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JUDICIAL REVIEW OF PAROLE ELIGIBILITY

Research Project for the Ministry of the Solicitor General Canada

Department of Criminology
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JUDICIAL REVIEW OF PAROLE INELIGIBILITY

DOCUMENT OVERVIEW

The purpose of this document is to provide information about Judicial Review, the mechanism by which inmates serving life terms may obtain a review of their parole ineligibility dates. This provision of the Criminal Code was introduced in 1976, but is only now having an important impact upon the correctional environment. The reason for this is of course that inmates must serve at least fifteen years in prison prior to making the application. With a relatively large and growing population of lifers, the judicial review provisions are likely to become ever more important as the decade progresses. And, as more applications are made, the issue is assuming a much higher public profile. (The issue of public reaction is the focus of one of the articles in this report.)

As of writing, there have been over 40 applications under this section of the Criminal Code. This number permits a limited statistical exploration of trends to date, and that is one of the aims of this report. The aim of this report is not simply to present the outcomes of the reviews to date (although this is done as well), but rather to provide some interpretation and analysis. To this end, the authors are concerned with the past -- with the outcomes so far -- and also with the future. As to the latter, we aim to identify problematic aspects of the judicial review process.

There are four components to this report. The first two parts contain an introduction to the Judicial Review process and an exploration of the role of the courts. The major component is an analysis, by Robert Gaucher and Marian Crow, of the first 40 Judicial Review applications. There is also a chapter addressing the issue of public concerns in the area, and an annotated bibliography of the limited literature that has accumulated on this topic over the past few years.

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AN INTRODUCTION TO THE JUDICIAL REVIEW PROCESS

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INTRODUCTION:

As punishment for murder, section 235 of Canadian *Criminal Code* provides for mandatory sentences of life imprisonment.

In general terms, the essence of the two categories of the life sentence are as follows:

**First degree murder*:

Upon conviction of this offence, an inmate is ineligible to apply for parole consideration until twenty-five years of the sentence have been served in prison.

**Second degree murder*:

In the case of a conviction of second degree murder, discretion rests with the sentencing judge to establish a period between ten and twenty-five years at which time the offender may apply to be considered for parole.

Aware of the inherent seriousness underlying the offence of murder, while also appreciating the severity of punishment mandated by a life sentence, in July of 1976, the Canadian Parliament, enacted section 745 of the *Criminal Code* which provides a means for a judicial review of parole ineligibility. In the case of offenders serving a life sentence, where the inmate is not eligible to be released on parole for more than fifteen years, an application for judicial review can be made to the Chief Justice of the province or territory where the original offence took place. The Chief Justice then designates a superior court judge to empanel a jury to hear the offender's application.

Guided by the overall objective to act in the 'best interests of society', the federal government has developed rules and regulations to manage the process of release. Although judicial review occurs at the post-sentencing stage, it remains an integral part of the criminal justice process given the intimate relationship between parole and sentencing.

The focus of this document will be on outlining of the origins of the current legislation governing judicial review of parole ineligibility for offenders convicted of first and second degree murder, as well as providing an overview of the context from which such provisions were developed and enacted.

THE HISTORICAL CONTEXT OF JUDICIAL REVIEW:

In general terms, judicial review is the venue by which courts supervise the exercise of powers delegated to subordinate decision-makers (Cole & Manson, 1990: 40). Administratively, judicial review is neither a novel, nor a recent invention of the legal system. The grounds for judicial

review evolved foremost as a check upon the criminal and quasi-criminal powers exercised by Justices of the Peace and Magistrates. Supervisory review ensures that due consideration has been paid to all relevant factors throughout a hearing; while also promoting respect for the jurisdictional integrity of tribunals and decision-makers in whom authority has been entrusted (Cole and Manson, 1990: 40).

While, historically, the process of judicial review has existed for some time, in the Canadian context, the role of a mechanism to assist offenders serving life sentences for murder who are seeking early parole eligibility is a much more recent phenomena. Before 1979, prison law in this country concerned itself with a small number of issues, relating mostly to matters of statutory entitlement. To date, the area of conditional release remains a fairly unexplored issue, given that it has only recently come under the influence of judicial consideration, comment and intervention (Cole and Manson, 1990: 39).

CANADIAN LEGISLATION GOVERNING MURDER:

In Canada, by virtue of section 92(1) of *The Constitution Act, 1867,* Parliament was given exclusive authority to legislate with respect to criminal law, this power also includes the procedure in criminal law. Acting pursuant to such authority, Parliament enacted a mandatory punishment for murder currently found under section 235 of the Canadian *Criminal Code*. The punishment for murder, reads as follows:

> (1) "Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life"
>
> (2) "For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment"
> (source: *Criminal Code*, R.S.C. 1985, C-46).

Essentially, section 235 of the *Criminal Code* mandates that anyone who commits murder shall be found guilty of an indictable offence and will receive an automatic sentence of life imprisonment. With respect to eligibility for conditional release, the primary difference distinguishing the two categories of murder is as follows:

> (i) First degree murder wherein the convicted offender may not apply, nor be considered for parole, for a period of twenty-five years;
>
> (ii) Second degree murder whereby the sentencing judge establishes a time frame between ten and twenty-five years governing when an offender may apply or be considered for parole
> (source: *Criminal Code*, R.S.C. 1985, C-46).

The mandatory nature of the life sentence as the penalty for murder has not been altered by the passage of *Bill C-84*. While respecting the inherent seriousness of the offence of murder, the implementation of judicial review reflects a desire to ensure that the severity of punishment is not disproportionately excessive to the sentence the offender receives. Members of the 1976 Standing Committee on Justice and Legal Affairs were guided by an interest to introduce legislation creating a process of review, while ensuring that "the amount of mandatory jail-time will be served without any exception" (Standing Committee on Justice and Legal Affairs, 69:17). An applicant who successfully obtains a grant of reduced parole ineligibility is still deemed to be serving sentence for the rest of his or her life; it is only the manner and place where the sentence is administered which changes. In the case of a life sentence, the warrant *never* expires. As the Solicitor General in 1976, Warren Allmand, himself stated, "...I want to make it very clear once more that the penalty for murder in this bill is not much different from the penalty for murder under the present law except for the fact that we are abolishing capital punishment" (Standing Committee on Justice and Legal Affairs, 69:43).

THE IMPLEMENTATION OF BILL C-84:

As a major legislative development, the passage of *Bill C-84* into law is significant primarily for the following reasons:

1. The imposition of mandatory periods of incarceration which provide for:

   - Life sentences for offenders convicted of first degree murder; and,

   - A minimum of twenty-five years of a life sentence must be served before an inmate convicted of murder can become eligible to be considered for parole.

   - For convictions of second degree murder, eligibility to be considered for parole will not be given until the inmate has served the ten to twenty-five year period of incarceration as originally determined by the sentencing judge.

2. The enactment of a legislative provision creating a venue by which an application for judicial review of parole eligibility can be made by a long-term offender.

Parliament's decision to remove any element of discretion from the sentencing judge with respect to the nature of the penalty, ascribes a somewhat unique status to the offence of murder. Offences which have mandatory sentences attached are the exception, rather than the norm.

Indeed, the majority of offences contained in the Criminal Code prescribe only maximum penalties, thereby affording the decision-maker a considerable degree of latitude in delivering sentence.

With respect to the principle of proportionality, the decision to institute a life sentence for murder was implemented as a means to denounce the killing of another person as a very serious act, while also ensuring that a substantial degree of state-sanctioned coercion and loss of individual liberties would follow (Standing Committee on Justice and Legal Affairs, 1976: 71:57). In terms of concepts of punishment, the implementation of a mandatory life sentence for murder not only incorporates the element of deterrence, but those of incapacitation, rehabilitation, and denunciation as well. The decision made by the federal legislature in 1976 to increase the amount of time for which an offender serving a sentence for murder must remain incarcerated before seeking parole eligibility reflects the belief that the protection of society is secured so long as the offender remains incarcerated. Indeed, law-makers often "place their greatest faith on imprisonment as a sanction, where the death penalty is not employed" (Cole and Manson, 1990: vi).

The change in the legislation represents a desire to ensure that the mandatory twenty-five year term of imprisonment takes precedence over all other considerations, including any concern for the future rehabilitation of the offender (Cole and Manson, 1990: 17-19). Indeed, the very choice of time frames underlying current legislation was perceived by one member of the Standing Committee on Justice and Legal Affairs as representing "a balance between the denunciatory effect of a penalty and rehabilitation." In principle, the decision to retain an element of flexibility was considered an important one to respect. As then Solicitor General Allmand explained, "we have drawn the line where we have drawn it...But as I have told you before, there are no absolutes in this" (Standing Committee on Justice and Legal Affairs, 1976: 69:68).

In terms of the actual content of the legislation, it should be noted that the current penalty for murder does not differ substantially from that of its predecessor. However, the decision made by legislators in 1976 to abolish the death penalty, in itself, constitutes a major substantive change in the law. At that time, the general consensus among Members of Parliament reflected the belief that, as an effective deterrent to crime, capital punishment had failed. The change in legislation was supported by an overriding desire to remove a punishment which was deemed primarily exemplary in nature, serving to satisfy the public's desire for vengeance. With respect to deterrence, agreeing to allow for the possibility of review after fifteen years of a life sentence has been served reflects an awareness of the fact that research has yet to find evidence of a positive correlation between an arbitrary prison sentence of a given number of years (such as twenty-five) and a decreased tendency to kill. As former Solicitor General Warren Allmand asked: "why have such an irreversible extreme penalty when it has so many bad side effects?" (Standing Committee on Justice and Legal Affairs, 1976: 69:34), The comments of another member of the

legislative standing committee reflected the sentiments shared by many involved in the debate at the time: "...many of us feel that capital punishment is inappropriate in Canada in 1976. We are moving to get rid of it and we have to propose an alternative in its place" (Standing Committee on Justice and Legal Affairs, 1976: 71:61).

Adopted by the legislative committee as the official response to the void in punishment left by the abolition of the death penalty, *Bill C-84* has not been without its share of criticism. Critics, such as former Ontario Attorney General Ian Scott, for example, have questioned the lack of balanced discussion surrounding the committee's decision to implement *Bill C-84*. Scott expressed concern over the fact that members may have been all too ready to accept lengthier periods of imprisonment as a trade-off for the abolition of the death penalty; "Virtually no one on the abolitionist side questioned the continued need for the trade-off...so the net result of this prolonged debate is that, although we may have taken one step forward, we may at the same time have taken two steps backward" (Justice Report 5(1)).

RELEVANT LEGISLATION:

Part XXIII of the Code, the section dealing with "Punishments, Fines, Forfeitures, Costs and Restitutions of Property" section 745, contains the law governing "Application for Judicial Review - Judicial hearing - Renewal of application - Reduction - Rules - Appropriate Chief Justice - Territories".

Section 745 of the *Criminal Code* reads as follows:

(1) "Where a person has served at least fifteen years of his sentence
(a) in the case of a person who has been convicted of high treason or first degree murder, or
(b) in the case of a person convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until he has served more than fifteen years of his sentence, he may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole"

(2) Upon receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to the character of the applicant, his conduct while serving sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and the determination shall be made by not less than two-thirds of the jury.

(3) Where the jury hearing the application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in his number of years of imprisonment without eligibility for parole.

(4) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by order,
(a) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or
(b) terminate the ineligibility for parole.
(source: *Criminal Code*, R.S.C. 1985, C-46).

It is section 745 of the *Criminal Code* which serves as the legislative authority for judicial review of parole ineligibility periods fixed at more than fifteen years by operation of law or judicial order and, to a certain degree, sets out the procedure to be followed and the possible determinations that may be made.

In terms of the timing of the application, case law has firmly respected the legislative requirement that the right to apply for review does not come into existence prior to the fifteen year point of sentence (R. v Frederick). In practice, even though the period of parole ineligibility for a conviction of second degree murder may have been set by the sentencing judge at a time earlier than the fifteen year mark, the legislation offers no flexibility for the possibility of earlier review.

It is important to note that the exception to periods of parole ineligibility was never intended to, nor does it in practice, apply to every offender. Only those inmates who have proven themselves able to survive the rigors of confinement in a pro-social manner have a reasonable chance of receiving the permission of the National Parole Board to obtain early release. As one member of the legislative committee studying the Criminal Code amendments noted at the time, "I am prepared to be tough about the criminal law but at the same time, I want the criminal law to be flexible enough so that in appropriate case the system can be compassionate at the same time" (Standing Committee on Justice and Legal Affairs, 1976: 71:58).

The existence of an opportunity for review to respond to changing circumstances and as an incentive to ameliorate the rigors of long-term imprisonment are two of the main factors cited to justify the existence of judicial review (Cole and Manson, 1990: 448).

The Canadian Sentencing Commission noted that,

> "...some offenders may, following incarceration, genuinely repent or make changes in their lives which alter their risk to the public or which alter the public's interest in seeing them so severely punished. Many such examples exist" (Department of Justice, 1988: 74).

Section 745(1) describes the circumstances under which applications may be made for judicial review of a period of parole ineligibility. To be eligible for review, the applicant must be serving a sentence of imprisonment for life for either high treason, or first or second degree murder without eligibility for parole until more than fifteen years of the sentence has been served. In practice, however, the prison population of 'lifers' is overwhelmingly composed of offenders incarcerated for murder. In terms of offence type, 1983 estimates reveal that almost three-quarters of the total group of long term prisoners are currently imprisoned for murder (Solicitor General of Canada, 1985: 11).

Table 1.1 offers an overview of offenders serving life sentences for convictions of first degree murder.

TABLE 1.1

JUDICIAL REVIEW STATISTICS

1st Degree Murder - 25yrs Parole Restriction

Province of Sentence

REVIEW YEAR	NFLD.	P.E.I.	N.S.	N.B.	QUE.	ONT.	MAN.	SASK.	ALB.	B.C.	YUK.	N.W.T.	NATIONAL TOTAL
1988													0
1989				2					1				3
1990					1								1
1991					3	5		1	1				10
1992					5	12	2	5	2	4			30
1993				1	8	11	2	2	2	2			28
1994				1	8	7	1	1		2			20
1995			1		3	7			3	2			16
1996			1		10	5	1	1	6	5			29
1997			1		9	6	1	1	5	5			28
1998	2		1	1	4	13	1	2	5	6			35
1999					8	10	4	1	3	9			35
2000	1			2	9	10	1	1	3	4			31
2001				1	6	11	5		4	1			28
2002	1		1	1	6	7	3	1	1	10			31
2003					6	12	1		1	5			25
2004			1		6	10		1	5	2			25
2005				2	10	10	1	3	1	1			28
2006					1	7	1	1	2	1			13
2007						2							2
Missing						15							15
TOTAL	4	0	6	11	103	160	24	21	45	59	0	0	433

Date as of November 22, 1992.
Note: The data represented offenders currently in custody

(Source: Research and Statistics Branch, (Communication and Corporate Development, Correctional Service of Canada).

THE EFFECTS OF BILL C-84 ON SENTENCE SEVERITY:

In terms of the effects on severity of punishment, the changes brought about by *Bill C-84* are rather significant. Table 1.2 supports the fact that the federal legislature's decision to increase sentence severity is best situated within the context of fairly recent trends towards longer lengths in sentences.

TABLE 1.2
ELIGIBILITY FOR FULL PAROLE FOR OFFENDERS CONVICTED OF MURDER

Life for murder before 4 January, 1968	7 years
Life for murder from 4 January, 1968 - 1 January, 1974	10 years
Life for murder from 1 January, 1974 - 26 July, 1976	10 to 20 years; Judicial Review possible at 15 years
Life for first-degree murder on or after 26, July 1976	25 years; Judicial Review possible at 15 years
Life for second-degree murder on or after 26 July, 1976	10 to 25 years; Judicial Review possible at 15 years

(Source: Correctional Service of Canada and National Parole Board, Corrections, *Conditional Release and Detection: A Statistical Overview* (Ottawa: Solicitor General of Canada, 1991).

As depicted in Table 1.2, prior to July of 1976, the penalty for first-degree murder was a life sentence with parole eligibility between ten and twenty years; this term being set pursuant to the discretion of the judge and jury. While some life sentences did exist with possible parole eligibility at twenty years, no chance of review by a court at the fifteen year mark existed. In its current form, the legislation now reflects an increased respect for sentence severity.

A PROFILE OF INMATES SERVING LIFE SENTENCES FOR MURDER:

With respect to the prison population, it is important to keep in mind that a direct result of *Bill C-84* has been a rather substantial increase in the numbers of inmates serving life sentences for murder in Canadian penitentiaries. As depicted in Table 1.3, 1993 Correctional Services Canada statistics reveal there now to be 2281 inmates currently serving life and indeterminate sentences in federal prisons; this figure represents 16.2 % of the entire federal prison population.

