formed a fixed determination to forsake his former habits and associates and to live as a law abiding citizen, and will he be assisted in that determination by being allowed to serve the balance of his sentence under supervision and at large?
>
> Your Commissioners do not agree that all first offenders after having served half their sentence should, as a matter of course, be granted ticket of leave. A so-called first offender may be a man of bad record in the community who has been clever enough to evade the police authorities in the commission of countless offences. The mere fact that

he has served half the sentence that has been imposed upon him by the court is no measure of his fitness to return to society.

On the other hand, your Commissioners do not agree that the report of the convicting magistrate or judge ought finally to determine the matter against the prisoner. Magistrates and judges are often called upon to make their reports several years after the accused has been sentenced. The whole purpose of the Act would be defeated if a prisoner who gives every indication of reform should be denied his release because the magistrate who tried him, but who has not seen him for several years, should report against his release. The report of the trial judge or magistrate is an important consideration, but it should not be conclusive.

Your Commissioners are of the opinion that the clemency features mentioned in the above quoted memorandum, with the exception of the special cases governed by ill-health, are not features which ought to be allowed to override the purposes of the Act.

Youth, age, and sex must all be taken into account in considering the reformation of the prisoner but not as a reason for departing from sound principles in deciding upon his release on ticket-of-leave.

Assistance given to the Crown ought never to justify release on ticket-of-leave. Contribution of his assistance to the Crown in order to procure his release on ticket-of-leave is little indication that a prisoner has reformed. It is contended by prisoners in the penitentiaries that certain inmates obtain recommendation for ticket-of-leave because of their services as spies among the inmates. If such practice exists, it is contemptible. No officer should afford the slightest justification for such complaints.

'Improbability of guilt' is not a matter for the remission officers. Guilt is for the courts. It is most unfair for one prisoner to have the merits of his case reviewed by the Remissions Branch while another has not. If there is any doubt as to a prisoner's guilt, the Minister of Justice should direct a new trial under section 1022 (2-a) of the Criminal Code, or refer the matter to the Court of Appeal under section 1022 (2-b) of the Criminal Code. It is essential to the fair administration of justice that all questions of guilt should be determined in open court. 'Extenuating circumstances' are also matters for the courts.

It is difficult to understand why remission officers should review a matter for which a prisoner has been tried, found guilty, and sentenced, and label it a 'technical offence', one in which there was 'lack of criminal intent', or one attributable to 'youthful ignorance', 'persuasion of evil companions', 'self-defence', 'extraordinary provocation', 'mere thoughtlessness', etc. These matters may in some cases be considered in remitting a portion of an excessive sentence, but should not influence the officers in considering the release of the prisoner on ticket-of-leave unless there is a reasonable probability that he will be rehabilitated if so released.

To proceed on any other principle would be to permit all sorts of undesirable representations being made on behalf of the prisoners. Your commissioners are of the opinion that in the past officers of the Remissions Branch have listened to, and, in some cases, acted upon, representations which were not founded on sound principles. Undoubt-

> edly, members of Parliament and those in positions of influence have had too much attention from the officers of the Remissions Branch. A perusal of the files in that Branch indicates that effect has been given to representations of this type, which are no more than appeals on grounds of compassion. When prisoners are released on ticket-of-leave on any other than sound principles, it degrades the administration of justice and hampers the maintenance of discipline within the prisons.[15]

The chief criticism to make of the administration of the Remissions Branch of the Justice Department is its informality and its secrecy. Interviews with the officials of the Branch are not usually very enlightening. They invariably decline to divulge the reasons that motivated them to refuse a licence to an offender. The officials in charge have no special qualifications for their office. Political influence carries an improper amount of weight and there is a shocking lack of uniformity in granting licences under the Ticket of Leave Act. Secrecy about matters of this character is dangerous and there should be no more of it; the proceedings of investigating officers and their records should be available upon request, if not to the public generally, certainly to the prisoner or to his counsel. The personnel who administer the Ticket of Leave Act — if the present system is not to be abolished completely — should possess special qualifications and training, and political influence ought to be removed completely.

One example of the unrealistic approach of departmental officials to an application for ticket of leave is that of a young man whom I at one time represented as counsel. He had a previous criminal record but his good conduct and creditable war record for a period of more than five years indicated a real disposition to avoid crime. Having regard to his previous record, he was doing remarkably well. The offence of which he had been convicted on the last occasion was breaking and entering and theft. It was committed while he was intoxicated. No irreparable harm or damage was done to anyone. In my opinion, having regard to the circumstances in which it was committed, the offence was trivial.

