

Fact Sheet

#5

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

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Judicial Review

Parliament is now considering a bill to abolish Section 745 of the *Criminal Code*, a provision that allows for a judicial review of the parole eligibility of prisoners serving a life sentence for murder with a parole eligibility of 15 years or more. We believe that public and political support for the abolition of the judicial review provision is largely based on misconceptions about the penalty for murder, how the judicial review process works and what happens to those serving a life sentence who apply for and are released on parole. Before Canada moves any closer to removing the possibility of reducing the parole eligibility in those situations where it is warranted, it is important to examine the facts.

What is murder and what is the punishment for murder?

Not all homicides are classified as murder. Homicide can be defined as murder, manslaughter or infanticide "depending upon the external circumstances of the killing and the mental element which accompanies it" (1995 Tremere's *Criminal Code*). The Canadian Centre for Justice Statistics (1994) gives the following definitions for the categories of homicide:

Manslaughter is generally considered to be homicide committed in the heat of passion caused by sudden provocation.

Infanticide occurs when a female causes the death of her newborn child if her mind is considered disturbed from the effects of giving birth.

A homicide is murder when a person intentionally causes the death of another human being, or means to cause bodily harm that is likely to cause death.

First degree murder is when:

- a) it is planned and deliberate or,*
- b) the victim is a person employed and acting in the course of his/her work for the preservation and maintenance of public peace (i.e., police officer, correctional officer) or,*
- c) the death is caused by a person committing certain serious offences (i.e., sexual assault, kidnapping, hijacking).*

Second degree murder is all murder that is not first degree.

In the case of manslaughter and infanticide, the judge has discretion in sentencing. There is no minimum sentence for either offence and the maximum penalty is life for manslaughter and five years for infanticide.

In the case of murder, the judge has no discretion in sentencing. The mandatory penalty is a life sentence which continues for the natural life of the convicted person.

When can a person convicted of murder be released from prison?

Unlike definite sentences where the end of the sentence is set, the only way that a person sentenced to life can ever be released from prison is through the discretion of the National Parole Board.

The parole eligibility date defines the first date that the person can be *considered* for full parole. The parole eligibility date is *not* a definite release date. The offender's release can be, and most often is, delayed beyond the eligibility date and could be refused entirely if the Parole Board feels that the person continues to present a risk of re-offending.

The date of parole eligibility is set at the time of sentencing. For those convicted of first degree murder, the parole eligibility must be 25 years. The period of ineligibility is mandatory. The judge cannot vary it. In the case of those convicted of second degree murder, the judge will ask for recommendations from the jury before setting the parole eligibility date. The jury can offer no recommendation or can recommend a date between 10 and 25 years. The judge may or may not accept the recommendation of the jury but must set the period of ineligibility between the 10 to 25 year range.

As Table 1 shows, Parliament has made a number of legislative amendments with respect to parole eligibility for those

<i>Date</i>	<i>Mandatory Penalty</i>	<i>Parole Eligibility</i>
1961 and prior	Death penalty for all murder	if commuted to life imprisonment, eligibility unrestricted
Sept. 1961	Death penalty for "capital murder"	if commuted to life imprisonment, 10 years
	Life imprisonment for "non-capital murder"	7 years
Dec. 1969	Death penalty for "capital murder"	10 years when commuted to life imprisonment
	Life imprisonment for "non-capital murder"	10 years
Jan. 1974	Death penalty for "murder punishable by death"	10 to 20 years at the discretion of court when commuted to life imprisonment
	Life imprisonment for "murder punishable by life imprisonment"	10 to 20 years at court discretion
July 1976	Life imprisonment for "first degree murder"	25 years
	Life imprisonment for "second degree murder"	10 to 25 years at court discretion

Note: The last execution in Canada was in 1962 after which all death penalty sentences were commuted to life sentences. The death penalty was finally abolished in 1976

Table 1

Source: Zubrycki, 1984)

convicted of murder since 1961 - steadily increasing the period before eligibility.

What has been the effect of the 1976 changes to parole eligibility?

Before 1976, the average time served in prison prior to parole on a life term for capital murder was 14 years (Zubrycki, 1984) - 11 years earlier than a person now convicted of first degree murder would normally be considered for parole.

