INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

ProQuest Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
800-521-0600

Université d'Ottawa • University of Ottawa

The "Faint Hope Clause" (*C.C.C.* s.745.6): the Judicial Review Process with Special Reference to the 1996 Amendments

By

Karin Stein

A thesis submitted to

the Faculty of Graduate and Postgraduate Studies

at the University of Ottawa in partial fulfillment of the requirements

for the degree of

Master of Arts.

Department of Criminology

University of Ottawa

Ottawa, Ontario

September 2001

Abstract

This study examines data provided by Correctional Service of Canada and the National Parole Board on applications for early parole under s.745.6 (the "Faint Hope Clause") both before and after the 1996 amendment to the clause. The data come from a Correctional Service Canada database containing comprehensive information about 1,325 individual case files of inmates convicted of first and second degree murder between 1961 and 2000. The data analyzed consist of statistics on counts of murder, inmates' current status as well as information on application and success rates. Similar data from the National Parole Board provide more detailed information on inmates' parole status. Overall, 82% of applicants have positive outcomes at judicial review. While there are substantially more applications from inmates convicted of first-degree murder (82%) than from inmates convicted of second-degree murder (18%), the second-degree murder applications have a higher success rate (89% vs. 80%). At the same time, applicants convicted of first-degree murder are granted greater reductions in parole ineligibility than are those with second-degree murder convictions. This is most likely due to longer ineligibility periods for the former. While there are more applications from inmates convicted of first-degree murder, both prior to and after the amendment, the success rate of these individuals has remained relatively stable at approximately 80%. Provincial differences exist in both the numbers and rates of applications as well as in their corresponding success rates before the judicial review hearing jury. The province of Quebec stands out as having the most applications although it does not have the largest number of eligible inmates. It also has one of the highest success rates for applications. This contrasts sharply with the province of Ontario, which has the greatest number of eligible inmates, but a substantially lower percentage of actual applications, as well as successful applications. Additionally, it would appear that inmates with a positive judicial review hearing are less of a threat to the safety of society upon release than those who have had positive judicial review and parole board hearings as the former have fewer revocations (32% vs. 43%) and new offences (7.5% vs. 9%). With respect to inmates convicted of more than one count of murder, the vast majority will remain incarcerated beyond their ineligibility periods.

ACKNOWLEDGEMENTS

This thesis would not have been possible without the expert guidance and assistance of Tom Gabor, my advisor, and Julian Roberts who suggested the topic in the first place and who has provided counsel throughout. I must also thank Mike Hayden of Correctional Service Canada and Gaetan Lalande of the National Parole Board for providing me with the necessary data. Also instrumental in the completion of this thesis were Roberta Russell and Ivan Zinger as well as the rest of my colleagues at the Research and Statistics Division of the Department of Justice. In particular, I would like to acknowledge Lia Digiulio and Dan Antonowicz for their ceaseless encouragement and positive attitudes. I would also like to include a very special thank you to Mark Pepin. Finally, I am eternally grateful to my parents for their continuous support of all my academic endeavours.

1.0 INTRODUCTION

Since the abolition of capital punishment in 1976, there has been considerable controversy over sentencing of those convicted of first and second-degree murder. Many believe that the life sentence should be just that: a sentence extending for the duration of the perpetrator's life. By contrast, others believe that each offender is deserving of mercy, as well as a chance to demonstrate both remorse and the opportunity to be rehabilitated. The issue of parole for first and second-degree murderers has become a point of contention in this debate.

Since 1977, section 745.6 of the *Canadian Criminal Code* has existed as a means of allowing first and second degree murderers convicted of life sentences an opportunity to seek a reduction in the number of years of parole ineligibility. Prior to 1996, the process allowed those offenders convicted of first or second degree murder the opportunity to make an application to the Review Board, after having served 15 years of their life sentence in prison. At that time, the application came before a judge and a jury made up of members of the community in which the offence took place. The jury reviewed the offender's correctional file, looking for indications of rehabilitation and remorse. The jury could then recommend a reduction in the number of years of parole ineligibility. The National Parole Board made the ultimate decision regarding early release based upon the risk to the community posed by the offender.

In 1996, as part of a series of reforms of the *Criminal Code* and partly in response to public pressure, section 745.6 was amended to make the application process more stringent. As of January 1, 1997, the process of applying for Judicial Review has changed. Three amendments were made: multiple murderers are no longer eligible to

apply; a provincial superior court judge alone determines whether or not the application is to be reviewed by the jury; and the jury must be unanimous in its decision, whereas it previously required only a two-thirds majority.

This thesis provides a descriptive analysis of the functioning of the provision prior to and following the amendment. It examines data provided by Correctional Service of Canada (CSC) and the National Parole Board (NPB) on applications for early parole under s.745.6 both before and after the 1996 amendments. It also includes an analysis of the recidivism rates of offenders released as a result of a successful judicial review. The successes rates nationally and by province are also reviewed. Also examined is the number of years of parole reduction granted by judicial review hearing juries.

An assessment of this nature is important for a number of reasons. There are increasing numbers of lifers in prisons (Motiuk and Belcourt, 1996) and prisons have become dangerously overcrowded (Zubrycki, 1984, Boe, 2000). To date, no such analysis of the information pertaining to s.745.6 has been conducted. In particular, no such examination has assessed the impact of the 1996 amendment to the *Criminal Code*. Public opinion and political rhetoric are at odds with the scientific literature as it relates to a very particular class of offenders: first and second-degree murderers who apply for a reduction in their parole ineligibility under s.745.6. This thesis presents a description and analysis of the ``Faint Hope`` clause and its amendments.

Chapter Two outlines the origin of s.745.6, the academic literature, and the controversy that surrounds it, as well as the amendment that came into effect in 1997. Chapter Three discusses the methodology and Chapter Four presents the results. Data provided by Correctional Service of Canada and the National Parole Board pertaining to

success rates of applications for judicial review are examined, at both the national and provincial/territorial levels. Specific issues to be examined empirically include: The total number of applications for judicial review; comparisons of first and second degree murderers; provincial comparisons of the aforementioned issues; reductions granted by the judicial review jury; pre and post amendment comparisons; the outcome of applications before the National Parole Board; the current status of successful applications and eligible non-applicants and the impact of the amendment on multiple murderers. In Chapter Five, these results are discussed in light of the controversy surrounding the clause and its amendment in order to speculate on whether or not the clause achieves a balance between public safety and reintegration of offenders.

2.0 LITERATURE REVIEW

2.1 Sentencing of convicted murderers

Prior to 1976, Part VI of the *Canadian Criminal Code* contained separate categories for murder, manslaughter and infanticide, and different sentencing dispositions for each of the corresponding offences. Under section 212 of the 1975 *Canadian Criminal Code* (Appendix A), culpable homicide was defined as murder where a person means to cause death or bodily harm that is likely to result in the death of a human being. Culpable homicide was also classified as murder where a person causes the death of another human being while committing or attempting to commit treason or another offence such as escape or rescue form prison, rape, indecent assault, forcible abduction, or robbery. It was culpable homicide regardless of whether or not the individual means to cause death or knows that death is likely to ensue. Section 214 categorized murder as either capital or non-capital murder, and defined them as follows: Murder is capital murder where a person, by his own act, caused or assisted in causing the death of (s.214 (2)(a)) an officer of the public peace in the course of his duties, or (b) a warden or other prison employee acting in the course of his duties. According to s.214 (3), all murder other than capital murder was non-capital murder. Infanticide, whereby a female person causes the death of her newly born child because at the time she is deemed to be suffering from a "disturbed mind" as a result of the effects of giving birth, falls under section 216.

The sentences for these offences were defined in section 218 and included the death sentence for capital murder. According to section 218(2), non-capital murderers were also guilty of an indictable offence, and were to be sentenced to life imprisonment.

Offenders who were under eighteen at the time of a capital murder were to be sentenced to life imprisonment. According to section 218(4), the sentence of imprisonment for life prescribed by the section, and for the purposes of Part XX of the *Criminal Code*, was a minimum punishment for capital murder (Martin's Criminal Code, 1975).

In 1976, Parliament abolished capital punishment and replaced it with mandatory life sentences for high treason, first-degree murder and second-degree murder. Part VI of the *Canadian Criminal Code* (Martin's Criminal Code, 1976) defined murder, manslaughter and Infanticide (Please see Appendix B). Section 212 defined culpable homicide as murder where the person who causes the death means to or means to cause bodily harm that he knows is likely to cause death, and is reckless of whether or not death ensues. Section 213 defined murder in the commission or attempted commission of offences. In section 214, murder was defined as either first degree or second degree. First-degree murder was planned and deliberate (s.214. (2)), and took into account contractual murder, death that occurs during the commission of another offence, and the murder of an officer of the maintenance of public peace, or a prison employee while the individual is acting in the course of his or her work duties. According to section 214. (7), all murder that is not first-degree murder is second-degree murder. The minimum punishment for either first or second-degree murder, as specified in section 218 (Martin's Criminal Code, 1976) was imprisonment for life.

In 1976, sections 669 to 681 of the Criminal Code that dealt with Capital Punishment were repealed, and replaced by the sentence of life imprisonment. Section 669 stipulated that those convicted of high treason or first degree murder were to be sentenced to life imprisonment without parole eligibility before twenty-five years of the

sentence have been served. For those convicted of second degree murder, the sentence was also life imprisonment without parole eligibility until at least ten years or a greater number not exceeding twenty-five years, have been served. In a second-degree murder trial, the judge may have taken into regard the character of the accused, the nature of the offence, the circumstances surrounding the offence and any recommendations by the jury in determining the period of parole ineligibility, between ten and twenty-five years.

When these amendments were passed, sentences of death for murder convictions, as well as any appeals against such convictions that were dismissed, were commuted to sentences of imprisonment for life for first degree murder, as per sections 25 to 28 of the Criminal Law Amendment Act (No.2), 1976. The same was true for those convicted of treason or piracy, and sentenced to death. At the same time, a parole ineligibility period of twenty-five years was set for those convicted of first-degree murder and high treason (Please see Appendix B). For those cases where proceedings were commenced before the coming into force of the Act, and the offence was not punishable by death, the sentencing and further proceedings were to continue as if the Act had not come into force. Those convicted of second-degree murder were also sentenced to life imprisonment, however the period of parole ineligibility was determined by the sentencing judge, and could be between ten and twenty-five years. The transitional provisions also provided that a person may, after having served at least fifteen years of the life sentence, make an application under section 672 of the Criminal Code for judicial review. This section became section 745.6 in 1989 as a result of Criminal Code Amendments. Heretofore, all references to this section prior to 1989 will refer to it as s.672, and all references after 1989 will refer to it as s.745.6.

History and Nature of s.672 (s.745.6)

Prior to the abolition of capital punishment, the convicted capital murderer spent on average 13 years in prison before being paroled (Department of Justice, 1996). For non-capital murder, the average was seven years (Department of Justice, 1996). In other countries where a life sentence with parole exists for murder, such as Belgium, England, Scotland, Sweden and Switzerland, and the United States, the convicted murderer spends on average 14 years incarcerated before being paroled (Harris, 1999). In countries where there is no minimum life sentence, such as Australia, Austria, Denmark, Finland, France, Ireland, Japan, New Zealand, and Norway, the average incarcerated time served is 14.5 years.

The judicial review provision (section 672 of the *Canadian Criminal Code*) came into effect at the same time as the new murder provisions, and was an integral part of the reforms. Section 672 allowed a person who had been convicted of murder or high treason, and who had served 15 years of the sentence, to have his or her parole ineligibility period reviewed in the hopes of having it reduced. The application was not decided by court officials, such as judges or lawyers, nor by bureaucrats, but by 12 members of the community sitting as a jury. This provision was added for a number of reasons: firstly, for the protection of prison guards and other prison employees from attacks by the inmates, and second, to provide some hope for long-term offenders and an incentive to rehabilitate themselves. With the outlawing of the death penalty, there needed to be a reason for those serving life sentences to be kept alive but doing nothing in prison (Marvel and Moody, 1996). Finally, the provision recognized that in exceptional

circumstances, the public interest might not be served by keeping an offender in prison for more than 15 years, in particular where the individual is not a threat to society.

When the changes to the legislation were first introduced by the Solicitor General as Bill C-84 in February of 1976, clause 21 of the Bill contained a provision that allowed offenders with more than 15 years of parole ineligibility to apply for a reduction in the number of years before being eligible. At the time, the provision was described by the Parliamentary Secretary to the Minister of Communications as a "glimmer of hope" and an incentive for the most serious of criminals (Pilon, 1996). Originally, the application was to be heard and determined by a panel of three superior court judges designated by the Provincial Chief Justice in the province in which the conviction took place. However, the Standing Committee on Justice and Legal Affairs amended the original clause to replace the panel of judges with a jury (Pilon, 1996).

Description of s.672

Section 672 enabled a life prisoner convicted of first-degree murder, high treason or, in some instances, second-degree murder, to apply for a reduction in parole ineligibility. The provision allowed the prisoner to make an application to the chief justice of the province in which he or she was convicted, for a hearing before a judge of the provincial superior court and a jury, empanelled and presided over by that judge. The judge and jury reviewed the offender's file and determined whether or not the offender was entitled to make an application to the National Parole Board to reduce the period of parole ineligibility. It was then up to the Parole Board to consider the case and decide whether or not to grant parole. In deciding whether or not to grant parole, the Board

considered the offender's risk to society. The life sentence imposed continued for the remainder of the offender's life, regardless of whether or not he or she was granted parole. Where such an offender was released on parole, he or she continued to be subject to the conditions of the sentence and could be sent back to prison for any breaches of the conditions set by the Parole Board (Department of Justice, 1996). A s.672 review was not intended as a forum for a re-trial of the original offence, and the focus was on the rehabilitation and behaviour of the offender after serving at least 15 years of the life sentence.

The legislation stipulated (Appendix C) that the judge and jury must take into account the following when determining the number of years of reduction of parole ineligibility: the character of the applicant, his/her conduct while serving his/her sentence, the nature of the offence, and other such matters that the judge deemed relevant in the circumstances (Martin's Criminal Code, 1976). The decision by the jury had to be made by no less than a two-thirds majority. Once the jury had determined that the applicant's number of years of parole ineligibility warranted a reduction, they could then order either a termination in the parole ineligibility, or substitute the current number of years with a lesser number. If the jury decided that the period of parole ineligibility was not to be reduced, they were to set another time at which another application could be made under this provision.

Description of a s.745.6 Review[1]

According to the 1996 Canadian Criminal Code, four factors are to be considered by the jury in assessing the application for a hearing: the personal character of the applicant; the applicant's conduct while serving the sentence; the nature of the offence for which that applicant was convicted; and any other matter the judge deems relevant to the circumstances of the case.

Each provincial or territorial Chief Justice has the responsibility of setting out the rules with respect to the actual procedure to be followed in the review application, hence the potential for different outcomes in different jurisdictions (Pilon, 1996). The rules in the different provinces are similar, but not identical: Neither Saskatchewan nor British Columbia specifically disallows evidence from third parties (Pilon, 1996). Conversely in Ontario, the judge may order the preparation of the "Parole Eligibility Report" as well as have a preliminary hearing to allow cross-examination on the report to determine what evidence the jury will hear (Pilon, 1996). As well, the applicant must present his or her evidence first, and no one other than the applicant and the Attorney General may present evidence.

What is needed for a s.745.6 review?

Two documents are necessary for a s.745.6 review application: an "Agreed Statement of Fact", describing the offence as agreed upon by the crown and the applicant's lawyer; and a "Parole Eligibility Report" (PER), prepared by the Correctional Service of Canada

[1] In 1989, section 672, Part XX, was replaced by section 745, Part XXIII (Martin's Criminal Code, 1989). The wording of the legislation remained the same. In 1997, the section for judicial review was changed from s.745 to s.745.6, and it currently retains that number (Martin's Criminal Code, 1997 and 2000).

staff. The PER includes information pertaining to the offender's case management files; psychiatric assessments; conduct while in prison as well as information about the offender's social, family and criminal background. Friends and family of the offender may contribute letters of support. A document published by the Correctional Service of Canada (CSC) describes the Standard Operating Procedures for judicial review from the perspective of the Case Management staff (Correctional Service Canada, 1999). The procedure requires that a parole officer consult with an institutional psychologist annually to determine the individual offender's need for psychological assessment. This is particularly important as the psychological and/or psychiatric report is an integral part of the judicial review hearing, and must be obtained during the year prior to eligibility. Psychological assessments are to be made every four years from the beginning of the sentence.

