Judicial Review – "The Faint Hope Clause"

Section 745.6 of the *Criminal Code of Canada*

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What is a life sentence? Life sentences translate into being under the supervision of the Correctional Service of Canada for the remainder of one's life. This supervision may be within an institution or within the community, should the individual be granted a conditional release following a hearing with the National Parole Board. There is no legislated requirement for an individual serving a life sentence to be released from prison. Any release must be based upon the merit of the applicant and their proposed plan once they enter into the community.

Judicial Review, also known as the "Faint Hope Clause", is an integral part of the Canadian Criminal Justice Process. The provision is found at Section 745.6 of the *Criminal Code of Canada ('CCC')*. This piece of legislation provides those individuals who have shown exemplary commitment to the improvement of both their lives and the lives of other Canadians, the opportunity to be released prior to the time originally set by the Court. At the time of sentencing these individuals were given lengthy sentences for the protection of society. The legislation provides an opportunity to take a look at the progress of the individual since the time of sentence and to determine whether society believes that this person should be given the opportunity to return to society earlier than originally mandated, now that they have had the opportunity to substantially change their behaviour.

Judicial Review is an application made to the Court, by an offender who has been convicted of Murder, requesting a reduction in the time incarcerated before being considered eligible for parole. Offenders can apply once they have served the first 15 years of their sentence. Judicial review procedures are available for individuals convicted of first-degree murder, those who are required to serve 25 years before parole eligibility, and individuals who have been sentenced to life imprisonment for second-degree murder, with parole eligibility being set at 15 years or more.

Three significant changes took effect on January 9, 1997 when section 745.6 *CCC* was amended. These amendments resulted in (1) the exclusion of multiple murderers (this does not apply to individuals who were currently under sentence prior to the amendment), (2) applications for judicial review being pre-screened by the court without a jury to determine if there is a "reasonable prospect" that the application will succeed and (3) the requirement for a unanimous jury decision.

Judicial Review provides an opportunity for the public to determine the status of the potential release of an offender. This places tremendous value on public involvement in the Judicial Review process. A jury of 12 citizens is empanelled to determine whether the applicant should receive a revised parole eligibility date. The jury, for the most part, is formulated from the community where the original jury was drawn. This facilitates community control over the early eligibility decision, rather than that of the stakeholders within the criminal justice system. If an applicant is successful, they are then referred to the National Parole Board, a body independent from the corrections and police, who utilize their expertise to determine whether and when that applicant should be released on conditional release to the community.

How does one apply for a judicial review?

- A prisoner can apply to the court, after serving 15 years of his sentence, for an order reducing the time that must be served before becoming eligible for parole.

- The first stage of this application is to a judge who must decide if the applicant has shown on a balance of probabilities that there is a reasonable prospect that the application will succeed. If satisfied the judge sends the matter on to the next stage where a jury is empanelled to hear the actual application. If not, the applicant must wait at least 2 years before another application may be made.

- Where a jury is empanelled, that jury must consider the applicant's character, his conduct in prison, the nature of the original offence and any information provided by the victim. The jury must be unanimous with respect to a decision to reduce the period of ineligibility.

- What the jury considers:
    a) The character of the applicant;
    b) His/her conduct while serving the sentence;
    c) The nature of the offence;
    d) Information provided by the victim's family members about how the crime has affected them; and
    e) Any other matters that the judge considers relevant in the circumstances.

- Once the jury has made a positive determination, they have options. They may chose to reduce the parole ineligibility period immediately or at a later date.

- Once a jury decides that the number of years to be served should be reduced, it then decides, by a majority of two-thirds, the number of years that must be served before the inmate can apply to the National Parole Board (eg: the time to be served before the individual can apply to the National Parole Board is reduced from 20 years to 15 years).

- If the jury decides that the period of parole ineligibility is not to be reduced, they may, again by a majority of two-thirds, set another time, not earlier than two years after the determination, at which the prisoner may re-apply for judicial review. If no date is set, the inmate must wait two years before making another application. The jury also has the option of determining that the inmate will not be entitled to make any further applications.

How Many Applications have been made?

Since the first Judicial Review hearing in 1987, there have been a total of 145 court decisions. Of these cases 81.4% have resulted in the reduction of eligibility dates for day parole. The breakdown of these 145 cases is as follows:

- As of September 26, 2004 there were 1,547 offenders with cases potentially eligible for Judicial Review;
- Of these, 712 are eligible for a Judicial Review hearing at the present time;

- Of these, 145 are the ones referred to above, which have been referred to the courts for a decision;
- Of the 145, 118 have resulted in early eligibility dates and 97 of those were granted release by the National Parole Board;
- Of these 97 offenders, 17 were returned to custody, four are deceased and two have been deported; and
- That leaves 74 persons on successful conditional release in the community

(These statistics were taken from the Public Safety and Emergency Preparedness Website, December 2004).

The experience of the John Howard Society relating to judicial review is that that most of those who are eligible for Judicial Review do not apply or are denied at the 'reasonable probability of success' stage by a Provincial Court Justice or their designate. Those who get a hearing are generally successful but not all are subsequently released on parole.

Opponents to this legislation do not believe an individual should ever be entitled to such a consideration. This position does not take into account the ability of individuals to change and to correct their behaviour. It is a position based upon fear and a fundamental lack of understanding. It is well documented, through research conducted on conditional release and the effectiveness of early release, that where individuals have made significant improvements to their lives while incarcerated, that their chances for successful reintegration to the community is substantially improved. A successfully reintegrated individual who contributes to society rather than being a ongoing burden upon the community through the enormous costs associated with continued incarceration, is a far more desirable outcome and far more responsive to the need for safe and just community. We need to provide hope for inmates so that change may be made possible.

The John Howard Society's position:

- We support the principles of rehabilitation and gradual release into society without risking citizens.

- It is in everyone's interest that people who murder and are sentenced to life, return from prison better citizens than when they went in.

- The monitored reintegration of offenders into society, particularly those who have reformed and are no longer considered a threat, makes sense.

- In no way do we excuse or exonerate them for their actions. There must be serious consequences for the crime of murder. The existing law is working and we reject a justice system that is solely a mask for vengeance and retribution.

- Only the most deserving cases should benefit from judicial review. Members of the community must be included in making these decisions and in the operation of the criminal justice system.