

**BILL C-36: AN ACT TO AMEND THE CRIMINAL CODE
(SERIOUS TIME FOR THE MOST SERIOUS
CRIME ACT)**

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LEGISLATIVE HISTORY OF BILL C-36

HOUSE OF COMMONS

Bill Stage	Date
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Bill Stage	Date
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N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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BILL C-36: AN ACT TO AMEND THE CRIMINAL CODE
(SERIOUS TIME FOR THE MOST SERIOUS CRIME ACT)*

Bill C-36, An Act to amend the Criminal Code (short title: Serious Time for the Most Serious Crime Act) was given first reading in the House of Commons on 5 June 2009. It was referred to the House of Commons Standing Committee on Justice and Human Rights, **which recommended some technical amendments. The bill, as amended, passed third reading in the House of Commons on 25 November 2009 and was introduced in the Senate the next day.** The bill amends provisions in the *Criminal Code* regarding the right of persons convicted of murder or high treason to apply for early parole.¹ This is done through the elimination of the so-called “faint hope” clause by which those given a life sentence for murder or high treason could apply for parole after having served 15 years of their sentence.

BACKGROUND

A. The Current Law

Section 745.6 of the *Criminal Code* is known informally as the “faint hope” clause, because it provides offenders serving a sentence for high treason or murder² with the

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

¹ R.S.C. 1985, c. C-46 [*Criminal Code*], s. 745.6.

² The definition of *high treason* is found in s. 46 of the *Criminal Code*:

(1) Every one commits high treason who, in Canada, (a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her; (b) levies war against Canada or does any act preparatory thereto; or (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.

possibility of parole after having served 15 years, where the sentence has been imprisonment for life without eligibility for parole for more than 15 years.

Offenders convicted of first-degree murder³ receive life imprisonment as a minimum sentence, with the earliest eligibility for parole set by law at 25 years. For offenders convicted of second-degree murder, a mandatory sentence of life imprisonment is also imposed, with the judge setting parole eligibility at a point between 10 and 25 years. Those serving a life sentence can be released from prison only if granted parole by the National Parole Board. Unlike most inmates who are serving a sentence of fixed length, e.g., 2, 10, or 20 years, lifers are not entitled to statutory release.⁴ If granted parole, they remain subject, for the rest of their lives, to

(cont'd)

(2) Every one commits treason who, in Canada, (a) uses force or violence for the purpose of overthrowing the government of Canada or a province; (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada; (c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a); (d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or (e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.

The definition of *murder* is found in s. 229 of the *Criminal Code*:

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 that he desires to effect his object without causing death or bodily harm to any human being.

³ First-degree murder is defined in s. 231 of the *Criminal Code*. This type of murder encompasses the following elements: it is planned and deliberate, a police officer (and other law enforcement officials) is killed while acting in the course of his or her duties, the death is caused in the course of committing various offences, and the murder is committed in the context of terrorist or organized crime activities. All murder that is not first-degree murder is second-degree murder.

⁴ “Statutory release requires federally sentenced offenders to serve the final third of their sentence in the community, under supervision and under conditions of release similar to those imposed on offenders released on full parole. Offenders serving life or indeterminate sentences are not eligible for this type of release. Offenders on statutory release are inmates who either did not apply for release on parole, or who were denied release on full parole. Statutory release can be denied, if a detention hearing determines that the offender will likely commit an offence causing harm or death, a sexual offence involving a child or a serious drug offence.” Correctional Service of Canada, *Parole and Community Corrections*, “Statutory Release,” <http://www.csc-scc.gc.ca/text/faits/faits/03-04-eng.shtml>.

the conditions of parole and the supervision of a Correctional Service of Canada parole officer. Parole may be revoked and offenders returned to prison at any time if they violate the conditions of parole or commit a new offence. Not all lifers are granted parole. Some are never released on parole because the risk of their reoffending is too great.