The Parole Eligibility Report for Judicial Review is completed by the parole officer, and is specific to the province in which the hearing is being held. The parole officer is entrusted with the preparation of a comprehensive and factual summary of information pertaining to parole eligibility. This includes information on the offender's criminal, social and institutional history. It is intended to be a summary that is investigative, objective and impartial, and is descriptive, but not evaluative (Correctional Service Canada, 1999).

There are content guidelines that set out what is to be covered in a Parole Eligibility Report for Judicial Review. Primary sources of information include lists of all persons contacted for the purpose of the report, as well as case management and institutional files. The Report also contains a substantial amount of background information, including basic

personal information such as the offender's place of birth, educational and employment history, marital status, physical and mental health, including any suicide attempts, and criminal history, both as a young offender (if applicable) and as an adult. The Report also contains information about sentence administration dates, including dates of arrest and charge, if and when the sentence was commuted from death to life imprisonment, the date of admission to federal custody, as well as the dates of parole eligibility and Judicial Review eligibility. The Report also includes summaries of transfers from other institutions, as well as any disciplinary interventions and security concerns associated with the offender. A summary of the offender's performance and conduct is also important, as it outlines the overview of the offender's correctional plan, including vocational training and employment, leisure activities, and relationships with institutional staff and peers. Contacts with family and/or the community are also included. As an indicator of rehabilitation, the offender's psychiatric and psychological assessments are addressed. This aspect outlines any treatment programs and ongoing counselling that the offender is involved in. Finally, the Report comments on the offender's personal development, including self-help programs and the offender's views towards his or her own general progress and emotional stability (Correctional Service Canada, 1999).

Preparing the Applicant for Parole and Conditional Release

The outcome of a successful s.745.6 review is that the inmate is entitled to apply to the National Parole Board at a specified date. It is therefore important to provide some background information about what is involved in preparing the inmate for the National Parole Board hearing. All prisoners are assigned various institutional personnel to work

with them during their time in a correctional facility. One purpose of this group of personnel, commonly known as the case management team, is to create and compile performance reports, and summarize other information about the prisoner, for the parole board.

Institutional and community reports about the prisoner are compiled once the prisoner files an application for parole. In the case of federal prisoners, in particular those convicted of first or second-degree murder, the parole board will not give serious consideration to an application without psychological and psychiatric assessments. If rehabilitation programs and other forms of treatment were suggested, and where such programs were available in the institution, the parole board will not grant release until the program has been completed and the prisoner has obtained a positive report. Included in the various reports to the parole board is either a transcript of the sentencing judge's reasons and recommendations for sentence, or at the very least a statement of fact about the offence as provided by the Crown or the investigating police force (Roberts and Cole, 1999: 17).

A few days before the hearing, one of the members of the parole board is randomly assigned to 'lead' the case, and is therefore responsible for being the principle questioner at the hearing. Prior to a parole board hearing, each attending member of the board will have read at least a summary of the prisoner's progress, and any reports from mental health professionals. As well, board members read submissions or letters of support filed by or on behalf of the applicant.

According to regulations pertaining to parole board hearings, an assistant, who, although not legally trained, acts as an advocate for the applicant, may represent the

applicant. It is very rare that a lawyer at a parole hearing will represent an applicant. Because the structure of a parole board hearing is that the lead and other board members pose questions to the applicant, the assistant's purpose is to act as an advisor to the applicant during the hearing, and to make summations at the conclusion of the hearing. The hearing is inquisitorial, not adversarial; therefore there is no representative of the crown present to speak on behalf of the community or the victim.

A parole board hearing begins with the assistant reviewing a checklist of procedural safeguards and ensuring that the applicant is aware of the purpose of the hearing. The assistant will also ensure that the applicant has had full disclosure of all written materials that will be relied upon for the hearing. Next, the institutional leader of the offender's case management team summarizes the case, and it is then up to the leader of the parole board to begin questioning. A great deal of the hearing is concerned with discussing the facts and circumstances of the initial offence, as well as the offender's criminal record and pre-incarceration lifestyle. The prisoner is expected to demonstrate significant insight into the circumstances of the offence.

Also of considerable importance is the offender's performance while incarcerated, in particular if he or she has taken part in any kind of treatment program. Because the board members have such detailed knowledge about the programs available and how they are administered, questions directed to the offender are very specific to the institution in which he or she has been incarcerated. Any attempts at deceit on the part of the offender are generally unsuccessful, and such behaviour ultimately leads to failure of the parole application.

2.2 Political Debates and Academic Controversy Surrounding the Clause

While there has been considerable debate surrounding the faint hope clause since its inception (Pilon, 1996; Cayley, 1998), most of the debate and a substantial amount of public pressure has arisen as some of the country's more notorious offenders have become eligible to apply. Parliament was attempting to re-examine the fairness and constitutionality of the law, while trying to balance the conflicting policy values of denunciation and rehabilitation. According to Cayley (1998), one of the most powerful forces is the victims' rights movement, which has increased its profile since 1992 with the founding of Citizens Against Violence Everywhere Advocating its Termination (CAVEAT)[2]. Part of their mandate includes advocacy for more careful bail hearings, tighter parole restrictions, greater Crown accountability, and longer sentences for crimes of violence. CAVEAT has been very successful and played an important role in securing the amendments to s.745.6 in 1996.

In December of 1996, Parliament passed amendments to s.745.6. These included a provision that nobody who has killed more than one person may be eligible for judicial review. Due to concerns about fundamental principles of justice, this particular aspect of the amendment could not be made retrospective.

A number of bills pertaining to s.745.6 were introduced in the thirty-fourth Parliament calling for later access to an application or an end to the parole eligibility of first and second-degree murderers. Bill C-311 called for those convicted of first degree murder to serve 20 years before review, and Bill C-330 called for the elimination of the

[2] As of June 1, 2001, CAVEAT is no longer operational, citing that it has completed its objectives along with a lack of stable corporate and state funding (Gray, 2001).

review for first degree murderers altogether (Pilon, 1996). Parliamentarian John Nunziata, with the support of the Canadian Police Association and victim's rights groups, put forth a private member's bill to repeal s.745. The bill, C-234 (originally Bill C-226), was introduced in March of 1994 and passed second reading in December of that year. However, it was not until 1996, after a series of rallies in the West, that the Minister of Justice and the Solicitor General of Canada submitted Bill C-45, which would amend the section in three ways. This bill, the details of which will be discussed below, was passed in December of 1996 and came into effect in January of 1997.

Academic Evidence on Homicide and Long-Term Offenders

Classifying offenders serving life sentences presents unique challenges, as these individuals do not make up a homogenous group (Luciani, 2000). Lifers range from the premeditated contract killer, to the hardened criminal who has a long history of involvement with the criminal justice system, to one-time offenders whose crimes may have been the result of an impulsive act. For the most part, these offenders are well-adjusted, cooperative individuals (Luciani, 2000: 22). They maintain and in some cases strengthen prison community resources by making the most of the programs available to them in prison. In this way, they are able to address their criminogenic needs and improve their educational and vocational skills (Luciani, 2000: 22).

One of the earliest commentaries on long-term imprisonment was Zubrycki's work in 1984. Canada's penitentiaries were experiencing a growing number of inmates who were serving life sentences without eligibility for parole before the 25-year mark (Zubrycki, 1984; Boe, 2000). While the consequences for the system and for the

individual inmate were unclear, there was clearly a need to address this problem (Zubrycki, 1984).

A large body of academic and scientific literature suggests that long prison sentences are inhumane, as they impose psychological effects on inmates that can be as cruel as physical torture (Haley, 1984). The data indicate that imprisonment, by its very nature, is painful and its use should be limited if not abandoned altogether (Haley, 1984: 489). Long sentences are not justifiable from the perspective of protection of society, nor are they justifiable ethically (Lemire, 1984:463). Other research on mandatory penalties has indicated that with respect to imprisonment as a deterrent to criminal activity, the severity of the punishment is less critical than is the certainty of being punished (Gabor and Crutcher, 2001). There is also a substantial body of literature, strengthened by statistics from the National Parole Board and Correctional Service of Canada, indicating that first degree murderers have very low recidivism rates and are stable and manageable inmates (Zubrycki, 1984).

More recent work (Gendreau, Goggin and Cullen, 1999) suggests that increasing the length of prison time served actually increases criminal behaviour among offenders. A meta-analysis of 50 studies involving over 300,000 offenders indicates that the recidivism rate for offenders who have been imprisoned is the same as for those given community sanctions (Gendreau, Goggin and Cullen, 1999). Longer sentences (more than two years) were associated with a 3% increase in recidivism (Gendreau, Goggin and Cullen, 1999). Although the authors do not specifically mention lifers, the results are suggestive of the detrimental effects of long-term incarceration.

Although not very influential, a small body of research has attempted to demonstrate that prisons are not harmful and, in fact, promotes good physical and mental health for long-term prisoners (Bonta and Gendreau, 1990). A 1988 study by Zamble and Porporino examined offenders' psychological changes over 18 months in prison as well as how offenders cope with problems that they encounter both in and out of prison. In 1992, a follow-up study conducted by Zamble extended the follow-up period to seven years, and involved 25 of the original 41 sample members.

Twenty-one of the twenty-five were serving life sentences for murder; however, only three had minimum life sentences with parole ineligibility periods of 25 years. Information was collected through questionnaires and structured interviews, as well as a review of institutional files. Although the beginning of the prison term was associated with psychological discomfort, this discomfort did not appear to increase. However, it did not appear to decrease. According to the researchers, there was no evidence that long-term offenders became more socially isolated over time, as they continued to have a few close friends despite a slight decrease in casual socialization. It would appear that long-term offenders prefer to spend their time alone engaged in their own routines. Emotional states and mood results remain positive, and feelings of depression, hopelessness, boredom, anxiety and guilt decrease over time while scores of self-esteem increase over time. Offenders are concerned with their release and become adaptive within the prison system to avoid the other potentially problematic inmates. The overriding conclusion from this study is that imprisonment up to a decade does not have deleterious effects. The study does not look at individuals who are imprisoned for more than a decade.

Like the original drafters of the legislation, as well as other academics, Lemire recommends a 15-year minimum altogether, or the 10-year minimum that existed before the abolition of the death penalty (Lemire, 1984). While there is some academic support for both shorter (ten years or less) and long-term (more than ten years) sentences of imprisonment, the evidence appears to be more favourable for shorter terms of imprisonment.

Recidivism of Long-Term and Homicide Offenders

Although there is now a large body of literature on the impact of long periods of incarceration on offenders, there is less information on the rates of recidivism for these individuals. A long-term offender can be defined as one who is serving a sentence of ten years or more (Johnson and Grant, 2000). This is a very particular subset of the carceral population as these individuals tend to have committed more violent crimes, in particular homicide (54%), but they also differ by the age at which they are released from prison and in the extent of their previous criminal histories. These offenders tend to be released later in life and have fewer previous convictions. However, the public sees them as being a threat to reoffend based on the violent nature of the crime of which they have been convicted. According to the authors of the follow-up study of long-term offenders' release outcomes (Johnson and Grant, 2000), offenders serving indeterminate sentences (dangerous offenders and first and second degree murder) are less likely than their determinate (10 years or more but not first or second degree murder) counterparts to have a new conviction. The most serious offence committed by this class of offender is non-violent and no new homicide related offences were committed. These offenders tend to

be older and also to be released on day parole, and these are at lower risk of re-offending than their long-term offender counterparts convicted of offences other than murder.

A study by the Correctional Service of Canada followed offenders convicted of murder and released on full parole between 1975 and 1990 in order to determine the success of their time spent in the community (Zamble, 1992). As the study was conducted in the early 1990's, the follow-up time ranged from 15 years to a few months.

During the 15-year period (January 1, 1975 to March 31, 1990), 658 murder offenders were released on full parole. Because some of these individuals were released more than once, there were a total of 752 full parole releases in that time frame. Seventy-seven point five percent of the offenders on parole remain successfully under supervision in the community; this accounts for 583 of the 752 full parole releases. Of the 169 (22.5%) who were reincarcerated, 100 (13.3%) had their release revoked for technical violations of parole while 69 (9.2%) had their parole revoked for an indictable offence.

Of the 69 indictable offences, 21 (30.4%) were offences against the person, 13 (18.8%) were narcotics offences, 12 (17.5%) were property offences, six (8.7%) were robbery offences and 17 (24.6%) were other *Criminal Code* offences.

Of the total 658 offenders convicted of murder and released on full parole, five were convicted of having committed a second murder while on parole. These five had initially been convicted of non-capital murder and had their sentences commuted after the 1976 changes to the *Criminal Code*: three to first-degree murder and two to second-degree murder. With the exception of these five, no released murderer has been convicted of attempted murder or any other offence causing death.

The study also looks at recidivism among murder offenders from another perspective by grouping offenders into the initial conviction categories. The status of these offenders is illustrated in Table 1.

Table 1: Status of Inmates by Murder Conviction

Conviction	**Number of inmates**	**Inmates who had their parole revoked (%)**	**Inmates with a new offence while on parole (%)**
Capital	75	25 (33%)	2 (2.7%)
First Degree	5	N/A	N/A
Second Degree	159	16 (10%)	95 (0.6%)
Non-Capital	510	128 (25%)	18 (3.5%)
Total	**749**	**169 (23%)**	**115 (15%)**

Source: Zamble, 1992

Of a total of 749 offenders convicted of some form of murder and released on full parole, 75 were convicted of capital murder, five of first degree murder, 510 of non-capital murder and 159 of second degree murder. Approximately one in ten offenders convicted of second degree murder, none convicted of first degree murder, approximately one in three convicted of capital murder and one in four convicted of non-capital murder had their parole revoked in the 15 year period studied. In addition, 0.6% of offenders convicted of second degree murder, no offenders convicted of first degree, 2.7% of offenders convicted of capital murder and 3.5% of offenders convicted of non-capital murder committed an offence against the person while on full parole. However, it is important to note that comparisons should not be made between these groups of offenders based on this data as the size of some of the groups is very small (i.e. five first degree murder versus 510 non-capital murder) and the follow up period was sometimes very brief.

Opponents of s.745.6 reiterate that the 25-year minimum arose as a political decision on the part of parliament (Lemire, 1984). This opinion is supported by scholars as well as by those within the system, including some judges (Desgagné, 1998). Police and correctional officers along with a substantial proportion of the public pushed for sentences that would be longer than ten years. Parliament addressed these concerns in 1976 by making the parole ineligibility for first-degree murder 25 years and not 10 or 15. According to one author, the 25-year parole ineligibility period is the result of a political compromise, and has nothing to do with what is good or best for the offender or society (Lemire, 1984: 489).

Public Opinion

Public opinion has played a substantial role in both the creation and subsequent amendments to the faint hope clause (Roberts and Cole, 1999). While opponents of the section maintain that the values inherent in the judicial review of convicted murderers are contrary to the values of Canadians, this argument is more complicated than one might suspect. Although no public opinion poll has ever directly asked about s.745.6 or about early parole for inmates serving life sentences for murder, an opinion survey conducted in 1988 examined Canadians' views on the issue of early parole for inmates. The results of the poll indicated that two-thirds of Canadians polled agreed that only certain offenders should be eligible for parole (Roberts, 1988). Of the two-thirds, 81 percent were of the opinion that murderers should never get parole. Interestingly, the results of this poll do not coincide with the actual results of s.745.6 reviews, in which in four out of five cases applicants received some form of reduction in their parole ineligibility (Roberts and Cole,

1999). Given that a s.745.6 jury is made up of members of the community in which the offence took place, it seems counterintuitive to suggest that judicial review of parole ineligibility for inmates serving life sentences for murder is contrary to the wishes of the Canadian public (Roberts and Cole, 1999).

One explanation for the discrepancy between the results of public opinion polls and jury hearings has to do with the amount of information presented to the decision-makers. Responses to polls tend to be top-of-mind, with a worst-case scenario foremost on the respondent's mind. However, research on public attitudes has shown repeatedly that when the public is given an adequate amount of information about a case, as would members of a jury, it responds very differently (Roberts and Cole, 1999). Furthermore, the results of the decisions to date (to be discussed in greater detail below) indicate that juries are indeed applying the law appropriately, as not all applications are successful (Roberts and Cole, 1999). Jurors are entitled to suggest a reduction in the number of years to be served before being parole eligibility and can choose any date from twenty-five years (minus a day) to fifteen years (immediate eligibility). To date, juries have been offering reductions of a varying number of years. These results suggest that jurors have adapted their responses and distinguish the cases that are more deserving of merit (Roberts and Cole, 1999).