TABLE 1.3
JUDICIAL REVIEW STATISTICS
All Offenders

Province of Sentence

REVIEW YEAR	NFLD.	P.E.I.	N.S.	N.B.	QUE.	ONT.	MAN.	SASK.	ALB.	B.C.	YUK.	N.W.T.	NATIONAL TOTAL
1988						1	1						2
1989				3	1				1	4			9
1990					5	2		1		1			9
1991					7	7	1	1	3				19
1992					11	16	2	5	2	4			40
1993			2	1	11	13	2	2	2	2			35
1994	1			1	13	7	1	1	1	2			27
1995			1	1	5	10			3	4			24
1996			1		12	12	1	2	6	6		1	40
1997			1	1	12	10	1	2	6	7			40
1998	2		2	1	6	18	2	2	6	7			46
1999			1	2	9	15	5	2	5	11			50
2000	1			2	13	14	1	1	4	4			40
2001			2	3	11	14	7		5	2			44
2002	1		1	2	9	10	4	1	2	10			40
2003	1		1		7	19	1	1	2	5			37
2004			5		11	15	3	1	7	2			44
2005			1	4	11	16	1	3	3	2		1	42
2006					3	8	1	1	2	1			16
2007						3							3
Missing						23				2			25
TOTAL	6	0	18	21	157	233	34	26	60	75	0	2	632

Date as of November 22, 1992.
Note: The data represented offenders currently in custody

(Source: Research and Statistics Branch, (Communication and Corporate Development, Correctional Service of Canada).

LAUNCHING AN APPLICATION FOR JUDICIAL REVIEW:

From the perspective of the offender convicted of murder, the prospect of making an application for judicial review is especially appealing, given the absence of other means by which to access parole either at, or before, the fifteen year mark. The indeterminate nature of the life sentence is somewhat unique. In the course of the 1976 Justice and Legal Affairs Committee hearings, the issue was framed in terms of the following: "it is really a 15 to 25 possibility. For the fellow starting his sentence, he does not know if he is going to get (parole) at 15 or up to 25" (Standing Committee on Justice and Legal Affairs, 1976: 69:44).

Section 745(1) of the Criminal Code mandates that the application and hearings must follow rules made by the appropriate Chief Justice under s.745(5) which reads as follows:

> (5) The appropriate Chief Justice in each province may make such rules in respect of applications and hearings under this section as are required for the purposes of this section.

Section 745(6) defines "Chief Justice" by listing, according to each province or territory, the official in whom authority has been vested determine the appropriate rules; for instance:

> (6) For the purposes of this section, the "appropriate Chief Justice" is (a) in relation to the Province of Ontario, the Chief Justice of the Ontario Court.

Under s.745(7), special provision is made for the designation of judges to hear applications in respect of convictions that have taken place in the Yukon Territory or Northwest Territories.

The decision to place the authority to determine the appropriate rules which are to apply in reviews in the hands of the Chief Justice of each province or territory is signifcant, for it reflects a conscious decision on behalf of Parliament to allow for some regional variation in the determination of the rules to guide these hearings. Although section 745 offers some guidance as to the procedures to be followed and determinations which may be made, it is by no means exhaustive in its description.

Pursuant to the authority provided to the Chief Justice under section 745(5), differences in such rules of practice do exist among the provinces and territories. Nonetheless, the basic process of applying for judicial review remains relatively straightforward. In all areas, the offender must first make an *Application For Review of Parole Ineligibility* and file this with the Registrar of the Court for the county or district in which a preliminary hearing or hearing in respect of an application takes place. As the ultimate symbol of authority of the Canadian Parliament, the respondent of this request is officially cited as *Her Majesty The Queen*, whereas the Honourable

Chief Justice of the Provincial Court is the agent responsible for overseeing the review.

The Rules of Practice developed by the province of Ontario offer an overview of the standard contents of an application for review:

> a) the applicant's given names, surname and date of birth;
> b) the name and place of the institution in which the applicant is detained;
> c) the name and place of each institution in which the applicant has been detained since the time of the applicant's arrest for the offence that is the subject of the application and the date of entry into each of those institutions;
> d) the offence that is the subject of the application, the sentence imposed, the dates of conviction and sentencing and the place of the trial;
> e) the applicant's number of years of imprisonment without eligibility for parole
> f) the applicant's criminal record;
> g) the grounds relied on, stated precisely and concisely;
> h) the relief sought; and
> i) the applicant's address for service.
>
> (Source: ONTARIO RULES OF PRACTICE RESPECTING REDUCTION IN THE NUMBER OF YEARS OF IMPRISONMENT WITHOUT ELIGIBILITY FOR PAROLE. 1988 *Canada Gazette* Part II: 4856).

THE PROCESS OF JUDICIAL REVIEW: HOW DOES IT WORK?

Review is by no means automatic; the onus has been placed upon the offender to apply for a hearing to the Chief Justice of the province or territory where the original conviction took place for a reduction in the number of years of imprisonment without eligibility for parole to be served (s. 745(1)). If the Chief Justice determines that the offender is indeed eligible to apply, the provincial attorney general is then notified of the application (Brown, 1992: 2). Next, a superior court judge is designated to empanel a jury; the composition of which must include residents from the area where the original crime was committed. It is the jury's role to hear the application and determine whether the applicant's number of years of parole ineligibility ought to be reduced (s.745 (2)).

Judicial review can prove to be a somewhat time-consuming process, even though the requirements are fairly straightforward. In each of the provinces and territories, there is a requirement that before an actual hearing can take place, the applicant must pass through a stage of preliminary hearings which often involve several sittings carried out over a period of time (Brown, 1992: 2).

It is during the pre-hearing phase that the court concerns itself with matters preparatory to the actual review. The housing and transportation of

the applicant, the kind of evidence which will be presented at the hearing are typical of the issues which the court deals with at this stage. In light of the fact that each case is somewhat unique and involves a distinct set of variables, in conducting its determination the court regularly admits evidence from character witnesses (who often include staff, professionals and persons familiar with the offender), expert witnesses, as well as reports and statements of fact previously agreed upon by counsel for the offender, as well as on behalf of the Attorney General (Brown, 1992: 2).

At the stage of the initial review, the duration of the hearing usually lasts between four and eight days (Brown, 1992: 3). Typically, four or five days of testimony are followed by a day in which counsel for the applicant and the Crown each present their summations. The final words the jury hears before embarking on their deliberations are the judge's directions.

The legislation clearly states that the underlying purpose of the judicial hearing is not to re-try the accused for their original crime, but to determine "whether or not present circumstances justify leniency and an earlier consideration of the offender's case by the Parole Board" (*Criminal Code*, R.S.C. 1985, C-46). In phrasing section 745 of the *Criminal Code*, the legislative drafters carefully chose their words so as to leave no scope for ambiguity over the fact that "(t)he review contemplated by this section is distinct from the original sentencing" (*Criminal Code*, R.S.C. 1985, C-46).

It would be erroneous to assume that all applications are treated as one and the same. Although each offender making an application is among an offender group of convicted murderers, in actuality, each case involves a unique set of variables. Individual circumstances are to serve as the basis for determining both the amount of time the applicant is to spend incarcerated, as well as any access to early release (Cole and Manson, 1990: 447). Upon examining the Minutes recorded from the Standing Committee on Justice and Legal Affairs, a concern for individuality underlies appears paramount. Committee members were clearly of the opinion that "each case (must be) considered on its own merits" (Standing Committee on Justice and Legal Affairs, 1976: 71:61).

The determination of the offender's application is to be based solely upon the character and conduct of the accused while incarcerated, with the legislation requiring that the jury must be specifically instructed by the trial judge that they are "not to reconsider the community's condemnation of the offence and repudiation of the offender" (*Criminal Code*, R.S.C. 1985, C-46). In making a decision on the application, section 745(2) of the Criminal Code mandates that the jury base its decision upon the following criteria:

- The character of the applicant;
- The applicant's conduct while serving his or her sentence;
- The nature of the offence for which the applicant was convicted; and,
- Such other matters as the presiding judge deems to be relevant" (*Criminal Code*, R.S.C. 1985, C-46).

In order to respect the underlying intent of the legislation, additional evidence about the original offence is generally inadmissible. The general exception to this rule being the information contained in the statement of facts, already consented to by counsel representing each party, which is presented to the court at the beginning of the hearing.

To ensure conformity with the common law doctrine of procedural fairness, it is paramount that, as the affected party, the applicant receives "sufficient notice of the relevant issues and evidence (so as) to enable effective participation in the sense of an opportunity to present contrary evidence and arguments" (Mullan, 1987: 51). Once the legal interest of the inmate has been framed in terms of the desire to seek early parole eligibility, it becomes the responsibility of the court to ensure that each side has the opportunity to have a role in the hearing. In this way, minimum standards of procedural fairness should be met.

Correctional Service of Canada assumes the task of filing a Parole Ineligibility Report with the court which, in its completed form, usually amounts to approximately twenty pages in length. The purpose of such a brief is to provide "a description of the applicant's character and conduct while in custody". The author of this document must be prepared to testify at any stage of the process (Brown, 1992: 3). According to guidelines, the Parole Ineligibility Report is not to offer any opinions or recommendations concerning the offender's period of parole eligibility, but is to reflect reporting of a nature which is purely "investigative, objective and impartial" (Brown, 1992: 3).

OUTCOMES OF A JUDICIAL REVIEW:

Section 745(2) of the *Criminal Code* requires that the determination of parole ineligibility must be made by not less than a two-thirds majority, so that at least eight of the total twelve member jury must be unanimous in their decision. Once the applicant and the Crown have each presented their case, the jury must limit its decision to one of the three available options. The original parole ineligibility period may be either:

1. retained;
2. reduced; or,
3. terminated.

(source: *Criminal Code*, R.S.C. 1985, C-46).

At this stage of the proceedings, it is the twelve members of the jury who serve as decision-makers.

Pursuant to section 745 of the Criminal Code, there are three possible outcomes from which the jury must choose upon hearing the case for review:

Section 745(3) states that:

> Where the jury decides that eligibility for parole ought not to be reduced, it shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in his or her number of years of imprisonment without eligibility for parole
> (*Criminal Code*, R.S.C. 1985, C-46).

If the inmate's application to approach the National Parole Board and immediately ask for a reduction in the parole eligibility period is rejected, it becomes the jury's responsibility to set a time in the future when the offender will next become eligible to launch another application.

The remaining two options are contained in section 745(4) which states that:

> Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury may, by order,
>
> (a) substitute that a lesser number of years of imprisonment without eligibility for parole than that then applicable; or
>
> (b) terminate the ineligibility for parole.
> (*Criminal Code*, R.S.C. 1985, C-46).

Case law has upheld the legislative requirement that the right to appeal the jury's determination is given neither to the prosecution, nor to the applicant from a disposition made on a judicial review hearing under section 745. In R. v Vaillancourt, (1989) the Supreme Court of Canada not only confirmed this pont, but further pointed out that the Charter does not create a right to appeal.

In the case of an applicant who proves successful in convincing a two-thirds majority of a jury of the merits of their case, in effect, all that has been gained is leave to apply for parole consideration. In no way does the outcome of the initial review constitute a guarantee that the applicant will end up receiving early parole eligibility. Federal policy is unequivocal with respect to this point:

> "(a) successful application does not result in the automatic release of the offender on parole. Eligibility dates are not a guarantee that inmates will be released"
> (Government of Canada, 1993a: 2).

While a jury can decide whether or not the applicant has been successful in establishing eligibility, Parliament has placed the ultimate

power to grant or deny parole at the discretion of the Parole Board. Correctional Services Canada policy reflects this distinction:

> An offender having obtained a favourable decision from the court, that is the waiving or reduction of the prescribed time to be served before eligibility, is subjected to the regulations, procedure and policies of the Parole Board as in other cases, subject to the provisions of the Criminal Code pertaining to the eventual release of inmates sentenced to life. The Parole Board applies its own decision-making policies regarding the criteria for allowing or refusing, which are developed within the framework provided by the Criminal Code and the Parole Act.
> (*Correctional Service of Canada, 1991: 45*).

While judicial review may serve as an important tool in terms of the hope of the possibility of release after fifteen, rather than twenty-five years, it offers to inmates serving life sentences, the authority of the National Parole Board to determine when, and ultimately if, an inmate will or will not be eligible to serve part of his or her sentence in the community is enshrined in our legislation.

THE ROLE OF THE JURY IN THE PROCESS OF JUDICIAL REVIEW:

Parliament's decision to place the initial stage of decision-making in the hands of the jury is consistent with the common law tradition to ensure our system of justice reflects contemporary community standards. A basic assumption underlying our notion of criminal law is that it is not simply the victim of an illegal act who suffers harm, but the entire community has been wronged by having its standards of decency offended by the illegal conduct. Indeed, it is in the name of the state that criminal proceedings are initiated. In its most basic sense, imprisonment as a form of punishment "involves an exercise of power by the State in response to an allegation, finding or perception that an individual has breached or threatened the order of the community" (Cole and Manson, 1990: 435). State-sanctioned punishment for a serious criminal act involves the coercive separation of the offender from the community. Hence, the justification for the appropriateness of a jury of one's peers playing a role in the determination of the offender's eligibility to approach the Parole Board and ask for early release.

A final benefit emnating from the public's involvement in the review process involves the enhanced level of public understanding which may be generated. Although admittedly on a small scale, public participation provides the opportunity for citizens to appreciate events which transpire at the post-conviction stage in the life of an inmate.

CONCLUSION:

The passage of *Bill C-84* into law by the Canadian Parliament in 1976 changed the mandatory penalty structure for murder. A sentence of death was replaced by one of life imprisonment with longer statutory periods of parole ineligibility. Aware of the increased severity of punishment contained in the nature of the mandatory punishment, a legislative decision was made to implement a means capable of ensuring that proportionality between offence seriousness and severity of punishment is respected at the post-conviction stage of sentencing in the context of offenders serving life sentences for murder.

On a case-by-case basis, judicial review offers a venue for those offenders who, by virtue of the seriousness of their acts, are being subjected to the most stringent deprivation of liberty sanctioned by Canadian law, to have an opportunity to access conditional release. Of course, neither review, nor a grant of release is automatic after fifteen years of imprisonment. The mandatory nature of the punishment for murder has not been altered by the inclusion of section 745 into the *Criminal Code*. In the case of an offender who is successful in obtaining release after the fifteen year mark, the individual remains under sentence for the duration of his or her life, given that the warrant for a life sentence *never* expires.

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THE ROLE OF THE COURTS

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INTRODUCTION:

Section 745 of the *Criminal Code* represents the statutory basis which provides for judicial review of parole ineligibility periods which have been fixed at more than fifteen years. The procedure to be followed and determinations which may be made are, to some extent, outlined in the legislation; section 745(5) has allocated the responsibiility for determining the rules which the application and hearings will follow with the appropriate Chief Justice of each province:

> (5) "The appropriate Chief Justice in each province may make such rules in respect of applications and hearings under this section as are required for the purposes of this section"
> (*Criminal Code*, R.S.C. 1985, C-46).

The inclusion of this section reflects a legislative intent to respect regional differences by providing each provincial or territorial Supreme Court with the decision-making power to determine the rules and procedures most appropriate for their locality. Theoretically, such a rationale has great merit. In practice, however, the lack of national guidelines to structure the process of judicial review has created a situation wherein regional disparity exists in each terms of the initiative taken to develop rules of practice. In this context, prisoner's rights before the courts have developed in a rather ad hoc basis.

Ultimately, the decision as to whether or not such disparity is acceptable or not depends on the importance one attaches to uniformity. Indeed, it may be argued that the vast diversity in the geographic and social landscape of Canada justifies the need for a mechanism flexible enough to account for regional differences. Nonetheless, basic procedural rights to receive a fair hearing, regardless of the location where the judicial review is heard, must also be taken into account.

A direct consequence emanating from the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 has been the creation of a judiciary who now assumes a more activist role in interpreting the scope of rights and freedoms. In the context of the case law surrounding prisoner's rights and related issues of release from imprisonment, judicial interpretation of the legislation has tended to conform to to its historical tradition of narrowly interpreting such rights. The experience of the case law has been to flesh out limitations, as opposed to a more expansive reading of rights. In this respect, learning more about the operation of the rules of process is important in light of the applicability of the *Charter Rights and Freedoms.*

RULES OF PROCESS GOVERNING REVIEW HEARINGS:

A useful place to begin a discussion of the rules of process governing judicial review of parole ineligibility is the March 1993 Supreme Court of

Canada decision to grant leave to appeal to a 1976 jury decision which denied early parole eligibility to Roman Swietlinski, an inmate serving a life sentence for first-degree murder. This case represented the first time that direction was given by our nation's highest court as to how juries should be instructed on the four key considerations stipulated by section 745 of the *Criminal Code*; namely:

- The character of the applicant;
- His conduct while serving sentence;
- The nature of the offence for which he was convicted; and,
- Such other matters as the judge deems relevant in the circumstances. (R.S.C., 1985, c-46).

In the case of the Swietlinski review hearing, there was little dispute between Crown and defence counsel with regard to the meaning of the first three requirements. However, it was the trial judge's treatment of the fourth consideration which became the basis of the Supreme Court's review.

