
CRIMINAL FOCUS

Volume I, Issue 3, pp. 17-24

January 2001

Fresh Perspectives on Stale Probation

R. v. Ivan, 2000 BCCA 452

by **Martin F. Allen**
Bastion Law Corporation

All criminal defence lawyers, of course, are familiar with the rules against “stale probation”: a term of probation cannot run for more than three years, or follow a jail sentence of more than two years.

If only it were that simple. In a recent judgment (now reported at 148 C.C.C. (3d) 295), our Court of Appeal dealt with an appeal against a probation order handed down as part of a sentence for assault causing bodily harm, and the appeal featured both interesting issues and interesting pronouncements by the Court.



By the time the appellant was sentenced on 31 August 1998, he had already served some time in custody, and the Crown was not seeking more jail. Accordingly, he was sentenced to a day in jail plus two years’ probation. He was not released, however, as he was detained on another matter. When this other matter was finally resolved, it was 26 February 1999, and the sentence imposed on that date was two years and eight months. Warrant expiry on that sentence is 25 October 2001.

The question before the Court was whether the original probation order had thus been made illegal, since it would not start to run until a date some three years and two months after it was pronounced, during all of which time the appellant would have been in custody.

The Majority

Hollinrake J.A. wrote for the majority, the Chief Justice concurring. The first principle noted was the well established one that when a probation order is attached to the end of a term of imprisonment, the order, even though legal when pronounced, can be made illegal by a further prison sentence that is handed down after

INSIDE THIS ISSUE

- 17** Fresh Perspectives on Stale Probation
- 18** Statutory Provisions
- 20** Previous Statutory Provisions
- 22** Cases Cited
- 23** Cumulative Index
- 24** Focus YOUR Criminal Appeal

continued on page 18

Criminal Code s. 731:

- (1) Where a person is convicted of an offence, a court may ...
- (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

Criminal Code s. 732.2:

- (1) A probation order comes into force
 - (a) on the date on which the order is made;
 - (b) where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or
 - (c) where the offender is under a conditional sentence, at the expiration of the conditional sentence.
- (2) Subject to subsection (5) [re amendment or revocation of orders],
 - (a) where an offender who is bound by a probation order is convicted of an offence, ... the order continues in force except in so far as the sentence renders it impossible for the offender for the time being to comply with the order; and
 - (b) no probation order shall continue in force for more than three years after the date on which the order came into force.

Corrections and Conditional Release Act, s. 139:

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

pronouncement of the probation order and before the jail term to which it is attached has run its course. This is because the original jail term and the new one are deemed to form together a single new term “commencing at the beginning of the first of these terms and terminating at the end of the last”: *R. v. Miller* (1987), 36 C.C.C. (3d) 100 (Ont. C.A.), applying what is now found in s. 139 of the *Corrections and Conditional Release Act*—sidebar). Once the two terms are merged, if the resulting aggregate sentence exceeds two years, the probation order no longer meets the s. 731(1)(b) criterion that it be attached to a term no longer than two years.

In this case, Hollinrake J.A. held, since there was a gap between the initial one-day jail term and the later longer one, the two terms were not consecutive, so the *Corrections and Conditional Release Act* provision had no application. The probation order could not be said to have been attached to a term of imprisonment exceeding two years, so met the requirement in *Code s. 731(1)(b)*.

Moving on to deal with the issue of the date on which the order could be said to come into force, Hollinrake J.A. stated that, following the prescription in s. 732.2(1)(b) (sidebar), this would occur ‘as soon as the offender is released from prison’, which had not yet happened.

“It can be seen that this probation order did not come into force at the end of the one day sentence because at that time the appellant was not released from prison.”

Based on these fairly brief reasons, the majority declared that the appellant’s probation would commence on his warrant expiry date, more than three years after it was pronounced. There being nothing in the *Code* specifically to prohibit that, the appeal was dismissed.

Donald J.A. in Partial Dissent

Donald J.A. took a rather different view of matters. The appellant, he wrote, had served his one-day jail sentence on 1 September 1998 (actually, it would appear that the one day was served on the day of sentencing, 31 August, but the discrepancy is not alarming), and had then become subject to the probation order.

The order had subsequently been suspended, wrote

Donald J.A., by operation of s. 732(2)(a), on 26 February 1999 when the later prison sentence made it “impossible for the offender for the time being to comply with the order”.

Because, according to this analysis, the probation order had come into force on 1 September 1998, the three year duration limit specified by s. 732(2)(b) should be calculated from that date, and would terminate on 31 August 2001. Therefore, the appellant would not have to serve the remainder of the order, except to the extent he was bound by it while at liberty on early release.

“...the phrase ‘as soon as the offender is released from prison’ ... should be understood as referring to release from prison for a sentence of imprisonment”

Donald J.A. rationalized this result on the basis of its harmony with the principle expressed in *Miller, supra*, that no probation order should commence more than two years after it is pronounced.