His release was to be desired because of unfortunate financial conditions at home, but written representations to the Department in support of the application were of no avail. Communications from the Remissions Branch simply advised, without any reason, that clemency was refused, and a personal interview with one of the officials did nothing to help. During this interview the only reason given for refusing the application was the offen-

---

[15] *Ibid.*, pp. 239-40.

der's criminal record. That was inevitable if the Department was to follow the rules of thumb which are reproduced in an earlier paragraph. The applicant's creditable war record, his good way of life for a long period of time, his financial and marital status — all these did not avail him, and instead the rules of thumb were obeyed.

The case of each prisoner, no matter who he is and no matter what he is, is an individual problem and to each problem different considerations must necessarily apply. The present operation of the licence system in Canada must greatly embitter the heart of many an offender. The mind of the prisoner whose case I have just described must have been assailed by some very unwholesome thoughts when he saw the summary refusal to give relief in his case and less deserving applications, blessed with some political influence, granted.

The Royal Commissioners, who made careful inquiry into our system of ticket of leave, made the following recommendations:

> Your Commissioners are of the opinion that an efficient well-organized system of parole operating under the provisions of the Ticket of Leave Act is a necessary part of our penal system. It provides a means of giving a worthy prisoner an opportunity to become rehabilitated under supervision. If a system of parole is to be successful and if it is to obtain public confidence, it is essential that means be provided for full investigation and report before release and adequate supervision after release. It is essential, moreover, that in order that the Act may be properly administered it should be removed from any suggestion of political influence.
>
> Your Commissioners recommend that the administration of the Ticket of Leave Act should be brought under the direction of the Prison Commission herein recommended.
>
> Provision should be made for the appointment of a parole officer in each of the provinces, or in each group of the more thinly populated provinces, so that responsibility and authority will be centralized. The duty of these officers would be to receive, and deal with, each application for parole (ticket-of-leave), interview the individual applicant, and arrange that proper case histories should be prepared. There would be no more need for lengthy petitions signed by citizens, reciting the reasons for release. Any prisoner would be entitled by right to put his name on the list prepared for the visit of the parole officer and be interviewed by him. In this connection, he would have the co-operation of the probation officers whose services should be enlisted to supervise the prisoner when released. The Prison Commission would be given authority, on the recommendation of the parole officer, to release the prisoner on ticket-of-leave only on receipt of satisfactory reports on the recommendations of proper officers. 'Influence' should be disregarded with the same scruples as it is in the administration of justice in the courts.
>
> Any expense that might be involved in putting this plan into effect

would be more than counterbalanced by the reduction in the prison population because of the rehabilitation of prisoners.[16]

IV. *Parole*

As was indicated in an earlier part of this article, parole is only referable to an indeterminate period of imprisonment. There are only two provinces in Canada whose courts have power to impose a sentence involving an indefinite or indeterminate period of incarceration. They are the provinces of Ontario and British Columbia. The courts of the province of Ontario, as I already pointed out, derive their power to impose indeterminate sentences from a federal statute, the Prisons and Reformatories Act.[17] The same statute empowers the Lieutenant Governor of the province of Ontario to appoint a Board of Parole. The Board so appointed is given power on the strength of its inquiry into the cases of prisoners sentenced to reformatory to admit them to parole during all or any part of any indeterminate period of imprisonment that might have been imposed upon them at their trial.[18]

Enabling legislation of a similar character was recently enacted by the federal parliament giving similar powers to the courts and to the Lieutenant Governor of the province of British Columbia.[19]

In discussing the question of parole I propose to confine my remarks to the operation of the system of parole which is now in effect in the province of Ontario. I do this because the system has been in existence in Ontario for a much longer time and because I was at one time a member of its Board of Parole. The Province of British Columbia had no such Board until after March 24th, 1949, so that the powers of its courts to impose indeterminate sentences and of its Board of Parole to admit prisoners to parole were acquired so very recently that it is not yet possible to express any opinion on the effectiveness of its system.