The increase in time served prior to parole eligibility has contributed to the problem of prison overcrowding. 25-30 prisoners per year enter the system serving life for first degree murder. As of February 22 1995, there were 564 people in federal prisons serving life with 25 years before parole eligibility. This figure is projected to rise to 700 by the year 2000. There are 1477 prisoners serving life for second

degree murder and almost one-half have a parole eligibility date greater than 10 years. The average parole eligibility date for those serving life for second degree murder is 12.5 years.

It has been estimated that the changes made in 1976 to parole eligibility for lifers resulted in an increase in the population in federal prisons of 888 - the equivalent of two maximum security institutions (Landreville, 1995).

What factors does the Parole Board consider?

While in prison, a correctional treatment plan is developed which identifies programs required to address problem areas such as substance abuse, anger management, cognitive skills and educational/vocational programs. Any parole decision is dependent upon successful completion of the correctional treatment

plan. As well, psychological and psychiatric assessments are completed for consideration by the Board.

A person serving a life sentence will be required to go through an extensive gradual release program before being released on full parole. A gradual release program begins with a series of escorted temporary absences (ETA) - short periods of time spent in the community under the escort of Correctional Services Canada personnel. After a number of successful ETAs, consideration is then given to expanding the program through unescorted temporary absences (UTA) - periods of time spent in the community up to 48 hours per month for a prisoner in a medium security prison and 72 hours per month for prisoner in a minimum security prison.

Most often UTAs are used to confirm halfway house accommodation and plans for education/employment in the community where the person plans to reside when released on parole. While in the community on a UTA, the person reports to a parole officer and to the local police.

After a number of successful UTAs, the person can be considered for day parole. A day parole requires that the person return to a correctional centre or a halfway house every night. After a successful period on day parole, the person will be considered for full parole.

It often takes two to three years from the time that the first ETA is granted to the granting of full parole. All decisions with respect to ETA, UTA, day parole and full parole are made by the National Parole Board.

How long does parole last and what is required of the parolee?

A person serving a life sentence who is released on parole continues to serve the life sentence in the community. He/she will be on parole until they die.

A person released on parole is subject to conditions and must report to a parole officer. Conditions include reporting to the police, remaining within a specified geographical area unless permission to travel outside of the area is granted, and

other requirements set by the National Parole Board or the parole officer such as participation in a substance abuse program and psychological counselling.

If the conditions are broken or even a minor criminal offence is committed, the offender is returned to the penitentiary to continue serving the life sentence.

How many commit an offence while on parole?

Of the 752 full parole releases of those serving a life sentence for murder between Jan. 1, 1975 and March 31, 1990, 69 (9.2%) were returned to prison for the commission of a new offence. Of the 69 returned for a new offence:

- 21 (30%) were for offences against the person,
- 13 (19%) were for narcotics offences,
- 12 (17%) were for property offences,
- 6 (9%) were for robbery, and
- 17 (25%) were for Other Criminal Code offences.

Of the 21 who committed an offence against the person, five were for murder. This represents 0.7% of all those serving a life sentence for murder who were released on full parole during this 15-year period. Besides these five cases, no person on full parole while serving a life sentence for murder has been convicted of attempted murder or any other offence causing death (Correctional Services Canada, 1992).

Relatively low re-offending rates among this group of offenders is not unique to Canada. Studies in the United Kingdom and Germany show similar low recidivist rates for those released from life imprisonment (United Nations, 1994).

What is Judicial Review?

Section 745 of the *Criminal Code*, called the Judicial Review provision, allows for prisoners serving a life sentence with a parole ineligibility period of greater than

15 years to apply to the court for a reduction in that period. The review is *not automatic* - the person serving the sentence must apply for it - and it can take place only *after* he/she has served 15 years of the sentence.

Judicial Review is not "a loophole in the law" as some contend but rather a deliberate decision by Members of Parliament to provide a mechanism to allow for reconsideration of parole eligibility after a lengthy period of time had been served. Those who drafted the law recognized that providing hope in the form of a more reasonable parole eligibility date would be: 1) an incentive to prisoners' rehabilitation, 2) a control mechanism which helps the prison administration, 3) an economic benefit of releasing a person who is no longer a danger to society to return to society to earn their living, support their families and pay taxes, and 4) a method to consider the implications of long periods of parole ineligibility in special cases such as the elderly.