The 1996 Amendment

In 1996, Bill C-45 amended section 745.6 and it was made more difficult for offenders to apply for judicial review.

Three amendments have been made: the first denies multiple murderers, defined as anyone who murders more than one person, access to s.745.6. However, only multiple murderers who have committed one of the murders after January 9, 1997 are ineligible to apply. The multiple murder aspect of the amendment is not retrospective and therefore does not to contravene fundamental principles of justice. Second, a screening process requires applicants to firstly persuade a superior court judge that the application has a reasonable prospect of success before it can actually proceed to the jury review. The criteria are the same as at the jury review. However, the judicial review is based on written materials only.

If the application is refused, the judge decides when and if the offender can apply again. The application cannot take place before another two years have elapsed, and it will be subject to the same screening process.

Once the application has successfully passed the judicial screening, it is brought before a jury composed of 12 citizens, in the jurisdiction where the original trial was held. The third condition of the amendment requires that the jury be unanimous in its decision to reduce parole ineligibility, whereas previously only a two-thirds majority was required. If the jury cannot reach a unanimous decision to reduce parole ineligibility, the application is denied. The jury may decide when and if the offender can apply again, but in any case an application cannot be made before two years have elapsed. Where the jury unanimously agrees to reduce parole ineligibility, a two-thirds majority is required in setting the length of the reduction.

If the parole ineligibility period is reduced, the offender may then apply to the National Parole Board, which will consider whether or not to grant parole. The Board's

main concern is whether the offender's release will result in undue risk to society. Not all applications to the Board result in early release. Those that do succeed and are released on parole are still subject to the conditions of parole for the rest of their lives. Any breach of the conditions imposed by the Parole Board can result in the offender being sent back to prison. The controversy surrounding the faint hope clause does not show any signs of abating, and the battle between the two sides is played out both in the media and also in the Government. Despite concerns about the existence of the clause, much less its amendments, s.745.6 continues to be a success by National Parole Board and Corrections standards that measure success by the number of inmates on parole and the low recidivism rate. Both pre and post amendment, those applicants who deserve to have their parole reduced convince the jury of such and it is for these individuals that the clause exists (Roberts, 1998).

The controversy surrounding the faint hope clause and sentencing for first and second-degree murderers is ongoing, and has become increasingly political even after the amendments to the clause had taken effect. In 1997, Bill C-258 was brought before the House of Commons, once again calling for an amendment to the *Criminal Code* to repeal s.745.6 altogether (House of Commons, 36th Parliament). Proponents of the repeal of the section are of the opinion that the sentence of life imprisonment should indeed mean life, and while the proponents continue to object to any parole whatsoever, offenders who are also murderers should not be eligible to apply for parole until the required years of ineligibility have passed. Those in opposition to the repeal of the section, in defence of the clause, suggest that there is much more to be done for victims of crime than to focus

on the repeal of the clause. Once again, support for the clause comes in the form of how Bill C-258 goes against the sentencing guidelines of public safety and rehabilitation.

Bill C-247, an act to amend the *Criminal Code* and the *Corrections and Conditional Release Act*, was introduced in to the House in October 1999. The bill had a four-year history in the House of Commons. It was introduced as Bill C-274 and Bill C-321 in 1996, then Bill C-251 in 1997 through to 1999. Bill C-251 died on the order paper when Parliament was prorogued on September 17, 1999.

Bill C-247 challenged the notion that multiple murderers are eligible to apply for parole after serving ten or twenty-five years of the sentence, regardless of the number of murders committed. The bill proposed consecutive sentences proportionate to the crimes, in addition to consecutive terms of parole ineligibility for multiple first and second-degree murderers, as well as consecutive sentences for sexual assault. The logic behind the bill is prefaced on the logic of the 1996 amendment to s.745.6, in that in recognition of multiple murderers as ineligible for judicial review after 15 years of the life sentence, multiple murderers should serve longer sentences prior to their eligibility date.

Those in opposition to the bill suggest that an amendment of this sort would undermine the principles of sentencing, as specified in section 718 of the *Canadian Criminal Code* (Appendix D). As well, opponents of the bill reiterate the findings of a 1999 Solicitor General study (Gendreau, Goggin, Cullen, 1999) that imposing longer prison terms increases rather than decreases the risk of recidivism. This Bill was not passed.

3.0 METHODOLOGY

This thesis sets out to provide an up to date statistical comparison of the functioning of judicial review prior to 1996 and after the amendment to s.745.6. The academic research to date, as well as public opinion and political rhetoric, is divided as to the harms or benefits of allowing offenders, serving life sentences for murder, the opportunity to be released from prison prior to their statutory minimum sentence. As much of the discussion concerns the issue of public safety, the recidivism rates of offenders who obtain early release must be compared to those remaining in prison up to and beyond the period specified by the trial judge or by the *Criminal Code.* The purpose of such a comparison is to speculate on the potential threat to public safety that these individuals posed to society both before the amendments and afterwards, to see if perhaps the amendment was not necessary from this perspective. An analysis of the effects of the 1996 amendment to the clause is also critical. Although it has only been three years since the amendment took effect, it is worthwhile to examine the differences in success rates between offenders who applied and were released under the original legislation, and those that applied and were released under the new legislation to get a sense of the amendments intention to make the process more stringent.

3.1 Information Sources

For this thesis, only scholarly and governmental documents have been reviewed. The data analyzed consists of statistics on application and success rates, as well as success and failure rates while on parole. The Correctional Service of Canada, the National Parole Board and the Canadian Centre for Justice Statistics collect these data.

The Correctional Service of Canada maintains a database containing considerable information about 1,325 individual case files of inmates convicted of capital, non-capital, first and second degree murder between 1961 and 2000. Cases of Capital murder, Capital murder Pers. LT 18 (where the offender is less than 18 when the crime was committed) and non-capital murder are included because some of the files pertain to offences committed prior to the abolition of capital punishment in 1976.

The Correctional Service of Canada database contains a considerable amount of information about each offender. This information includes the offender's date of birth, date of arrest and date of sentence commencement. The database also indicates the offender's date of eligibility for judicial review (illustrated by the date of arrest plus 15 years) and eventual full parole date. The offender's conviction status (first or second degree murder) as well as the ineligibility period set at trial is also included. Also indicated is the province in which the offender was tried and sentenced (the judicial province), the offender's current status (incarcerated, supervised, deceased) as well as the count of offence. There is also an indication of whether or not the offender is eligible for parole. This is particularly relevant for offenders who were sentenced after 1997 and are considered to be multiple murderers such that they may reach the point where they have served 15 years, but they will remain ineligibility to apply because of the third provision

of the amendment. Most importantly for the current analysis, the database includes the date of the offender's application for judicial review, the date the decisions was handed down, and the outcome of the decision.

Because of the small numbers of offenders (1,325 in total, of which 488 are eligible to apply), there are insufficient cases with which to do a series of inferential statistical analyses. However, given that the data pertains to the entire population of individuals convicted of first and second-degree murder, inferential statistical analysis is not necessary. For the most part, the analysis consists of descriptive statistics.

3.2 Limitations

This study had a number of limitations. First, although the database contains an abundance of information, there are certain aspects of its functioning that create limitations in the analysis of its data. While there is information about the offender's application date and the subsequent outcome, it is not indicated how many times the individual has applied. Thus, a given application date and outcome may be the offender's first, second or third application. The effect of this missing information on the analysis is that while one may assume that an individual offender has waited 10 years beyond his or her ineligibility period before applying for judicial review, it may just be that he or she has applied more than once and has been denied. As well, there is no information about details of the offence nor is there information about the offender's conduct while in prison. There is also no information about when the offender applies to the National Parole Board, if at all.

A certain amount of inference is required in the analysis of some outcomes as well as in the discussions of averages and rates. For example, an offender who has had a successful judicial review but remains incarcerated beyond the ineligibility period may have been denied release by the National Parole Board, or alternatively, may have chosen not to apply for release at all. This information is not recorded in the Correctional Service of Canada database.

The unavailability of the offenders' case files and court transcripts present another limitation as the details of the original offence and the inmates conduct while incarcerated are unknown. Offender case files are classified materials and obtaining them was beyond the scope of this thesis. The court transcripts, although public documents, were not easily accessible due to limited jurisdictional cooperation on the part of the individual provincial superior courts. Without interviews with criminal justice officials (judges, lawyers, correctional employees) and inmates the more subjective details of the process cannot be explored.

Additionally, the influence of Victim Impact Statements, which allow the families of the victim an opportunity to speak at both the initial sentencing trial, as well as at the judicial review hearing, is unknown.

Finally, with respect to applications that take place after the amendment has taken effect, it is unknown whether an offender's outcome from the application is a result of the jury's decision to deny a reduction in parole ineligibility, or whether a judge screened out the application before it ever came before a jury. Such information would be invaluable in examining the effects of the amendment on the process.

3.3 Approach/Research Issues

Issue #1: A Description of Applications for Judicial Review: 1987-2000

First, results of s.745.6 applications are examined from the first application in 1987. This information will provide the necessary background for the analysis to come. The number of inmates eligible, the total number of applications, and the number of successful applications are described. A successful application is defined as one for which the s.745.6 jury grants the applicant the opportunity to apply to the National Parole Board at a given time for parole. Unfortunately, with respect to applications that take place after 1997, it is unknown whether an unsuccessful application (an applicant who has been denied the opportunity to apply to the National Parole Board) was denied by the screening judge or by the jury. The current status of the applicants is indicated as well.

Issue #2: A Comparison of First and Second Degree Murderers

This analysis is similar to issue #1; only the comparisons are made for first and second-degree murderers in the rates and results of application for judicial review. This will give an indication of the influence, if any, of the original offence (either first or second-degree murder) in the application. For those convicted of second degree murder, only those cases where the individual has been sentenced at trial to an ineligibility period of at least 15 years are included. Someone convicted of second-degree murder with a parole ineligible period of less than 15 years would apply directly to the National Parole Board for release after having served the required ineligibility period.

Issue #3: Provincial Comparisons

Provincial comparisons can demonstrate how applications from first and second-degree murder cases are dealt with across Canada. The analysis concerns the number of positive and negative judicial review decisions in each province and the territory. Rates of successful and unsuccessful applications will be calculated based on total incarceration for murder in each province.

Issue #4: Decisions of the Juries

The first part of this analysis involves an examination of the number of years elapsed between the applicant's judicial review eligibility date and the date the actual application is submitted. The next step involves an analysis of the number of years of reduction granted to offenders with 25-year restrictions (those convicted of first degree murder or of the most serious form of second- degree murder) and those convicted of second-degree murder with varying years of parole ineligibility. Comparisons between these two groups will be made for reductions granted both before and after the amendment. The number of years beyond the eligibility date that the applicant has waited before applying for judicial review is also taken into account. For example, a 20-year restriction can be reduced to between 15 and 19 years. A 25-year restriction can be reduced to between 15 and 24 years. The purpose of this analysis is to determine whether or not the number of years served has an impact on the number of years of reduction granted, if at all.

Issue #5: Pre and Post Amendment Comparisons

A comparison of applications submitted before and after the amendment will indicate whether the amendment has reduced the number of applications and assess whether the judicial review hearing juries have become more careful about granting reductions after the amendment. This analysis will compare the rates of success at the hearing stage both prior to and after the 1996 amendment. Unfortunately, the data available do not permit an analysis of the role of the judge as a screening mechanism in the post-amendment cases. Thus, the data describe cases that the jury has decided may apply to the National Parole Board, and do not incorporate the screening judge's evaluation of the file.

Issue # 6: Outcome of Applications that go before the National Parole Board

Because the process is two-tiered (the applicant must first convince a jury and then the National Parole Board of his or her readiness for release), the success of applications at both stages is examined. An offender who received a positive outcome at the s.745.6 hearing and who is released under supervision will be deemed to have succeeded at both levels of the process. An offender who has received a positive outcome at the s.745.6 hearing but remains incarcerated is presumed to have been denied by the National Parole Board. That is, the offender has had a successful judicial review hearing, but was not granted release by the National Parole Board upon completion of the ineligibility period. Although the initial assumption is that the offender was denied release, an alternate explanation is that the offender for some reason did not apply to the

National Parole Board for release. The database does not indicate when, if at all, the offender applied to the National Parole Board for release.

Issue #7: Current status of eligible non-applicants and unsuccessful applicants

The recidivism rates of those applying for and receiving a reduction in time served under s.745.6 are compared to those not applying for such a reduction. This will help to determine the threat, if any, of early releases under s.745.6. This information has been obtained from Correctional Services of Canada and includes data on breaches of day and full parole, as well as new offences. An analysis of this nature is important as it indicates how inmates fare outside of the institution once they have been paroled. This information is relevant to the literature suggesting that the longer one spends in prison the more difficult it is to reintegrate into society.

Issue #8: Impact on Multiple Murderers

As the Correctional Service of Canada database contains the number of murders committed by each offender, it is possible to determine how many multiple murderers have applied for judicial review, how many have had a positive outcome, and what their current parole or institutional status is. This will help assess the necessity of an amendment to s.745.6 that prevents multiple murderers from applying for a reduction in parole ineligibility.

4.0 RESULTS

4.1 Overall results of s.745 applications to date

The Correctional Service of Canada maintains a database of all inmates convicted of first and second-degree murder in Canada. The database itself contains 1,402 separate entries, however only 1,325 individuals are relevant to this analysis as 77 of the entries account for multiple offence counts by the same offenders (i.e. the same offender may appear more than once as a result of more than one conviction). Thus, of the 1,402 inmates in the database, 77 of those may appear more than once, leaving 1,325 individuals with single convictions. These 1,325 individuals serve as the sample for the purposes of this analysis.

Four hundred and eighty-eight of the 1,325 inmates with first and second degree murder convictions (36.8%) were eligible as of 1987 to apply for a hearing to apply to the National Parole Board for a reduction in parole ineligibility as they have served 15 years of the life sentence and have parole ineligibility periods of 15 to 25 years. However, of the 488, 136 (27.86%) have parole ineligibility periods of 15, 16, or 17 years, and have elected not to apply, presumably because of the significant amount of time that the process of application requires. Another 17 inmates are either deceased, or have had their sentences reduced or overturned for reasons that are beyond the scope of the present analysis. This leaves 335 eligible inmates, and 103 of these have applied. This 103 of 335 accounts for 31% or one in three cases who are eligible.

Table 2 presents an overview of the status of applications under s.745.6 from 1987 to 2000. The breakdown indicates that just over 20% of the 488 eligible inmates

who have served 15 years for first or second degree murder have applied for judicial review. While the rate of successful applications is high, as will be discussed in detail below, it is clear that one is dealing with a very small proportion of eligible prisoners.

