

# Fact Sheet

#14

*in a series of fact sheets  
that examine questions  
frequently asked about  
the criminal justice  
system*

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## Updates on ...

### ...Judicial Review

Section 745 of the *Criminal Code*, often referred to as the “faint hope clause”, has been the subject of considerable attention and debate. This provision allows for a judicial review (by judge and jury) of the parole eligibility of prisoners serving a life sentence for murder with a parole eligibility of 15 years or more. At the height of this debate in 1996, we produced Fact Sheet #5 with the aim of dispelling some of the myths which we believed were the basis of much of the public and political support for the abolition of Section 745. This update presents information on amendments to the law, current data on judicial review and international comparisons of sentence review/parole for the offence of murder .

#### **Significant amendments**

After much debate in an environment in which media and political attention was primarily focused on the rare, sensational cases, Parliament decided to amend rather than abolish the provision. The amendments to Section 745 enacted three significant changes (see sidebar).

The exclusion of multiple murders (c) does not apply to individuals already under sentence before the passage of the amendments. The changes regarding

prescreening by a court (a) and the requirement for a unanimous jury decision (b), however, relate to all offenders under sentence who apply for a judicial review after January 9, 1997.

It is clear that these amendments were crafted to meet both legal and political objectives. They maintain legal principles relating to the effect of retroactive changes

while, at the same time, virtually ensuring that certain offenders would have *no* chance of success of obtaining a hearing or a positive decision.

#### ***Few of those eligible apply and are successful***

Current data show that relatively few of those who are eligible for judicial review apply. As of May 16, 1999, there were 412 prisoners eligible to apply but only 97 have had a judicial review hearing in which a decision had been rendered. Many of those who are eligible feel that the costs of the review process outweigh any benefits, particularly when the parole eligibility is 20 years or less. Judicial review is a rigorous process which brings the offender and the facts of the case back into the public eye and is often aggressively contested by the Crown.

#### ***Outcome of Judicial Review Hearings***

Of the 97 judicial reviews, 80 have resulted in a decision by a jury to reduce the individual's parole eligibility period, while 17 applications were denied. Over one-half of the successful applications took place in Quebec. The variation in the reduction in the parole eligibility in successful cases ranges from one year to ten years (see Table #1). Of the 80 successful cases to date, 46 are currently on conditional release (12 day parole and

#### **1997 Amendments to Section 745 of the Criminal Code**

(a) applications for judicial review are now prescreened by a court without a jury to determine if there is a “reasonable prospect” that the application will succeed (*prior to the amendments, there was no prescreening and all applicants would have a hearing in which the jury would decide*);

(b) the jury's decision to reduce the parole eligibility must be unanimous while the decision with respect to the number of years reduction is subject to a two-thirds decision (*this was changed from a two-thirds decision for both*); and

(c) those convicted of more than one murder, if one of the murders was committed after January 9, 1997, are not eligible to apply (*there were no exclusions relating to eligibility to apply prior to the amendments*).

34 full parole), one is currently under suspension (for being unlawfully at large from a day parole), two are deceased and 31 are incarcerated. The number who continue to be incarcerated reflects the fact that, despite a favourable decision to reduce their parole eligibility, these individuals still have to be approved by the National Parole Board in order to be released. On release, these individuals will be under supervision for life.

**Eligibility for release and average time served: Comparison with other countries**

A recent survey prepared by the Solicitor General Canada of eligibility periods for sentence review/parole for those convicted of murder in 16 other industrialized countries shows that Canada has one of the *harshest* sentencing policies with respect to first degree murder. The average time before eligibility in these 16 countries for the equivalent to first degree murder was 9.5 years (compared with 25 years or 15 years if eligible for a judicial review in Canada). The average time served before release in these countries was 14.3 years. In Canada, it is expected to be 28.4 years (only a projected figure

can be used at this time because parole eligibility was increased to 25 years from 10 years in 1976). Only the United States has a longer average time served and, only slightly, at 29 years. (For further details, contact the John Howard Society of Ontario.)

The judicial review provision is the only way that we can temper these current, relatively harsh sentencing policies and their effects. The criminal justice system embraces many purposes other than punishment and there must be a forum in which the potential for rehabilitation, treatment and reconciliation are heard. No forum gives greater safeguard than an open court before a jury, such as that which occurs within a judicial review hearing.

**...Electronic Monitoring**

In January 1996, the Ontario government introduced the use of electronic monitoring (EM) for offenders under provincial authority. The government promoted the use of EM on the basis that it would be effective (a deterrent to future re-offending); it would

be a cost-saving measure; and, it would replace the use of halfway houses, which were closed completely in the Fall of 1995. In Fact Sheet #7, we analyzed the potential value of EM by examining the experience with EM in other jurisdictions and the research evidence on “what works” to reduce re-offending. All of the evidence available at the time cast doubts on the government’s claim that it would be effective and cheaper. We can now update the analysis with current data on EM in Ontario and recent Canadian research.

