THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

February 25, 2004

Mr. David Daubney
General Counsel
Sentencing Reform Team
Department of Justice Canada
284 Wellington Street, Room 5089
Ottawa ON K1A 0H8

Dear Mr. Daubney,

We write on behalf of the Canadian Bar Association's National Criminal Justice Section and its Committee on Imprisonment and Release (the Section) in response to your letter of October 31, 2003 asking for comments on a proposal of the Federal/Provincial/Territorial Working Group on Sentencing, specifically concerning intermittent sentencing. The CBA represents over 38,000 jurists, including lawyers, notaries, law teachers and students. The Section consists of both Crown and defence lawyers from across Canada.

In previous correspondence to then Assistant Deputy Minister Mosley (October 9, 1998 - attached), the Section stressed that intermittent sentencing is an integral part of a rational sentencing scheme and that repeal of the provisions would result in particular hardship for groups such as single parents, the working poor and students.

Background:

The background to the Working Group's proposal is generally accurate. In 1969, the Ouimet Committee recommended introducing the "intermittent sentence"[1]. It was at that time described as "weekend detention", and was accompanied by related sentencing options such as "night detention" or "semi-detention". The objective was to provide punishment "without unnecessary social disruption of the life of the offender"[2] and the recommendation was predicated on the provision of the "necessary physical and staff facilities".

1 See Report of the Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Queen's Printer, Ottawa: 1969).

2 *Ibid*, at 203.

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

Although the "intermittent sentence" was subsequently added to Canada's *Criminal Code* in 1972, very little was ever done to provide appropriate facilities and other resources. Nowhere are there separate facilities; this group of prisoners must be admitted into and housed in ordinary jails.

Resulting administrative problems were predictable and, in our view, have led to current provincial and territorial opposition to intermittent sentencing. At a 1999 meeting on the subject of intermittent sentences organized by the Department of Justice, heads of corrections of nine provinces argued that the intermittent sentence should be abolished. The arguments used to support that position were that it was inconsistent with the principles of sentencing because it detracted from proportionality, and that any original need for intermittent sentencing had been addressed by the subsequent introduction of the conditional sentence. Also, it was suggested that people without legitimate claims on the basis of work, school or family were inappropriately able to convince judges that they should receive intermittent sentences, and that there were problems with people arriving in an impaired state or carrying contraband. However, these anecdotal claims were offered without any data to support them.

The Section is not convinced by these arguments, and is of the view that objections to intermittent sentencing are actually based primarily on administrative cost and inconvenience, rather than on principles or documented problems. As we noted in our 1998 letter:

> Now, a system which has integrated the availability of intermittent sentences risks losing them because some of its constituencies have not adequately responded to easily anticipated practical demands. Surely, the answer is to provide or shift resources…. Repealing the intermittent sentence provisions will produce an increase in the conditions which we know are the sources of crime: poverty, dysfunctional families, and lack of educational and vocational training. This is not an enlightened or thoughtful response to a resource problem.

Since the 1999 meeting, the Department of Justice has been working on an alternative proposal that would limit but maintain the availability of intermittent sentences. It would constrain discretion, and create new mechanisms for variation and termination, as well as penalties for non-compliance. It is telling that the Canadian Association of Provincial Court Judges, representing the judges that hear more than 98% of all criminal cases, oppose these amendments.

Criteria:

While the *Criminal Code* currently does not provide criteria for imposing intermittent sentences, the case law is clear that the usual justifications for those sentences include avoiding loss of employment or disruption of education, and ensuring continuity of care for dependents.[3] In our view, the use of intermittent sentences should be subject to the same threshold as that used for discharges, simply considering if it is in the best interests of the offender and not contrary to the public interest.

However, if proposed section 732(2) is to be maintained, it is absolutely essential that a general "basket" clause be added. We propose the following:

> (v) or such other similar circumstances in which an intermittent sentence is in the best interests of the offender and not contrary to the public interest.