Table 2: Breakdown of Federal Inmates in Relation to s.745.6

Status of Inmates	**Number of Inmates**	**% of Eligible Inmates**
Total inmates in Federal penitentiaries across Canada	13,131	N/A
Number of inmates with first or second degree murder convictions	1,325	N/A
Number of inmates who have become eligible for judicial review	488	N/A
Number of inmates eligible for judicial review who are serving more than 15, 16 or 17 years	335	69%
Have a judicial review decision	103	21%
Positive outcome from judicial review	84	17%
Negative outcome from judicial review	19	4%

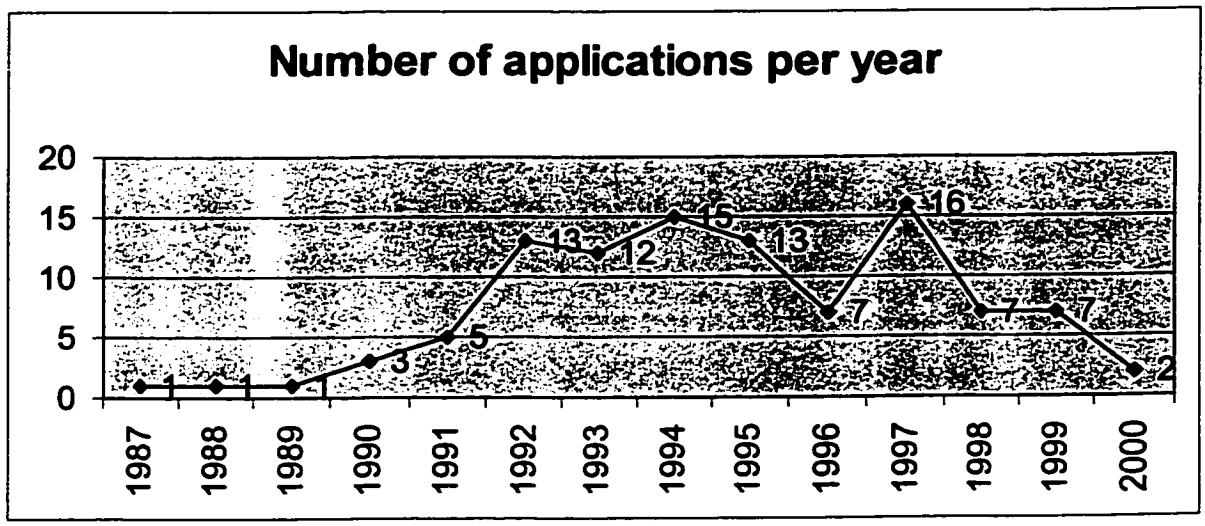
Source: Correctional Service of Canada (2000)

Issue #1: The Number of Applications for Judicial Review since 1987

Total Applications for Judicial Review across Canada

According to CSC (2000) since the first hearing was held in 1987, 103 prisoners (roughly seven per year) have applied for a reduction in their parole ineligibility. The yearly breakdown of the number of applications submitted between 1987 and 2000 is illustrated in Figure 1.

Figure 1: Judicial Review Decisions by Year: 1987-2000



Source: Correctional Services Canada, 2000

The number of applications has been increasing since 1987. The mean number of applications over the first six years with the clause in effect (1987 to 1992) is four, while the mean for the last six years (1995 to 2000) is approximately seven. The dip and the subsequent dramatic increase in applications between 1996 and 1997 are potentially due to the impending amendment. It is possible that as inmates became aware of the amendment's attempt to toughen the process, those who might have otherwise waited

until later in their sentence rushed to get their applications in before the amendment took effect.

Positive Outcomes at Review

Of the 103 applications, 84 (82%) have had a positive outcome, meaning that the jury has decided that the individual may apply to the National Parole Board for parole at some point before the eligibility date set at trial. The yearly breakdown of positive applications is illustrated in Table 3. The rate of positive applications has fluctuated over the years from 50% to 100%, however, because in some years the sample size was very small, such a range is not an accurate depiction of the overall outcomes. Discounting those years in which there were only one or two applications, positive applications ranged between 57% and 100%.

Table 3: Positive Judicial Review Outcomes by Year

Judicial Review Year	Successful / Total applications	% of Successful Cases
1987	**1/1**	100%
1988	**0/1**	--
1989	**1/1**	100%
1990	**2/3**	67%
1991	**3/5**	60%
1992	**12/13**	92%
1993	**9/12**	75%
1994	**13/15**	87%
1995	**12/13**	92%
1996	**4/7**	57%
1997	**13/16**	81%
1998	**6/7**	86%
1999	**7/7**	100%
2000	**1/2**	50%
Total	**84/103**	**82%**

Source: Correctional Service Canada, 2000

Negative Outcomes at Review

Of 103 applications for judicial review, 19 (18%) had a negative outcome, meaning that the jury denied them the opportunity to apply to the National Parole Board for earlier parole (Table 4). Sixteen of the 19 are currently incarcerated. Discounting the years in which there were two or fewer cases, the rate of denied applications has fluctuated over the years, and ranges between 8% and 43%.

Closer examination of the numbers suggests that overall there are relatively few applications that are denied the opportunity to apply to the National Parole Board.

Table 4: Decisions Resulting in a Denial to Apply to the National Parole Board for a Reduction in Parole Ineligibility

Judicial Review Year	Failed /Total applications	% of failed applications
1987	0/1	--
1988	1/1	100%
1989	0/1	0%
1990	1/3	33%
1991	2/5	40%
1992	1/13	7.7%
1993	3/12	25%
1994	2/15	13%
1995	1/13	7.7%
1996	3/7	43%
1997	3/16	19%
1998	1/7	14%
1999	0/7	--
2000	1/2	50%
Total	**19/103**	**18%**

Source: Correctional Service of Canada, 2000

Section Summary

Since the first hearing was held in 1987, the majority (82%) of applications has had positive outcomes at judicial review. Of the positive review outcomes, the majority (63%) are under supervision within the community. These findings suggest that the existence of the judicial review process is positive for inmates in that it allows them the opportunity to apply for early parole, which the majority then receives. The low number

of individuals who have been or are temporarily detained at some point in their supervision period (three individuals in total) suggests that these individuals have been neither arrested nor convicted to date.

Issue #2: A Comparison of First and Second Degree Murderers

The 103 applications can be broken down into first and second-degree murder cases (Table 5). The first-degree murder category includes the old designations of Capital Murder and Capital Murder PERS LT 18 (an offender less than 18 at the time the offence was committed). The second-degree murder category includes what was formerly known as non-capital murder. Because the 1976 legislation was retrospective, those who were sentenced under the old legislation also became eligible to apply for judicial review after having served 15 years.

The majority (84 of 103 or 82%) of the applications were from those serving sentences for first-degree murder, with a parole ineligibility of 25 years. Eighteen percent (19) of the applications come from those convicted of second-degree murder and whose parole ineligibility has been set at between 20 and 25 years. As mentioned, those convicted of second degree murder with a parole ineligibility periods of 15, 16 or 17 years generally do not bother to apply, because the application process is sufficiently lengthy that the time spent in preparing for the application ends up being more than the actual time remaining on the ineligibility period set at trial.

The number of applications for judicial review by those convicted of first and second-degree murder is outlined in Table 5.

Table 5: Breakdown of First and Second-Degree Murder Judicial Review applications

Judicial Review Year	First Degree Murder Cases	Second Degree Murder Cases	Total Applications
1987	1 (100%)*	-	1
1988	1 (100%)	-	1
1989	-	1 (100%)*	1
1990	1 (33%)	2 (67%)	3
1991	-	5 (100%)	5
1992	10 (76%)	3 (23%)	13
1993	11 (92%)	1 (8%)	12
1994	11 (73%)	4 (27%)	15
1995	12 (92%)	1 (8%)	13
1996	7 (100%)	-	7
1997	15 (94%)	1 (6%)	16
1998	6 (86%)	1 (14%)	7
1999	7 (100%)	-	7
2000	2 (100%)	-	2
Total	**84 (82%)**	**19 (18%)**	**103**

Source: Correctional Service Canada, 2000
* Percentage of applications for that year

Since the first application was submitted in 1987, individuals convicted of first-degree murder have applied more often than those convicted of second-degree murder. In all but three years (1989, 1990 and 1991), the number of applications from inmates convicted of first-degree murder has been higher than by those convicted of second-degree murder. Since 1992, there has been a noticeable increase in the number of applications, in particular by those convicted of first-degree murder. This may be because 1992 marks fifteen years since the introduction of s.745.6, and it is really only in this year

that the clause became "operational". Although there are more inmates serving life sentences for second-degree murder, their parole ineligibility periods are not as long as the automatic 25-year restriction that those convicted of first-degree murder must serve. It therefore makes sense that more first-degree murderers would apply for an opportunity to have a reduction in the number of years to be served before being eligible to apply for parole.

The breakdown of the successful applications for first and second-degree cases is illustrated, by year, in Table 6. While there are more successful first degree than second-degree cases, the proportion of successful second-degree cases is greater: 89% of second-degree cases (17 out of 19) are successful compared to 80% (67 out of 84) of the first-degree murder applications. Thus, inmates convicted of second-degree murder have had slightly more success in obtaining a positive outcome from a judicial review hearing than have those convicted of first-degree murder. Perhaps the initial conviction has had something to do with the greater success of inmates serving life sentences for second degree murder in that the jury may see the original conviction as somewhat less severe than for first degree murder.

With the exception of 1990, in which only three of the five applications form inmates convicted of second-degree murder received a positive outcome, all other applications from second-degree murderers were successful. For applications coming from inmates convicted of first-degree murder, the success rate fluctuates by year, but is always lower than that for inmates convicted of second-degree murder. In only two years, 1987 and 1999, were 100% of applications from inmates convicted of first degree successful, compared to eight years in which all applications from inmates convicted of

second degree were successful. The lowest success rate was 1996: only 57% of applications (four out of seven) were successful. All of these applications came from inmates convicted of first-degree murder, and this year appears to be an anomaly. One factor, however, is that the data from 2000 are incomplete, and the results do not necessarily paint a complete picture of the success rates for that year.

Table 6: Breakdown of Successful First and Second Degree Murder Applications.

Judicial Review Year	Successful 1st Degree Murder/Total 1st Degree Murder	Successful 2nd Degree Murder/Total 2nd Degree Murder	Total Successful/Total Applications
1987	1/1 (100%)	-	**1/1 (100%)**
1989	-	1/1 (100%)	**1/1 (100%)**
1990	-	2/2 (100%)	**2/3 (67%)**
1991	-	3/5 (60%)	**3/5 (60%)**
1992	9/10 (90%)	3/3 (100%)	**12/13 (92%)**
1993	8/11 (73%)	1/1 (100%)	**9/12 (75%)**
1994	9/11 (82%)	4/4 (100%)	**13/15 (87%)**
1995	11/12 (92%)	1/1 (100%)	**12/13 (92%)**
1996	4/7 (57%)	-	**4/7 (57%)**
1997	12/15 (80%)	1/1 (100%)	**13/16 (81%)**
1998	5/6 (83%)	1/1 (100%)	**6/7 (86%)**
1999	7/7 (100%)	-	**7/7 (100%)**
2000	1/2 (50%)	-	**1/2 (50%)**
Total	**67/84 (80%)**	**17/19 (89%)**	**84/103 (82%)**

Source: Correctional Service of Canada, 2000

The differences in the success rates between first and second-degree murder applications suggest that juries may take into account the original offence when granting

or denying an applicant the opportunity to apply to the National Parole Board for early release. It is possible that by the very nature of the original offence the inmate is seen as less of a threat to the community by the jury and thus less of a risk to be let out at an earlier date. However, because one is dealing with such a small population and such small numbers of applications in each year, even a shift of one or two cases could affect the interpretation of the results. Thus, these results are inconclusive as to the differentiation between successful first and second-degree murderer applications for judicial review.

Section Summary

While there are more applications from inmates convicted of first-degree murder (82%) than from inmates convicted of second-degree murder (18%), the second-degree murder applications have slightly higher rates of positive outcomes (89% vs. 80%). However, this result must be taken with caution, as a difference of one or two positive outcomes in each category would easily tip the balance in favour of the opposite conclusion that second-degree murder applications have slightly higher rates of positive outcomes. This would suggest, at first glance, that inmates convicted of second-degree murder stand a slightly better chance of being granted the opportunity to apply to the National Parole Board for early release. While it is possible that the judicial review hearing jury sees the initial offence of second-degree murder as being less severe than a conviction of first-degree murder, this conclusion is purely speculative.

Issue #3: Provincial Comparisons

Table 7 indicates the number of inmates convicted of first and second-degree murder for each province and territory across Canada. Ontario has the highest number incarcerated, with 429 inmates or 33% of the population of first and second-degree murderers. Quebec has the second highest number incarcerated with 321 (24%), followed by British Columbia (15%) and Alberta (10%). Prince Edward Island, the Yukon, and the Northwest Territories have the lowest number with under one- percent each.

The total number of eligible inmates, by province, is also illustrated in Table 7. Ontario has the largest number of eligible inmates (142) followed closely by Quebec (136), which is not surprising given that these two provinces have the highest number of inmates convicted of first and second-degree murder. These two provinces together account for more than half of the total eligible inmates across the country, and this is proportional to their respective populations.

It is interesting to compare the number of eligible applications to the number that actually apply. The highest proportions of eligible inmates applying for judicial review are in the provinces of Quebec (36%), Saskatchewan (24%), Manitoba (19%) and Ontario (16%).

While the national success rate of applications is 82% (Table 7), the province of Ontario stands out as having the lowest percentage of successful candidates, with 64% of applications (14 out of 22) being permitted to apply to the national parole board for a reduction in parole ineligibility. Conversely, the province of Quebec has the highest percentage of successful applications, with 94% (46 out of 49) of applications proceeding

to an early hearing before the National Parole Board. The province of Manitoba has the second highest success rate for applications, with four out of five applications being successful. Saskatchewan has a positive application outcome similar to that of Ontario, with 67% or four out of six applications. However, the overall number of incarcerated first and second-degree murder inmates differs greatly between the two provinces. While Ontario has a first and second-degree murder inmate population of 429 inmates, Saskatchewan has 59. Saskatchewan also has a higher percentage of eligible inmates (42%) compared to Ontario (33%). Finally, a greater proportion of eligible inmates in Saskatchewan make an application for judicial review, then do their counterparts in Ontario (24% vs. 15%). Nova Scotia and New Brunswick have the highest proportion of successful applications although the number of cases is very small.

Table 7: Provincial Differences in Eligibility, Applications and Outcomes under s.745.6: 1987-2000

Judicial Province	Number of lifers in custody	Number of lifers Eligible for review	Number of Applications (%)	Successful Applicants (%)
Alberta	133	51	11 (22%)	8 (73%)
British Columbia	193	69	8 (12%)	6 (75%)
Manitoba	67	26	5 (19%)	4 (80%)
New Brunswick	36	14	1 (7%)	1 (100%)
Newfoundland	16	3	-	-
Northwest Territories	5	2	-	-
Nova Scotia	56	16	1 (6%)	1 (100%)
Ontario	429	142	22 (16%)	14 (64%)
Prince Edward Island	4	2	-	-
Quebec	321	136	49 (36%)	46 (94%)
Saskatchewan	59	25	6 (24%)	4 (67%)
Yukon	2	-	-	-
Outside Canada	4	2	-	-
Total	**1325**	**488**	**103 (21%)**	**84 (82%)**

Source: Correctional Service Canada, 2000

Nationally, the province of Quebec has the highest percentage of applications, with 36% of all eligible inmates making an application for judicial review. The province of Saskatchewan has the second highest (24%), followed closely by Alberta (22%) and Manitoba (19%). Although the province of Ontario has a large number of eligible inmates (142), only 22 or 16% make an application. With respect to the percentage of successful applicants, New Brunswick and Nova Scotia have the highest percentages

(100%, although they had only one application each) and are closely followed by Quebec (94%). Ontario has the lowest percentage of successful applicants, with 64%.

Section Summary

The results of this section indicate provincial variation in both rates of applications and in the corresponding rates of successful applications. The province of Quebec has the most applications although it does not have the largest number of eligible inmates. It also has one of the highest success rates for applications. The province of Ontario has the greatest number of eligible inmates, but a substantially lower percentage of actual applications, as well as successful applications. The remaining provinces are fairly consistent.

Issue #4: Reductions granted by the Jury

The timing of applications does not appear to influence outcomes, as illustrated by Table 8. The majority (87%) of eligible inmates apply for judicial review within one calendar year of being eligible (i.e. having served 15 years). Six inmates who waited any number of years more than one year to apply were granted immediate release, regardless of when they applied. For example, an inmate who waited 4 years more than the required 15 was granted an immediate reduction by the jury and immediate release by the National Parole Board, as was an inmate who waited 5 years. However, 20 of those inmates with 25-year parole ineligibility periods were granted reductions of 10 years.

Table 8: Years Beyond Ineligibility Period Waited Before Applying for Applications Resulting in a Reduction in Parole Ineligibility

Years waited beyond ineligibility period	**Number of Successful / Total Applications**	**Percentage of Total Successful Applications**
1	73/86	87%
2	4/8	5%
3	1/2	1%
4	4/5	5%
5	1/1	1%
6	1/1	1%
Total	**84/103**	**100%**

Source: Correctional Service Canada, 2000

Of the 19 offenders who applied for judicial review and were denied (Table 9), the majority (13 out of 19 or 68%) applied at the 15-year mark. All 19 had ineligibility periods of 20 or 25 years.