In its direction to the jury, defence counsel argued that Justice John O'Driscoll of the Ontario Court General Division placed undue emphasis on the inmate's upbringing and lifestyle at the time of the murder, over seventeen years ago, while making little reference to evidence presented about the positive changes in character and pro-social behaviour exhibited by Swietlinski during his time in prison (Globe and Mail: February 9,1993). Concern was expressed over the fact that judicial direction which attaches disproportionate emphasis on the offender's past could compromise basic rights to procedural fairness by adversely influencing the perception and attitudes of the jurors towards the applicant.

With respect to the common law duty to act fairly, it has been stated that "(i)ssues of notice and an opportunity to respond generate questions of adequacy, reasonableness and appropriateness...the prisoner should know which issues of fact must be resolved in his favour in order to produce a favourable result" (Cole and Manson, 1990: 61). During the course of his sixteen years of imprisonment, Swietlinski admitted to engaging in some questionable behaviour. Nevertheless, basic hallmarks of our legal system, principles of fairness and equity each dictate that undue emphasis should not be attached to limited aspects of the prisoner's conduct, given the strong likelihood of adverse influence upon the decision-making process. Legislation clearly outlines that objective and balanced directions are to be given to the jury by the decision-maker. To suggest that the status of the litigant as prisoner in some way alters such a requirement would not only compromise the individual's right to a fair hearing, but would bring the very administration of justice into disrepute.

AN EXAMINATION OF THE RULES OF PRACTICE IN OPERATION:

Section 745 of the *Criminal Code* outlines the legal requirements governing judicial review of parole ineligibility, yet it does so in rather general terms. As is the case with the majority of our laws, the task of fleshing out the content and scope of the law remains with the courts. Members of the judiciary have been entrusted with the task of determining, on a case-by-case basis, the substantive content of the law. In the context of section 745, the final determination as to the meaning and operation of the rules governing the inmate's review at the stage of the jury hearing rests with the judiciary.

As already noted, the absence of national guidelines to structure the review process has created a situation wherein some disparity in terms of the rules of practice in place does exist among provinces and territories. Federal statistics released in early 1993 document that to only six provinces - Newfoundland, Nova Scotia, Ontario, Manitoba, Saskatchewan and Alberta - have rules of procedure officially registered as statutory regulations. According to 1991 Correctional Services Canada information, proposals to implement rules have been put forth by Quebec, New Brunswick and British Columbia. During the interim when such proposals have yet to receive official promulgamation, the rules can still be used at a judicial review hearing in the area concerned. To date, Prince Edward Island and the North West Territories have yet to act to put forward any such rules (Correctional Services Canada, 1991: 43).

The absence of national guidelines to govern reviews of parole ineligibility renders a national evaluation of the operation of process rules an inevitably imperfect exercise. However, given the understanding to be gained by studying issues deemed by the judiciary to be important, it is a useful exercise to examine the rules of practice developed in a given area; the province of Ontario has been chosen as the subject of a brief overview given efforts which have been undertaken to develop a set of rules.

RULES OF PRACTICE FOR THE PROVINCE OF ONTARIO:

By decree of the Honourable F.W. Callaghan, Chief Justice of the Ontario Court, the *Review of Parole Ineligibility Rules* was issued on May 11, 1992 (1988 *Canada Gazette*, Part II: 4856). These draft rules of practice stipulate the requirements to be followed by Ontario courts in hearing reviews for a reduction of the number of years of imprisonment without eligibility for parole. A brief overview of the sections reveals that the underlying intent reflects a desire to preserve a broad realm of judicial discretion in decision-making. As the rules themselves repeatedly state, the guiding objective of such discretion is, at all times, to be concern for the "best interests of all parties involved."

In terms of substantive content of the Ontario Rules of Practice, beyond the various subject headings, each section rarely contains more than a few

brief sentences. The overall effect of the passages centers around concern to place the ultimate authority throughout the review in the hands of the presiding judge. For instance, a section under *Adjournment of Preliminary Hearing*, reads as follows:

> "The judge at a preliminary hearing may adjourn the preliminary hearing as the judge considers appropriate in the interests of justice"; and,
> all that follows *Adjournment of Hearing* is the phrase:
>
> "The judge at the hearing of an application may adjourn the hearing as the judge considers appropriate in the interests of justice"
> (1988 *Canada Gazette*, Part II: 4856: 4).

Under *Conduct of the Hearing*, the rules read as follows:

> "the judge may admit any evidence that the judge considers credible and trustworthy and (furthermore may) order any investigations that the judge considers necessary in the interest of justice"
> (1988 *Canada Gazette*, Part II: 4856: 6).

CASE LAW IN ONTARIO REGARDING RULES OF PRACTICE:

Although the first case of judicial review heard in Ontario took place four years prior to the enactment of Ontario's provincial rules of practice, the 1988 hearing of Rene Vaillancourt had a significant impact on the substantive content of the rules which were to follow (R. v. Vaillancourt (1988) 43 C.C.C. (3rd)). At that time, the task of determining the scope of the special rules of practice rested with the presiding judge, Chief Justice Callaghan of the Ontario Supreme Court.

Fundamental to our common law system is the concept of precedent whereby decisions of higher courts bind lower ones. "An original precedent is one which creates and applies a new rule" (Roger Bird, 1983: 259). Hence, until such time as current rules are overturned, or until new rules are developed by Parliament, the rules of practice developed by Justice Callaghan in the Vaillancourt case constitute the binding authority to guide the judicial review process of parole ineligibility in Ontario.

CRITICISM OF ONTARIO'S RULES OF PRACTICE:

Upon hearing applications for review of parole ineligibility, the Ontario Supreme Court has placed the onus on the inmate, as litigant, to substantiate the case for release. Speaking of the right to review under section 745 of the *Criminal Code*, Chief Justice Callaghan has stated that a claim to review "is permissive and it is the applicant who has the option of determining whether or not to bring the application. There is nothing

compelling the applicant to bring the application" (O'Reilly-Fleming, 1991: 164). As the legislation has enshrined, review is by no means automatic at the fifteen-year mark.

The principle of a "case to meet" is a long-standing corollary of the criminal law; it is from this tenet which the presumption of innocence flows. The underlying premise of this principle is that the state must present its case first, with the accused not being required to make a statement until the state has discharged this mandatory presumption. In Ontario, however, a policy decision was made to alter the rules of procedure which operate during criminal proceedings; a reverse onus provision is to guide the interpretation of section 745 of the *Criminal Code.* When a judicial review is heard in the province of Ontario, it is the applicant who assumes the initial responsibility of discharging their legal burden of proof. The offender presents their case first, followed by counsel for the attorney general who is then free to offer rebuttal evidence (Brown, 1992: 3). Another departure from standard rules of procedure concerns the fact that upon presenting their case, it is government counsel, rather than the applicant, who first addresses the jury. From the standpoint of the inmate, the implications of the reversal of the standard course of requirements are rather significant; the net result being that a more onerous burden of proof is placed upon the applicant.

It has been stated that the hearing for judicial review should represent "an effective method of ensuring that decisions are made on an accurate and factual basis. This necessarily includes ascertaining and appreciating the prisoner's position on matters in issue" (Cole and Manson, 1990: 61). Procedural fairness can, of course, still operate in the context of a certain amount of deviation from standard rules; it is the degree of divergence which becomes important.

One particular ruling made by the Ontario Supreme Court in the *Vaillancourt* case which is especially interesting in terms of effects upon future reviews is the decision to prevent defence counsel from questioning prospective jurors about their attitudes towards neither capital punishment in general, nor to the more specific issue involved in that particular case; namely, the killing of a police officer. Standard rules of criminal procedure normally permit defence counsel to question jurors about their attitudes on issues directly related to the content of the case. From the applicant's perspective in a judicial review hearing, the precedent is important, for such a ruling may lead to a jury being composed of members who are biased towards the applicant from the start.

As noted in Chapter One, the context of the discussion surrounding the content and passage of Bill C-84 has also been the focus of some criticism. In the Vaillancourt case, for instance, defence counsel Cole and Manson's attempted to introduce evidence pointing to the lack of substantive and detailed discussion surrounding the deliberations of the Standing Committee on Justice and Legal Affairs in an attempt to substantiate their claim that the development of the current legislative process involved 'midnight hour' decisions; their request, however, was denied. It was hoped that if the jury

could be presented evidence illustrating that the fifteen and twenty-five year figures were arrived at rather haphazardly, such information would serve as a useful background to guide the decision-making process in terms of the appropriate length of sentence. Given that the current twenty-five year sentence equals almost two life sentences in terms of what existed before the 1976 legislative amendments (a situation commonly referred to as "life on life"), had Cole and Manson's request been accepted by the Ontario Supreme Court, an interesting discussion about proportionality in sentencing may have ensued.

PRISONERS RIGHTS BEFORE THE COURTS:

As already explained, an applicant who successfully convinces the jury of their case is given permission to approach the National Parole Board and ask for reduced parole eligibility. Although it is not a court of law, the fact that this administrative tribunal deals with the rights of individuals renders it subject to the common law duty to act fairly. Interestingly enough, the requirement to respect this duty has been extended only fairly recently. Reluctance on the part of our legal system to extend a broad scope of recognition to prisoner's rights has a long history in the case law. Such hesitation is especially evident in the 1976 Supreme Court of Canada case of Howarth v. National Parole Board. In this case, Dickson J. cited the nature of the "identifiable judicial features" of the Parole Board in the attempt to extend a legal obligation to the Board's duties. In opposing Dickson's views, the majority judgement maintained that the Parole Board must respect the principle of operating in 'good faith'; a comparatively weaker phrase given that the only requirement becomes the duty to operate without evidence of malice (Cole and Manson, 1990: 51).

In the 1976 Supreme Court of Canada case of Mitchell v. R., Laskin C.J.C. made a clear attempt to move beyond the confines of the traditional classification parameters which, if left unchanged, would have served as a significant barrier to judicial review. In his own words, then Chief Justice Laskin stated as follows: "I do not think it follows that a denial of judicial or quasi-judicial status to a tribunal relieves it from observance of some at least of the requirements of natural justice" (Mitchell v. R. at 579-580).

The 1980 Supreme Court case of Martineau v. Masqui Institution Disciplinary Board dealt primarily with the sanctioning of procedural fairness obligations within the overall context of institutional correctional administration. Nonetheless, the Court's judgement in this case had important implications for judicial review. It was here that for the first time, procedural entitlements of fairness were deemed to apply to prisoners appearing before the courts. "Prior to this decision, those enmeshed in the correctional processes, prisoners or parolees, were generally thought of as persons who had no rights and therefore no claim to procedural decency in the taking of decisions affecting them (Mullan, 1987: 13).

The expanded scope of *certiorari* (the instrument for reviewing orders and convictions of inferior tribunals), as well as the entrenchment of the *Canadian Charter of Rights and Freedoms* each constitute significant developments in influencing the judiciary to undertake "a more active role in mapping the contours of powers, rights and privileges which characterize imprisonment in Canada" (Cole and Manson, 1990: 40). Other relevant advancements include the establishment of provincial legal aid programs during the 1970's, as well as the beginning of specialized legal services projects for prisoners during this same period of time; each of these events serving to enhance prisoners access to legal counsel (Cole and Manson, 1990: 48).

Developments not only inside, but outside the court-room as well illustrate the progress made by the judiciary in Canada to better protect the rights of prisoners as litigants. Increasingly, it is being recognized that a decision to afford only select litigants appearing before administrative tribunals the full benefit of procedural protections, while denying prisoners a similar realm of protection is not simply unfair, but an outright violation of fundamental principles of justice.

THE RELEVANCE OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS TO AN INMATE SEEKING JUDICIAL REVIEW:

The *Canadian Charter of Rights and Freedoms* became an entrenched part of the Constitution of Canada by virtue of the enactment of the *Canada Act* 1982 by the Parliament of the United Kingdom. The importance of the Charter in broadening the scope of procedural protections, most notably that of natural justice, is great; "without doubt, the advent of the Charter has reinforced judicial control of procedural unfairness in the broadest sense of the term" (Beaudoin & Ratushny, 1989: 371). For instance, "the courts have gone so far as to affirm that the exclusion of the inmate during even part of the parole hearing amounts to a refusal to hear him and so does not conform to the requirements of fundamental justice" (Beaudoin & Ratushny, 1989: 372).

While most of the provisions of the *Canadian Bill of Rights* have been reproduced in the Charter in either similar or broader language, three provisions of the Bill remain notably absent from the Charter. Of significance to judicial review of parole ineligibility is the omission of the right to a fair hearing. Section 2(e) of the Bill provides that no law of Canada shall:

> "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

The Charter, however, contains no general right to a fair hearing for the determination of a person's rights and obligations (Beaudoin &

Ratushny, 1989: 14). Furthermore, the various legal rights enumerated in sections 8 to 14 will not prove useful to applicants of judicial review seeking guarantees for a fair hearing. Although periodic reference is made throughout these sections, any constitutional guarantee to this right is restricted solely to the level of the criminal trial.

In the context of Charter guarantees, the legal status of the Parole Board as an administrative tribunal constitutes more than a classificationary difference; "A civil proceeding before a court or administrative tribunal in not subject to the requirements of a "fair hearing" or of the application of "fundamental justice"" (Beaudoin & Ratushny, 1989: 14). Of all existing provincial and territorial bills of rights in Canada, only section 23 of the *Quebec Charter of Human Rights and Freedoms* includes the right to a fair hearing in the determination of rights and obligations. Hence, for all Canadian inmates outside of Quebec, section 2(e) of the federal Bill of Rights remains the only source of protection for a Canadian inmate to rely upon when appearing before the Parole Board. Overall, the legal status of the Bill of Rights as a regular federal statute affords a lesser degree of legal protection, than had the right to a fair hearing been specifically provided for in the *Constitution Act*, 1982.

OVERVIEW OF IMPORTANT SECTIONS OF THE CHARTER OF RIGHTS AND FREEDOMS:

SECTION ONE - THE LIMITATION CLAUSE:

All Charter guarantees are of an inherently illusory nature as not one of the enshrined rights and freedoms are absolutes, each is subject to limits as determined by the judiciary. Section one of the Charter enables Parliament or a legislature to enact a law which limits one of the guaranteed rights or freedoms, provided that the law is "reasonable" and can be "demonstrably justified in a free and democratic society" (R.S.C. 1985, c-46).

> 1. "The *Canadian Charter or Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"
> (R.S.C. 1985, Appendix II, No. 44)

The decision to deliberately express Charter rights in "exceedingly vague terms" reflects an underlying legislative intent to leave the scope of the rights and freedoms subject to the courts determination (Johansen, 1987: 5). Thus, while rights are guaranteed, claims to such rights are not open-ended. In the case of a prisoner as litigant in the context of a judicial review hearing, this fact can prove to be an especially difficult obstacle to overcome. From the courts point of view, parole is strictly a privilege.

SECTION 7 - THE RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON:

Section seven of the Charter entrenches three fundamental rights: the right to life, liberty and security of the person. This section also provides for the protection of these rights from interference by public authorities, by requiring that these persons act in accordance with 'principles of fundamental justice' (Beaudoin & Ratushny, 1989: 331).

> 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"
> (R.S.C. 1985, Appendix II, No. 44).

From the perspective of an inmate seeking judical review, the guarantees provided in this section may, at first glance, appear to be of potential relevance. However, while the opportunity for substantive review created by section seven has expanded the judicial mandate, claims must proceed from a source that can be characterized as basic or fundamental to our legal system (Cole and Manson, 1990: 131). As such, the success of inmates invoking a section seven claim has been limited in practice.

An explicit function of judicial review has been identified as the enforcement of Charter limitations (Johansen, 1987: 2). Judicial determination has distinguished the grounds covered by section seven and established limits on the law's scope of protection of the rights and freedoms guaranteed to inmates. Indeed, the basic right to be represented by counsel before administrative bodies has become the subject of frequent debates with respect to the scope of section seven of the Charter. In this respect, it is important to note that the Federal Court has been "quite conservative" in its rulings (Beaudoin & Ratushny, 1989: 372). For instance, in Howard v. Stony Mountain Institution, Mr. Justice Thurlow stated as follows:

> I am of the opinion that the enactment of section 7 has not created any absolute right to counsel in all such proceedings. It is undoubtedly of the greatest importance to a person whose life, liberty, or security of the person are at stake to have the opportunity to present his case as fully and adequately as possible...But what is required is an opportunity to present the case adequately and I do not think it can be affirmed that in no case can such an opportunity be afforded without also as part of it affording the rights to representation by counsel at the hearing"
> (Howard v. Stony Mountain Institution at 662-663).

In practice, the effects of such reasoning, as well as the entrenchment of the Charter may serve to render a more strict interpretation of procedural

safeguards than existed before. "Given the fundamental character of the rights protected, it is natural that any interference with them must conform to stringent requirements" (Beaudoin & Ratushny, 1989:373).

Although it could be argued that inequity exists in terms of the disparity on a regional basis of provincial initiatives to implement rules of process governing judicial review of parole ineligibility, section seven offers no remedy in this respect. Were the applicant not serving a sentence for a criminal offence, the Charter's section seven guarantee of the right to "life, liberty and security of the person" could serve as the basis for a Charter challenge given the fact that judicial review is, by the federal governments own admission, not equally accessible on a national basis to offenders serving life sentences for murder.