Achieving a result in this case consistent with that principle involved holding that a probation order is suspended while the offender is in custody serving a sentence, but not while he is in custody under a detention order. Donald J.A. noted in this regard that the wording of s. 732(2)(a) does not specifically address the latter situation. The resulting uncertainty was resolved in accordance with the general rule that ambiguity in penal statutes is to be resolved in favour of the offender: *R. v. McIntosh*, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481.

Donald J.A. criticized the judgment of the majority for interpreting the phrase ‘released from prison’ in isolation, without reference to the preceding words, which suggest that the phrase applies specifically to an actual prison sentence. Applying it to other types of detention, such as pre-trial custody, in the view of Donald J.A., requires ignoring statutory language that is present, and reading in language that is absent.

Commentary

The point agreed upon by all three justices in this case seems unassailable: where there is a hiatus between two prison terms—even though the offender may not have budged from the institution during it—the merger provision found in s. 139 of the *Corrections and Conditional Release Act* does not operate. That being so,

the restriction mandated by *Code* s. 731(1)(b) (confirmed by cases such as *R. v. Kellogg* (1982), 7 W.C.B. 74 (B.C. C.A.) that the attached jail term be no longer than two years has no application in this case.

The difference of opinion here really centres on the correct interpretation of the phrase “released from prison” in s. 732.2(1)(b). The provision, stripped of irrelevancies, reads as follows:

A probation order comes into force..., where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or... where the offender is under a conditional sentence, at the expiration of the conditional sentence.

This writer, with the greatest respect to the legislative draftspersons involved, would suggest that the provision is most readily interpreted by reading it backwards.

Starting, then, with a consideration of the last situation described: an offender sentenced to a conditional sentence, of course, is not supposed ever to be in prison, so is not expected to be released from it. It is reasonable, then, for any attached probation to begin, not upon “release from prison”, but “at the expiration of the conditional sentence”. There is no possibility of delaying the coming into force of the probation order, just because the offender may have been taken into custody for some reason and may be detained. He simply serves the conditional sentence, and on the day it ends, his probation starts, regardless of his custodial status.

Moving back a phrase, what are we to do with an offender who, like most convicts sentenced to “real” jail followed by probation, obtains early release? Once again, the *Criminal Code* is quite clear: the probation order comes into force “at the expiration of the sentence of imprisonment”. No matter, for example, if the offender is “gated”—denied release because of an outstanding warrant—the probation order runs from warrant expiry.

Finally, what if the offender gets real jail plus probation (or is currently serving a jail sentence when a probation order is made), and serves out the whole term in the institution. Well, his probation runs from the date he is “released from prison”. That is, surely, at the expiration of the jail sentence, just as specified for the other situations. To conclude otherwise would be to conclude

PREVIOUS STATUTORY PROVISIONS

Criminal Code (1995) s. 738:

- (1) A probation order comes into force
- (a) on the date on which the order is made; or
 - (b) where the accused is sentenced to imprisonment under paragraph 737(1)(b) [now s. 731(1)(b)] otherwise than in default of payment of a fine, on the expiration of that sentence.

that Parliament intended someone who has to serve out his full term to be subject to a potentially unlimited postponement of the commencement of his probation order, whereas all others are not.

This conclusion is greatly reinforced by a consideration of the wording of the applicable section before the 1995 amendments to Section XXIII that brought in, amongst other changes, the conditional sentence provisions. Back in 1995 (see sidebar), the section was significantly simpler. The order came into force either immediately, or as soon as any attached jail term had expired, period.

In the new version of the section, the drafters have removed the exception for jail in default, added a parallel paragraph to deal with conditional sentences, and made provision for offenders who are already serving time. Presumably they then, seeking a way to lump together all the possible permutations of circumstances where probation would be delayed until some jail sentence had been completed, felt it would be simplest just to say the order would begin as soon as the offender was released from prison. That then brought up the problem of early release, which was papered over with the corresponding proviso covering such situations.

In the course of the amendments, an unnecessary ambiguity was introduced—one which, it is respectfully submitted, has now been resolved incorrectly by our Court.

Indeed, an earlier statement by the North West Territories Court of Appeal, in *R. v. Amaralik* (1984), 16 C.C.C. (3d) 22 at 25, makes it clear there really is no ambiguity to resolve. As Stevenson J.A. wrote in that case:

It is clear that Parliament does not consider it appropriate to impose probation which will come into effect more than two years from the time of sentencing.

Of course, for a truly troublesome commentator, disagreeing with the majority does not necessarily imply complete agreement with the dissent. This writer respectfully also takes issue with two aspects of Donald J.A.'s judgment. The first is his treatment of the situation where an offender is currently under a probation order and is then jailed for something else. The second is his ultimate conclusion regarding disposition of the appeal.

First, the dissenting justice may have fallen into error in

his interpretation of s. 732.2(2)(a). It will be recalled that this paragraph states that where a probationer is imprisoned, the probation order

continues in force except in so far as the sentence renders it impossible for the offender for the time being to comply with the order.

