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Section.745.6 - The "Faint Hope Clause"

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How is homicide defined in Canada?

According to the Canadian *Criminal Code*, there are two kinds of homicide: culpable and non-culpable homicide. Culpable homicide includes murder, manslaughter and infanticide. Homicide that is not culpable is not an offence.

There are two forms of murder: first degree and second degree. First degree murder is the most serious and therefore carries the highest penalty. The mandatory penalty for first degree murder is life imprisonment, with no eligibility for parole before 25 years of the sentence has been served in prison. An example of a first-degree murder is one that is planned and deliberate. First degree murder also encompasses contract killings and the murder of police officers and prison employees.

Second degree murder, which is all murder that is not first degree, also carries a mandatory penalty of life imprisonment. However, the parole eligibility period for second-degree murder is a minimum of ten years, but the sentencing judge may vary that period from 10 years to a maximum of 25 years.

Without parole, the offender remains imprisoned for life. Offenders who are paroled while serving life sentences remain on parole for life unless parole is revoked. If parole is revoked, the offender is reincarcerated.

Manslaughter is a culpable homicide that is not murder or infanticide. There is no minimum sentence for manslaughter and the maximum sentence is life imprisonment. There is no mandatory minimum for parole eligibility.

Infanticide occurs when a mother causes the death of her newborn infant. The main element of this offence is that at the time of the killing the perpetrator has not fully recovered from the negative effects associated with childbirth. The maximum penalty for infanticide is five years.

Where did section 745.6 - Judicial Review ("faint hope clause") come from?

In 1976, Parliament abolished the death penalty for *Criminal Code* offences (as opposed to the death penalty for military offences which was abolished in 1999) and replaced it with mandatory life terms of imprisonment for first-degree murder and second-degree murder. The judicial review provision (i.e., the faint hope clause) came into effect in 1976 at the same time as the new murder provisions. It allows those convicted of murder, and who have served 15 years of their sentence, to apply to the Chief Justice of the province in which the conviction occurred to have their parole ineligibility period reviewed by a jury. The actual decision to allow for parole is not made by court officials, such as judges or lawyers, or by bureaucrats, but by 12 members of the community sitting as a jury.

This provision was added to the *Criminal Code* to provide an incentive for long-term offenders to rehabilitate themselves. The provision recognized that, in exceptional circumstances, the public interest might not be served by keeping an offender in prison for more than 15 years; in particular, where the individual is not a threat to society.

The provision also represents Parliament's awareness of how long other countries imprison persons convicted of murder before allowing them to apply for parole. Countries such as Australia, Belgium, Denmark, England, New Zealand, Scotland, and Switzerland keep their persons convicted of murder in prison for, on average, 15 years before being paroled.

What exactly is Judicial Review (the "faint hope clause")?

Section 745.6 of the *Criminal Code*, the judicial review provision, enables offenders serving life imprisonment with parole ineligibility periods of more than 15 years to apply for a reduction of that period. A s.745.6 review is not intended as a forum for a re-trial of the original offence. The focus is instead on the progress of the offender after having served at least 15 years of his or her life sentence.

On January 9, 1997, amendments to section 745.6 came into force. The purpose of these amendments was to re-focus the process to ensure that the most deserving cases benefit from a judicial review.

Since 1997, in order to obtain release before 25 years have been served, the offender must first convince a Superior Court Justice that the application has a reasonable prospect of success. The offender must then convince a jury from the community in which the conviction occurred or a community selected by the Provincial Superior Court judge, that the parole ineligibility period ought to be reduced. The jury's decision must be unanimous. Finally, if the jury grants a reduction, the offender must convince the members of the National Parole Board that he or she is not a risk to the community.

The application process is now as follows:

- Section 745.6 prohibits any person convicted of more than one murder, where one or more of the murders was committed after January 9, 1997, from applying for judicial review. Multiple murderers must serve the entire parole ineligibility period of 25 years before being able to apply for parole to the National Parole Board.
- The eligible prisoner makes an application to the Chief Justice of the province in which he or she was convicted. A Chief Justice or a designated Superior Court Judge reviews written materials from the Crown and the applicant. The Chief Justice or superior court judge then determines, on the basis of the written materials, whether the applicant has shown, on a balance of probabilities, that there is a reasonable prospect that the application will succeed. If the judge is of the opinion that it does, a jury is empanelled to hear the case. If not, the application stops there, subject to appeal by the applicant.
- The jury considers the following when determining whether there should be a reduction of parole ineligibility:

  (a) the character of the applicant;
  (b) his/her conduct while serving the sentence;
  (c) the nature of the offence;
  (d) information provided by the victim's family members about how the crime has affected them; and,
  (e) any other matters that the judge considers relevant in the circumstances.

- The decision of the jury to reduce the ineligibility period must be unanimous. The jury can reduce the parole ineligibility period immediately or at a later date, or deny any reduction.
- Where the jury unanimously decides that the number of years to be served should be reduced, it then decides by a 2/3 majority the number of years that must be served before the inmate can apply to the National Parole Board (e.g., time to be served is reduced from 20 years to 15 years before the individual can apply to the National Parole Board).
- If the jury decides that the period of parole ineligibility is not to be reduced, they may set another time at which the prisoner can apply again for judicial review. If no date is set, and unless the jury decides that another application may not be made, the inmate must wait two years before applying again.

What is the role of the National Parole Board and Correctional Service of Canada?

The National Parole Board has no official role in the judicial review process; however, Board personnel may be called upon to explain the parole process to the court.

Correctional Service of Canada completes a Parole Eligibility Report in accordance with the rules or practices of the province where the hearing will take place. In this report, information such as an offender's personal education and employment history, marital status, adult and juvenile criminal history, as well as any disciplinary evaluations, transfers, leisure activities, relationships with staff, family, community and medical history must be included. Correctional Service of Canada staff may attend the judicial review hearing to clarify the submission on the request of the court.