SECTION 11: PROCEEDINGS IN CRIMINAL AND PENAL MATTERS

The presumption of innocence is a long-standing corollary of the criminal law. From the inmate's point of view, relevant aspects of section eleven of the *Canadian Charter of Rights and Freedoms* include the following:

> 11. "Any person charged with an offence has the right to
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence:
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. (R.S.C. 1985, Appendix No. II, No. 44).

The most significant aspect of the case law which has developed to date concerning this section is R v. Vaillancourt. In 1988, the Ontario Court of Appeal ruled that rules as contained in section 745(5) of the *Criminal Code* which require the applicant to disclose the nature of the evidence to be called and to lead evidence first and address the jury before the Crown do not constitute an infringement on the principles of fundamental justice. According to the court's reasoning, the inmate as applicant no longer effectively alters the status of the individual, so that they are no longer merely a person charged with an offence. Hence, the presumption of innocence and the right not to be compelled to testify outlined in Charter sections 11(c) and (d) no longer apply at this stage of the criminal process.

SECTION 15 - THE EQUALITY PROVISIONS:

Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides as follows:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability"
> (R.S.C. 1985, Appendix II, No. 44).

In substantive terms, the meaning of equality is not a matter of logic, but one of moral and political choice; a fact which assumes special relevance in the context of judicial interpretations of Charter rights and freedoms in cases of judicial review of parole ineligibility (Beaudoin & Ratushny: 563).

In R. v. Vaillancourt, the Supreme Court of Canada outlined the legal status of the prisoner as litigant. In the words of the court, upon conviction, an individual becomes:

> no longer a person charged with an offence within the meaning of section eleven of the Charter of Rights and Freedoms and therefore the legal rights set out therein have no application. As well, (the review) does not involve a deprivation of liberty, the offender already being deprived of his liberty, section seven of the Charter does not apply"
> (R. v. Vaillancourt at 61).

In relation to the rest of Canadian citizens, the status of the applicant as offender limits the realm of protection against interference with one's rights and freedoms. Until such time as either the judiciary alters its position on this matter is given by Parliament, any attempt by an applicant of judicial review of parole ineligibility to rely on Charter guarantees will remain rather meaningless.

While it may be argued that the decision made by the case law to effectively limit the rights and freedoms of offenders on the basis of their minority status as offenders is somewhat unjust, as the guardian of our nation, the government, whether it be through the executive, legislative or the judicial branch, is justified in drawing some sort of limits. The vast number of conflicting interests each vying for legal recognition necessitates that completing claims be balanced and evaluated. In its most fundamental sense, judicial review involves the selective balancing of competing interests, whether these be of a public or a private nature. Inherent in such a process, certain interests or groups, because of their unique conditions, must end up receiving less recognition than will the majority.

With respect to the equality provisions contained in the Charter, whether or not the limited status afforded to inmate's rights and freedoms constitutes a justifiable limitation is as issue grounded in subjective judgement. In terms of the great severity underlying a life sentence for murder, it can be argued that this long-term of offenders is in a 'unique' position. However,

> It has yet to be argued that prisoners as a class represent a 'discrete and insular minority...(While historical evidence of disadvantage and stereotyping of offenders could, in fact, be documented), an important question, however, will be whether the status of prisoner is different from other recognized personal characteristics in that it is acquired in response, arguably, to anti-social choices"
> (Cole and Manson, 1990: 136).

If, in fact, the paramount objective of section fifteen is to afford protection to "the alleviation of inequality for persistently disadvantaged groups" (Beaudoin & Ratushny, 1989: 584), and a strong argument is offered to substantiate the historical disadvantage suffered by murderers as a group, a challenge to the limits established by the judiciary on the rights and freedoms of inmates could, theoretically, be possible. Historically, prisoners have struggled to have their rights respected by the courts, thereby making an expansive interpretation of section fifteen a rather remote possibility in the context of judicial review. In all likelihood, section one of the Charter would be invoked to limit such a claim. Ultimately, it is only "the most flagrant examples of comparative disadvantage will meet with a receptive judicial audience" (Cole and Manson, 1990: 136).

CONCLUSION:

The infliction of state-sanctioned punishment on offenders who commit a crime which ranks at the top of the scale in terms of offence seriousness is a notion well grounded in public support . Equally so, fundamental ideals of justice prohibit the state from inflicting excessive amounts of punishment on any individual. It is the responsibility of the courts to ensure that the balance between these two competing interests is best respected.

The present situation wherein 'official' and 'unofficial' rules are found in disparate forms across the country is in need of reform. It is unfortunate that a process which offers the potential to restore inequity and proportionality into the sentencing process is, in its' current form, not only misunderstood by the public, but often by the offenders themselves.

Key issues surrounding rules of practice, such as the reversal of the normal sequence of procedure, for example, need to be comprehensively examined by Parliament to ensure the effective operation of the judicial review process within the overall context of the criminal justice system. In this respect, national rules of practice developed by Parliament as a

Given that eighteen years have now passed since Bill C-84 was enacted, along with the fact that in years to come, increasing numbers of offenders will be eligible to apply for judicial review, the need to study and evaluate the functioning of this process is especially important. Exploring the implications of the current legislation governing homicide will generate greater understanding of the review process and will place the correctional system in a position to better respond to the challenges of managing offenders convicted of life sentences. A systemic overview of judicial review would not only verify that this process is operating in a manner consistent with the original intent of the legislature, but that it actually serves a meaningful and integrated role in the release process, rather than merely serving as an obstacle which offenders must struggle through.

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WORKING PAPER

Judicial Review Hearings (*Criminal Code*, S. 745)

A Preliminary Study

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May, 1994

Abstract

This is a preliminary study of the Judicial Review Hearings (*Criminal Code* Section 745). It is intended to provide direction for further research and forms the basis for an ongoing examination of this process. This report examines the judicial processes, controversies and determinations of the first forty JRHs held between August 1987 and February 1994. It notes that outcomes vary considerably from province to province. Most importantly, formal procedures and legal rulings have yet to be clearly defined in all jurisdictions. Important issues arising to this point include: procedures, the role of the crown attorney; the admissibility of information; the intent of the Parole Eligibility Report and the role of its author; the weighing of the three elements under consideration (i.e., offence, conduct and character); the involvement of victims' families; and the availability of legal assistance/legal aid for the applicant.

Introduction

The first Judicial Review Hearing was held in St. Jerome, Québec in August of 1987. The result was favourable and the applicant was granted immediate parole eligibility. As of March 1994, there have been forty JRHs. These forty cases have been analyzed to discover developing trends, problems or controversies that have arisen to this point. Two additional cases, Comeau (1994) and Sauvé (1994), are also referred to but do not appear in our data analysis.

It is essential to acknowledge that this is a new process that has yet to be clearly defined by courts across Canada. At this stage, the intent, procedural form and processes have not been firmly established. This lack of formal definition is also problematic for others involved, including the role and procedures of CSC; the applicant and his counsel; and the wider public. This preliminary study takes the form of a working paper focused on elucidating the current perceivable trends, recurring controversies and inconsistencies in the first forty JRHs. The information relied upon while not complete provides a basis for identifying areas requiring continued monitoring and indepth research in the future. Primary sources of information included correspondence and interviews with applicants and their counsels, the monitoring of JRH by Senator Earl Hastings, attendance at three Judicial Review Hearings and a survey of news coverage. Though our files are not complete in all cases, we have summarized our findings and provided rough data which indicate trends or inconsistencies.

Major trends and recurring issues identified are as follows:

(1) Only a proportion of those eligible for JRH are in fact applying. The actual proportion of persons serving sentences for First Degree Murder or Second Degree Murder with minimum ineligibility greater than 15 years who have applied is not clearly definable from our data base. However the majority of those eligible have not applied; our estimates range from a maximum of 40 percent applying in Québec to much less than that in all other regions.

Our discussions with lifeterm prisoners provided the following explanations. Some lifers are incapable of organizing their applications without considerable assistance. An important aspect of this problem pertains to retaining suitable legal counsel and financial assistance. In other cases the negative results and media retrials have reduced the "faint hope" associated with JRH and led eligible prisoners to pass the opportunity by, choosing to wait for the more anonymous process of a parole hearing. This is clearly the case for most second degree convictions with mandatory parole ineligibility periods exceeding 15 years. In light of eligibility for day parole three years in advance of full parole eligibility, this has seemed a reasonable step since it avoids media attention applicants fear may negatively affect NPB decisions. The recent (November 1992) *Corrections and Conditional Release Act* may produce a change in this approach. However, this will not change the reluctance to submit oneself and one's family to a media retrial.

An examination of the first forty cases suggests that for the most part, only those lifers with strong cases are now applying. Furthermore, most of those serving sentences for sexual assault or particularly brutal offenses have not applied. The province in which the JRH is to be held and the success or failure of JRHs previously held in that jurisdiction is also a factor in lifers' decisions to apply or not apply.

(2) There have been significant differences between provincial jurisdictions. Of the first forty JRHs, one half have taken place in Québec where the results have been primarily favourable. All but one of these cases resulted in a reduction in parole ineligibility, and 75% resulted in an outcome of immediate eligibility (see Table 1). This contrasts sharply with the smaller number of applications and largely negative results in the other provinces, particularly in Ontario and Alberta.

There have not been a sufficient number of JRHs outside of Québec to reach any firm conclusions as to the specific factors such as original offense, which may explain this variation. The most apparent factors at this time are the different approaches taken by the Crown Attorneys

in Ontario and Alberta and the focus and intent of the Parole Eligibility Report (PER) provided by CSC in different jurisdictions. In both instances, the newness of the JRH process is a factor in the different approaches and resultant outcomes. Whether this provincial variation will be reduced over time or will harden into clear lines of difference is not yet ascertainable. The Supreme Court of Canada's decision to examine C.C. section 745 and to hear the appeal of Roman Swietlinski (re: the rejection of his application), indicates that in the future, legislative and higher court decisions may play a part in determining the development of this process.

(3) The philosophic and legislative/juridical understanding of the intent of Section 745 is a major factor in the current situation.

Though taking a legal format, the JRH differs significantly from the normal trial process and its focus on hard evidence, and guilt or innocence. In an essential way, the JRH operates as a tribunal of citizens weighing the merits of clemency.

The principle of "community approbation" associated with Section 745 is a key area of contention which has yet to be clearly and comparably defined across jurisdictions. This relates to the stance of the Judge and most especially the crown attorney, as well as the role and involvement of the community where the initial offence occurred. Since JRHs involve juries, the community is closely involved in deciding the final outcome. Counsel for some applicants have argued that "community approbation" occurred at the initial trial and should not intrude on judicial reviews. This argument has been primarily directed at crown attorneys who have placed greatest emphasis on the initial offence and its role in assessing the current character of the applicant. To what extent should the crown attorney act as an adversary? Is their role to oppose any type of reduction and if so on what basis is this conclusion arrived at? These questions focus on factors that are clearly influential in the differing approaches and resultant outcomes in Québec, Alberta and Ontario.

The role and influence on the proceedings of the mass media and lobby groups such as Victims of Violence and Police Associations has been apparent from the outset. In the Stewart case in Alberta (1990) a local newspaper was charged with Contempt of Court for its pre-hearing commentary and the case was delayed. The visible lobbying of Police Associations (see Vaillancourt, 1988), and more recently in concert with Victims of Violence (see Glaremin, 1993) has led to questions/accusations of intimidation and in the Fisher (1994) case to the stopping of the hearing. In Alberta and Ontario crown attorneys now regularly bemoan the lack of availability to juries of victim impact statements.

(4) The focus on the JRH is upon three components; the initial offence, the applicant's conduct while in prison and current character. How these components are addressed, the information made available in assessing them and their relative weighing are all open to debate and contention. This includes the role of CSC employees as authors of PER and as witnesses for the crown or applicant. The newness of the JRH process and its lack of clear definition plays a part in this situation.

The original offence is primarily addressed through the provision to the jury of an Agreed Statement of Facts which details the offence and conviction. This has been contentious in at least four cases (Boyko, 1990; Ruddick, 1992; Comeau, 1994; Sauvé, 1994) where innocence is still asserted by the applicant. Since the JRH is not intended as a retrial, this question was not allowed to directly enter into the proceedings by the court. However it has posed a dilemma for the court and counsel and extends into the PER where issues of remorse and attitude play a major role in institutional and psychiatric assessments.

Their conduct while incarcerated and the current character of the applicant should be addressed fully in the PER prepared for the court by a CSC representative. Here the admissibility of evidence, the style and focus of the report and the intent of the author are relevant issues. Our examination of PER reports for approximately half of these first forty cases indicate considerable variation in their focus and substance. During preliminary negotiations

between the crown and applicant's counsel the final wording of the PER is agreed upon. A major issue of controversy has been the inclusion of unsubstantiated allegations taken from institutional Internal Preventive Security files; files which are not made available to the applicant's counsel. Our preliminary investigation indicates that this is a recurring problem which the courts have dealt with by excluding unsubstantiated (by institutional charge or conviction) allegations as innuendo and not legal fact (see Hyppolite, 1992: Sauvé, 1994).

The construction of the PER by CSC also varies in form and content from region to region. In Québec the bulk of the reports have been compiled by different CSC employees within the region while the trend in Ontario is to designate one or more employees to take on the task. Though the region in which the applicant is imprisoned does not necessarily coincide with the jurisdiction of the JRH, the PER is compiled by officials from that CSC region. In the Ontario region (CSC) Al Partington, a parole officer from Peterborough has filed nine parole eligibility reports to date and is currently (May, 1994) involved in the preparation of four additional cases. Whether or not either of these models will become the format throughout the country is unknown. While a familiarity with the process and distance from the applicant's case provides some benefits, it also poses problems concerning knowledgeability of the applicant and the biases of the author of the PER. In Mr. Partington's reports there is some suggestion that these problems are arising. In the Homer case (1993), for example, the PER is clearly focused on a few institutional charges and ignores the involvement of the applicant in reclaiming his Aboriginal Culture and embracing its spirituality. Not only does the report define Homer's religion as "unknown" but a clear indication of the importance of Aboriginal culture to the conduct and character of the applicant is largely missing. This was rectified by the witnesses for the applicant and was an important factor in the jurors' deliberations. In addition, it may be argued that the reliance on designated authors for this essential report allows the particular attitude or perspective of the author to unduly affect the procedure, since at this point the designated author may be considerably more knowledgable of the process and what "works" than the other participants. If the extent of the reliance on one or two people to create PERs current in Ontario is extended across the country, then minor CSC officials may come to play a highly

influential role in the eventual processes and outcomes of future JRHs. In addition, those with the most knowledge of the applicant's case may be reduced to contributing standard reports on the institutional file.

An important consideration concerning the form and content of PERs revolves around the interpretation of the role and intent of the PER by its author.

(5) A crisis of the future will undoubtedly revolve around the provision of legal aid and legal assistance to applicants. In all jurisdictions the financial assistance available to applicants is very limited and, as numerous counsel have informed us, "insufficient to cover essential expenses". It also limits the applicant's reliance on expert witnesses.

At this point a number of counsel have taken on cases because of their novelty, previous involvement in the case or for those working in smaller penitentiary centers such as Kingston, because of their prior involvement with an applicant. The degree of work required to properly prepare these applications and actual time spent in court, in light of the paltry remuneration available, suggests that experienced legal counsel will become increasingly difficult to obtain. If this situation develops it will be exacerbated by expected increases in the number of applicants, which current trends in sentencing indicate will occur in the future.

Context

Within the current retributive and reactionary temper of dominant Canadian discourse on criminal justice, questions of equality and inequality are usually lost amidst the politics of resentment and vengeance. There are few categories of offenders more representative of the dominant folk devil image of the criminal than the murderer. Ranging from feminist demands to put an end to domestic violence through the vituperative demands for vengeance of Victims Against Violence, dominant social responses to questions concerning the fairness and equality of sentences or prisoners' rights are currently negative. That the emerging process of judicial

review of life sentences is being defined within this climate of reaction may have long term consequences.

On July 4, 1976, with a vote of 130 members of Parliament for and 124 against, capital punishment in Canada was abolished. Capital and non-capital murder were replaced with first and second degree murder. In both instances the penalty is a natural life sentence. In the debate over what should replace the death penalty, the positions of Members of Parliament ranged from natural life without the possibility of parole, to life with ten years minimum parole ineligibility, which was then the current practice. The House of Commons settled on a minimum sentence that would not be "too crushing" but which would satisfy those who would reluctantly vote for abolition. Those convicted of first degree murder were to serve a minimum of twenty-five years before parole eligibility. For a second degree murder conviction the court could impose life sentences with minimum periods of parole ineligibility ranging from ten to twenty-five years. Many abolitionists objected to this political compromise, arguing that such mandatory minimum sentences were counterproductive, destructive and above all, unnecessary, serving only to pander to the retributive element within the debate. The response to these abolitionists was the "faint hope" provision, in the form of a possible sentence review after fifteen years had been served. The intent of this provision was to allow for the possibility of a reduction in parole ineligibility for those who exhibited remorse and who had used their time in prison productively. This window of opportunity was intended to mitigate the harshness of the mandatory minimum sentences for those whose conduct in prison and character warranted it.