**Use, cost and user fee**

Data provided by the Ontario Ministry of Correctional Services (see Table #2) show that EM has not been used extensively since its inception and certainly has never come close to replacing halfway houses. The highest average count for EM was 64, compared with approximately 400 on any given day in halfway houses prior to their closure.

The low level of use is most likely related to the eligibility restrictions of the program. Only offenders who have been convicted of a non-violent offence, are serving less than 180 days, assessed as low risk and need, have secure accommodation (not a shelter or a rooming house) and have a secured phone line in their residence will be considered for the program. The program has focused resources on those who worry us the least and those who could be managed safely and effectively on regular supervision available through temporary absences or parole. Further, it discriminates against the homeless and those without the resources to afford a secure phone line.

The per diem cost has been much higher than the \$17 figure originally projected by the government. These costs relate only to surveillance and the monitoring equipment - no rehabilitative programs are factored into the cost. It is often argued that it reduces the cost of imprisonment (currently \$136 per day per offender). This is only true if it targets individuals who would remain in prison otherwise because they cannot be safely managed in the community without the

**Table #1**

<b>Judicial Review Decisions (as of May 16, 1999)</b>												
	Parole eligibility reduced to (years):										Rejected	Total
	15	16	17	18	19	20	21	22	23	24		
<b>Alta.</b>	1					4				1	3	9
<b>B.C.</b>		2			2	2					1	7
<b>Man.</b>	1	1	1	1							1	5
<b>N.B.</b>						1						1
<b>N.S.</b>				1								1
<b>Ont.</b>	1	1	1	3	4	1	2				8	21
<b>Que</b>	22	6	4	3	4	5		1			2	47
<b>Sask.</b>	1	1					1		1		2	6
<b>Total</b>	26	11	6	8	10	13	3	1	1	1	17	97

Source: Correctional Services of Canada

**Table #2**

**Electronic Monitoring in Ontario  
1996 to 1999**

	1996	1997	1998	1999 (to Sept.)
Average Daily Count	45	64	64	62
Per Diem Cost	**	\$66	\$56	\$52
User Fee (per day)	\$8	\$8	\$12	\$12

\*\* data not available

Source: Ontario Ministry of Correctional Services

additional supervision provided by EM and in sufficient numbers to effect the closure of all or part of a prison. The eligibility requirements and the low numbers of participants suggest that this is not the case.

The cost to the offender has increased to \$12 a day (\$360 per month) from the original \$8 a day (\$240 a month). The increase in the user fee makes it even less affordable to those on social assistance or in a low paying job who are struggling to meet the costs of basic needs such as food and shelter. The offender must apply for a subsidy or a waiver of the fee. While it would be difficult to get hard data to show that even with a sliding scale the fee is a barrier, one must wonder how many offenders are discouraged from even applying for the program because of the fee. Research in the U.S. has suggested also that cost-recovery demands can have an impact on the decisions of correctional officials to reduce or waive the fee.

### **Research on the effectiveness of EM**

To date, no research on the effectiveness of the EM program in Ontario has been conducted. We can, however, look to recent research undertaken by the Solicitor General Canada on EM programs in Saskatchewan, British Columbia and Newfoundland (Bonta, Rooney and Wallace-Capretta, 1999). Using a one year follow-up of re-offending rates of released inmates, probationers and EM participants and controlling for offender risk and needs in

these three samples, the study found that:

*...EM had no effect on recidivism (emphasis added). That is, the recidivist rates were comparable for all three groups.*

The only difference identified was with the group assessed as high risk in the Newfoundland EM program, the only one of the three programs to attach rehabilitative programs as a requirement of participation. There was a significant reduction in the recidivist rate of high risk offenders in the Newfoundland program while low risk offenders showed *increased* recidivism. This finding, however, speaks to the effectiveness of cognitive-behavioural treatment appropriately targeted at high risk offenders, rather than to the effectiveness of EM.

The study concluded that:

*There are two general findings that have important implications for policy and practice. First we, found no evidence that EM has a more significant impact on recidivism than the less intrusive, and less costly correctional measure of probation. Thus, the "value added" of EM programs appears limited. Second, cognitive-behavioural treatment programming targeting higher risk offenders (not necessarily the highest risk) was associated with significant reductions in offender recidivism. Continued support of treatment programs for higher risk offenders, perhaps married with EM to increase treatment attendance, is suggested.*

Even with respect to using EM in conjunction with treatment programs, the authors later added the following cautionary note:

*This said, however, there may be other less intrusive and costly interventions than EM that can improve treatment participation.*

The facts continue to confirm the conclusions that we came to in our analysis in 1996: electronic monitoring - not effective, not cheaper, not humane - not right for Ontario.