If a jury finds that the offender ought to have a reduction, the offender's parole ineligibility period may be lowered. If lowered, the ultimate decision to grant or deny parole remains with the National Parole Board.

A reduction in parole eligibility does not mean the offender will be released on parole or will be released at the reduced eligibility date. In determining whether or not to grant parole, the Board members carefully review information provided by victims, the courts, correctional authorities, and the offender. In arriving at a decision, the Board considers a number of factors, but above all the protection of society. Board members must be satisfied that the offender will not pose an undue risk to the community and will follow specific conditions. These conditions may include restriction of movement, prohibitions on drinking, participation in treatment programs, and prohibitions on associating with certain people (such as victims, children and convicted criminals).

The Correctional Service of Canada, which is responsible for supervising federal offenders in custody and also in the community, can take action if it believes the offender is violating release conditions or may commit another crime. It can suspend the release and return the offender directly to custody until the risk is assessed. Some offenders may remain in prison if the National Parole Board revokes their parole. Others may be released again, but usually under more stringent conditions or when community support services are in place.

How many inmates have applied for judicial review?

Between 1987, when the first judicial review hearing was held, and June 4, 2000, 488 offenders convicted of murder have reached the 15-year point since their official sentence in 1976 (in many cases, time served before sentencing in 1976 was taken into account in calculating the 15 years). According to section 745.6, this would make them eligible to apply for a judicial review. Of these 488 offenders, 103 (21%) have applied and had a judicial review.

How many applicants have had their parole ineligibility period reduced?

As shown in Table 1, of the 103 applications heard across Canada over the past 13 years, juries have granted some reduction in the parole ineligibility period in 84 cases or 81.6% of applications. This is an average of 6 successful applications per year across Canada.

Table 1: Reductions on parole ineligibility periods granted by juries

Successful applications (n=84)	Reduction Granted (years)
5	from 20 to 15
4	from 20 to 16
2	from 20 to 17
1	from 20 to 18
20	from 25 to 15
10	from 25 to 16
5	from 25 to 17
7	from 25 to 18
11	from 25 to 19
12	from 25 to 20
3	from 25 to 21
1	from 25 to 22
1	from 25 to 23
2	from 25 to 24

Source: Correctional Service of Canada, June 4, 2000.

What is the status of successful applications to date?

The status of the 84 successful applications to date is as follows:

- 53 are serving their sentence in the community on parole;
- 25 prisoners are still currently incarcerated. Of the 25, 6 have not yet reached the required number of years before they can apply to the National Parole Board, 17 of the successful applications were denied parole by the National Parole Board, and 2 have been granted parole but have had their parole either suspended or revoked;
- 3 are deceased;
- 2 are unlawfully at large; and,
- 1 has been deported.

The status of the 53 currently being supervised in the community is as follows:

- 14 are on day parole: *Day Parole* allows offenders to participate in community-based activities to prepare for release on full parole. Offenders on day parole must return nightly to an institution or a halfway house unless otherwise authorized by the National Parole Board.

- 39 are on full parole: *Full Parole* is a conditional release program that allows an offender to serve a part of the sentence in the community. Under this form of release, an offender may live with his or her family and continue to work and contribute to society. Although no longer required to return to the institution, the offender remains under supervision for life and must continue to abide by certain conditions.

Over 13 years, there have been 17 revocations and 4 suspensions of offenders on parole following a s.745.6 application. Out of the 17 parole revocations, 4 were revoked following allegations of a new offence (one armed robbery, one serious drug offence, and two less serious drug offences). Of the four suspensions, two are unlawfully at large and two have been returned to custody.

What is the parole status of unsuccessful applications and non-applicants to date?

As of October 29, 2000, a total of 420 offenders have served at least 15 years of their life sentences for first or second degree murder and have either not applied for judicial review or applied and were denied. Of this group, 20 have applied for a reduction and been denied, whereas 400 did not apply and waited out the remainder of their ineligibility periods before applying to the National Parole Board.

The status of the 420 offenders to date is as follows:

- 312 prisoners are still currently incarcerated; and,
- 108 have been released by the National Parole Board.

Of the 108 granted release, their status is as follows:

- 15 are being supervised on day parole;
- 55 are being supervised on full parole;
- 3 have had their parole suspended and were temporarily detained;
- 7 have been deported;
- 3 have escaped;
- 2 have had their sentences overturned or reduced on appeal; and,
- 23 are deceased.

Over 13 years there have been 30 revocations and 42 suspensions of offenders on day or full parole. Out of the 30 revocations, four day parolees and two full parolees experienced revocations due to a new offence and one day parolee experienced a revocation without standing charges.

Which provinces account for the highest number of judicial reviews?

The number of applications vary across the country and the provincial differences are displayed in Table 2. The highest numbers of applications come from Quebec (49), Ontario (22), and Alberta (11). Quebec also accounts for the greatest number (46) and highest proportion (55%) of successful applications. Conversely, Ontario accounts for

the greatest proportion (42%) of unsuccessful applications.

Table 2: Provincial differences in judicial review decisions

Provincial Jurisdiction	Number of Cases Reduced	Number of Cases Not Reduced	Total	% Reduced
Alberta	8	3	11	72%
British Columbia	6	2	8	75%
Manitoba	4	1	5	80%
New Brunswick	1	-	1	100%
Nova Scotia	1	-	1	100%
Ontario	14	8	22	67%
Quebec	46	3	49	94%
Saskatchewan	4	2	6	67%
Total	**84**	**19**	**103**	**82%**

Source: Correctional Service of Canada, 2000.

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