Judicial Review Hearing (JRH) legislation (*Criminal Code*: section 745) provides prisoners sentenced to life, with a parole ineligibility period greater than fifteen years, the right to apply to the "appropriate Chief Justice in the province in which the conviction took place" for a hearing after serving fifteen years. If the application is judged valid, the Chief Justice appoints a Justice of the superior (general) court of criminal jurisdiction who will "empanel a jury to hear the application" (*Criminal Code*: section 745). Of the twelve person jury, two-thirds must agree on the final decision. Their decision is to be based upon the character of the

applicant, conduct while serving the sentence, the nature of the offence for which they were convicted, and other such matters as the judge deems relevant. Notes accompanying section 745 explain that "a jury's role is not to reconsider the community's condemnation of the offence and repudiation of the offender", but to determine "whether or not present circumstances justify leniency and an earlier consideration of the offender's case by the Parole Board". The jury has three options:

1. to grant immediate parole eligibility : terminate the ineligibility for parole (S:745).

2. to grant a reduced period, stating a new number of years of ineligibility: substitute a lesser number of years of imprisonment without eligibility for parole (S:745).

3. to permit reapplication in a stated number of years at a set date. The Criminal Code states that where the jury "determines that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice" (S.745).

In practice, the interpretation of the latter clause has allowed juries to deny the application and to not set a new application date for the future; in short to refuse any reduction in the mandatory period of parole ineligibility.

Provincial Differences in Rules of Practice

The first rules of practice were established by Chief Justice Gold of the Québec Superior Court, dated January 28, 1985. To date, rules for conducting hearings under section 745 have been established for all provinces and territories except the Yukon. The order in which they were registered is as follows:

January 28, 1985	-	Québec (Montreal)
November 25, 1988	-	Manitoba (Winnipeg)
December 5, 1988	-	Alberta (Calgary)
June 2, 1989	-	Newfoundland (St.John's)
January 9, 1990	-	Saskatchewan (Regina)
February 27, 1991	-	Nova Scotia (Halifax)
September, 1991	-	Northwest Territories (Yellowknife)
May 11, 1992	-	Ontario (Toronto)
June 18, 1992	-	Prince Edward Island (Charlottetown)
August 28, 1992	-	New Brunswick
December 5, 1992	-	British Columbia (Vancouver)

We discovered considerable differences in these Rules of Practice the significance of which requires close socio-legal study and analysis.

Questions of Practice and Procedure

In line with provincial differences in approach and rules of practice we discovered significant differences (over time and location) in the procedures and emphasis in the first forty JRHs.

Jury Selection

The procedures for jury selection varied from case to case. In the first JRH, the Chartrand hearing in Québec (1987), Justice Biron ruled that the jury selection would be made as per a criminal trial and that the crown attorney and applicant's counsel would each be permitted twenty challenges. The Chartrand case involved a commuted death sentence for the murder of a police officer.In this case the applicant's counsel was also permitted to ask prospective jurors "their opinion on the death penalty in relation to the murder of police officers" and if they supported the death penalty in these circumstances, their ability "to set aside their support of that penalty" and decide the case "strictly on the facts presented". He was also permitted to ask "whether any member of the juror's family was a member of, or worked for, or with, the police". In contrast, in the Homer (1993) JRH, neither the crown attorney nor the

applicant's counsel were allowed to challenge each prospective juror for cause, but retained the 20 peremptory challenges.

Following the recent ruling by the Ontario Court of Justice (General Division) (Parks, 1994) the possibilities of Challenge for Cause in jury selection has been extended. It appears that this ruling may have important implications for the future. In the Sauvé (May 1994) JRH, both the crown attorney and the applicant's counsel were allowed two questions to be put to prospective jurors. This case is illustrative of a number of recurrent issues, including proclaimed innocence of the original conviction by the applicant, the influence of current social discourse as presented in the mass media, and the issue of community approbation.

In this widely publicized and controversial case the question of the innocence of the applicant had been previously addressed in a best selling book and in the media coverage of the JRH of a co-accused the previous month. Justice McIssac ruled that the intent of Section 745 was not to retry the original offence and therefore the question of innocence was not pertinent or admissible to the deliberations at hand. Similar to the question of innocence (see also Boyko, 1990; Ruddick, 1992; Comeau, 1994), the results of other JRHs were also ruled to be beyond the scope of consideration and therefore inadmissible (see Homer, 1993 for a further example). Since the Hearing took place in a small town near the location of the original offense, the prospective jurors' prior knowledge of the case was at issue.

Therefore, the crown attorney was allowed to question prospective jurors on their knowledge of the earlier hearing of a co-accused (Comeau, 1994) and whether or not they had any reasons to doubt the validity of the original conviction in Sauvé's case. In the weeks leading up to this hearing a controversy concerning the competence and methods of the NPB had been widely aired in the mass media. The applicant's counsel chose to question prospective jurors on their attitude to the operations of the NPB, and on their attitude to the question of clemency (i.e., should mandatory minimums be allowed to be reduced) for convicted murderers.

The jury selection in the Sauvé JRH represents the conflation of three issues: the proclaimed innocence of the applicant; the admissibility of information on previous JRH, notably in relation to co-accused; and the nature and relevance of community approbation.

Framing The Jury Decision

The framing of the purpose and result of a jury's decision has been a major point of contention in a significant portion of the first forty JRHs. Applicants' counsels have stressed that juries were not deciding on the release of an applicant but whether or not the applicant warranted the opportunity to be able to apply for parole. They stressed that the professionals involved in parole hearings were ultimately responsible for the decision to release an applicant. Some crown attorneys have argued in court that the jury should focus on protection of the public as their principal concern and that clemency should be a secondary consideration. In Sheldon, (1989) the crown informed the jury that the "responsibility for the protection of the public rests with you, the jury; if you can't guarantee it...then we can't take that chance". In Swietlinski (1992) the crown addressed the jury concerning its "responsibility to the community at large" for "public safety".

In instructing the jury, the presiding Justice has the opportunity and responsibility of clarifying the intent and result of their decision as per legislation. The limited impact of the JRH and the jury's decision can become obscured by the emphasis of the crown attorney. Establishing confidence in the Parole Board and parole process, and clearly instructing the jury so that it distinguishes its role from that of NPB appears to be significant in the jury's decision.

Evidence and Testimony

As previously noted the content of the Agreed Statement of Facts and the PER has been a focus of argument and debate. In addition, the number and type of witnesses and expert witnesses called by the crown and applicant's counsel, and the type and volume of letters of

reference and other such materials provided to the jury has been at issue. This has been particularly apparent in Ontario. The complexity of the issue of what evidence and testimony is allowed/necessary to assess the case requires further investigation and analysis.

This is compounded by a number of concerns. The paucity of financial assistance available to applicant's counsel seriously limits the extent and type of expert witnesses they can call. This can be of vital importance to the applicant's ability to address and counter negative reports contained in the PER and provided by the crown attorney's witnesses. In addition, both the crown and applicant have called CSC staff familiar with the applicant's case as witnesses. Whether or not this has or will lead to conflicts in the future needs to be assessed by all parties involved. As with other aspects of JRHs, admissible evidence and testimony has not been consistently ruled upon, and clearly agreed upon procedures have not been established across jurisdictions.

It is somewhat surprising that criminologists or experts in corrections have been called to testify in only a few cases. Our files reveal that only in Québec have such expert witnesses been a regular feature of JRH. Bernard Le Bel from Pinel has been involved in at least 7 cases in Québec and a Mr. Lagier in an additional Québec hearing. The only notation we have of a criminologist being involved in JRHs outside Québec is that of Dr. Gaucher, for the applicant, in the Homer (1993) case. In all but one of these cases the outcome was immediate eligibility. What these experts provide to the jury is an understanding of the context and effects of prison life on the applicant and a basis for comparison and evaluation of the conduct of the applicant while incarcerated. In some cases this context was in part provided by (CSC) institutional staff, who testified for the applicant.

<u>The Character of The Accused</u>

The essential element of the JRH is the assessment of the "current" character of the applicant. The evidence representing the original offence and conduct while in prison frame the

jury's deliberations in this assessment. Therefore the relative importance given the original offence (See Swietlinski, 1992; Glaremin, 1993) can be a determining factor in the outcome. Swietlinski was denied relief; and Glaremin was deferred for three years. In Vaillancourt (1988) there is a conjunction of the two elements as negative factors; resulting in the first denial of an application in Canada. In the Comeau and Sauvé JRHs these factors combined positively. Sauvé was the first of nine Ontario cases to result in immediate eligibility.

The centrality of the offence to the question of character focuses attention upon crown attorneys' interpretation of their role. To what extent should they be adversarial and what weight should be given to the original offence? It is in the context of the tribunal nature of the JRH, that the appropriate role of the crown attorney should be defined. Crown attorneys who have taken the position that they should oppose release have usually (Vaillancourt, 1988; Stewart, 1990; Swietlinski, 1992; Comeau, 1994) emphasized the offence as the determinant in evaluating the case. In Québec this emphasis on the offence and antagonism to relief is much less apparent and a factor in the positive outcomes in that jurisdiction.

The role of the author of the Parole Eligibility Report is also controversial. There is little variation between jurisdictions in the provisions set out for the content of the PER. They can be summarized as follows:

1. the applicant's social and family background
2. summary of the applicant's institutional classification and disciplinary files
3. summary of psychological and psychiatric assessments
4. criminal record

In only a few cases do we have any information noting the inclusion of information from Internal Preventive Security files. (see Hyppolite, 1992; Sauvé, 1994). These files are not available to the applicant or the applicant's counsel, but are made available to the author of the PER and the crown attorney.

What at times has been at issue is the perspective and emphasis of the author of the PER. In summarizing institutional files, what should be emphasized? Reports of institutional misconduct and disciplinary responses have been considered an important factor in assessing "conduct" and "character". However, the positive involvements and accomplishments of the applicant are also of major importance to the process of assessing and evaluating the character of the applicant. Some of the parole eligibility reports we have studied have primarily focused upon negative notations on files and virtually ignored the accomplishments of the applicant (see Homer, 1993 for an clear example). Though institutional files tend towards logging social, psychological and disciplinary problems encountered by the applicant, and largely ignore the positive attributes of the inmate, the requirements of the PER demand a more complete assessment. Furthermore, institutional files often contain competing or contradictory psychological/psychiatric assessments. Is the role of the author of the PER to highlight the negative reports and down-play the positive? This has been the case in a number of the PERs we have examined. In short, what should be the intent of the PER and what should it emphasize?

This leads into a discussion of the role of the author of the PER, and questions concerning who is best suited to compile the report.

There is some variation between jurisdictions, notably between Québec and Ontario. Though we have not had access to all parole eligibility reports written in the Québec and Ontario (CSC) regions, on the basis of our sample, differences appear to be developing.

In Québec, the bulk of the reports have been compiled by different CSC employees from the region. These PERs tend to be somewhat detailed and inclusive, focusing on the current character of the accused and their conduct while in prison. The intent seems to be to fill out the social and personal history of the applicant and therefore, conduct is understood in its widest terms, incorporating both positive and negative information. In the most thorough reports, the

result is a rounded and balanced assessment which reflects the intent of JRH; the evaluation of current character of the applicant.

The situation in Ontario is somewhat different. Mr. A. Partington, a parole officer from Peterborough has authored the majority of the PERs in this region. Reliance on a few CSC employees is the procedure that appears to be developing in Ontario. The sample of these PERs we have examined are briefer and with a narrower focus and emphasis on misconduct reports, negative assessments and risk factors.

It may be argued that reliance upon an external evaluator will produce a more objective report. However, the lack of familiarity with an applicant may cause difficulties in filling out the questions necessary for a fair evaluation of essential character. For example, in the case of Homer, (1993) the applicant's rediscovery of his aboriginal culture and his involvement with aboriginal spirituality are not explored within the PER. Under the category religion, the notation is "unknown". The importance of this lacuna to the issue of current character became apparent during the testimony of expert and CSC character witnesses for the applicant.

A concentration on negative assessments, institutional misconduct and risk assessment,as provided in institutional files, is the standard for reports considered for release decisions by the NPB. Is it suitable for the significantly different focus of the JRH? Whose point of view does this report represent? Since the PER is requested by the Court, it would seem that the author has the responsibility to act in a value neutral manner, fairly presenting information that will enlighten the juror's deliberations. To what extent should institutional (systemic) biases be unguardedly reproduced? Since institutional records focus on "institutional problems" and security concerns and risk assessment, they tend to present a negative image of the applicant, whether warranted or not. While this concern is partially addressed by the opportunity for the applicant's counsel to contest and debate the content of the report in pre-trial conferences (preliminary hearing), is it sufficient? This would, at least in part, depend upon the applicant's counsel's knowledge of penal institutions and the nature of the institutional files. In the Suave

(1994) case, the applicant's counsel contested the content of the PER, resulting in it being rewritten twice before it was reasonably acceptable if not satisfactory to all concerned. In this instance, the applicant's counsel was well versed in correctional custom and practices.

Another issue concerns the role within the proceedings of the judicial review of the author of the PER. Should the author be involved in more than compiling the report at the pre-hearing stage? In the Sauvé (1994) case the PER author took a more active involvement. During the actual hearing should the author of the PER do more than present his report and be examined on it? In two judicial review hearings we attended (Homer, 1993; Sauvé, 1994) Mr. Partington stayed for the complete five 5 days of proceedings.

In the latter case, he appeared to actively assist the crown. It was widely commented upon at the time by people observing the proceedings. It was especially noticeable in light of Justice McIssac's suggestions that Mr. Partington was his witness, and therefore assumed to be neutral like the Court. The role and approach of the PER like that of the crown attorney promises to be a major issue in future judicial review hearings.

In addition, it may now be argued that reliance on only a few CSC employees to author this essential report (as is currently the practice in Ontario) allows the particular attitude or perspective of a few minor CSC officials to unduly influence the format and emphasis of this report. At this stage of the development of the judicial review process such officials may well have considerably more experience than other participants in the hearing and through their report and involvement may affect the very emphases and (to a lesser extent) practices that take hold.

Data

Table 1. This table provides data on the outcomes of the first forty JRHs by province. As can readily be seen, most of the hearings in Québec were favourable, none of those in Ontario and Alberta; there were mixed results in the four other provinces, in part dependent on whether

or not the outcome or its actual effects on the ineligibility periods are considered. Since the parole process of gradual release for longterm prisoners commenced three years prior to the full parole eligibility date, applicants with reductions from immediate to 18 years were subsequently eligible for a pass program and day parole. In practical reality this alters the importance of the differences between immediate eligibility and reduction of ineligibility of 18 years.

TABLE 1 RESULTS OF JRH BY PROVINCE

RESULTS

Province	IMM	R/17	R/18	R/19	R/20	R/21	D/3	D/4	DEN	Total
NS	-	-	1	-	-	-	-	-	-	1
QUE	15	1	1	-	2	-	-	-	1	20
ONT	-	-	1	1	-	1	-	-	4	7
MAN	1	2	-	-	-	-	-	-	-	3
SASK	2	-	-	-	-	-	-	1	-	3
ALTA	-	-	-	-	1	-	1	-	2	4
BC	1	-	-	-	-	-	1	-	-	2
TOTAL	19	3	3	1	3	1	2	1	7	40

RESULTS

IMM = IMMEDIATE R/ = REDUCED TO (YEARS)
D/ = DEFERRED FOR (YEARS) DEN = DENIED

*Note, because of the length of the time served before the JRH two reductions to 16 years and one to 17 years have been categorized as "immediate eligibility" decisions.

Table 2. The first associated variable to be considered is time. This table provides information on the number and results of JRHs by year. It indicates that the process is just beginning and that there has been no significant change in results, over time.

TABLE 2 RESULTS OF JRH BY YEAR

RESULTS

Year	IMM	R/17	R/18	R/19	R/20	R/21	D/3	D/4	DEN	Total
1987	1	-	-	-	-	-	-	-	-	1
1988	-	-	-	-	-	-	-	-	1	1
1989	-	1	-	-	-	-	-	-	-	1
1990	-	2	-	-	-	-	-	1	1	4
1991	3	-	-	-	-	-	-	-	1	4
1992	7	1	1	1	2	-	-	-	1	13
1993	5	-	2	-	-	1	1	1	2	13
March 31, 1994	2	-	-	-	-	-	-	-	-	2
TOTAL	19	3	3	1	3	1	2	1	7	40

RESULTS

IMM = IMMEDIATE
D/ = DEFERRED FOR (YEARS)
R/ = REDUCED TO (YEARS)
DEN = DENIED

Table 3. This table presents provincial distribution by year. It indicates that the results to date continue to be relatively consistent within provinces with neither a swing towards clemency nor its denial. The variation in results between different jurisdictions is maintained over time; eg., between Ontario/Alberta and Québec.