Offenders in British Columbia upon whom indeterminate terms of imprisonment are imposed and who will therefore ultimately be eligible for parole consideration serve their terms in an institution known as "New Haven", located in the New Westminster District. The only prisoners eligible to be sent to it are male persons apparently over the age of sixteen and under

[16] *Ibid.*, p. 243.
[17] R.S.C. 1927, c. 163, s. 46.
[18] *Ibid.*, s. 43.
[19] Statutes of Canada 1948, c. 26.

the age of twenty-three years. The enabling legislation passed by the federal Parliament in 1948 by its amendments to the Prisons and Reformatories Act was not acted upon by the British Columbia Legislature until 1949 when it enacted a statute entitled "An Act Respecting the Institution known as "New Haven".[20]

Under the authority conferred upon it by the relevant provisions of the Prisons and Reformatories Act, the Ontario legislature enacted The Parole Act, which by reason of recent changes is now cited as Statutes of Ontario, 1946, Chapter 69. It is under the authority of this statute (and its predecessors, which went through successive amendments) that the Ontario Board of Parole was appointed and it is from this statute that it derives its powers.

The members of the Ontario Board pay one visit monthly to each reformatory in the province, but no more than one full day is spent in each one of them — although in addition to interviewing applicants for parole consideration the Board interviews prisoners who appear before it for ticket of leave as well. The travelling expenses of the members are paid and in addition each one receives a nominal per diem allowance. The members do not possess any specialized knowledge or training and have no special qualifications for their office. Indeed, none is required in order to be appointed. Except for the chairman, the members of the Board are engaged on a part-time basis only.

The interviews at the various institutions are far too brief — in many cases lasting for less than five minutes. The Board acts on very little information. A prisoner who has a record of previous criminal offences has learned that it does him no good to appear before the Board — such short shrift is made of his application. Invariably the superintendent of the prison in which the offender is confined is present during the interview. This is objectionable because it restrains the prisoner from speaking his mind and makes it unduly difficult for the Board to get to the root of his problem.

A record indicating breaches of prison regulations is attached to the file of every applicant, and this, weighing heavily against the applicant, operates as a strong influence on the members of the Board. This is unfortunate, because frequently the offences are of a very trivial character and often the institutional punishment that has been imposed for their commission is far too severe. In any case it is punishment enough. The manner in which an inmate in a prison conducts himself ought not to be

[20] Statutes of British Columbia 1949, c. 45.

the sole guide as to his disposition or character. How men react to the form of society that exists in our penal institutions does not give us any real basis for judging them as good or bad subjects for parole. I can recall the case of one applicant upon whose file at the time of his appearance before the Board (of which I was a member at the time) was a note that he had been punished by the institution for destroying government property. This, of course, sounded like an offence of some gravity, but on inquiry it was discovered that all he had actually done was to tear up a sheet of paper forming part of a writing pad, presumably with the intention of scribbling a note to a fellow inmate (which would have been a violation of the prison rules as well). It is my opinion that if the Board takes into account the prison record of the inmate it should satisfy itself of the nature of the particular offence and form its own opinion whether that would justify a refusal of parole.

Somehow or other the Ontario Board of Parole, or some of its members, have conceived the idea that in determining what disposition to make of an application for parole they should apply the rules of thumb adopted by the Remissions Branch in dealing with applications for ticket of leave. There is no legislative authority that compels the Board of Parole to apply those rules, and without it I find it difficult to understand why anyone would care to subscribe to them.

The trial judge who imposes an indeterminate sentence on a prisoner is not unaware of his criminal record when he does so. There is only one object in imposing an indeterminate sentence and that is to enable the individual prisoner to apply for parole. Trial judges throughout the province of Ontario would be appalled if they knew that almost as a matter of course the applicant who has a criminal record will never receive parole, and that frequently long periods of time are spent in custody by such prisoners — periods of time that the sentencing tribunal never intended the prisoner should serve. I have made it a practice, when representing a prisoner who has a criminal record, of inviting the court not to impose an indeterminate period of imprisonment, because under our parole system in Ontario it is highly improbable that he will be released before the full term, both determinate and indeterminate, has been served.

The Board's practice has been complained about on previous occasions. Its most distressing feature is illustrated by the case of a prisoner who, notwithstanding his criminal record, thinks that since he has been given an indeterminate period of imprison-

ment he will, at the expiry of the determinate period, be eligible for parole. He therefore conducts himself during the whole of the determinate period of his incarceration with the best possible decorum, looking forward to the day when his efforts will be rewarded by his release on parole. Such a prisoner must naturally feel very disillusioned when he discovers that, because of his record, parole is denied him as a matter of course.