Table 9: Years Beyond Ineligibility Period Waited Before Applying for Applications Resulting in No Reduction in Parole Ineligibility

Years waited beyond ineligibility period	**Number of Unsuccessful / Total Applications**	**Percentage of Unsuccessful Applications**
1	13/86	68.4%
2	4/8	21%
3	1/2	5.3%
4	1/5	5.3%
5	N/A	N/A
6	N/A	N/A
Total	**19/103**	**100%**

Source: Correctional Service Canada, 2000
* Percentage of unsuccessful applications

These outcomes may be suggesting that inmates with longer ineligibility periods as set at sentencing are not seen as being sufficiently deserving or rehabilitated to be allowed the opportunity to apply to the National Parole Board for early release. This result is also consistent with previous analyses suggesting that inmates convicted of first degree murder are less likely to have a positive outcome at a judicial review hearing than are their counterparts convicted of second degree murder. Again, this may be due to the nature of the original offence which has warranted a more serious conviction and hence penalty. Conversely, it is possible that offenders who receive a longer ineligibility period at sentencing are perceived as more of a threat to the public, as evidenced by the longer

ineligibility period, and they are not sufficiently rehabilitated at the time of their application for judicial review. A final interpretation of these results may be that, as the academic literature has shown, longer periods of incarceration are harmful to inmates and they are therefore not seen as being psychologically healthy enough to be released.

Number of years of reduction in parole ineligibility granted by the jury

Table 10 illustrates the breakdown in the number of years of reduction in parole ineligibility granted to applicants. The results indicate that, on average, the judicial review jury grants applicants with periods of ineligibility of 20 years a reduction of four years. That is, the average offender with 20 years of parole ineligibility must serve 16 years or 80% of the mandatory parole ineligibility in prison before he or she can apply to the National Parole Board.

For those inmates with a parole ineligibility period of 25 years, the average number of years of reduction is between 6 and 7 years. This suggests that, on average, applicants with parole ineligibility periods of 25 years must serve 18 or 19 years in prison, or 76% of the mandatory parole ineligibility period, before being eligible to apply to the National Parole Board for a parole hearing.

Table 10: Reductions in Parole Ineligibility

Outcome	Number of applicants granted the reduction
20 reduced to 15	5
20 reduced to 16	4
20 reduced to 17	2
20 reduced to 18	1
25 reduced to 15	20
25 reduced to 16	10
25 reduced to 17	5
25 reduced to 18	7
25 reduced to 19	11
25 reduced to 20	12
25 reduced to 21	3
25 reduced to 22	1
25 reduced to 23	1
25 reduced to 24	2
Total	**84**

Source: Correctional Service of Canada, 2000

Reductions granted by the judicial review jury to offenders convicted of first degree murder

It is interesting to compare the outcomes from applicants who are serving life sentences for first degree murder versus second degree murder to speculate on whether the original offence and the ineligibility period as set by the sentencing judge make a difference in the ultimate outcome at the judicial review hearing. Looking only at the number of years of parole ineligibility is not specific enough as it cannot account for the original offence in the eventual outcome of the judicial review hearing.

Of the 84 applications that came from inmates convicted of first-degree murder with a mandatory minimum parole ineligibility of 25 years, 67 were granted some form of reduction by the jury. The number of years of reduction in the period of parole ineligibility is illustrated in Table 11.

The majority of reductions granted were for 10 years, with almost one-third (28%) of applicants being granted a reduction from 25 to 15 years of parole ineligibility. A substantial proportion (17.9%) of applicants was granted reductions of 5 years. The average number of years of reduction granted was seven years. Thus, in general, the average inmate convicted of first-degree murder serves 18 years in prison before he or she is deemed to be eligible for a parole hearing.

Table 11: Number of Years of Reduction for First-Degree Murder Applications Granted by the Jury

Outcome (by jury)	**Total Successful Applications (First degree)**
25 reduced to 15	19
25 reduced to 16	9
25 reduced to 17	4
25 reduced to 18	7
25 reduced to 19	10
25 reduced to 20	12
25 reduced to 21	3
25 reduced to 23	1
25 reduced to 24	2
Total	**67**

Source: Correctional Service of Canada, 2000

The largest number of applicants is granted a ten-year reduction in parole ineligibility, while the second and third most number of applicants are granted five year and six-year reductions, respectively. Only one application to date has been granted a two-year reduction. These results would suggest that applicants with the longest parole ineligibility periods receive the greatest reductions.

Reductions granted by the judicial review jury to offenders convicted of second degree murder

Of the 19 applications for judicial review from inmates convicted of second-degree murder, with a minimum of 20 years of parole ineligibility on the life sentence, the jury granted 17 reductions (Table 12). Twelve of these reductions were granted to inmates with parole ineligibility periods of 20 years, and five reductions were granted to inmates with parole ineligibility periods of 25 years. The average reduction granted to inmates with parole ineligibility periods of 20 years is four years, suggesting that the average reduction granted to inmates of this category is 16 years. The average reduction granted off a 25-year parole ineligibility period is seven years. This would suggest that inmates convicted of second degree murder with parole ineligibility periods of 25 years are granted a greater reduction in time served before being eligible to apply to the parole board than their counterparts with a 20 year parole eligibility restriction for those convicted of second degree murder. However, it should be mentioned that is not surprising that inmates with longer parole ineligibility periods will be granted greater reductions, as they will have a greater number of years to serve to begin with. As well, there are fewer applications from inmates convicted of second-degree murder with

ineligibility periods of 25 years. Overall, inmates convicted of second-degree murder are granted average reductions of five years off of their ineligibility periods.

Table 12: Number of Years of Reduction for Second-Degree Murder Applications Granted by the Jury

Outcome (by jury)	**Total Successful Applications (Second degree)**
20 reduced to 15	5
20 reduced to 16	4
20 reduced to 17	2
20 reduced to 18	1
Total for 20 year ineligibility period	**12**
25 reduced to 15	1
25 reduced to 16	1
25 reduced to 17	1
25 reduced to 19	1
25 reduced to 22	1
Total for 25 year ineligibility period	**5**
Total	**17**

Source: Correctional Service of Canada, 2000

Table 13 indicates the average reduction granted by the jury for inmates convicted of first and second-degree murder who have a successful judicial review hearing. As mentioned earlier, the average reduction granted to applicants convicted of first-degree murder is seven years, resulting in an average period of incarceration of 18 years before being eligible to apply to the National Parole Board. Applicants with a conviction of first-degree murder serve 72% of the average parole ineligibility period. For applicants

convicted of second degree murder, the average number of years of reduction granted is five years, resulting in an average period of incarceration of 17 years before applying to the National parole Board. Applicants convicted of second-degree murder serve 77% of the average parole ineligibility period. Therefore, applicants convicted of second-degree murder serve more of their sentence in prison than their counterparts convicted of first-degree murder before they are eligible to apply to the National Parole Board.

Table 13: Average Years of Reduction Granted, Years Served and Proportion of Sentence Reduced for Inmates Convicted of First or Second-Degree Murder

Murder Category	Average years of reduction / average ineligibility period	Average years served	Proportion of sentence served
1st degree	7/25	18	72%
2nd degree	5/22	17	77%

Source: Correctional Service of Canada, 2000

Section Summary

The results of this section suggest that applicants convicted of first-degree murder are granted greater number of years reductions in parole ineligibility than are their counterparts with second-degree murder convictions. However, this difference is most likely due to the fact that those with first-degree murder convictions must serve longer parole ineligibility periods to begin with. The majority of applicants convicted of second-degree murder have parole ineligibility periods of 20 years, and not 25 years. On average, inmates convicted of second degree murder serve a greater proportion of their parole ineligibility period in prison compared to those convicted of first degree murder.

Issue #5: Pre and Post-Amendment Comparisons

Because of the change in the legislation it is worthwhile examining if the number of applications for judicial review has changed in the years prior to and after the amendment. With the change in the legislation, the process has become slightly longer in that the application must first be reviewed and approved by a superior court judge before it goes to a judicial review hearing jury. This may extend the time involved in the application process, as well as put the application up against a judge who is more knowledgeable than a jury about the inmate's chances of success with the parole board. Conversely, the implied approval of an application by a judge may create a sense of security among jury members that the application stands a good chance of success. The amendment may therefore affect applications in more than one way.

Total applications for judicial review

A total of 103 prisoners have applied for a reduction in parole ineligibility, an average of seven applications per year. Seventy-one applications were submitted in the 10 years prior to the 1996 amendment, for an average of seven applications per year. Thirty-two applications were submitted in the four years post-amendment, for an average of eight applications per year (Table 14). The breakdown according to murder conviction status will be described in detail below.

Positive outcomes at judicial review hearings

On average, six inmates have had a successful judicial review hearing in each of the 14 years that the hearings have been held (Table 14). Of the 57 successful applications between 1987 and 1996, approximately six inmates had positive outcomes

each year as a result of the judicial review hearing, for a success rate of approximately 80%. In the four years following the amendment, on average between six and seven inmates per year of the total 27 applications were successful, for a success rate of 84%. It is important to mention, however, that these numbers must be read with caution as the sample before and after the amendment are not equivalent. Of the total 103 applications across the 14 years, the average of seven successful applications per year is consistent, as is the overall rate of approximately 81%. This result would suggest that the amendment has not had a dramatic effect on the number or rate of successful applications since 1997.

Differences in first and second degree applications pre and post amendment

As mentioned, 71 applications were made in the 10 years prior to the 1996 amendment, for an average of seven applications per year. Thirty-two applications were put forth in the four years post-amendment, for an average of eight applications per year.

In the ten years prior to the amendment, fifty-four offenders convicted of first-degree murder applied for judicial review, for an average of 5.4 applications per year. In the ten years prior to the amendment, 17 offenders convicted of second-degree murder applied for judicial review, for an average of 1.7 applications per year.

In the four years following the amendment, 30 offenders convicted of first-degree murder applied for judicial review, for an average of 7.5 applications per year. There were two applications by second-degree murderers in the four years post-amendment, for an average of 0.5 applications per year. Table 14 illustrates the differences between first and second-degree murderers before and after the amendment.

Table 14: Breakdown of Successful First and Second Degree Murder Applications (pre and post amendment)[3]

Judicial Review Year	Successful 1st Degree Murder/Total 1st Degree Murder Cases	Successful 2nd Degree Murder/Total 2nd degree Murder Cases	Successful/Total Applications
1987	1/1	-	**1/1**
1988	1/1	-	**0/1**
1989	-	1/1	**1/1**
1990	1/1	2/2	**2/3**
1991	-	3/5	**3/5**
1992	9/10	3/3	**12/13**
1993	8/11	1/1	**9/12**
1994	9/11	4/4	**13/15**
1995	11/12	1/1	**12/13**
1996	4/7	-	**4/7**
1987-1996	**42/54 (78%)**	**15/17 (88%)**	**57/71 (80%)**
1997	12/15	1/1	**13/16**
1998	5/6	1/1	**6/7**
1999	7/7	-	**7/7**
2000	1/2	-	**1/2**
1997-2000	**25/30 (82%)**	**2/2 (100%)**	**27/32 (84%)**
Total	**67/84 (80%)**	**17/19 (89%)**	**84/103 (82%)**

Source: Correctional Services of Canada, 2000

[3] As in Table 5, the number of cases being dealt with are small and the data is extremely volatile. Due to limitations within the database, it is unknown whether a given application date or outcome is a result of the offender's first, second or third application. As well, it is uncertain whether applications after 1997 are being evaluated under the rules pre or post 1996 amendment.

In the ten years prior to the amendment, 57 of the 71 applications (80%) by both first and second-degree murderers were successful. Once again, while there were more successful outcomes, in terms of numbers, awarded to first-degree murderers than second-degree murderers, the proportion of successful outcomes is greater for second-degree applicants. While 54 first-degree murderers applied for judicial review, 42 had a positive outcome for a success rate of 78%, whereas of the 17 applications by second-degree murders, 15 were successful for a success rate of 88%.

After the amendment, the rate of positive outcomes increased for both first and second-degree murderers: 25 of 30 applications from first-degree murderers were successful, while both of the two second-degree murderer applications were successful. The rates of successful applications are thus 82% for first-degree murderers and 100% for second-degree murderers after the amendment.

Section Summary

It would appear that the amendment has not had a noticeable effect on the number of applications as a whole from inmates convicted of both first and second-degree murder. While there appear to be more applications from inmates convicted of first-degree murder, both prior to and after the amendment, the success rate of these individuals has remained relatively stable at approximately 80%. Conversely, while there appear to be fewer applications from individuals convicted of second-degree murder, these applicants have higher rates of positive outcomes before the judicial review jury, both prior to and after the amendment. While there are fewer applications from individuals convicted of second-degree murder after the amendment, the rate of positive

outcome is 100% compared to 82% for applicants with first-degree murder convictions within the same time frame. It would appear then that the amendment has not had a noticeable effect on the rates of successful outcomes for applicants convicted of first or second-degree murder. One unknown remains, however, with respect to the post-amendment decisions: whether or not the screening judge's input has had an impact on the ultimate outcome by the judicial review hearing jury. Unfortunately, an analysis of this kind is beyond the scope of this thesis.

Issue # 6: Outcome of applications that go before the National Parole Board

Having a positive judicial review hearing does not guarantee that the offender will be released after having served the required number of years.

Of the 84 successful applicants, three are deceased and one has been deported (Table 15). Approximately 30% of inmates with positive outcomes at a s.745.6 review are currently incarcerated. This percentage includes the 23 inmates who are incarcerated as well as the two inmates who are under supervision but who have been temporarily detained. The majority (63%) of the inmates with positive outcomes is under some form of supervision in the community. The exact status of these offenders will be discussed in greater detail below. The four remaining applicants have been temporarily detained or are unlawfully at large.

Table 15: Status of Inmates with Positive Judicial Review and Parole Board Outcomes (as of October 2000)

Inmate Status	**Number of Cases**	**% of Cases**
Supervised – Full Parole	39	46%
Incarcerated	23	27%
Supervised – Day Parole	14	17%
Deceased	3	3.5%
Supervised – Day Parole (Unlawfully at large)	2	2.4%
Supervised – Day Parole (Temporarily Detained)	1	1.2%
Supervised – Full Parole (Temporarily Detained)	1	1.2%
Deported	1	1.2%
Total	**84**	

Source: National Parole Board, 2000

Table 16 illustrates the number of years that a successful judicial review hearing applicant must wait before applying to the National Parole Board. Of the 84 offenders

with positive judicial review hearing outcomes, 32 were granted the immediate opportunity to apply to the National Parole Board and were subsequently released on parole. Thus, the grant rate for the immediate opportunity to apply for parole is 38%. An additional 21 applicants, representing 25% of all successful applicants, were entitled to apply in the five years following their hearing. All of these 53, as shown in Table 16, are currently on some form of supervision within the community.

Table 16: Number of Years Until Applicant can Apply to the National Parole Board

Years until eligible to apply to the NPB	**Number of Successful Applicants**
Immediate	32
1	6
2	3
3	5
4	6
5	1
Total	**53**

Source: National Parole Board, 2000

An offender on conditional release may have more than one supervision period. That is, an inmate may be released on individual day parole for varying lengths of time, for instance to take part in a work term and each term of day parole must be applied for in turn. Because of the way parole is granted, an exact measure of each offender's parole success is difficult to develop. For example, one offender may have 17 different parole supervision periods, with 16 successful day parole supervision periods and one ongoing full parole supervision period. However, a general grant rate and number of supervision periods granted is available.

Of the 84 successful applications to date, 67 offenders have been granted at least one day parole[4] or full parole[5] supervision period. This number (67) is different from the one illustrated above (53) because it includes positive applications that have been applied to inmates who are now deceased or deported. Of the 67 granted some form of parole, 64 have had a total of 183 day parole supervision periods. These day parole supervision periods are illustrated in Table 17.

Table 17: Status of Inmates on Day Parole after a Positive Judicial Review Hearing

Day Parole Status	Number of supervision periods
Successful	156
Revoked	7
Terminated	3
Ongoing	17
Total	**183**

Source: National Parole Board, 2000

There have been 156 successfully completed day parole supervision periods for the aforementioned 64 offenders. There have been seven revocations of day parole, three terminations by the National Parole Board, and 17 supervision periods are still ongoing. Of the 17 ongoing, 14 are under supervision, one has been temporarily detained and two are unlawfully at large. Thus, the 64 offenders have had a total of 183 day parole supervision periods.