This addition is crucial because the current proposed list could never be considered exhaustive. For example, suppose an offender is sentenced in June for a subsequent offence following a previous impaired

3 See *R. v. Parisien* (1993), 81 CCC(3d) 351 (Man.C.A).

driving conviction. The offender is from an impoverished background, and has just won an athletic scholarship to begin university in September, on condition that he participate in certain tournaments over the summer months. A jail term would result in forfeiting the scholarship. For this hypothetical offender, there would be no "disruption" of education since the program had not yet begun. However, the scholarship could well represent a life-changing opportunity. Certainly, the goal should be to leave room for judicial discretion to use intermittent sentences in worthy cases.

Onus:

The proposed onus provision is problematic. It is awkwardly worded, and seems to require the offender to provide actual evidence that an intermittent sentence would be appropriate. If this is to suggest that a judge should not exercise discretion based on submissions by counsel, this is a needless constraint that will generate needless injustice.

Further, there is no documented proof, other than anecdotal claims, that a change is required to address problems in the current operation of intermittent sentences.

A statement that the court "may (rather than shall) have regard to the personal circumstances..." would remedy this provision. If further elaboration is necessary, wording stating that a judge may impose an intermittent sentence "if satisfied that it is in the best interests of the offender and not contrary to the public interest..." would be appropriate.

Termination by Crown:

We question the need for the proposed procedure to allow a prosecutor to apply to change an intermittent sentence to a regular carceral sentence based on information from a probation officer that the offender's circumstances had changed from those originally justifying an intermittent sentence. The proposal is cumbersome, would have to be conducted quickly and would only arise if "a material change in circumstances" were confirmed by a probation officer. Given the nature and length of intermittent sentences and the need for the offender to remain in society being socially productive, the likely contact that an offender would have with a probation officer would be minimal. Further, if an offender's employment or educational program were terminated, it would not necessarily imply that an intermittent sentence would no longer be warranted. If the probation order required the offender "to maintain employment, or actively seek employment", the obvious solution would be simply to require the offender to look for another job. In our view, these procedures would be quite rare, and an amendment is unnecessary.

Non-Carceral Program:

Separate facilities for serving intermittent sentences would avoid any administrative and practical difficulties in receiving offenders serving such sentences into the general prison population. Facilities separated from correctional facilities would already have been valuable for offenders on temporary absences. In our view, a non-carceral program could actually save money for the provinces and territories and keep people out of jail. For example, a dormitory for people serving intermittent sentences affiliated with a real program for community service would address the logistical and administrative problems of admitting people into jail on weekends.

The penalty provision for non-compliance should not be any different than the general probation provision under section 733.1, which includes the "reasonable excuse" defence. There is no valid reason to eliminate the same defence from subsection (8).

Mandatory Condition:

Many probation orders already contain a "will submit to a breathalyzer" provision to deal with drunkenness on admission to a facility to serve an intermittent sentence. However, we note that subsection 732(9) is not actually aimed at proving impairment. It is aimed at detecting any "alcohol or any other mind-altering substance" in the body, and probably contemplates a urinalysis provision in the probation order. Aside from the fact that the definition or ambit of "mind-altering substance" is extremely vague, it is important to recall that the expressed objective is to deal with the problem of disruptive or unmanageable prisoners. Substances vary in how long they remain in the body and for how long they remain detectable, so that a person could test positive for marijuana, for example, even if the substance were consumed a week prior to admission. For alcohol, we must clarify whether the goal is to prohibit any trace of alcohol in the body or to avoid dealing with intoxicated and disruptive offenders.

We recommend that the section read:

> An offender shall not, upon reporting to a place of custody, be impaired by reason of alcohol or non-medical drugs.

This wording would appropriately focus on the undesirable conduct, rather than the presence of a substance which may well have been legally consumed and not have any effect at the moment of admission.

We hope that these comments will be helpful to the Working Group, and will be pleased to provide further explanation if needed. Thank you for the opportunity to participate in this process.

Yours truly,

(original signed by Tamra L. Thomson for Kate Kerr and Allan Manson)

Kate Ker
Chair, National Criminal Justice Section

Allan Manson
Chair, Committee on Imprisonment and Release