

## Judicial Review: How Does It Work and How Does It Affect Federal Corrections?

Almost 16 years ago, in July 1976, Bill C-84 was passed by Parliament. The provisions for Judicial Review of Parole Ineligibility were then prescribed in section 745 of the *Criminal Code of Canada*. The Bill ended capital punishment and, in its place, instituted mandatory life sentences, with parole restrictions of 25 years for those convicted of first-degree murder and high treason and a varying parole restriction of 10-to-25 years for those convicted of second-degree murder. (Parole restriction refers to the length of time an offender must serve before being eligible for parole.)

Judicial Review can create an exception to these periods of parole ineligibility. After serving at least 15 years of a sentence for high treason, or for first- or second-degree murder, an offender may apply for a reduction in the number of years of imprisonment that he or she must serve before being eligible for parole. This provision is outlined in section 745 of the *Criminal Code*. The application for Judicial Review is made to the chief justice in the province or, territory where the original conviction took place. A jury is empanelled to hear the application and may reduce the number of years the offender is required to serve without eligibility for parole.

### Numbers

As of February 1991, 600 offenders in Canada were serving life sentences with parole restrictions of 15 years or more. As a group, they constitute about 5% of the 11,800 incarcerated federal offenders. Each year, about 41 offenders are sentenced to life with parole restrictions of more than 15 years. This group represents about 1% of the approximately 4,300 new offenders now admitted to federal custody each year. The proportion of offenders with parole restrictions of more than 15 years will likely continue to climb modestly and represent a small but significant portion of incarcerated federal offenders.

**Table 1**

<b>Eligibility for Full Parole for Offenders Convicted of Murder</b>	
Life for murder before 4 January 1968	7 Years
Life for murder from 4 Jan 1968 - 1 Jan 1974	10 Years
Life: Death commuted before 1 Jan 1974	
Life for murder from 1 Jan 1974 - 26 July 1976	10 - 20 Years; Judicial Review possible at 15 years
Life: Death commuted by 1 Jan 1974 - 26 July 1976	

Life: Death not commuted by 26 July 1976	25 Years; Judicial Review possible at 15 years
Life for first-degree murder on or after 26 July 1976	
Life for second-degree murder on or after 26 July 1976	10 - 25Years; Judicial Review possible at 15 years
Source: Correctional Services of Canada and National Parole Board, Correctional Conditional Release and Detention: A Statistical Overview. (Ottawa: Solicitor General of Canada, 1991).	

In 1992, 45 offenders become eligible to apply for Judicial Review. Over the next 10 years, the number of offenders becoming eligible varies between 25 and 52 per year (see Table 2). On average, 41 offenders per year become eligible to apply for Judicial Review.

**Table 2**

<b>Distribution of Judicial Review Cases* by Province of Sentencing and Year</b>												
<b>Year</b>	<b>Nfld.</b>	<b>PEI</b>	<b>NS</b>	<b>NB</b>	<b>Que</b>	<b>Ont</b>	<b>Man</b>	<b>Sask</b>	<b>Alta</b>	<b>BC</b>	<b>Yuk</b>	<b>NWT</b>
1988						2	3					
1989				3	2					3		
1990					8	1		1	1	2		
1991					8	5		2	5	1		
1992					15	14	2	6	4	4		
1993			2	1	13	13	3	2	1	2		
1994	1			1	13	7	1	1	1	2		
1995			1	1	6	10			3	4		
1996			1		13	11	1	2	6	5		1
1997			1	1	14	10	1	2	6	7		
1998	2		2	1	6	17	3	1	7	9		
1999			2	2	9	14	5	2	5	13		
2000	1			2	14	13	3	1	4	6		
2001			2	5	16	13	7	1	7	1		
2002	1		1	2	11	8	4	1	2	13		
Missing				1	8	15	6		3	4		1
<b>Total</b>	<b>5</b>	<b>0</b>	<b>12</b>	<b>20</b>	<b>156</b>	<b>153</b>	<b>39</b>	<b>22</b>	<b>55</b>	<b>76</b>	<b>0</b>	<b>2</b>
* Data as of February 1991 - offenders currently in custody												

## **Outcomes**

As of 31 March 1992, 63 inmates had become eligible for Judicial Review. Of these, 13 have had hearings. Five were granted immediate eligibility for parole, three were given a partial reduction in their parole restriction and five applications were denied.

Five of the 13 hearings were held in Quebec. Only one of these resulted in a complete denial of the application. In Ontario, both applications heard to date were denied. Cases have also been heard in Manitoba, Alberta and British Columbia.

Four of the 13 offenders were in minimum-security institutions at the time of their application, while the rest (nine) were in medium security. Application was denied for one of the minimum-security applicants.

Some offenders who have become eligible for Judicial Review have not yet applied. In a recent survey conducted by the Correctional Service of Canada, these offenders offered a variety of reasons for their decision not to apply. Some plan to apply at a later date; they need more time to complete program requirements or to consult legal counsel. For some, access to financial assistance for legal counsel, which varies between provinces, was a barrier. A minority of offenders have no intention of applying for Judicial Review at all.