---

[4] *Day Parole* allows offenders to participate in community-based activities to prepare for release on full parole. Offenders on day parole must return nightly to an institution or a halfway house unless otherwise authorized by the National Parole Board (Correctional Service Canada, 1999).

[5] *Full Parole* is a conditional release program that allows an offender to serve a part of the sentence in the community. Under this form of release, an offender may live with his or her family and continue to work

Of the 67 offenders who have been granted some form of parole, 48 have had a total of 51 full parole supervision periods, and their status is illustrated in Table 18.

Table 18: Status of Inmates on Full Parole after a Positive Judicial Review Hearing

Full Parole Status	Number of supervision periods
Successful	1
Revoked	9
Deceased	1
Deported	1
Ongoing	39
Total	**51**

Source: National Parole Board, 2000

In total, there have been 17 revocations of parole, both full and day parole as shown in Table 19. Eight have had their day parole revoked for breach of conditions, and 9 have had their full parole revoked. Of the 9 full parole revocations, 5 revocations were for breaches of conditions, whereas 4 were for new offences. The new offences include one armed robbery, 1 Schedule II (drug) offence and 2 Schedule I (non-violent/non-drug) offences.

---

and contribute to society. Although no longer required to return to the institution, the offender remains under supervision and must continue to abide by certain conditions (Correctional Service Canada, 1999).

Table 19: Revocations by Type of Parole Granted

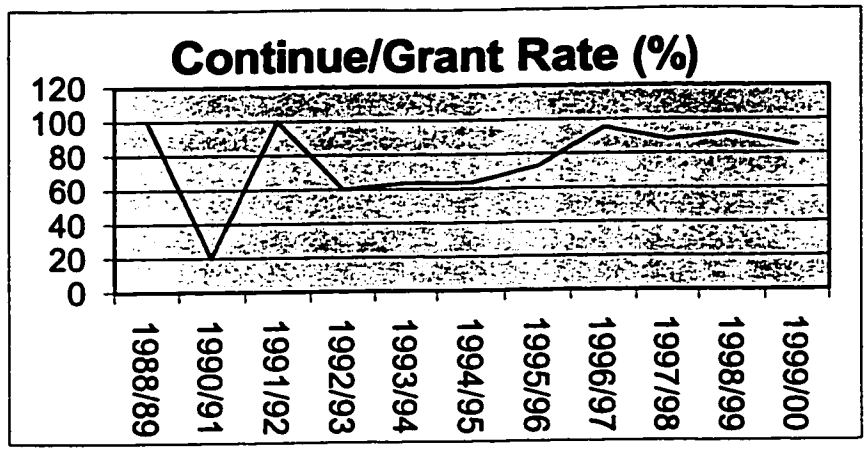
Type of Parole	Number of Revocations	Reason for Revocation
Day	8	Breach of Conditions
Full	5	Breach of Conditions
Full	4	New Offence
Total	**17**	

Source: National Parole Board, 2000

Day Parole Grants to Inmates with a Successful Judicial Review Hearing Outcome

The grant rate for both full and day parole decisions, according to the National Parole Board, has fluctuated considerably over the 14 years since judicial hearing reviews began in 1987. As shown in Table 20, the overall day parole grant rate for inmates who have had positive judicial review hearings is 79.6%, but has fluctuated anywhere between 20% and 100%. There is no data available for 1987/88 as this is the first year that judicial review hearings were held, and the applications did not make their way to the National Parole Board until the following year. No applications came before the National Parole Board in 1989/90 and with respect to 2000/01 no data was available at the time of writing. Figure 2 illustrates the grant rate, graphically.

Figure 2: Day Parole Continued/Grant Rate 1987-2000



Source: National Parole Board, 2000

It would appear that the day parole grant rate for judicial review cases has actually increased since the 1996 amendment, as shown in Table 20. In the eight years prior to the amendment, the grant rate was 72% whereas in the three years after the amendment the grant rate is 87%. It is still too early to tell whether or not the 1996 amendment has had an impact on National Parole Board decisions to grant or continue day parole for successful judicial review hearing applicants. While the rate appears to be on a downturn from 1997 on, it is still higher than it was in the early 1990's. The fairly high grant rate in 1996/97 (95.7%) is surprising, given that this was the year that the amendment came into effect. It would appear that the members of the National Parole Board did not react to the amendment by denying more inmates a continuance or parole.

Table 20: Day Parole Grant Rate for Judicial Review Cases - Reduced

Year of decision (fiscal)	Continued	Grant	Deny	Total	Continue/Grant Rate (%)
1987/88	N/A	N/A	N/A	N/A	N/A
1988/89	-	1	-	1	100.0
1989/90	-	-	-	-	-
1990/91	-	1	4	5	20.0
1991/92	-	6	-	6	100.0
1992/93	2	4	4	10	60.0
1993/94	3	4	4	11	63.6
1994/95	8	9	10	27	63.0
1995/96	11	10	8	29	72.4
1996/97	11	11	1	23	95.7
1997/98	18	11	4	33	87.9
1998/99	19	12	3	34	91.2
1999/00	12	15	5	32	84.4
2000/01	**N/A**	**N/A**	**N/A**	**N/A**	**N/A**
Total	**84**	**84**	**43**	**211**	**79.6**

Source: National Parole Board, 2000

Full Parole Grants to Inmates with a Successful Judicial Review Hearing Outcome

The grant rate for full parole has fluctuated tremendously since 1987, ranging anywhere from zero to 67%. Clearly, the grant rate for full parole is not as high as the grant rate for day parole. The overall full parole grant rate for inmates who have had a positive judicial review hearing is 39.5%, and is illustrated in Table 21.

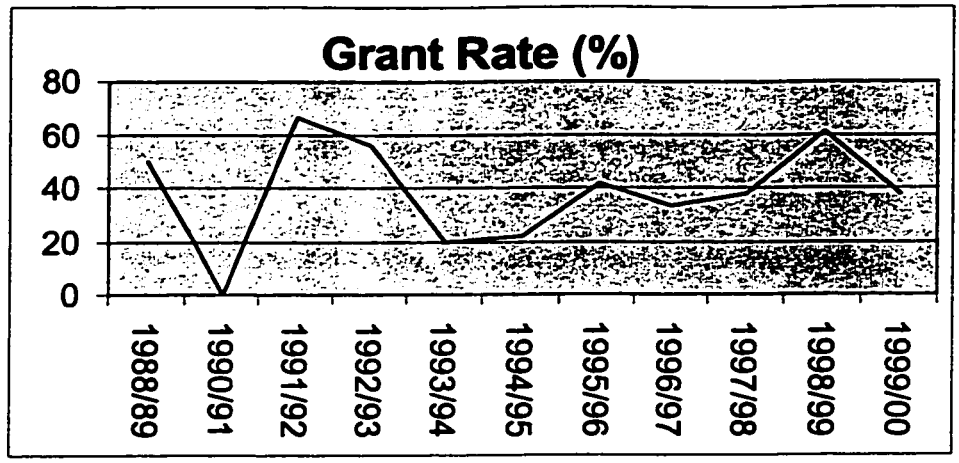
Table 21: Full Parole Grant Rate for Judicial Review Cases - Reduced

Year of decision (fiscal)	Grant	Deny	Total	Grant Rate (%)
1987/88	N/A	N/A	N/A	N/A
1988/89	1	1	1	50.0
1989/90	-	-	-	-
1990/91	-	3	3	0.0
1991/92	4	2	6	66.7
1992/93	5	4	9	55.6
1993/94	2	8	10	20.0
1994/95	4	14	18	22.2
1995/96	7	10	17	41.2
1996/97	3	6	9	33.3
1997/98	3	5	8	37.5
1998/99	11	7	18	61.1
1999/00	9	15	24	37.5
2000/01	N/A	N/A	N/A	N/A
Total	**49**	**75**	**124**	**39.5**

Source: National Parole Board, 2000

As with the day parole information, 1987/88 does not have any data available as this is the first year that judicial review hearings were held, and the applications did not make their way to the National Parole Board until the following year. No applications came before the National Parole Board in 1989/90 and with respect to 2000/01 no data was available at the time of writing. Figure 3 illustrates the continue/grant rate for full parole, graphically.

Figure 3: Full Parole Continue/Grant Rate for 1987-2000



Source: National Parole Board, 2000

The full parole grant rate is 39.5% over the entire 13 years since the first judicial review hearing was held. As with day parole, the full parole grant rate has increased after the 1996 amendment. In the 8 years prior to the amendment, the full parole grant rate was 35.6% whereas in the 3 years following the amendment, the grant rate is 46%. Although the grant rate for full parole has fluctuated more than the grant rate for day parole, as with the Day Parole Grant/Continuance rate, there does not appear to be any discernible impact of the new legislation. That is, it does not appear that the amendment has encouraged the National Parole Board to be any more restrictive in their decisions than previously. There is, however, a drop in the grant rate in 1999/00, but it is too soon to say whether this may be the beginning of a downward trend.

It is likely that the full parole grant rate is lower than that of day parole because of the nature in which day and full parole are granted. If an inmate has had numerous unsuccessful day parole supervision periods, it is not likely that he or she will be granted full parole. Generally, an inmate must successfully complete at least one day parole

supervision period before being granted full parole. In the case of lifers, who have spent upwards of 15 years in an institution, the National Parole Board is hesitant to grant full parole without first ensuring successful day parole supervision periods.

Negative outcome with NPB

Despite a positive judicial review hearing at which a jury of community members decides that the offender should receive a reduction in the number of years to be served before being eligible for parole, there is no guarantee that the offender will also have a positive outcome in front of the National Parole Board. It is important at this point to explore what happens to individuals who have been deemed worthy of earlier release by a judicial review jury, but not by the National Parole Board.

Of the 84 applicants who were successful in front of the jury and received a reduction in the number of years of parole ineligibility, 23 are still incarcerated. These 23 represent more than one quarter (27%) of all successful applicants. As shown in Table 22, six inmates have not yet reached the required eligibility date, despite having had the parole ineligibility period reduced and 17 have gone before the NPB but were refused. They were not deemed by the members of the Parole Board to represent a low enough risk to society that they could commence conditional release.

Table 22: Current Status of Incarcerated Inmates After a Positive Judicial Review Hearing

Current Status of Incarcerated Inmates after a positive Judicial Review Hearing	Number of inmates
Not eligible to apply to NPB	6
Denied Parole	17
Total	**23**

Source: National Parole Board, 2000

In addition to being denied parole at the new eligibility period, four of the 17 inmates have been denied parole beyond their expected parole eligibility date as set at trial. All four have been denied at least twice by the National Parole Board, once at the new ineligibility period that was set by the judicial review hearing jury, and also at their original ineligibility period set by the sentencing judge at conviction.

Section Summary

Of the 84 positive applications that have gone through the judicial review hearing jury, 17 have been denied parole by the parole board, and are therefore required to re-apply to the parole board. Of these 17, four have applied and been denied more than once by the National Parole Board. In reality, then, 67 of the 103 applications (65%) have been granted early parole and are under some form of supervision in the community. These results can be interpreted in a number of ways. The public may not be as sophisticated as the members of the National Parole Board in determining who is or is not a threat to public safety, or perhaps the public is more concerned with who they deem is deserving of early release. Regardless, the public in the form of the jury may be using

extra-legal factors in making their decision, whereas the members of the Parole Board may be looking more closely at institutional behaviour and other legal factors. The discrepancy between success rates at the two stages reinforces the notion that going before the National Parole Board is indeed a separate step in the judicial review process. It also reinforces that the decisions made by the members are independent of any decision made by the members of the judicial review hearing jury. Unfortunately, it is not possible to tell whether the National Parole Board has become more cautious in its decision as a result of the 1996 amendment. This is because an inmate may have more than one supervision period, and due to the nature in which full and day parole supervision periods are granted.

Issue #7: Current status of eligible non-applicants and unsuccessful applicants

The following section provides slightly more up-to-date information about the current status of unsuccessful applicants, but also of eligible non-applicants. As of October 29, 2000, a total of 420 offenders have served at least 15 years of their life sentences for first or second degree murder, but have either not applied for judicial review or have applied and been denied. Of this group, 20 have applied for a reduction and been denied. While this number of denied applications (20) is different from the number of the earlier analyses (19 denied), it is close enough to the original figures to consider it to be almost equivalent. Of the 420 inmates, 312 are currently incarcerated and the National Parole Board has granted 108 some form of parole. Again, it must be emphasized that this 420 consists of those inmates that have applied for judicial review and have been denied, as well as those that have never applied. These individuals have all had to wait out their entire parole ineligibility period before being able to apply to the National Parole Board. The status of the 108 inmates granted release is outlined in Table 23.

Table 23: Status of Inmates Granted Release After Waiting out the Entire Parole Ineligibility Period

Status	Number of Cases
Supervised: Full Parole	55
Deceased	23
Supervised: Day Parole	15
Deported	7
Escaped	3
Suspended	3
Sentence Overturned or Reduced	2
Total	**108**

Source: National Parole Board, 2000

Over the 14 years that judicial review hearings have been in existence, there have been 30 revocations and 42 suspensions of this particular group of offenders while on day or full parole. Out of the 30 revocations, four day parole and two full parole supervision periods were revoked following a new offence. Another inmate had his or her day parole revoked without standing charges.

Table 24 summarizes the differences in the rate of revocations and the number of new offences for inmates who have had positive judicial review outcomes and those who have not or did not apply. The figures for total inmates under supervision includes only those that are listed elsewhere as being on Full or Day parole, and excludes those who are deceased or have been deported. Comparing the revocations of inmates who were released as a result of a positive judicial review hearing with the revocation rate of inmates who went directly to the National Parole Board after having served their entire ineligibility period, it can be shown that the group that was either denied judicial review

or did not bother to apply has a slightly higher revocation rate (43%) than those with positive judicial review outcomes (32%). Turning to new offences, the group that was denied or did not apply for judicial review has a slightly higher rate of new offences (9%) than those with positive judicial review outcomes (7.5%). There are a number of possible explanations for this finding: judges and/or juries may be making accurate risk assessments, and that is why these inmates were denied either a reduction or release. Another possible explanation, as might be argued by social scientists, is that long periods of incarceration (more than ten years) are more detrimental to the offender. These long periods of incarceration may lead to problems in reintegrating into society upon condition release, as evidenced by more breaches of conditions and new offences. Yet another explanation would be that the inmates who were denied judicial review in the first place and those that did not bother to apply were perceived as possibly presenting more of a threat and would have greater chances of breaches and new offending to begin with. However, it must be reiterated that none of the offenders were charged with new murder, and the most serious offence out of all 10 was an armed robbery.

Table 24: Comparisons Between Applicants and Non-Applicants

Judicial Review Hearing Status	**Revocations/Total inmates under Supervision**	**Number of New Offence/ Total inmates under Supervision**
Granted	17/53 (32%)	4/53 (7.5%)
Denied/No Application	30/70 (43%)	6/70 (9%)

Source: National Parole Board, 2000

Section Summary

Inmates that apply for and have a positive judicial review hearing have slightly more positive outcomes with respect to revocations of parole and new offences than do their counterparts that do not apply for or who are denied judicial review hearings. While the differences are small, it would appear that those who are released as a result of a positive judicial review hearing are less of a threat to the safety of society upon release. Whether or not this is a function of their early release, or a function of how long they spend in prison before being released remains open to discussion.

Issue #8: Impact on Multiple Murderers

The 1996 amendment to section 745.6 excludes offenders convicted of more than one murder (if one of the murders was committed after January 9, 1997) from making an application for judicial review. Of the 1,325 offenders in the CSC database convicted of either first or second-degree murder, a total of 187 have been convicted of more than one count of murder. The exact breakdown of counts of murder is illustrated in Table 25.

Table 25: Inmates Convicted of More than One Murder

Count of Murder	Number of Cases	Currently Under Supervision (beyond Parole Ineligibility period or after Judicial Review)	Currently Incarcerated (beyond Parole Ineligibility period or after Judicial Review)
2	136	11	6
3	30	4	--
4	11	--	5
5	7	1	--
6	1	--	--
9	1	--	--
11	1	--	1
Total	**187**	**16**	**12**

Source: Correctional Service of Canada, 2000

A closer examination of this category of offender is warranted, as they are one of the primary targets of the 1996 amendment was drafted. The current status of these individuals, whether or not they are under supervision in the community as well as their recidivism, is instrumental in determining whether or not these individuals should be staying in prison for a greater proportion of their sentences.