TABLE 3 RESULTS OF JRH BY PROVINCE AND YEAR

RESULTS

Year	Province	IMM	R/17	R/18	R/19	R/20	R/21	D/3	D/4	DEN	Total
1993	NS	-	-	1	-	-	-	-	-	-	1
1987	QUE	1	-	-	-	-	-	-	-	-	1
1991	QUE	3	-	-	-	-	-	-	-	1	4
1992	QUE	6	1	1	-	1	-	-	-	-	9
1993	QUE	3	-	-	-	1	-	-	-	-	4
1994	QUE	2	-	-	-	-	-	-	-	-	2
1988	ONT	-	-	-	-	-	-	-	-	1	1
1991	ONT	-	-	-	-	-	-	-	-	1	1
1992	ONT	-	-	-	1	-	-	-	-	1	2
1993	ONT	-	-	1	-	-	1	-	-	1	3
1989	MAN	-	1	-	-	-	-	-	-	-	1
1990	MAN	-	1	-	-	-	-	-	-	-	1
1993	MAN	1	-	-	-	-	-	-	-	-	1
1992	SASK	1	-	-	-	-	-	-	-	-	1
1993	SASK	1	-	-	-	-	-	-	1	-	2
1990	ALTA	-	-	-	-	-	-	-	-	1	1
1992	ALTA	-	-	-	-	1	-	-	-	-	1
1993	ALTA	-	-	-	-	-	-	1	-	1	2
1990	BC	1	-	-	-	-	-	1	-	-	2
TOTAL		19	3	3	1	3	1	2	1	7	40

RESULTS

IMM = IMMEDIATE
D/ = DEFERRED FOR
R/ = REDUCED TO
DEN = DENIED

*Figures for 1994 are incomplete, including only the two JRHs held by the end of February.

Tables 4 & 5. The next variable to be examined is the type of conviction and sentence of the applicant. Are JRH outcomes more or less favourable depending on whether or not the convictions were for first or second degree murder? Table 4 provides the distribution of the type of conviction by province. The proportion of applicants serving first degree murder sentences is twice that of those serving second degree murder convictions with minimum parole ineligibility sentences exceeding fifteen years.

TABLE 4 PROVINCIAL VARIATIONS IN APPLICATIONS BY CONVICTION

Conviction	NS	QUE	ONT	MAN	SASK	ALTA	BC	TOTAL
1ST	-	12	6	1	3	4	1	27
2ND	1	8	1	2	-	-	1	13
TOTAL	1	20	7	3	3	4	2	40

Table 5 presents the results of JRHs in terms of conviction. The type of conviction does not result in major variation in the outcome. In terms of provincial variations, the type of conviction has not significantly altered the pattern of results.

TABLE 5 RESULTS OF JUDICIAL REVIEW HEARING IN TERMS OF ORIGINAL CONVICTION

Conviction	**IMM**	**R/17**	**R/18**	**R/19**	**R/20**	**R/21**	**D/3**	**D/4**	**DEN**	**TOTAL**
1ST	11	1	2	1	3	1	2	1	5	27
2ND	8	2	1	-	-	-	-	-	2	13
TOTAL	19	3	3	1	3	1	2	1	7	40

RESULTS

IMM	=	IMMEDIATE	R/	=	REDUCED TO
D/	=	DEFERRED FOR	DEN	=	DENIED

Clearly, neither trends over time, nor type of original conviction are to any apparent extent correlated with the provincial differences in outcome in the first forty cases.

Tables 6, 7, 8 & 9. Time Served and Parole Eligibility

The average time served prior to the JRH of these forty applicants was sixteen years and one month. There has been a slight reduction in this time variable over the period analyzed. The time between eligibility to apply and JRH date affects the result in practice. Reductions to sixteen to eighteen years, depending on the amount of sentenced served, may be comparable to that of immediate eligibility in terms of the practical situation of the applicant. In Rodrigues (1991), in light of time served, the successful application for a reduction to seventeen years in reality produced the same result as that of "immediate eligibility". The parole process for long term prisoners normally involves a gradual release program of Escorted Temporary Absences followed by Unescorted Temporary Absences and Day Parole prior to any decision on Full Parole. Therefore, the effect of reductions spanning immediate eligibility to a reduction in ineligibility to 18 years is, in practical terms, similar.

TABLE 6 THE EFFECTS OF JRH RESULTS ON ELIGIBILITY FOR FULL PAROLE

RESULT	INELIGIBILITY PERIOD, FULL PAROLE (YEARS)									
	0	0-1	1-2	2-3	3-4	4-5	5-8	8-9	9-10	TOTAL
IMM.	19	-	-	-	-	-	*	-		19
R/17	-	1	2	-	-	-	*	-	-	3
R/18	-	-	-	3	-	-	*	-	-	3
R/19	-	-	-	-	1	-	*	-	-	1
R/20	-	-	-	-	-	3	*	-	-	3
R/21	-	-	-	-	-	1	*	-	-	1
D/3	-	-	-	-	-	-	*	-	2	2
D/4	-	-	-	-	-	-	*	-	1	1
DEN	-	-	-	-	1	-	*	2	3	7
TOTAL	19	1	2	3	2	4	*	2	6	40

TABLE 7 THE EFFECTS OF JRH ON ELIGIBILITY FOR DAY PAROLE

RESULT	ELIGIBILITY PERIOD, DAY PAROLE (YEARS)						
	0	0-1	1-2	2-5	5-6	6-7	TOTAL
IMM.	19	-	-	*	-	-	19
R/17	3	-	-	*	-	-	3
R/18	3	-	-	*	-	-	3
R/19	-	1	-	*	-	-	1
R/20	-	-	3	*	-	-	3
R/21	-	-	1	*	-	-	1
D/3	-	-	-	*	-	2	2
D/4	-	-	-	*	-	1	1
DEN	1	1	-	*	2	3	5
TOTAL	26	2	4	*	2	6	40
				*Represents 3 Columns (2-3, 3-4, 4-5 Years)			

TABLE 8 THE EFFECTS OF JRH ON ELIGIBILITY FOR FULL PAROLE BY PROVINCE

OUTCOME	INELIGIBILITY PERIOD, DAY PAROLE (YEARS)						
	0	0-1	1-2	2-5	5-6	6-7	Total
IMM	19	-	-	*	-	-	19
R/17	3	-	-	*	-	-	3
R/18	3	-	-	*	-	-	3
R/19	-	1	-	*	-	-	1
R/20	-	-	3	*	-	-	3
R/21	-	-	1	*	-	-	1
D/3	-	-	1	*	-	-	1
D/4	-	-	-	*	-	2	2
DEN	1	1	-	*	2	3	5
TOTAL	26	2	4	*	2	6	40

TABLE 9 THE EFFECT OF JRH RESULT ON ELIGIBILITY FOR DAY PAROLE BY PROVINCE

PROV.	INELIGIBILITY PERIOD, DAY PAROLE (YEARS)						
	0	**0-1**	**1-2**	**2-5**	**5-6**	**6-7**	**TOTAL**
NS	1	-	-	*	-	-	1
QUE	17	1	2	*	-	-	20
ONT	2	1	1	*	-	3	7
MAN	3	-	-	*	-	-	3
SASK	2	-	-	*	-	1	3
ALTA	-	-	1	*	2	1	4
BC	1	-	-	*	-	1	2
TOTAL	26	2	4	*	2	6	40

Table 10. GENERAL DATA ON THE FIRST FORTY JRHs HELD IN CANADA

TABLE 10 JUDICIAL REVIEW HEARING RECORD OF KEY DATES

No	Name	Pr	Sent	Date Arrested	Date JRH Eligible	Date Hearing	Time Served	Out-Come	Full Parole Eligible
1	CHARTRAND	QC	CM(C)	1971-08-	1986-08-04	1987-04-04	15/08	IMM	1987-04-04
2	VAILLANCOURT	ON	CM(C)	1973-02-01	1988-02-01	1988-09-07	15/07	DEN	1998-02-01
3	SHELDON	MN	NC/20	1973-09-07	1988-09-07	1989-06-28	15/10	R/17	1990-09-07
4	LUCAS	MN	NC/20	1973-06-04	1988-06-04	1990-02-28	16/08	R/17	1990-02-28
5	COCKRIELL	BC	CM(C)	1974-03-29	1989-03-29	1990-03-26	16/00	D/03	1990-03-26
6	BOYKO	BC	NC/20	1974-04-16	1989-04-16	1990-05-27	16/01	IMM	1990-03-29
7	STEWART	AT	CM(C)	1973-08-15	1989-08-15	1990-12-06	16/04	DEN	1990-08-19
8	SIMARD	QC	2/NC/20	1975-01-31	1990-01-31	1991-02-01	17/01	IMM	1991-02-01
9	RODRIGUES	QC	NC/20	1975-06-03	1990-06-03	1991-04-29	15/11	IMM	1991-04-29
10	POULIN	QC	2/NC/20	1975-04-18	1990-04-18	1991-06-25	16/02	DEN	1995-04-18
11	PARKER	ON	2/NC/20	1974-08-22	1989-08-22	1991-09-10	17/00	DEN	1994-08-22
12	LAVIGNE	QC	2/NC/20	1975-06-14	1990-06-14	1991-09-12	16/03	IMM	1991-09-12
[redacted]	THERIAULT	QC	1ST	1976-07-02	1991-07-02	1992-01-20	15/06	R/20	1996-07-02
[redacted]	NADEAU	QC	2/2N/20	1976-09-19	1991-09-19	1992-02-05	15/05	IMM	1992-02-05
15	NICHOLS	AT	1ST	1976-03-13	1991-03-13	1992-03-12	16/00	R/20	1996-03-13
16	ROBERGE	QC	1ST	1976-10-08	1991-10-08	1992-04	15/06	IMM	1992-04
17	LEVESQUE	QC	2N/25	1977-11-21	1991-11-21	1992-05	16/06	IMM	1992-05
18	SWIETLINSKI	ON	1ST	1976-11-01	1991-11-01	1992-06-03	15/07	DEN	2001-11-01
19	VALADE	QC	1ST	1976-12-06	1991-12-06	1992-09-19	15/09	R/17	1993-12-06
20	MYMRYK	QC	1ST	1977-01-06	1992-01-06	1992-09-23	15/08	IMM	1992-09-23
21	DRINNAN	SK	1ST	1976-12-11	1991-12-11	1992-09-28	15/09	IMM	1992-09-28
22	BRISSON	QC	1ST	1977-05-15	1992-05-15	1992-10-04	15/05	IMM	1992-10-04
23	RUDDICK	ON	1ST	1977-02-08	1992-02-08	1992-10-16	15/08	R/19	1996-02-10
24	HYPPOLITE	QC	1ST	1977-01-25	1992-01-25	1992-11-28	15/10	R/18	1995-01-25
25	CARON	QC	2N/20	1976-09-17	1991-09-17	1992-12-17	16/03	IMM	1992-12-17
26	CHARTIER	QC	1ST	*1977	1992	1993-02-17	15/	IMM	1993-02-17
27	GLAREMIN	AT	1ST	1977-05-24	1992-05-24	1993-02-22	15/09	D/03	2002-05-24
28	DROSTE	ON	2/1ST	1977-03-03	1992-03-08	1993-03-29	16/01	R/21	1998-03-08
29	McKINNON	AT	2/1ST	1976-10-02	1991-10-02	1993-03-29	16/06	DEN	2001-10-02
30	DUHAMEL	QC	1ST	1977-03-30	1992-03-30	1993-04-26	16/01	IMM	1993-04-26
31	HOMER	SK	1ST	1977-01-13	1992-01-13	1993-05-18	16/04	IMM	1993-05-18
32	POITRAS	QC	1ST	1976-10-15	1991-10-15	1993-05-28	16/07	IMM	1993-05-28
33	MONROE	SK	1ST	1977-06-11	1992-06-11	1993-06-24	16/00	D/04	2002-09-11
34	CLAIRMONT	ON	1ST	1977-09-16	1992-09-16	1993-07-05	15/10	R/18	1995-09-16
35	MALETTE	MN	1ST	1978-01-23	1992-01-23	1993-09-07	17/08	IMM	1993-09-07
36	WHITE	NS	2N/20	1978-01-26	1993-01-26	1993-11-08	15/09	R/18	1996-01-26
37	KINSELLA	ON	1ST	1978-04-07	1993-04-07	1993-12-06	15/08	DEN	2003-04-07
38	BEROUARD	QC	1ST	1978-07-29	1993-07-29	1993-12-	15/05	R/20	1998-07-29
39	FRENETTE	QC	2N/20	*1978-05-04	1993	1994-01-28	16/	IMM	1994-01-28
[redacted]	GAUMONT	QC	1ST	*1979-03-17	1994	1994-02-18	15/	IMM	1994-02-18

* CONVICTION DATES

HEADINGS

NO	=	JUDICIAL REVIEW HEARING NUMBER	Y	=	YEAR
PR	=	PROVINCE	M	=	MONTH
SENT	=	SENTENCE			

SENTENCES			OUTCOMES		
CM(C)	=	CAPITAL MURDER (COMMUTED)	IMM	=	IMMEDIATE
NC	=	NON CAPITAL MURDER	R/	=	REDUCED TO
1ST	=	FIRST DEGREE MURDER	DEN	=	DENIED
2N	=	SECOND DEGREE MURDER	D/	=	DEFERRED FOR

Summary

In this brief report, I review the issue of public knowledge of, and attitudes towards Judicial Review. Although no opinion poll has directly addressed the question of Judicial Review, there has been a fair amount of research upon public attitudes towards parole in general. Beginning with this literature, I then make some inferences about public attitudes towards judicial review. At the end of the chapter I suggest some strategies for dealing with public opposition to the judicial review provisions.

Introduction

Why is it important to know something about public knowledge of, and attitudes towards Judicial Review of parole eligibility for life term inmates? There are several answers to this question. First, because the judicial review provisions have been subject to a great deal of publicity (mostly adverse) in the news media. Some of this coverage has come about as a result of specific Judicial Review applications, some has come about as a result of a general concern over public safety and the parole process.

The provisions have also been the object of considerable criticism by politicians (such as John Nunziata. M.P.[1]) and Victims' Rights Advocates (e.g., Scott Newark). The consequence of all this has been that the judicial review process has achieved a high degree of public visibility. In May, 1994, the topic was examined in depth on the national news programme "Prime Time Magazine". Variously described as a "loophole for lifers" or a humane incentive for rehabilitation, the judicial review mechanism is of considerable interest to the general public.

An additional reason for wanting to know what the public think about judicial review of the process concerns the issue of reform. Some groups want to see Section 745 repealed, with the result that parole eligibility would continue to be completely determined by the Criminal Code (in cases of first degree murder) or the sentencing judge (who may determine the number of years of parole ineligibility in excess of ten years for cases of second degree murder. Other individuals would like to see preservation of the *status quo.*

[1] Mr. Nunziata was responsible for the private member's Bill which would repeal the Judicial Review provisions.

It is also possible that an intermediate option may be pursued by the government, namely modifying the existing legislation. There are many possible options, including changing the jury's decision-making formula from a simple majority to one of unanimity, and/or perhaps deferring the application point to some number of years short of the mark originally established by the sentencing judge. If such a middle option is being contemplated, it will be important to know what the public would support, since public pressure will play a role in driving statutory revision in the first place.

The latest statistics reveal that there are 2,347 life inmates on register in Canada's penitentiaries (Correctional Services Canada, 1994). In addition, projections show that there will be approximately 600 lifers eligible to apply for a review within the next few years. Judicial Review is an issue which is going to get more prominent in the near future.

Judicial Review has not been the object of a systematic public opinion survey. Accordingly, our knowledge of what the public think about the parole eligibility provisions is derived from previous research on attitudes towards parole.

Public Attitudes Towards Parole

A recent examination of public opinion and criminal justice (Roberts, 1992) revealed that sentencing and parole are the areas that generate most concern among members of the public. In fact, it can be said that public confidence in the criminal justice system declines significantly as we move from the early stages (policing) through to the so-called "deep end" (sentencing and conditional release). (This is particularly true in light of the adverse publicity surrounding parole board members that has been the focus of several newspaper articles in April and May, 1994.)

A considerable amount of research has been conducted on public knowledge of, and attitudes towards parole in Canada. This research is available elsewhere (e.g., Canadian Criminal Justice Association, 1987; Roberts, 1988). However it is worth reiterating the most salient points that have emerged from that literature. The results of opinion polling on this issue can be summarized in the following statements:

* *The public support the idea of conditional release from prison, but not the practice (or what they perceive the practice to be -- their views are frequently inaccurate).*

* *The public feel that too many inmates are released too soon on parole.*

* *The public favour tightening the parole system; that is, making parole available principally to non-violent offenders. Fully two-thirds of the public feel that parole should be available "only for*

certain offenders".[2]

* *The public are frequently confused about the different forms of early release from prison.*

* *The public over-estimate the recidivism rates of inmates released on parole.*

* *The public over-estimate the full parole grant rate for federal offenders.*

* *The public over-estimate the proportion of the average inmate's sentence that is served in the community rather than in an institution.*

Consequences for Judicial Review

The critical finding for Judicial Review that emerges from the previous literature is the following: respondents to a nation-wide survey were asked who should never be eligible for full parole. Over 80% responded by identifying "murderers" (see Roberts, 1988, Table 3). This would seem to suggest that the public are totally opposed to parole for inmates serving life terms for murder. As I shall attempt to explain, I do not believe this to be an accurate reading of public attitudes in this area.