How does the Judicial Review process work?

The judicial review hearing takes place in the same province and in the same community where the murder occurred. A jury of 12 citizens from that community decides only whether to reduce the *eligibility* date for parole. The jury will hear information presented by the applicant and the Crown relating to the following areas:

- 1) the character of the applicant,
- 2) the applicant's conduct while serving his/her sentence,
- 3) the nature of the offence for which the applicant was convicted, and
- 4) such other matters deemed relevant by the presiding judge.

A number of witnesses are called by both the applicant and the Crown to present the information. The applicant must testify. The onus is on the applicant (the offender) to convince the jury that the eligibility date for parole should be reduced.

Two-thirds of the jury must agree before the eligibility date for parole can be reduced. They can decide to:

- 1) make no change or reduction to the period of parole eligibility but set a date when a new application can be made; or
- 2) make no change or reduction to the period of parole eligibility and refuse the possibility of future applications; or
- 3) reduce the number of years of imprisonment without eligibility for parole; or
- 4) terminate the ineligibility for parole, making the offender eligible to apply for parole immediately.

How many have applied for Judicial Review?

Not everyone who is eligible to apply for a judicial review applies. It is a rigorous process that brings the offender and the facts of the case back into the public eye. The Judicial Review hearing often lasts a week or more and the application is often contested aggressively by the crown. Some who are eligible for judicial review have chosen to forego the review, particularly when the parole eligibility is 20 years or less.

As of June 30 1994, 128 prisoners were eligible to apply for judicial review but only 71 had applied (Correctional Services of Canada).

How many Judicial Reviews have taken place and what was decided in these cases?

As of February 15, 1995, 55 judicial reviews have been completed and decisions rendered. Table 2 shows the outcome in these cases by province.

No judicial reviews have taken place in Newfoundland, Prince Edward Island or in the territories.

Both the number of judicial review applications heard and the nature of the review decisions varies between the provinces where reviews have taken place. Almost one-half of the reviews have taken

Judicial Review Decisions by Province (to Feb. 15, 1995)														
	Parole Eligibility Reduced to:									Rejected: re-application permitted in:			Total	
	15	16	17	18	19	20	21	22	23	3 years	4 years	none		
N.B.						1								1
N.S.				1										1
Quebec	12	3	3	1		2		1					1	23
Ontario	1		1	1	2		1						5	11
Manitoba	1		2	1									1	5
Sask.	1	1							1			1		4
Alberta						1					1		3	5
B.C.	1	1				2					1			5
Total	16	5	6	4	2	6	1	1	1	2	1	10		55

Table 2

Source: Senator Earl Hastings

place in Quebec. Seventy five percent of the applicants who have had their parole eligibility reduced to 15 years had their judicial review in Quebec.

When can the offender be released following a favourable judicial review decision?

A favourable decision does not mean that the person is released at that time. A judicial review decision to reduce the parole eligibility date only means that the person can apply for parole at the time specified by the jury. The individual must then await a hearing (4-6 months from the time of application). He/she must show that he/she is no longer a danger to the public and is rehabilitated. If they are considered for

release, all will be required to go through a gradual release program (ETAs leading to UTAs leading to day parole) prior to being considered for full parole.

As of February 28, 1995, 15 of those who have received a reduction in their parole eligibility have been released on full parole and 6 on day parole.

Why should we support the Judicial Review provision?

Judicial review is a humane practice because it gives an offender some hope - an essential component of coping with the sentence and managing day-to-day existence in prison. It is a just practice because it allows for the possibility of review of the offender's circumstances and an adjustment

of the parole eligibility date in a manner and forum that is fair and independent and represents the interests of the community. Judicial review also limits the problems associated with continued long-term incarceration for those offenders who no longer present a risk to the community.

Some say that the majority of citizens favour the abolition of judicial review. But it is clear that when citizens are asked, as jury members, to review individual cases in depth, they are quite willing and able to use their discretion properly.

Abolition of judicial review robs the future generation of making their own choices based on their assessment of the impact of our sentence on the offender and their communities at that time. It also robs them of the opportunity to respond in a humane way to special circumstances. When we create laws that allow for no exceptions, we create a tyranny.

Sources

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The John Howard Society is an organization of citizens who accept responsibility for understanding and dealing with the problems of crime and the criminal justice system.

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