This is what the Ontario Court of Appeal had to say about the practice of imposing an indeterminate period of imprisonment on an offender who had a previous criminal record:

> Thus encouraged, the prisoner proves to be a model prisoner. He gives every indication of his reformation, and is taken at the expiry of the definite term before the Board. He is hopeful of liberty and full of good resolutions, and the Board announces that by reason of an earlier conviction, a fact well known to the Judge who imposed the sentence, they will not allow him parole, and he must serve the indefinite term. I can imagine no situation more cruel and more likely to convert a man really desiring to reform into an enemy of society.[21]

Persons who take the view, as I feel improperly, that a person with a criminal record must be assumed to be a bad subject for parole would be well advised to bear in mind the words of Mr. Sandford Bates who, in addressing the Canadian Penal Congress at its fifth convention in Kingston in the month of June 1949, made this observation:

> We like to say that parole is the modern method of releasing a man from a prison sentence, and if that's so it doesn't make any difference how many times he's been in prison or how long his sentence. Your sentencing process must be so contrived that you allow, somehow, for a supervised period in the community. We prevailed on Congress to accept the revolutionary theory that the worse the prisoner was the more the community was entitled to have him on parole for a period; not to give parole in the sense that we give clemency but to impose parole on every man who comes out of prison. Now you see, there again, is that funny little intellectual dilemma. Many people say that it's better to be out of prison than it is to be in, and therefore when you let a man out you're conferring a favour on him — and you would be surprised, if we had time to give you the figures, but most men in the States who go out under the parole system have served in prison, on the average, a longer time than they did when they went out scot-free. So that you cannot maintain the theory that a man who goes out on parole is being given a favour. It's the public that's protected by parole. It's the public who can locate and follow and assist and supervise a man during that difficult period of re-acceptance in the community, and it's only under the parole system that you can send him back without a trial, or that you can send him back before he commits the crime he may be going to commit with that gun the parole officer found under his mat-

[21] *Rex* v. *Bond*, [1937] O.R. 535, at p. 541.

> tress. So even if you look at parole in the most matter-of-fact way, you've got to accept it as a modern, scientific, professional ending to the prison experience. But because it's that, it requires a full-time, intelligent, well-qualified, non-political Board, who knows all the facts, who administers the system fearlessly and who gives the benefit of the doubt to the public.

Even a hasty examination of the problem of parole in Ontario forces one to conclude that something ought to be done about it immediately. Over a trial period of many years the operation of indeterminate sentences in this province has not proved satisfactory and much criticism has been directed against its various Boards of Parole.

V

It is apparent that the whole problem of the conditional release of prisoners in Canada is in a state of confusion. An indication of this state of affairs was given at the beginning of this article. Much of the confusion is due, as was pointed out there, to the distinction between the various types of release. Although they are called by different names, remission, ticket of leave and parole refer essentially to the same thing, the conditional release of an offender from prison, and this is best comprehended by the use of one word — parole. Much of the confusion is due as well to the distinction between federal and non-federal penal institutions and between determinate and indeterminate sentences.

The first step towards reform is to convince the profession and the public generally of the wisdom of parole.

When we are, all of us, favourably minded to parole as a matter of sound penal policy, we must then take steps to remove some of the confusion inherent in our present system. The problem of parole is a national one, and the administration of a parole system should, therefore, be centralized in one body. The distinction between determinate and indeterminate sentences ought to be abolished. Provincial Boards of Parole should be done away with and where none is now in existence in a province no effort should be made to create one. The distinction between penitentiaries and non-federal institutions should, for the purpose of parole, be removed as well.

In my opinion a national Board of Parole should be appointed. It should be composed of responsible men specially trained and qualified for their important offices. They should, of course, be engaged on a full-time basis and they should be given adequate

compensation. Such a Board should be required to tour the country at regular intervals, visiting every one of its penal institutions and interviewing such of their inmates as may see fit to make application for release on parole. It seems desirable that the Board should hold regular sittings at our various institutions, should conduct judicial hearings and listen, if deemed advisable, to the testimony of witnesses. It should be given a broad discretion, unfettered by rules of thumb, in arriving at its decisions.