In light of the research on public attitudes towards parole, the Judicial Review process is clearly going to provoke a strong negative reaction from the Canadian public. In this report, I shall explore the reasons for this, and end by suggesting some strategies that can be adopted that might address public concern. The issue of public opinion is an important one to research: some suggestions for further analysis are presented at the end of the document.

General versus Specific Measures of Public Attitudes

The first point that needs to be made is that the Judicial Review experience provides a fascinating illustration of the importance of context, and the amount of information in determining public reaction. There are clear analogies between the current situation regarding Judicial Review of parole ineligibility, and research in the area of sentencing.

Many politicians have blindly accepted polls regarding sentencing at face value: they learn that three-quarters of the public think sentences are not harsh enough, and interpret this to mean that Canadians want harsher penalties for all crimes, all offenders.

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[2] These polls were conducted prior to the passage of Bill C-36, which provides judges with them power to defer parole eligibility to the 50% mark for certain offenders.

More sophisticated research conducted here in Canada and elsewhere suggests that this is not in fact the case.

In 1983, in conjunction with Tony Doob from the Centre of Criminology at the University of Toronto, I ran an experiment involving public attitudes towards sentencing. The hypothesis being tested in that research (see Doob and Roberts, 1983 for further information) was that the amount of information provided to people would be critical in determining their reaction to a sentencing decision. We hypothesized that if people had more information than is available in the average newspaper story, they might be more accepting of the sentencing decision.

This hypothesis was tested in the following way. Volunteer subjects were randomly assigned to one of two conditions. One group received very brief descriptions of a crime; the other group received a more complete account of the incident. After reading either the "short" or the "long" description, subjects were asked to sentence the offender. Subjects who had read the long description were significantly less punitive than those who had read the shorter description.

In another, related experiment conducted at the same time, comparable[3] groups of subjects were asked to read either the newspaper account of a sentencing decision or a summary of the actual court documents. After reading one of these two versions of the same sentence, both groups were asked to evaluate the offender, the offence, the judge, and of course the sentence imposed. Subjects who had read the court documents version had significantly different views of all aspects of the case. Participants in the "media" condition regarded the offence, the offender and the judge in a more negative light than did the subjects in the "Court documents" condition. And, most importantly, subjects in the media version regarded the sentence imposed as being too lenient, a view that was not shared by the subjects in the other condition. All these differences were statistically significant. Some of the findings from that study are summarized in the following Table 1.

[3] By this I mean that subjects were randomly assigned to experimental condition, thus ensuring there were no pre-experimental differences between groups.

Table 1

Public Ratings of Sentence, Judge, Offence and Offence

A. Evaluation of the Sentence Imposed

	Too Harsh	About Right	Too lenient
Court Documents	52%	29%	19%
Newspaper	13%	24%	63%

B. Evaluation of the Offender

	Better than average	Average	Worse than average
Court Documents	22%	42%	36%
Newspaper	7%	17%	76%

(Adapted from: Roberts and Doob, 1990).

In the report describing that research, we argued that these results indicated that widespread public opposition to sentencing decisions (picked up in opinion polls that ask simplistic questions) is in part a function of the amount of information available to the public. If members of the public were exposed to as much information as was available to a sentencing judge, public satisfaction with sentencing decisions would undoubtedly increase.

When the public have more information at their disposal, their "attitude" is quite different, as these studies have shown. Comparable results have been found in a number of other studies in other jurisdictions (e.g., Doble and Klein, 1989; Galaway, 1984).

The same argument can be made with regard to Judicial Review. We know from public opinion research on attitudes towards parole (see above) that if the public are asked whether convicted murderers should be eligible for parole, four out of five members of the public will say no. Yet the Judicial Review hearings that have been conducted so far indicate that there is a considerable degree of support for reducing lifers' ineligibility periods. Judicial Review applications have generally been more successful than unsuccessful. This suggests a paradox: we know that the public oppose parole for lifers convicted of murder, and yet juries drawn from the same public are giving applicants the ability to apply for early review, thereby potentially reducing the custodial term by up to nine years (for an inmate serving a minimum 25-year term who is granted immediate parole eligibility and is then released by the parole board).

The resolution to this paradox seems (to me at least) to be found in the sentencing research some results from which I have summarized above. When asked a simple question on an opinion poll, people think of a heinous category of crime (first or second degree murder) and little else. However, when confronted with an actual case, and when provided with more information about the original incident, including the inmate's conduct over a fifteen-year period, the purpose of the provisions and so on, public reaction (as revealed by the juries' decisions at least) is far less punitive. Hence the positive results to date of the 42 Judicial Review applications.

Analogy with Capital Punishment Research in the U.S.

A similar pattern of findings emerges from the American literature on public attitudes towards capital punishment. Opinion polls which ask respondents whether they are in favour of, or opposed to, the death penalty, show that over two-thirds of the American public support capital punishment (e.g., Flanagan and Maguire, 1990; Zeisel and Gallup, 1989). However, on some occasions researchers have approached the question in a slightly different way. They have given respondents a full description of a capital murder case. In this description the subjects learn a lot more about the offender and the offence than they would from a brief newspaper report. Under these conditions,

support for capital punishment diminishes considerably, particularly for offenders who are young when the offence was committed (as is the case for most lifers; see Roberts, 1992, for further information about this kind of research).

Summary

Research upon related issues (sentencing; capital punishment) suggests that we should not read too much into surveys that provide little or no contextual information, or pose simplistic questions. Applying this to the area of Judicial Review, would suggest that the Canadian public are not implacably opposed to parole for lifers under any conditions.

At this point I shall address the issue of how to respond to public concern over Judicial Review.

Addressing Public Concern Regarding Judicial Review

Public outrage is likely to erupt whenever an inmate receives a favourable result from a Judicial Review hearing. Unlike the occasional lenient sentence, the issue is likely to occur regularly as these hearings take place. Understandably, public antipathy will be particularly strong in cases of first degree murder in which the victim was a police officer. There are several such cases coming up for review in forthcoming months and years. Can anything be done to assuage public sentiment regarding judicial review? I believe that several steps need to be taken within the context of a public education campaign. A number of facts need to be brought to the attention of the public. First, I shall examine the grounds for supporting or opposing release on parole.

Grounds for supporting or opposing full parole

It is important in any attempt to deal with the public on this issue to recall the grounds on which they support or oppose release on full parole. In 1986, the Canadian Sentencing Commission asked a series of questions about attitudes towards parole. Two of these questions asked respondents to specify the strongest argument in favour of parole, and the strongest argument against parole. The results were revealing.

The argument for parole endorsed by the largest number of respondents was that it provides a second chance to inmates. Most people are unlikely to be inclined to favour a second chance for someone convicted of murder, particularly a case of first degree murder of a police officer. However, the second most persuasive argument from the perspective of the public was that parole "provides an incentive to inmates". Lifers more than other inmates need some form of incentive; if this notion were stressed to the public, they might be more accepting of the judicial review mechanism.

There was even more consensus regarding the strongest argument against parole: Over half the sample said that future offending by parolees was the main argument against parole. No other argument came close.[4] This is significant, for it suggests that providing the public with more accurate information about recidivism rates would reduce opposition to parole in general, and judicial review in particular.

1. Decision-making is in the hands of the community.

Part of the hostility members of the public feel towards sentencing judges and parole boards springs from the fact that the public have no input into decision-making. Nor, in the case of lenient sentences, or inappropriate comments by judges, do the public have any direct means by which they can ask for a review of the decision. The independence of the judiciary may be an indispensable component of the criminal justice system, but it is a source of great frustration for members of the public.

The same can be said, but to a lesser extent, for parole boards. When the public learn that a sex offender has committed further offences after having been granted parole, their outrage is frequently exacerbated by the fact that the releasing decision is made without consulting the public or the victim. (One of the reasons for Bill C-36 was to promote the voice of the victim, and the interests of the community.)

But Judicial Review decisions are not determined by elected or appointed officials, they are taken by members of the community. Moreover, the individual jurors are drawn from the community in which the offence of conviction occurred. The public are in all probability unaware of their level of involvement, and likely regard positive reviews as further evidence of unjustifiable leniency on the part of the criminal justice system. If they knew that the decision to terminate parole ineligibility *was taken by members of the community* -- by themselves as it were -- I believe that they would become far less critical of positive review decisions.

It is very ironic that much of the opposition to the judicial review provisions has come from people who have claimed that the Canadian public are opposed to parole for lifers, and that the provisions should be repealed in order to make the criminal law more consistent with public sentiment. And yet it is public sentiment which has resulted in parole ineligibility reductions in four out of five applications to date (see Table 2).

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[4] The argument identified by the next highest percentage (14%) was that parole release undermines the deterrent power of the law.

2. Judicial Review Hearing is not a releasing decision.

It seems highly likely that the public regard Judicial Review as a releasing decision, rather than a decision to permit a releasing decision to be taken. The distinction between the Judicial Review and the subsequent decision by the National Parole Board needs to be clarified in the public mind. If this were accomplished, it would also reduce criticism of the Board, who, if they decide to grant parole to an inmate, can reasonably point to the support for the individual from the very community against which his original crime was directed. In this regard, it should be noted that the Board has denied release on full parole to a number of inmates who have received a positive response from the jury in their application.

Related to this point, it is important to note that a considerable amount of time will have elapsed between eligibility for judicial review, and eventual release on parole, if the review and the parole decision are both positive. This should be pointed noted in any public information campaign as it has a bearing on the "net" reduction in time served.

3. Parole is not re-sentencing

One of the thorniest questions in the literature on conditional release from prison is whether parole decision-making is re-sentencing. The response from the Board is that the original sentence of the court still stands; the parole decision merely changes the location in which the sentence is served, from the correctional institution to the community. Some members of the public will find this argument difficult to accept. Nevertheless it is technically true, and it should be made. An attempt should be made to make the public understand that an offender on parole is not free to do whatever he or she wishes, and that supervision is more than merely perfunctory, particularly in the early period after release from the institution.

4. A life sentence never expires

Criminal justice professionals are aware that the warrant of a life sentence never expires. A lifer will be under some form of social control for the rest of his or her natural life. This fact also needs to be brought to the attention of the public.

5. Parole Success and Failure

The public are very sensitive to outcome issues; they tend to see parole supervision in terms of success (completing term without incident for non-lifers) or failure (revocation of parole and return to the institution). The public assume that most parole revocations are for fresh offending, when this is not the case. They also assume

the parole recidivism rates to be much higher than they in fact are (see Roberts, 1988; Canadian Criminal Justice Association, 1989). It is important to provide the public with accurate information about parole success rates generally, and in particular with the outcome of the lifers to date who have obtained early release due in part to a favourable judicial review decision.

6. Outcomes of judicial reviews to date

If the reviews to date had resulted in a quasi-automatic reduction to immediate parole eligibility for all applicants, the public would have great difficulty accepting the judicial review provisions. They would see the process as a way to subvert the 25-year minimum sentence which itself was a second choice (in the eyes of the public) after capital punishment. This is not of course the case. As noted earlier, the decisions have been mixed, and although generally positive in Quebec, have been less so in Ontario.[5] And, in many cases where juries have permitted an early application to the Board, this application has been delayed by several years. As well, a significant minority of applicants have been flatly refused permission to make an application.

Opponents of the judicial review provisions, as well as some journalists, have encouraged the perception that judicial reviews result in immediate eligibility for parole in almost all cases. For example, it was noted recently on national television that three-quarters of reviews were positive, with the implication that all these individuals received permission to apply immediately. This is not the case.

The actual statistics need to be brought to the attention of the public. They reveal a process that is sensitive to individual differences, and does not simply consist of reducing custodial terms for all applicants. Table 2 presents a summary of the outcomes of the first 40 judicial review hearings.[6] These figures make it quite clear that different cases are treated in different ways, and that there is no automatic granting of immediate eligibility. To me, these data are a clear refutation of the "loophole" analogy used by critics of judicial review and by some news media commentators.

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[5] This may be changing; the two most recent Ontario applications resulted in reductions to immediate eligibility.

[6] Since this article was written there have been at least two more hearings (see preceding footnote).

Table 2

Results of Judicial Review Hearings: Canada[7]

Outcome	# Cases	% Total
Immediate Eligibility	19	48%
Reduction in Ineligibility to 17 years	3	8%
To 18 years	3	8%
To 19 years	1	3%
To 20 years	3	8%
To 21 years	1	3%
Application Deferred	3	8%
Application Denied	7	18%
	40	100%

[7] To April 1, 1994.

7. Positive Case History Approach

Ample research has demonstrated the limited ability of statistical information to change public attitudes (see for example, Fiske and Taylor, 1984). Statistical data should be supplemented by a positive case history of one of the early judicial review cases. This case history should include information on the ex-inmate's progress and activities since his release.

8. Comparisons with other jurisdictions

As far as I am aware, Canada is alone in providing a jury with the power to determine whether an inmate serving a life term should be eligible for parole before the mandatory twenty-five year period has elapsed. But other jurisdictions permit lifers to obtain early release on parole, and frequently before a twenty-five year period has elapsed. In England, for example, lifers are released on licence at the discretion of the Home Secretary. So there are precedents for a mechanism of this nature, and this should be noted in any public legal education initiative dealing with Judicial Review.

Research Priorities

1. Public Opinion

In this brief report, I have reviewed the public opinion research dealing with parole, and have made some inferences about public attitudes towards judicial review of parole ineligibility. What is needed, of course, is a representative survey of the public which would systematically explore public knowledge of, and attitudes towards, the Judicial Review process. The public know little about the judicial review procedure, but the exact degree of knowledge needs to be established. As well, we need to know how much of the public's opposition to Judicial Review is founded on misperception (which is amenable to change) and how much is founded on an ideological opposition to releasing lifers before their terms have expired (this kind of opposition is not likely to be affected by public legal education initiatives).

2. News Media coverage of Judicial Review Applications

It also goes without saying that any public education initiative relating to a criminal justice issue such as Judicial Review should include a media component. The news media are of course critical to the formation of public opinion. A systematic content analysis of newspaper reports of applicants would provide a great deal of insight into the way that Judicial Review material has been conveyed to the public. An informal survey of newspaper stories has shown that a large number of misconceptions have been

transmitted. In this context it would be interesting to conduct research along the lines of that described earlier in this report. This would involve comparing the reactions of different groups of subjects, some of whom had read a newspaper account of an application, others who had read a more comprehensive summary of the information emerging during the course of the actual hearing.

Both of these research projects would generate material to inform a public legal information initiative. Such an initiative would also include a media component: Educating the educators (in this case news media professionals) is as important as educating the public directly.

Finally, it should be noted that legal education initiatives are not restricted to the general public. Until fairly recently, the judicial review provisions were not well-known to criminal justice professionals, some of whom may have a negative view of the process that is founded upon a misperception of the process and its results to date. Accordingly, some of the points relevant to public legal education might profitably be directed at criminal justice professionals as well.

Conclusion

Unless some steps are taken to address public concern over the issue of Judicial Review of parole eligibility, it will continue to be regarded not as a legitimate life-line for a very special minority of long-term inmates, but as a "loophole" for all lifers. As such it will continue to undermine the parole process in the eyes of the Canadian public.

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JUDICIAL REVIEW OF PAROLE ELIGIBILITY: THE VIEWS OF THE PUBLIC

"Life-line or Loophole?"

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Report for the Ministry of the Solicitor General Canada

1994

ANNOTATED BIBLIOGRAPHY:
JUDICIAL REVIEW OF PAROLE INELIGIBILITY FOR CONVICTED MURDERERS

SOURCE: Government Document

AUTHOR: BRAITHWAITE, John.

SOURCE: "Do the Best We Can", Forum on Corrections Research, 4(2) (June, 1992), 14-16.

SUMMARY: The issue of the management of long-term offenders is looked at from the perspective of an individual who has been heavily involved in the field of corrections. Specifically, the need for better and more effective programming is discussed with particular emphasis on the sense of hope and opportunities such initiatives can offer in the life of the long-term offender. Furthermore, in facing the growing challenge of managing long- term offenders, the need to better document and evaluate the results of new programs can be performed on a more efficient basis. Despite the current emphasis on reintegration, the author cautions that related issues need to be addressed throughout the process, and not simply at the stage of judicial review of parole ineligibility.

SOURCE: Government Document

AUTHOR: BROWN, Glen.

SOURCE: "Judicial Review: How Does It Work and How Does It Affect Federal Corrections:?", Forum on Corrections Research 4(2), 14-16.(June, 1992) Ottawa, Department of Justice and the Ministry of the Solicitor General.

SUMMARY: This article begins by providing an overview of the mechanics of the judicial review process. 1991 statistics are used to discuss the group of offenders who are serving sentences for murder in relation to the rest of prisoners admitted to federal custody every year. Forecasts are made concerning the likely increase in the proportion of offenders with parole restrictions of more than fifteen years. An outcome of hearings held since March 31, 1992 is provided showing that of the 63 eligible inmates, 13 have had hearings, with 5 being granted immediate eligibility for parole, three were given a partial reduction in their parole restriction and five applications were denied.