Of the 136 who have been convicted of two counts of murder, 10 will never be eligible to apply for judicial review as they committed more than one murder after January 9, 1997. Of those that were eligible, four have applied for and successfully received a reduction in parole ineligibility, however they remain incarcerated. It is not known whether they are incarcerated because they have not applied to the National Parole Board or because they have applied and been denied. Twelve are currently under some form of supervision within the community, but one has had his or her supervision period suspended and is temporarily detained.

Of the 30 inmates convicted of three counts of murder, four are under supervision in the community. None of these four individuals applied for judicial review, and instead waited out their entire full parole eligibility date.

There are 11 inmates convicted of four counts of murder; four remain incarcerated beyond their ineligibility periods. Another applied for review after serving 18 years of a 25-year ineligibility period, but was denied and remains incarcerated after 20 years.

Seven inmates are serving life sentences for convictions of five counts of murder, only one of which is under supervision in the community. The other four were arrested prior to the amendment and will thus be unaffected by the new legislation.

One inmate is serving a life sentence for a conviction of six counts of second-degree murder with a parole ineligibility period of 25 years. Although this individual has served 17 years, he/she has not applied for judicial review and remains incarcerated.

One inmate is serving a life sentence for conviction of nine counts of second-degree murder with a parole ineligibility period of 20 years and has not yet served 15 years and is therefore not eligible to apply for judicial review.

Finally, one inmate is serving a life sentence for conviction of 11 counts of first-degree murder. This individual applied for judicial review after having served 15 years, but was denied. This individual remains incarcerated after 19 years.

Section Summary

The results of these analyses of inmates serving life sentences for multiple murders suggest that the vast majority remain incarcerated despite a positive judicial review (where eligible) and others remain incarcerated beyond their ineligibility periods. Only six have applied for judicial review and just four have been granted a reduction in their parole ineligibility. However, all four remain incarcerated beyond their new parole ineligibility periods. Seventeen multiple murderers have been under some form of supervision within the community, although at the time of writing one has been temporarily detained for reasons not indicated. These results would suggest that the amendment has not, as of yet, had a discernible impact on applications from inmates serving life sentences for more than one count of murder. These individuals did not generally apply for judicial review to begin with. Those that were successful with the jury were not generally successful before the National Parole Board. Only a very small number (16 of 187 or 9%) of this category of offender has been released on supervision within the community.

5.0 SUMMARY

This thesis sought to provide a description and assessment of the faint hope clause and its 1996 amendment. The results are discussed in light of the controversy surrounding the clause and its amendment to determine whether or not the "faint hope" clause achieves a balance between public safety and reintegration of this very specific class of offenders.

This provision was created, in part, to provide some hope for long-term offenders and an incentive for rehabilitation. The provision also recognizes that, in exceptional circumstances, the public interest might not be served by keeping an offender in prison for more than 15 years; in particular, where the individual is not a threat to society.

According to the academic literature in the area (Luciani, 2000: Gendreau, Goggin and Cullen, 1999) these offenders are, for the most part, well-adjusted, cooperative individuals. They tend to make the most of the programs available to them in prison. A great deal of the debate in the political and scientific arenas focuses on the danger that these individuals pose to society, and communities do not want to have these individuals among them. However, given that a s.745 jury is made up of members of the community in which the offence took place, it seems counterintuitive to suggest that judicial review of parole ineligibility for inmates serving life sentences for murder is contrary to the wishes of the Canadian public (Roberts and Cole, 1999).

While the public and some politicians argue that these offenders should be imprisoned for as long as possible, if not life, academic research has indicated that longer sentences (more than two years) are associated with slight increases in recidivism. While this argument has no effect on arguments in support of life imprisonment, it is relevant to

the periods of incarceration that first and second-degree murderers currently serve. The results of this thesis would tend to support the clause as a privilege and not a right for all inmates convicted of first or second-degree murder.

This thesis has demonstrated that overall, the majority (82%) of applications have had positive outcomes at judicial review. However, those that apply make up a smaller percentage of those that are eligible: 488 are eligible but only 103 have applied. Of the 103 applicants, 84 have been granted the opportunity to apply to the National Parole Board earlier in their life sentence. In total, 21% of eligible inmates apply and 17% of the eligible inmates have positive judicial review hearing outcomes. Of the 84 positive outcomes, 67 went on to be successful before the National Parole Board. Of the positive review outcomes, the majority (63%) is under supervision within the community. This finding is consistent both prior to and after the 1996 amendment and suggests that the amendment has not had a discernible impact on the success rates of applicants. The success rates have remained constant, with the exception of 1997. It is possible that the large number of applications represents a flood of individuals who attempted to get an application in "under the wire" (in 1996) before the amendment came into effect in 1997.

While there are substantially more applications from inmates convicted of first-degree murder (82%) than from inmates convicted of second-degree murder (18%), the second-degree murder applications have greater rates of positive outcomes (89% vs. 80%). This would suggest that inmates convicted of second-degree murder stand a slightly better chance of being granted the opportunity to apply to the National Parole Board for early release. Despite the volatility of the data, this result appears to be consistent both prior to and after the amendment.

At the same time, applicants convicted of first-degree murder are granted greater reductions in parole ineligibility than are their counterparts with second-degree murder convictions. However, this difference is most likely due to the fact that those with first-degree murder convictions must serve longer parole ineligibility periods to begin with. The majority of applicants convicted of second-degree murder have parole ineligibility periods of 20 years, and not 25 years.

It would appear that the amendment has not had a noticeable effect on the number of applications as a whole from inmates convicted of both first and second-degree murder. While there are more applications from inmates convicted of first-degree murder, both prior to and after the amendment, the success rate of these individuals has remained relatively stable at approximately 80%. Conversely, while there are fewer applications from individuals convicted of second-degree murder, these applicants have higher rates of positive outcomes before the judicial review jury, both prior to and after the amendment. While there have been fewer applications from individuals convicted of second-degree murder after the amendment, the rate of positive outcome is 100% compared to 82% for applicants with first-degree murder convictions during the same time frame. It would appear then that the amendment has not had an effect on the rates of successful outcomes to applicants convicted of first or second-degree murder. Unfortunately, it is not possible to tell with this information if the screening judge's input has had an impact on the ultimate outcome by the judicial review hearing jury, as well as if the judge has already screened out the cases that stand a poorer chance of success before a jury. It may be that the continued success rates following the amendment reflect the jury's appreciation of the screening judge's decision, such that an application may be

seen as "approved" by the judge before it comes before the jury. At the same time, such an explanation might imply that juries are informed of the change in the process as a result of the amendment, and such information is not available at this time.

There are provincial differences in both the numbers and rates of applications as well as in their corresponding success rates before the judicial review hearing jury. The province of Quebec stands out as having the most applications although it does not have the largest number of eligible inmates. It also has one of the highest success rates for applications. This contrasts sharply with the province of Ontario, which has the greatest number of eligible inmates, but a substantially lower percentage of actual applications, as well as successful applications. However, this finding may be more a result of different prosecutorial approaches in the provinces, and less related to the implementation of the clause.

It is also important to look at decisions handed down by the National Parole Board following a positive judicial review hearing. The results here indicate that 67 of the 84 successful judicial review hearing applicants are also successful before the National Parole Board. One possible explanation for this slightly lower success rate at this stage may be that the public is not as sophisticated as the members of the National Parole Board in determining who is or is not a threat to public safety. If this were so, it would indeed be in keeping with the spirit of the clause that asks that jury members to look for indications of rehabilitation and remorse. Regardless, the jury may be relying on extra-legal factors such as the age of the offender and whether or not the offender has strong ties the community (family, job) in making their decision. Conversely, the members of the Parole Board may be looking more closely at institutional behaviour and other legal

factors, and making their decision based upon the potential risk that the offender may pose to the community. The discrepancy between success rates at the two stages reinforces the notion that going before the National Parole Board is indeed a separate step in the judicial review process. It also reinforces that the decisions made by the members do not take into account the decision made by the members of the judicial review hearing jury. That is, the Parole Board will look at different criteria than the average member of the judicial review jury.

Inmates that apply for and have a positive judicial review hearing have slightly higher success rates with respect to revocations of parole and new offences than do their counterparts that do not apply for or who are denied judicial review hearings. That is, compared to inmates who have been denied judicial review or did not bother to apply, inmates who have had positive judicial review and parole board hearings have fewer revocations (32% vs. 43%) and new offences (7.5% vs. 9%). While the differences are small, it would appear that those who are released as a result of a positive judicial review hearing are less of a threat to the safety of society upon release. Sadly, this is not a very strong finding, as it would help to clarify some of the confusion and debate with regards to the length of time spent in prison and eventual reintegration. It can be used to support the position that longer sentences are detrimental in that those offenders who were granted early release had fewer revocations and less recidivism. Those who have been in prison for longer periods of time appear to have more trouble adjusting to life outside of the institution, as evidenced by slightly higher rates of revocation and recidivism. Alternatively, the inmates that remained in prison longer, as well as those that were denied judicial review, may indeed be more problematic in that they were and continue to

pose more of a risk and that is why they were kept in prison longer to begin with. The different interpretations of this result would not be completely satisfying for those in favour of repealing the faint hope clause, nor is it completely supportive of those in favour of maintaining the clause. It cannot be ignored that for many politicians and members of the public, even one revocation or one new crime, regardless of the seriousness, is too many.

The final analysis has to do with the impact of the amendment on inmates convicted of more than one count of murder. These inmates are perhaps the group that is of most concern to the public, and to politicians as well, in that they commit some of the most heinous crimes. The 1996 amendment came about in part to deal with these individuals. The vast majority of this subsection of the inmate population remains incarcerated beyond their ineligibility periods. Only six have applied for judicial review, four of which have been granted a reduction in their parole ineligibility. However all four remain incarcerated beyond their new parole ineligibility periods. Only a very small number (16 of 187 or 9%) of this category of offender has been released on supervision within the community, and none have committed any new crimes.

The conclusion of this thesis is that the 1996 amendments to s.745.6 do not appear to have had a discernible impact on the process. Those offenders that are perceived as low risk will continue to be granted the opportunity to apply to the National Parole Board before their parole ineligibility period as set at their sentencing trial. Multiple murderers, the most loathed and feared sub-class of the category of first and second-degree murders, will be essentially unaffected as their rates of successful applications were low to begin

with. It would appear that the amendment is primarily a demonstration of the power of public pressure or political posturing.

Research in this area needs to be improved. In the future, more specific quantitative information would be helpful with regards to the post-amendment judicial screening process. It is as yet unclear if applications were denied after the amendment by the screening judge or by the jury. Future work in this field would benefit considerably from a more qualitative component. The interpretations of many of the results here were hindered by the lack of case and offender-specific information. Without case files, it is impossible to determine what specific factors are associated with a successful judicial review. Because jury deliberations are not open to the public, one can never know exactly what the jury members rely on in making their decision, and if the unanimity aspect hinders success in that an application, which may have been approved by a two-thirds majority prior to the amendment, now fails because of the unanimity requirement. Such insight into jury decision-making processes and the reasoning behind them would be beneficial in other sentencing areas as well. Finally, interviews with criminal justice personnel, including correctional officers, defence and crown attorneys, and judges, as well as inmates themselves would provide enormous insight into how the process and its outcome is perceived by those who are most directly affected by the system.

Appendix A: Murder, Manslaughter and Infanticide, 1975 *Canadian Criminal Code*

Murder, Manslaughter and Infanticide

212. Culpable homicide is murder
(a) where the person who causes the death of a human being
    (i) means to cause his death, or
    (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause him his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being. 1953-54, c. 51, s.201

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit treason or an offence mentioned under section 52, piracy, escape or rescue from prison or lawful custody, resisting lawful arrest, rape, indecent assault, forcible abduction, robbery, burglary or arson, whether or not the person means to cause death to any human being and whether he knows that death is likely to be caused to any human being, if
(a) he means to cause bodily harm for the purpose of
    (i) facilitating the commission of the offence, or
    (ii) facilitating his flight after committing or attempting to commit the offence,
and the death ensues from the bodily harm;
(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
(d) he uses a weapon or has it upon his person
    (i) during or at the time he commits or attempts to commit the offence, or
    (ii) during or at the time of his flight after committing or attempting to commit the offence,
and the death ensues as a consequence. 1953-54, c.51, s.202

214. (1) Murder is capital murder or non-capital murder
(2) Murder is capital murder, in respect of any person, where such person by his own act caused or assisted in causing the death of
(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties, or

(b) a warden, deputy warden, instructor, keeper, gaoler, guard or other officer or permanent employee of a prison, acting in the course of his duties,

or counselled or procured another person to do any act causing or assisting the death

(3) All murder other than capital murder is non-capital murder. 1960-61, c.44, s.1; 1967-68, c.15, s.1.

215. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section. 1953-54, c.51, s.203

216. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed. 1953-54, c.51, s.204.

217. Culpable homicide that is not murder or infanticide is manslaughter. 1953-54, c.51, s.205.

218. (1) Every one who commits capital murder is guilty of an indictable offence and shall be sentenced to death.

(2) Every one who commits non-capital murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(3) Notwithstanding subsection (1), a person who appears to the court to have been under the age of eighteen years at the time he committed a capital murder shall not be sentenced to death upon conviction therefore but shall be sentenced to imprisonment for life.

(4) For the purposes of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment. 1960-61, c.44, s.2.

219. Every one who commits manslaughter is guilty of an indictable offence and is liable to imprisonment for life. 1953-54, c.51, s.207

220. Every female person who commits infanticide is guilty of an indictable offence and is liable to imprisonment for five years. 1953-54, c.51, s.208.

Appendix B: Murder, Manslaughter and Infanticide, 1976 *Canadian Criminal Code*

Murder, Manslaughter and Infanticide

212. Culpable homicide is murder
(a) where the person who causes the death of a human being
    (i) means to cause his death, or
    (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding the he desires to effect his object without causing death or bodily harm to any human being. 1953-54, c.51, s.201

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 14 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
(a) he means to cause bodily harm for the purpose of
    (i) facilitating the commission of the offence, or
    (ii) facilitating his flight after committing or attempting to commit the offence,
    and death ensues from the bodily harm;
(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
(d) he uses a weapon or has it upon his person
    (i) during or at the time he commits or attempts to commit the offence, or
    (ii) during or at the time of his flight after committing or attempting to commit the offence,
and the death ensues as a consequence. 1953-54, c.51, s.202; 1974-75-76, c.93, s.13; 1974-75-76, c.105, s.29.

214. (1) Murder is first-degree murder or second-degree murder.
(2) Murder is first-degree murder when it is planned and deliberate.

(3) without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling or procuring another person to do any act causing or assisting in causing that death.

(4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first-degree murder when the victim is

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
(b) a warden, deputy warden, instructor, keeper, gaoler, guard or other officer or permanent employee of a prison, acting in the course of his duties; or
(c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first-degree murder in respect of a person when the death is caused by that person

(a) while committing or attempting to commit an offence under section 76.1 (hijacking aircraft) or 247 (kidnapping and forcible confinement); or
(b) while committing an offence under section 144 (rape) or 145 (attempt to commit rape) or while committing or attempting to commit an offence under section 149 (indecent assault on a female) or 156 (indecent assault on a male).

(6) Murder is first-degree murder in respect of a person when the death is caused by that person and that person has been previously convicted of either first degree murder or second degree murder.

(7) All murder that is not first-degree murder is second degree murder. 1973-74, c.38, s.2; 1974-75-76, c.105, s.4.

Transitional Provisions

Sections 25 to 28 of the Criminal Law Amendment Act (No.2), 1976 (1974-75-76, c.105) provides as follows:
"25. (1) If, on the day this Act comes into force, any person is under a sentence of death for murder punishable by death that has not been commuted, that sentence thereupon becomes a sentence of imprisonment for life for first degree murder without eligibility for parole until he has served twenty-five years of his sentence.

(2) If, after the coming into force of this Act, an appeal against conviction by a person under a sentence of death upon the coming into force of this Act for murder punishable by death is dismissed, that sentence thereupon becomes a sentence of imprisonment for life

for first degree murder without eligibility for parole until he has served twenty-five years of his sentence.

(3) If, on the day this Act comes into force, any person is under a sentence of death for treason or piracy that has not been commuted, that sentence is deemed to have been commuted to imprisonment for life with like effect as if the commutation had been granted before the day this Act came into force.