For offenders whose parole restriction is 20 years or less, applying for Judicial Review offers little benefit. After making an application on or after the 15-year point, they would then receive their hearing in the 16th year of their sentence. However, offenders with a 20-year parole restriction are eligible to commence conditional release via unescorted temporary absences and day parole after serving 17 years. Judicial Review in this instance is therefore of diminished practical benefit to the offender.

## **Process**

The *Criminal Code* allows the chief justice of each province or territory to make rules governing the manner in which applications are to be heard. Rules of Practice are now in place in six provinces: Newfoundland, Nova Scotia, Ontario, Manitoba, Saskatchewan and Alberta. Other provinces and territories have draft rules which they may act upon until Rules of Practice are set.

In all cases, it is the offender's responsibility to apply for Judicial Review of Parole Ineligibility. The application is made directly to the chief justice in the province or territory where the offender was convicted. The chief justice determines whether the offender is actually eligible to apply and then notifies the provincial attorney general of the application.

Although the process varies from province to province, the hearing of Judicial Review applications usually occurs in two stages. The first stage is known as the preliminary hearing or prehearing conference. (In fact there can be several of these hearings.) The second phase is the actual hearing.

During the preliminary or prehearing phase, the court usually deals with matters necessary to prepare for the hearing, including the attendance, housing and transportation of the applicant (offender). The court

also determines what kind of information or evidence will be received at the hearing. Evidence is ordinarily admitted from character witnesses, expert witnesses, reports and statements of fact agreed upon by the offender and the attorney general.

Of particular importance to Correctional Service of Canada staff is the direction provided by the judge regarding the preparation of the Parole Eligibility Report. This document is filed by the Correctional Service of Canada and contains a description of the applicant's character and conduct while in custody. It is investigative, objective and impartial. These reports are comprehensive, often about 20 pages in length, but do not contain opinions or recommendations. The author of the report may be cross-examined on the content of the report during the prehearing phase or at the actual hearing.

In most cases, other staff, professionals and persons who know the offender are called as witnesses by either the applicant or the provincial attorney general. The evidence provided is usually intended to speak to the character of the offender. The purpose of the hearing is not to revisit the conviction, and additional evidence about the crime is not ordinarily admitted. Details of the offence are usually admitted in an agreed-upon statement of facts at the beginning of the hearing.

As in the criminal trial at which the offender was convicted, 12 jurors are empanelled to decide the Judicial Review, and the process is an adversarial one between the provincial attorney general and the applicant (offender). However, the roles of the attorney general (or Crown counsel) and the applicant are reversed in Judicial Review cases. The case of the applicant is presented first, then the attorney general presents rebuttal evidence. Witnesses may be called by either side to provide testimony, and they may then be cross-examined. After all the evidence has been presented, counsel for the applicant addresses the jury, followed by the Crown counsel. At the end of the hearing, the judge addresses the jury by reviewing the evidence, explaining the law and outlining the decision options available to the jury.

Hearings may last between four and eight days. Typically, there are four or five days of testimony and a and by the Crown, followed by the judge's direction and the jury's deliberations.

The jury's decision must be made by at least two thirds of the jury. The jury has three options:

1. make no change or reduction to the period of parole eligibility;
2. reduce the number of years of imprisonment without eligibility for parole; or
3. terminate the ineligibility for parole, making the applicant eligible to apply immediately. This does not mean that the offender will automatically be released on parole, but that the offender may now apply to the National Parole Board for release on parole.

Department of Justice lawyers, representing the Solicitor General and the Correctional Service of Canada, are involved in all Judicial Review cases (but the extent varies). Their role is to represent the Minister and the Correctional Service of Canada in matters pertaining to the conduct of the hearing and to assist corrections staff who may be called to provide evidence.

## **Issues**

The Correctional Service of Canada has institutions in all regions of Canada. During the course of a sentence, an offender may be transferred to an institution in another part of Canada for a variety of reasons, including closer proximity to family, additional programming opportunities or personal safety considerations. In four of the 13 cases concluded so far, when the offenders applied for Judicial Review, they were outside the province to which they applied (i.e., the province in which they were originally convicted). In three of these four cases, the offenders remained outside the province of conviction until the time of their Judicial Review hearing; only then were they transferred to a location near the court for the duration of the hearing.

The management and programming of long-term offenders present Service of Canada. For instance, there has been some question of the use of escorted temporary absences for offenders who have parole restrictions of 15 years or more, but who have not yet had a Judicial Review hearing. It is clear that escorted temporary absences must not be used to groom offenders for Judicial Review hearings; however, consideration for escorted temporary absences (or other decisions, e.g., transfers) should depend on each offender's own merits, not simply on whether he or she has or has not yet had a Judicial Review hearing.

## **Summary**

To date, experience with the Judicial Review process has been limited; only a minority of eligible inmates have applied for Judicial Review. Of the 13 applicants, eight have received consideration for either immediate eligibility for parole or a partial reduction in the number of years that must be served before parole eligibility.

However, we may anticipate an increase in the proportion of offenders who do apply for Judicial Review in the future, as offenders, legal counsel, providers of legal assistance (Legal Aid), the Crown and the courts become more familiar with Judicial Review.

On another point, the distribution of both positive and negative Judicial Review decisions indicates that outcomes in these cases are far from predetermined and that the interests of the offender and the community are being carefully balanced.