The legislative process providing for judicial review is discussed, as well as the three options from which the jury may base their decision on. Issues of concern to the Correctional Service of Canada are overviewed, most of which reflect a concern for the management and programming of long-term offenders.

Two tables are provided:

1. "Eligibility for Full Parole for Offenders Convicted of Murder" traces the changes in eligibility criteria from January 4, 1968 through July 26, 1976 for both first-degree and second-degree to murder.

2. "Distribution of Judicial Review Cases by Province of Sentencing and Year", serves as a useful reference guide by which to compare the outcome of such cases on a provincial, as well as a national basis from 1988 through to the forecast projected for the year 1992.

SOURCE: Journal Article

AUTHOR: Canadian Criminal Justice Association

SOURCE: "Comments on Bill C-84, 1976", Justice Report, 4(3), 1987, 7 & 19.

SUMMARY: The paper on Bill C-84 which was presented by the Canadian Criminal Justice Association to the House of Commons Standing Committee on Justice and Legal Affairs in 1976 is reproduced here. The recommendations put forth by the Association are also included.

Bill C-84 provided that any person convicted of high treason or first degree would receive a mandatory sentence of life imprisonment and would be ineligible to apply for parole until 25 years had been served in prison.

This article sets out the Association's official approval policy regarding the provision of Bill C-84 for the abolition of the death penalty and its replacement by a mandatory sentence of life imprisonment. The provision for application for judicial reduction of the nonparole period after the offender has served 15 years is briefly discussed, with a cautionary note concerning the difficulty of predicting which policy the courts will follow.

SOURCE: Government Document

AUTHOR: CANADIAN SENTENCING COMMISSION

SOURCE: Sentencing Reform: A Canadian Approach, Ottawa: Ministry of Supply and Services Canada (1987).

SUMMARY: The most significant work to date, the work by the Canadian Sentencing Commission discusses the serious problems existing in the structure and process of sentencing. The report concluded that the system is in need of fundamental changes in both its orientation and operation. The abolition of full parole was recommended.

SOURCE: Book

AUTHOR: COLE, David P and Allan Manson.

SOURCE: Release From Imprisonment: The Law of Sentencing, Parole and Judicial Review, Toronto: Carswell (1990).

SUMMARY: The authors place parole within the context of sentencing and imprisonment. Chapters focussing on remedies, both independently and under the *Charter of Rights and Freedoms,* are included in order to provide a background for a detailed discussion of procedural problems which may potentially arise at each stage of the process. A chapter on legislation seeks to place judicial decisions in the appropriate contemporary, statutory, and regulatory contexts.

This work is written is marked by impartial analysis and presentation in terms of the obstacles faced by inmates seeking release. In conclusion, the authors make a plea for systemic integration and better understanding of punishment and of imprisonment as one of its agencies. Concern is expressed over the omission of both academic studies and governmental reports which, to date, have failed to construct an integrated framework of clearly articulated and mutually consistent alternatives to the three core elements of the sentencing process: sentencing, imprisonment and release. A brief review of the recommendations of the Canadian Sentencing Commission is also included.

SOURCE: Government Document

AUTHOR: CORRECTIONAL SERVICES CANADA

SOURCE: Judicial Review: Information for Staff, Ottawa: Offender Management Division (1991).

SUMMARY: Published by Correctional Services Canada (CSC), this handbook contains background information on the subject of judicial review which is intended primarily to assist CSC staff who are working with and providing case management services for inmates serving life sentences with a parole restriction in excess of fifteen years. In particular, it contains advice for those staff involved in preparing Parole Eligibility Reports for Judicial Review and making arrangements regarding the inmate's attendance in court.

SOURCE: Government Document

AUTHOR: DEPARTMENT OF CRIMINOLOGY, University of Ottawa

SOURCE: Judicial Review of Parole Ineligibility Ottawa: Ottawa, Solicitor General Canada and the Department of Criminology, University of Ottawa (1994).

SUMMARY: This document, produced by the Department of Criminology, University of Ottawa, in conjunction with Solicitor General Canada, provides an overview of the process of judicial review of parole ineligibility as provided for under section 745 of the *Canadian Criminal Code*.

To begin, the legislative origins of section 745 are situated in the context of the discussions of the 1976 Standing Committee on Justice and Legal Affairs. Other topics related to judicial review of parole ineligibility which are covered in this document include the role played by the courts, the relevance of the Canadian Charter of Rights and Freedoms, an analysis of public opinion and, an analysis of recent statistics.

SOURCE: Government Document

AUTHOR: GALL, Gerald

SOURCE: "The Human Dimension in Decision-Making" in The National Parole Board Report on the Conference on Discretion in the Correctional System (Ottawa: Government of Canada) (1981).

SUMMARY: This article seeks to draw attention to the subjective aspect of the decision-making process. As such, the author has chosen to make a few remarks concerning why the exercise of discretion in our judicial system is not only appropriate, but essential. The power of the sentencing judge is labelled the largest source of discretionary power. Within this discussion, "a new form of discretion" which judges now exercise in specifying the minimum period of incarceration before parole eligibility for first and second degree murderers is briefly discussed.

SOURCE: Government Document

AUTHOR: GOVERNMENT OF CANADA

SOURCE: Judicial Review of Parole Ineligibility: Fact Sheet (1993) Ottawa, Department of Justice and the Ministry of the Solicitor General.

SUMMARY: This two-page fact sheet serves as a brief overview outlining key aspects of judicial review of parole ineligibility. Topics covered include the relevant statutory provisions related to this process, the time at which an application for a review can be commenced, an explanation of how the process works, the possible outcomes of the hearing, as well as the role played by the National Parole Board. The final section addresses the issue of how judicial review actually affects the original life sentence given to the offender.

SOURCE: Government Document

AUTHOR: GOVERNMENT OF CANADA.

SOURCE: "Recidivism Among Homicide Offenders", Judicial Review Handout, Ottawa: Department of Justice, 6-9.

SUMMARY: This article presents statistics which seek to shed some light on the question as to how well murder and manslaughter offenders perform when they are finally released from federal prisons. Groups of offenders originally incarcerated for both murder and manslaughter between 1975 and 1990 serve as a sample group by which to determine whether their time spent in the community on parole was successful or not.

SOURCE: Journal Article

AUTHOR: LEMIRE, Guy

SOURCE: "La sentence minimale d'emprisonment de 25 ans: principe et pratique", Canadian Journal of Criminology, 26, 459-466.

SUMMARY: The 25-year ineligibility for parole of murderers sentenced since the abolition of the death penalty has, in the view of the author, created a situation in need of reform. Lemire reviews the historical background of abolition, the lack of statistical or scientific justification for the 25-tear minimum, as well as the effects of this minimum on the correctional system. In conclusion, the author presents four possible solutions to the problems perceived to be developing and puts forth suggested measures to more effectively make use of the 15-year judicial review now provided in the law.

SOURCE: House of Commons "COMMUNIQUE"

AUTHOR: NUNZIATA, John. M.P.

SOURCE: SECTION 745...MURDER = 15 YEARS, Ottawa: House of Commons (March 17, 1994).

SUMMARY: A one-page sheet announces that Liberal M.P., John Nunziata has introduced aPrivate Member's Bill into the House of Commons which seeks to remove the judicial review provisions, as found in section 745 of the *Criminal Code.*

Nunziata explains that "(t)he process is flawed", due to the distinct disadvantage the Crown Attorney is placed at when resisting Section 745 applications. Families of victims are being revictimized as "(l)ife imprisonment does not mean life...it's more likely to mean 15 years."

SOURCE: Journal Article

AUTHOR: O'REILLY-FLEMING, Thomas

SOURCE: "The injustice of judicial review: Vaillancourt reconsidered", Canadian Journal of Criminology, 33, 163-170.

SUMMARY: Section 745 of the Canadian *Criminal Code,* the section which establishes the process by which persons serving life sentences may apply for a judicial review of parole ineligibility, after fifteen years of their sentence has been served, is briefly discussed.

The article focuses on Rene Vaillancourt, whose case was the first to be heard in Ontario under section 745. In an attempt to portray the injustices inherent in the process of judicial review, the author discusses how the rules used in Vaillancourt's hearing were unfair. The rules operated to directly hinder the jury's ability to appreciate the implications their decision would have on the applicant.

Upon outlining review as an indeterminate process, the article discusses why the release process needs to be rehabilitated. The lesson to be learned from the Vaillancourt case is that judicial reviews are bound by special rules which, in practice, serve to disadvantage the appellant. The author concludes by expressing the opinion that release process needs to be scrapped in the same arbitrary manner in which it was implemented.

SOURCE: Newspaper Article

AUTHOR: PERITZ, Ingrid

SOURCE: "On the outside, lifers struggle to pick up the pieces" in The Montreal Gazette, (March 14, 1993), A1.

SUMMARY: Upon discussing that in coming years, more lifers will eventually be returned to society upon release from imprisonment, the article then focuses on problems of alienation and isolation which offenders often experience.

Numerous comments from Senator Earl Hastings, a longtime advocate for lifers are included. Hasting's remarks highlight the often devastating effects which lengthening sentences for murder have on this group of offenders. For example, Hastings says that while "(w)e need sentences that show our repugnance (to murder) as a society. But this way you're just destroying a human being." The meaning of a life sentence is discussed, as well as concerns of victims groups criticizing the perceived leniency in the current release process for inmates serving life sentences for murder.

SOURCE: Newspaper Article

AUTHOR: PERITZ, Ingrid

SOURCE: "Quebecers go easier on lifers data show"
The Montreal Gazette, (March 14, 1993), A4.

SUMMARY: This article discusses how Quebec seems to have "a more forgiving attitude" than the rest of Canada with respect to the number of offenders convicted of murder who have used the venue of judicial review to obtain release after serving a minimum of fifteen years of their sentence. The perceived disparity between requests in Quebec versus those in Ontario is raised as an issue worthy of further consideration. To explain such disparity, the comments of Senator Earl Hastings are relied upon. Hastings attributes the difference in release primarily to the fact that English Canadians appear to have a more law and order approach when it comes to punishment, whereas French Canada is more ready to forgive.

The penalty for murder is explained and some basic facts about lifers, such as the percentage who murder again, for example, are provided.

SOURCE: Government Document

AUTHOR: PERRON, Jean-Claude and Andre Corriveau.

SOURCE: "Remarks on the Report of the Task Force on Long-Term Sentences," Forum on Corrections Research. 4(2), (June, 1992), 25-29.

SUMMARY: Based on the Report of the Task Force on Long-Term Sentences published by the Executive Committee of the Correctional Service of Canada in April 1991, remarks pertaining to the sample group of inmates serving long-term sentences are provided.

With respect to the topic of judicial review of parole ineligibility, a table providing a national profile of male inmates by the length of sentence as of 31, January 1992 is of interest.

A brief overview summarizing what may be learned from the literature on long-term sentences is also included.

SOURCE: Background Paper, Library of Parliament

AUTHOR: PILON, Marilyn

SOURCE: "Murderers' Parole Eligibility: Judicial Review", Research Branch, Library of Parliament, (October, 1993).

SUMMARY: Intended to serve as a background paper for Members of Parliament and their staff, this paper provides an overview of section 745 of the *Criminal Code*. Topics include the sentencing of convicted murderers, the procedure for review, consideration of evidence, the outcome of review applications, as well as future concerns.

SOURCE: Journal Article

AUTHOR: ROBERTS, Julian

SOURCE: "Early Release From Prison: What Do the Canadian Public Really Think?", Canadian Journal of Criminology 30, 231-248

SUMMARY: Early release from prison is an area which, over the years, has become a growing concern of both members of the public and criminal justice professionals. Previous opinion polls have documented public dissatisfaction with parole decisions, but research which systematically explored public views of full parole and earned remission was missing. A representative sample of Canadians were polled for this study.

Findings of the survey include the following: the Canadian public do not oppose the principle of early release from prison, but are not satisfied with the current practice of full parole. Given a choice between the two, the public favours remission-based release over release on parole. As well, parole eligibility should be restricted to a smaller number of inmates. The Canadian public seems to feel that release on full parole is granted too early into an inmate's sentence, too often, and tends to be given to the wrong individuals. Little demographic variation on the attitude questions was reported; a finding which indicates opinions seem to be shared by disparate groups in the population.

SOURCE: Journal Article

AUTHOR: ROBERTS, Julian and Andrew von Hirsch

SOURCE: "Sentencing Reform in Canada: The Context for reform", Canadian Journal of Criminology, 32(3), 381-385.

SUMMARY: A brief introduction of events in the area of sentencing since the publication of the Report of the Canadian Sentencing Commission is provided. The following four principal policy issues are then examined:
(i) statutory statements of sentencing purpose;
(ii) sentencing guidelines;
(iii) the future of release on parole;
(iv) the creation of a permanent sentencing commission for Canada.

For each issue, the article critically examines the position taken by key players involved in the area of criminal law reform. To conclude, a brief examination of Bill C-90 is provided.

SOURCE: Government Document

AUTHOR: SOLICITOR GENERAL CANADA MINISTRY
COMMITTEE ON LONG TERM IMPRISONMENT

SOURCE: Long-Term Imprisonment in Canada - Working Paper No. 1, Ottawa: Solicitor General of Canada, (1985).

SUMMARY:

This report has been prepared as part of the work of the Ministry Committee on Long Term Imprisonment. Long Term imprisonment was identified as an area of Ministry concern following the 1976 abolition of the death penalty and the introduction of life sentences with lengthy minimum periods of parole ineligibility for first and second degree murder. These legislative changes have led to interest about the implications for the management of correctional institutions, as well as concern about the welfare of prisoners serving very lengthy sentences. This report reviews the changes in Canada's murder legislation during the period from 1961 to 1976. Emphasis is paid to the fact that the current legislation has not only broadened the range of homicides which are subject to a charge of first degree murder, but has also considerably extended the mandatory minimum time to be served before eligibility for parole consideration.

SOURCE: Government Document

AUTHOR: STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS.

SOURCE: Minutes of the Standing Committee on Justice and, Legal Affairs, Ottawa: 1st Session, 30th Parliament, Nos, 55 - 72. (1976).

SUMMARY: The Committee Minutes from the legislative committee which discussed and approved the passage of Bill C-84 serve as a unique source of insight and understanding into the context of the discussions which surrounded the committee debate of current legislation. Numerous statements by Mr. Allmand, who served as Solicitor General in 1976, provide an especially interesting discussion on the government's motivation and objectives behind the introduction of this law.

SOURCE: Journal Article

AUTHOR: THE CANADIAN BAR ASSOCIATION'S SPECIAL COMMITTEE ON IMPRISONMENT AND RELEASE

SOURCE: Justice Report, 6(1) (Winter 1989), The Canadian Criminal Justice Association, 16-17.

SUMMARY: An excerpt from the Report of the Canadian Bar Association's Special Committee on Imprisonment and Release is reproduced. Of special interest is Section C which focuses on Parole and Early Release.

The position of the Bar Association endorses retaining the maintenance of a system of parole. With respect to early release from imprisonment, it is recommended that current practice be re-shaped, so that particular emphasis may be placed upon reintegrating the offender back into the community setting.

SOURCE: Government Bill

AUTHOR: THE HOUSE OF COMMONS CANADA

SOURCE: An Act to amend the Criminal Code (Bill C-226).

SUMMARY: This Bill received first reading on March 17, 1994. The underlying purpose of this Bill it delete the section of the *Criminal Code* providing for a judicial review of the parole ineligibility period with respect to certain life sentences.

SOURCE: Newspaper Article

AUTHOR: TYLER, Tracey

SOURCE: "Law allows murderers to seek early release" in The Toronto Star, (June 2, 1991).

SUMMARY: The article begins by stating that "nearly 600 convicted murderers sentenced to life in prison have earned a shot at early parole". This article relies heavily on criticisms victims rights groups have expressed concerning judicial review of parole ineligibility. For example, Gary Rosenfeld, executive-director of Victims of Violence, is quoted as saying that he "has a problem" with 15-year reviews because "most people think a life sentence means exactly that. Life". The article concludes by providing a brief overview of the process of judicial review, focussing mainly on the role played by the jury.

SOURCE: Journal Article

AUTHOR: ZUBRYCKI, Richard

SOURCE: "Long-Term Incarceration in Canada", Canadian Journal of Criminology, 26, 397-402.

SUMMARY: The author provides a brief history of the 1976 decision of the Canadian Parliament to implement mandatory life sentences for first degree murder without eligibility for parole until 25 years has been served. Prior to 1976, the average length of sentences served in Canadian penitentiaries has been less than three years, with the average time served by those paroled on a life term for capital murder had been about 14 years. With the advent of lengthier terms of parole ineligibility, the probable impact on the system, as well as the consequences for the inmates are issues which need to be considered. As such, the special needs of long-term inmates need to be addressed immediately. Careful study and monitoring of the effects of long-term incarceration must become a key concern of future planning in the area of criminal justice policy.