Donald J.A. construed this statement as follows:

Section 732.2(2)(a) has the effect of suspending a probation order when the offender receives a sentence on a subsequent conviction which "renders it impossible for the offender for the time being to comply with the order".

On the face of it, that is not at all what the section says. The section says that the probation order continues in force. The only proviso is that this is true "except in so far as" the order can not be complied with. The Oxford Dictionary defines the expression "in so far as" as meaning "to the extent that". A reasonable interpretation of the paragraph, then, is that a new prison sentence only suspends the running of the probation order to the extent that its conditions can no longer be complied with. Since, at the very least, the statutory condition that the probationer keep the peace and be of good behaviour can still be enforced while the offender is in jail, the order itself must surely continue in force, just as the *Criminal Code* stipulates.

There could be said to be a statement to the contrary in *R. v. Hackett* (1986), 30 C.C.C. (3d) 159 at 162 (B.C. C.A.), in which Macfarlane J.A. writes:

The terms of a probation order are meant to operate while the accused is in the community and outside prison. Probation cannot, therefore, run concurrently with a prison sentence.

That case, though, was concerned with the legality of a probation order intended to run from the end of a jail term of two years less a day, but handed down together with a concurrent sentence of three years (the order was quashed). The case is distinguishable therefore, and may not detract from the submission that the *Code* is not ambiguous on this point either, and that while probation does not commence until any current jail sentence has ended, it then continues to run during any subsequent periods of incarceration. Indeed, this very distinction was underlined by Howland C.J.O. in *Miller, supra*, when he wrote, at 104:

In my opinion, the principle governing s. 663(1)(b) [now s. 731(1)(b)] of the Code is that Parliament

~

In the course of the amendments, an unnecessary ambiguity was introduced—one which, it is respectfully submitted, has now been resolved incorrectly by our Court.

~

To conclude otherwise would be to conclude that Parliament intended someone who has to serve out his full term to be subject to a potentially unlimited postponement of the running of his probation order, whereas all others are not.

~

CASES CITED

R. v. Amaralik (1984), 16 C.C.C. (3d) 22 (N.W.T. C.A.) 20
R. v. Hackett (1986), 30 C.C.C. (3d) 159 (B.C. C.A.)..... 21
R. v. Kellogg (1982), 7 W.C.B. 74 (B.C. C.A.) 19
R. v. McIntosh, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481 19
R. v. Miller (1987), 36 C.C.C. (3d) 100 (Ont. C.A.)..... 18, 21

See Also:

R. v. Couvreu, [1993] O.J. No. 120 (QL) (Ont. C.J., Gen. Div.), in which the court was only prepared to merge the new sentence with the remaining remnant of the earlier one to determine whether a probation order had been attached illegally to an aggregate jail term exceeding two years, or not.

R. v. W.J.A., [1995] Y.J. No. 84 (QL) (Y.T.C.), in which similar problems when applying the limiting provisions of the *Young Offenders Act* are considered, and in which the court also considers the issue of whether an accused can be convicted of breaching an illegal probation order by disobeying it during the period before it is quashed.

intended that a probation order would not come into effect more than two years from the time of sentencing and that an accused would not be made subject to a probation order, if required to serve a sentence of more than two years. While a probation order is intended to operate while the accused is not incarcerated, but is in the community, there is an express exception under s. 664(2)(a) [now s. 732.2(2)(a)] of the Criminal Code where an accused who is bound by a probation order is convicted of an offence or is imprisoned in default of payment of a fine.

If this submission is correct, and Mr. Ivan’s two-year probation order actually continued in force uninterrupted after its coming into force on 31 August 1998, it would have run its course by 30 August 2000. His appeal should have been allowed.

Having said that, though, it would appear that even on the basis of the dissenting justice’s reasons, the appeal should have been allowed (Donald J.A. concurred in the result, dismissing the appeal). The appellant was complaining that he was going to have to begin his probation period on 25 October 2001, and that it would run until 24 October 2003. By the logic of Donald J.A.’s judgment, the order would expire on 31 August 2001, more than two years earlier.

It would seem, then, that the appeal would have merit even by the calculus of the dissent. The appellant wanted a ruling that the order could not be enforced after his current period of incarceration, and that is a ruling it would seem Donald J.A. should have been prepared to support. It is curious, therefore, that he was not. ❖



Cumulative Index

	page
Firearms, imitation.....	1
Marijuana, criminalization of.....	9
Probation, stale.....	17
<i>R. v. Ivan</i> (2000), 148 C.C.C. (3d) 295, 2000 BCCA 452	17
<i>R. v. Malmo-Levine; R. v. Caine</i> (2000), 145 C.C.C. (3d) 225, 2000 BCCA 225.....	9
<i>R. v. Scott</i> , (2000), 145 C.C.C. (3d) 52, 2000 BCCA 220	1

© Martin F. Allen, Bastion Law Corporation
203 – 1005 Broad Street
Victoria B.C. V8W 2A1
tel: (250) 595-2212; fax: (250) 385-4506
e-mail: mallen@bastionlaw.ca
web site: www.bastionlaw.ca