The creation of a central Board of Parole, composed of qualified members, would serve to remove the present lack of uniformity. It cannot seriously be disputed that the inauguration of such a system would prove to be beneficial to society generally. In giving effect to this recommendation careful thought would have to be given to the problem of after-care for the offender.

I should like at this point to refer to some of the relevant recommendations of the Commissioners who inquired into our penal system:

> 1. The Canadian penal system should be centralized under the control of the Government of Canada, with the federal authorities taking charge of all the prisons in Canada, the provinces retaining only a sufficient number to provide for offenders against provincial statutes, prisoners on remand, and those serving short sentences.
>
> 4. A Prison Commission, composed of three members removable only for cause, should be appointed with full authority over the management of penitentiaries, empowered to appoint staff, *and to act as a central parole board.* The Commission should be responsible directly to the Minister of Justice and to Parliament.
>
> 77. The Ticket of Leave Act should be amended to give effect to the recommendations contained in this report.
>
> 78. The Remission Branch should be abolished, and the services now performed by it should be transferred to the Prison Commission, *which will act as a central parole board.*
>
> 79. A parole officer should be appointed by the Prison Commission in each province or group of provinces, according to population, to investigate applications for parole and make recommendations to the Prison Commission.
>
> 80. The administration of the Ticket of Leave Act should be definitely and completely removed from any suggestion of political interference.
>
> 81. There should be a definite rule that a prisoner who has already violated the conditions of a previous ticket of leave should not be permitted further benefit from the Act.
>
> 82. When provision is made for a more efficient system of adult probation in Ontario and the administration of the Ticket of Leave

> Act as herein recommended, the provisions of the Reformatories Act providing for indeterminate sentences and parole in Ontario should be repealed.[22]

With reference to these recommendations, I think that the Prison Commission whose appointment was urged by the Commissioners ought not to be given the additional responsibility of acting as a central Board of Parole. My feeling is that the Board of Parole should not be composed of members who also supervise the custody of prisoners, and in a sense the members of the Prison Commission are the senior custodians of all the inmates of the penal institutions under their jurisdiction.

Nor do I concur in recommendation No. 81 of the Royal Commission, which would prevent a prisoner's release on ticket of leave if he had already violated the conditions of a previous licence. I object to that recommendation because, as the recommendation itself points out, it is to be "a definite rule". As I suggested earlier, this particular part of our penal system ought not, in my opinion, to be governed by definite rules. There is no doubt that a prisoner who has violated a previous ticket of leave or licence is less likely to be a good subject for release, but inquiry may show circumstances that would justify his release notwithstanding his earlier failure to justify the confidence that was placed in him.

It is right to say that effect has not been given to any of the recommendations of the Commissioners on ticket of leave and parole, although their report is eleven years old.

It is my hope that by persistent clamour for a much needed amendment to our present system of parole there will emerge a new plan, whose founders will contrive to give effect to some of the suggestions made in this article. The best test of its wisdom will be the marked success that I confidently believe will follow its introduction. It is a pity that in order to bring about reform there has to be any clamour at all. Parole is simply one part of the whole problem of crime and punishment, and I think it is right to say that there is no human problem that has been the subject of more discussion and controversy.

For centuries reformers have advocated changes in the penal system and more often than not it took centuries before their ideas commended themselves to the proper authorities. There is no subject about which there is so much talk and so little action. I have often wondered why governments moved so slowly before

[22] Report of the Royal Commission to Investigate the Penal System of Canada, pp. 354, 360-1. The italics are added.

acting upon the recommendations of commissions appointed to investigate the problem. For example, to have carried out immediately the recommendations contained in the Archambault Report would not have raised a political issue calculated to endanger the life of the government. I rather doubt if the public — broadly speaking — would have cared very much. Why then was immediate action not taken? I do not know the answer.

Perhaps the crime wave of the last few years will hasten needed changes. The public has remained indifferent to the problem of penal reform. How a prison operates and how a prisoner lives is of little consequence to the great majority of citizens who are not and never will be prisoners. But as increasing numbers of citizens are affected by the depredations of those who are committing serious crimes, people are bound to ask that an inquiry be made to determine the cause and that steps be taken to remove it.

Governments rarely act in matters of this sort unless they are driven by the force of public opinion. We should stop addressing our pleas to governments. We should go directly to the people. It seems a pity that the road to penal reform is so long and roundabout. But if we follow this perhaps exasperating detour we shall sometime reach our stopping place.