## **...Boot Camps for Young Offenders**

In 1995, the Ontario government announced its intention to establish a "strict discipline" program with a military structure and milieu (conventionally known as a boot camp) for young offenders in custody. In light of our view that criminal justice policy and practice should be developed from sound research and evaluation, we reviewed the information available at the time on the nature and use of boot camps and on the research evidence as to their effectiveness and presented the information in Fact Sheet #8 (August 1996). The research evidence both from the U.S. (where boot camps have been operating since 1983) and on "what works" to reduce re-offending was not supportive of the boot camp model as an effective way of dealing with young offenders. Further research evidence from the U.S. and preliminary results of the evaluation of the Ontario program are now available.

### **Project Turnaround**

Despite the research evidence available at the time, the government moved ahead with the establishment of a "strict discipline" facility as a pilot project. The government contracted with a private, for-profit organization, Encourage Youth Inc., to operate the facility for Phase 2 young offenders (age 16 and 17 on sentence) with a capacity of

32 youths and an annual operating budget of approximately \$2.3 million (\$197 per youth per day). Further, the government established an independent research component and declared that the model would be expanded only if the research results proved to be favourable.

Project Turnaround opened in the Summer of 1997.

Young offenders are sent to Project Turnaround from other custody facilities. They are screened and must meet the following eligibility criteria: male, no current or previous offences for homicide, arson or sex offences, from 16 to 19 years of age, medically fit and free of major medical disabilities that would prevent them from program participation, 4 to 6 months remaining on a custody disposition and no serious mental disorder.

The military model is evidenced by the dress and the titles assigned to staff and youth (i.e., sergeants, cadets) and the routine. The day begins at 06:00 (6:00 a.m.) with reveille, followed by washroom, breakfast, hygiene and inspection parades. One hour is spent every weekday morning in drill and ceremony parade. The daily schedule, which allows for very little free time, follows military precision. Lights out/kit lock-up occurs at 21:45 (9:45 p.m).

Rehabilitative programs are present within the military context. There is scheduled time for academic, vocational, recreational programs, as well as specialized treatment in cognitive skills, substance abuse, anger management and values and moral reasoning. Components also include a behaviour-based reward

system, a general group milieu program and aftercare.

### ***Preliminary Results of the Evaluation***

To date, evaluations have been conducted on the Project Turnaround programs to assess their adherence to the principles defined by the research literature as elements of programs that have shown to be effective in reducing recidivism. The institutionally-based programs have been evaluated as “very satisfactory” in terms of their potential to be effective. The aftercare service, however, has been criticized by the evaluators as ignoring many of the principles of effective corrections - “passive intervention rather than the active structured intervention required”. As predicted in Fact Sheet #8, the evaluators indicated that the problems probably stem from having to provide services in the many communities across the province to which the young offenders are released.

Preliminary recidivism data show that close to 40% of the graduates have committed new offences within the first year after release from custody. Not yet known is how this figure compares to recidivism rates of comparable youth released from other youth custody facilities. The Minister of Correctional Services (Ontario) suggested that recidivist rates for other institutions would likely be much higher but this remark should be viewed with caution. To prove that any model of intervention is effective, recidivist rates of the experimental group

must be compared to a matched control group (i.e. similar offences, similar criminal histories) and have a similar follow-up periods (the “rule-of-thumb” is seen to be two years because 80%-90% of recidivism is detected within this period).

### ***Further research evidence***

A recent report to the U.S. Congress, “Crime Prevention: What works, what doesn’t, what’s promising” prepared by the National Institute of Justice, reviewed four scientifically rigorous studies of juvenile boot camps and found that:

*The results from three of the studies reveal no significant differences in recidivism between the boot camp youth and the control groups. In the fourth site, the CYA, more of the boot camp youth were reincarcerated than the control group. Obviously this presents little support for these boot camps as crime prevention techniques.*

Accordingly, the list of “what doesn’t work” to prevent crime includes boot camps.

Ontario should not be using resources - both in terms of energy and money - to pursue those models of correctional intervention, such as boot camps, that current research evidence and experience tells us is ineffective.

***To obtain copies of Fact Sheets #5, #7 and #8, please contact the John Howard Society of Ontario or your local branch.***

## ***Effective, just and humane responses to crime and its causes***

For more information, please contact us at:

John Howard Society of Ontario  
123 Edward St., Suite 701  
Toronto, Ontario  
M5G 1E2  
Tel: (416) 408-4282  
Fax: (416) 408-2991  
E-mail: [jhso@johnhoward.on.ca](mailto:jhso@johnhoward.on.ca)  
Website: [www.johnhoward.on.ca](http://www.johnhoward.on.ca)