(4) If, after the coming into force of this Act, an appeal against conviction by a person under a sentence of death on the coming into force of this Act for treason or piracy is dismissed, the sentence is deemed to have been commuted to imprisonment for life immediately upon the dismissal with like effect as if the commutation had been granted before the day this Act came into force.

(5) In calculating the period of imprisonment served for the purpose of subsection (1) or (2), section 6732 of the *Criminal Code* applies *mutatis mutandis.*

"26. (1) Where, in proceedings commenced before the coming into force of this Act, a person is found guilty after the coming into force of this Act of an offence punishable by death, whether the offence be treason, piracy or murder, he shall be sentenced therefor and all further proceedings in respect thereof shall be continued as if the offence had been committed after the coming into force of this Act.

(2) Where, in proceedings commenced before the coming into force of this Act, a person is found guilty after the coming into force of this Act of murder that is not punishable by death, he shall be sentenced therefor and all further proceedings in respect thereof shall be continued as if this Act had not come into force.

"27. (1) Where proceedings in respect of any offence of treason, piracy or murder, whether punishable by death or not, that was committed before the coming into force of this Act are commenced after the coming into force of this Act, the offence shall be dealt with, inquired into, tried and determined, and any punishment in respect of the offence shall be imposed as if the offence had been committed after the coming into force of this Act irrespective of when it was actually committed.

(2) Where proceedings in respect of any offence of treason, piracy or murder, whether punishable by death or not, were commenced before the coming into force of this Act, and a new trial of a person for the offence has been ordered and the new trial is commenced after the coming into force of this Act, the new trial shall be commenced by the preferring of a new indictment before the court before which the accused is to be tried, and thereafter the offence shall be dealt with, inquired into, tried and determined, and any punishment in respect of the offence shall be imposed as if it had been committed after the coming into force of this Act.

"28. (1) Subsection 218 (5) (except paragraph (e) thereof) and subsections 218 (6), (7) and (9) of the *Criminal Code*, as they read immediately before the coming into force of this Act, shall be read as unrepealed by this Act in so far as it is necessary to give effect to any term of imprisonment for life imposed before the coming into force of this Act upon a person described in paragraph 218 (5) (a), (b) or (c) of the *Criminal Code* as it read immediately before the coming into force of this Act.

(2) Where

(a) subsection 25 (1) or (2) of this Act applies in respect of a person, or

(b) a person described in paragraph 218(5) (a), 9b) or (c) of the *Criminal Code* as it read immediately before the coming into force of this Act had been sentenced to a term of imprisonment for life and a judge had, under subsection 218 (6) of the *Criminal Code* as it read before the coming into force of this Act, by order, substituted for the number of years specified in paragraph 218 (5) (d) of the *Criminal Code* as it then read a number of years that is more than ten but not more than twenty,

that person may, after having served at least fifteen years of his sentence, make an application under section 672 of the *Criminal Code* as enacted by this Act and that section applies *mutatis mutandis* in respect of that person."

218. (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 purpose of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment. 1973-74, c.38, s.3; 1974-75-76, c.105, s.5.

Appendix C: Sentencing for Murder, 1989 *Canadian Criminal Code*

Part XX – Sections 669-674

Imprisonment for Life

669. The sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be,
   (a) in respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;
   (b) in respect of a person who has been convicted of second degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served at least ten years of his sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 671; and
   (c) in respect of a person who has been convicted of any other offence, that he be sentenced to imprisonment for life with normal eligibility for parole.

670. Where a jury finds an accused guilty of second degree murder, the judge who presides at the trial shall, before discharging the jury, put to them the following question:

> "You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against him. Do you wish to make any recommendation with respect to the number of years that he must serve before he is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before he is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five."

671. At the time of the sentencing of an accused under section 669 who is convicted of second degree murder, the judge presiding at the trial of the accused or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the accused, the nature of the offence and the circumstances surrounding its commission, and to any recommendation made pursuant to section 6780, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as he deems fit in the circumstances.

672. (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 or territory 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 his sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and such determination shall be made by no less than two-thirds of such jury.

(3) Where the jury hearing an application under subsection (1) determine 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) determine 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.

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

(6) For the purposes of this section, the "appropriate Chief Justice" is

(a) in relation to

(i) the Provinces of British Columbia and Prince Edward Island, respectively, the Chief Justice of the Supreme Court,

(ii) the Provinces of Alberta, Nova Scotia and Newfoundland, respectively, the Chief Justice of the Supreme Court, Trial Division,

(iii) the Province of New Brunswick, the Chief Justice of the Supreme Court, Queen's Bench Division,

(iv) the Province of Ontario, the Chief Justice of the High Court of Justice, and

(v) the Province of Quebec, the Chief Justice of the Superior Court;

(b) in relation to the Yukon Territory, the Chief Justice of the Court of Appeal thereof; and

(c) in relation to the Northwest Territories, the Chief Justice of the Court of Appeal thereof.

(7) For the purposes of this section, when the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction to empanel a jury

to hear an application in respect of a conviction that took place in the Yukon Territory or the Northwest Territories, the appropriate Chief Justice may designate the judge from the Court of Appeal or the Supreme Court of the Yukon Territory or Northwest Territories, as the case may be.

673. In calculating the period of imprisonment served for the purposes of section 669, 671 or 672, there shall be included any time spent in custody between,

(a) in the case of a sentence of imprisonment for life imposed after the commencement of the *Criminal Law Amendment Act (no. 2), 1976,* the day on which that person was arrested and taken into custody in respect of the offence for which he was sentenced to imprisonment for life and the day the sentence was imposed; or

(b) in the case of a sentence of death that has been or is deemed to have been commuted to a sentence of imprisonment for life, the day on which that person was arrested and taken into custody in respect of the offence for which he was sentenced to death and the day the sentence was commuted or deemed to have been commuted to a sentence of imprisonment for life.

674. (1) Unless the parliament of Canada otherwise provides by an enactment making express reference to this section, no person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall be considered for parole or released pursuant to the terms of a grant under the Parole Act or any other Act of the Parliament of Canada until the expiration or termination of his specified number of years of imprisonment without eligibility for parole.

(2) Notwithstanding the *Penitentiary Act and* the *Parole Act*, in the case of any person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three years of his number of years of imprisonment without eligibility for parole, no absence without escort may be authorized under the Penitentiary Act, no absence without escort for humanitarian and rehabilitative reasons may be authorized under the *Penitentiary Act* without the approval of the National Parole Board and no day parole may be granted under the *Parole Act*.

Appendix D: Purpose and Principles of Sentencing, 1997 *Canadian Criminal Code*

Purpose and Principles of Sentencing

PURPOSE

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives.

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary to assist in rehabilitating offenders to provide reparations for harm done to victims or to the community; and

(d) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community. 1995, c.22, s.6.

FUNDAMENTAL PRICIPLE

718.1 A sentence must be proportionate to the gravity of the offences and the degree of responsibility of the offender. 1995, c.22, s.6.

OTHER SENTENCING PRINCIPLES

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. 1996, c.22, s.6; 1997, c.23, s.17.

Appendix E: Judicial Review Provision, 2000 *Canadian Criminal Code*

Application for Judicial Review

s.745.6 (1) Subject to subsection (2), a person may apply, in writing, to the appropriate Chief Justice in the province in which their conviction took place for a reduction in the number of years of imprisonment without eligibility for parole if the person
(a) has been convicted of murder or high reason;
(b) has been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of their sentence has been served; and
(c) has served at least fifteen years of their sentence.

(2) A person who has been convicted of more than one murder may not make an application under subsection (1), whether or not proceedings were commenced in respect of any of the murders before another murder was committed.

(3) For the purposes of this section and section 745.61 to 745.64, the "appropriate Chief Justice" is
(a) in relation to the Province of Ontario, the Chief Justice of the Ontario Court;
(b) in relation to the Province of Quebec, the Chief Justice of the Superior Court;
(c) in relation to the Provinces of Prince Edward Island and Newfoundland, the Chief Justice of the supreme Court, Trial Division;
(d) in relation to the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen's Bench;
(e) in relation to the Provinces of Nova Scotia and British Columbia, the Chief Justice of the Supreme Court; and
(f) in relation to the Yukon Territory and the Northwest territories and Nunavut, the Chief Justice of the Court of Appeal thereof. 1993, c.28, Sch.III, s.35; 1995, c.22, s.6: 1996, c.19, s.6: 1996, c.34, s.2(2).

Judicial Screening

S.745.61 (1) On receipt of an application under subsection 745.6(1), the appropriate Chief Justice shall determine, or shall designate a judge of the superior court of criminal jurisdiction to determine, on the basis of the following written material, whether the applicant has shown, on a balance of probabilities, that there is a reasonable prospect that the application will succeed:
(a) the application;
(b) any report provided by the Correctional Services of Canada or other correctional authorities; and
(c) any other written evidence presented to the Chief Justice or judge by the applicant or the Attorney General.

(2) In determining whether the applicant has shown that there is a reasonable prospect that the application will succeed, the Chief Justice or judge shall consider the criteria set

out in paragraphs 745.63(1)(a) to (e), with such modifications as the circumstances require.

(3) If the Chief Justice or judge determines that the applicant has not shown that there is a reasonable prospect that the application will succeed, the Chief Justice or judge may

(a) set a time, not earlier than two years after the date of the determination, at or after which another application may be made by the applicant under subsection 745.6(1);

(b) or decide that the applicant may not make another application under that subsection.

(4) If the Chief Justice or judge determines that the applicant has not shown that there is a reasonable prospect that the application will succeed but does not set a time for another application or decide that such an application may not be made, the applicant may make another application no earlier than two years after the date of the determination.

(5) If the Chief Justice or judge determines that the applicant has shown that there is a reasonable prospect that the application will succeed, the Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application. 1995, c.22, s.6; 1996, c.34, s.2 (2).

s.745.63 (1) The jury empanelled under subsection 745.61(5) to hear the application shall consider the following criteria and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced:

(a) the character of the applicant; the applicant's conduct while serving the sentence;

(b) the nature of the offence for which the applicant was convicted;

(c) any information provided by the victim at the time of the imposition of the sentence or at the time of the hearing under this section; and

(d) any other matters that the judge considers relevant in the circumstances.

(2) In paragraph (1)(d), "victim" has the same meaning as in subsection 722(4).

(3) The jury hearing an application under subsection (1) may determine that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced. That determination to reduce the number of years must be by a unanimous vote.

(4) The applicant's number of years of imprisonment without eligibility for parole is not reduced if

(a) the jury hearing an application under subsection (1) determines that the number of years ought not to be reduced;

(b) the jury hearing an application under subsection (1) concludes that it cannot unanimously determine that the number of years ought to be reduced; or

(c) the presiding judge, after the jury has deliberated for a reasonable period, concludes that the jury is unable to unanimously determine that the number of years ought to be reduced.

(6) If the jury determines that the number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by a vote of not less than two thirds of the members of the jury,
   (a) substitute a lesser number of years of imprisonment without eligibility for parole that that then applicable; or
   (b) terminate the ineligibility for parole.

If the applicant's number of years of imprisonment without eligibility for parole is not reduced, the jury may
(a) set a time, not earlier than two years after the date of the determination or conclusion under subsection (4), at or after which another application may be made by the applicant under subsection 745.6(1); or
(b) decide that the applicant may not make another application under that subsection.

(7) The decision of the jury under paragraph (6) (a) or (b) must be made by not less than two thirds of its members.

(8) If the jury does not set a date at or after which another application may be made or decide that such an application may not be made, the applicant may make another application no earlier than two years after the date of the determination or conclusion under subsection (4). 1996, c.34, s.2 (2).

Works cited

Bonta, J. & Gendreau, P. (1990). Reexamining the Cruel and Unusual Punishment of Prison Life. Law and Human Behaviour, 14 (4), 347-562.

Boe, R. (2000). Population Aging and the Federal Inmate Profile of 2010! Forum on Corrections Research, 12 (3), 29-34.

Cayley, D. (1998). The Expanding Prison: The Crisis in Crime and Punishment and The Search for Alternatives. Toronto: House of Anansi Press Ltd.

Correctional Service Canada (1999). Judicial Review: Standard Operating Practices (SOPs) (Interim). Ottawa: Correctional Service Canada.

Correctional Service Canada (2000). Judicial Review Decisions by Year. Ottawa: Correctional Service Canada.

Cumberland, J. & Zamble, E. (1991) General and Specific Measures of Attitudes Toward Early Release of Criminal Offenders. Canadian Journal of Behavioural Science, 24(4), 442-455.

Department of Justice Canada (1996). Backgrounder Section 745 Amendments. Ottawa: Department of Justice Canada Press Releases.
http://canada.justice.gc.ca/en/news/nr/1996/doc745.html

Desgagne, J-G. (1998). Monitoring the Implementation and Impact of 745.6 CCC In Ontario. Ottawa: Department of Justice Canada Research Section

Gabor, T. & Crutcher, N. (2001). Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures. Ottawa: Department of Justice Canada.

Gendreau, P., Goggin, C., & Cullen, F.T. (1999). The Effects of Prison Sentences on Recidivism. Ottawa: Solicitor General Canada.

Gray, B. (2001, May 11). ``Victims' Group Folds; CAVEAT has been a success, founder says''. The Toronto Sun, p. A36.

Haley, H. (1984). Does the Law Need to Know the Effects of Imprisonment? Justice Report, 44, 479-489.

Harris, A. (1999). Life Sentences for First Degree Murder (Canada) and International Equivalents Eligibility for Release and Average Time Served. Ottawa: Correctional Service Canada.

House of Commons Debates (1998) Official Report (Hansard): Wednesday, September 23, 1998, Ottawa, 1st Session, 36th Parliament no. 124

Johnson, S. & Grant, B. (2000). Release Outcomes of Long-Term Offenders. Forum on Corrections Research, 12 (3), 16-20.

Department of Justice (1996). Judicial Review of Parole Ineligibility Period: Factsheet. Ottawa: Department of Justice Canada http://canada.justice.gc.ca/News/communiques/1997/judicia_en.html

Lemire, G. (1984). La Sentence Minimale D'Emprisonnement de 25 Ans: Principe et Pratique. Justice Report, 44, 459-466.

Luciani, F. (2000). Classifying Offenders Serving Life Sentences, Forum on Corrections Research, 12 (3), 21-28.

Martin's Criminal Code (1975, 1976, 1989, 1997, 2000) Toronto: Carswell

Marvel, T. & Moody, C. (1996). Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime. Criminology 34(1), 107-128.

Morley, G. (1997). A Just Measure of Pain? Sentencing and Sentencing Reform in the Era of the *Charter*. University of Toronto Faculty of Law Review, 55 (2), 269-302.

Motiuk, L.L. & Belcourt, R.L. (1996). Homicide, Sex, Robbery and Drug Offenders in Federal Corrections: An End-of-1995 Review. Ottawa: Correctional Service of Canada

National Parole Board of Canada (2000). Statistical Tables on Judicial Review. Ottawa: National Parole Board.

Pilon, M. (1996). Murderer's Parole Eligibility: Judicial Review. Ottawa: Library of Parliament.

Roberts, J. (1988). Early Release: What do the Canadian Public Really Think? Canadian Journal of Criminology, 30, 231-239.

Roberts, J. (1996). L'Article 745: Une Question de Compromis. Actualités-Justice 12(2), 4-5.

Roberts, J.V. & Cole, D.P. (1999). Sentencing and Early Release Arrangements for Offenders Convicted of Murder. in J. Roberts and D. Cole (eds.) Making Sense of Sentencing (pp. 277-294) Toronto: University of Toronto Press.

Sansfacon, D. (1998). Study on the Implementation of Cr.C. 745.6 in Quebec. Ten Years of Experience with Section 745 From 1987 to July 20, 1997. Ottawa: Department of Justice.
http://canada.justice.gc.ca/News/communiques/1997/parole_en.jpg l

Walker, N. (1991). Why Punish? Oxford: Oxford University Press.

Wormith, J.S. (1984). LongTerm Incarceration Data and Reason Meet Ideology and Rhetoric. Ottawa: Ministry of the Solicitor General

Zamble, E. (1992). Coping, Behaviour and Adaptation in Long-Term Prison Inmates: Descriptive Longitudinal Results. Unpublished paper, Queen's University.

Zubrycki, R. M. (1984). Long-Term Incarceration in Canada. Canadian Journal of Criminology, 55, 397-402.