During the years following its initial introduction in 1976, the “faint hope” provision underwent a number of amendments, so that now the criteria for the possible release on parole of someone serving a life sentence are as follows:

- The inmate must have served at least 15 years of the sentence.
- An inmate who has been convicted of more than one murder, where at least one of the murders was committed after 9 January 1997 (when certain amendments came into force), may not apply for a review of his or her parole ineligibility period.
- To seek a reduction in the number of years of imprisonment without eligibility for parole, the offender must apply to the chief justice of the province or territory in which his or her conviction took place.
- The chief justice, or a superior court judge designated by the chief justice, must first determine whether the applicant has shown that there is a reasonable prospect that the application for review will succeed. This assessment is based on the following criteria:
 - the character of the applicant;
 - the applicant’s conduct while serving the sentence;
 - the nature of the offence for which the applicant was convicted;
 - any information provided by a victim⁵ at the time of the imposition of the sentence or at the time of the hearing under this section; and
 - any other matters that the judge considers relevant in the circumstances.
- If the application is dismissed for lack of a reasonable prospect of success, the chief justice or judge may set a time for another application not earlier than two years after the dismissal, or he or she may declare that the inmate will not be entitled to make another application.
- If the chief justice or judge determines that the application has a reasonable prospect of success, a judge will be assigned to hear the matter with a jury. In determining whether the period of parole ineligibility should be reduced, the jury should consider the five criteria outlined above. The jury determination to reduce the parole ineligibility period must be unanimous. The victim(s) of the offender’s crime may provide information either orally or in writing or in any other manner that the judge considers appropriate. If the application is

⁵ Subsection 722(4) of the *Criminal Code* defines *victim* in this context as the spouse or common-law partner of the murdered person, any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

dismissed, the jury may, by a two-thirds majority, either set a time not earlier than two years after the determination when the inmate may make another application, or it may decide that the inmate will not be entitled to make any further applications.

- If the jury determines that the number of years of imprisonment without eligibility for parole ought to be reduced, a two-thirds majority of that jury may substitute a lesser number of years of imprisonment without eligibility for parole than the number then applicable. The number of years without eligibility for parole that they may assign can range from 15 to 24 years.
- Once permission to apply for early parole has been granted, the inmate must apply to the National Parole Board to obtain parole. Whether the inmate is released, and when, is decided solely by the Board based on a risk assessment, with the protection of the public as the foremost consideration. Board members must also be satisfied that the offender will follow specific conditions, which may include restriction of movement, participation in treatment programs, and prohibitions on associating with certain people (such as victims, children, and convicted criminals).

A “faint hope” clause review, then, is not a forum for a retrial of the original offence, nor is it a parole hearing. A favourable decision by the judge and the jury simply advances the date on which the offender will be eligible to apply for parole.

B. Judicial Consideration of the “Faint Hope” Clause

The Supreme Court of Canada has stated that the purpose of this review procedure is to re-examine a judicial decision in light of changes which have occurred in the applicant’s situation since the time of sentencing that might justify lessening the parole ineligibility period. Section 745.6 of the *Criminal Code* gives the jury broad discretionary power to consider any matter concerning the offender’s situation, and the Supreme Court has provided guidelines for the exercise of this discretionary power, namely that the jury must consider only the applicant’s case and must not try the cases of other inmates who may have committed offences after being released on parole. The Court has also stated that it is not the jury’s role to determine whether the existing system of parole is effective.⁶

C. History of the “Faint Hope” Clause

In July 1976, Parliament voted to abolish capital punishment for *Criminal Code* offences (as opposed to the death penalty for military offences, abolished in 1999). The *Criminal Code* was amended, and the categories of murder were changed from capital and non-capital to

⁶ *R. v. Swietlinski*, [1994] 3 S.C.R. 481.

first- and second-degree. Mandatory minimum sentences for murderers were introduced. The compromise arrived at between the supporters and opponents of the death penalty was its replacement by long-term imprisonment without parole.

The “faint hope” clause was adopted in 1976 in connection with the abolition of the death penalty. Speaking in favour of the abolition of the death penalty and the addition of the “faint hope” clause to the *Criminal Code*, the solicitor general of the day, Warren Allmand, said the following:

I disagree with those who argue that a life sentence with no parole eligibility for 25 years is worse than death. A period of incarceration, with hope of parole, and with the built-in additional incentive for the inmate, and protection for the guards, of a review of that parole eligibility after 15 years is necessarily better than a sentence of death because it removes the possibility of an irreversible error of execution.⁷

Thus, the “faint hope” clause was added to the *Criminal Code* in the hope that it would provide an incentive for long-term offenders to rehabilitate themselves and, therefore, afford more protection to prison guards. The provision is also said to represent Parliament’s awareness of how long other countries imprison persons convicted of murder before allowing them to apply for parole. For example, Australia, Belgium, Denmark, England, New Zealand, Scotland, and Switzerland keep persons convicted of murder in prison for, on average, 15 years before they may be paroled.⁸

Concerns were raised about the “faint hope” clause in the course of the debate over the abolition of capital punishment. One member of Parliament said that, before going any further with parole provisions, a total reform of the *Criminal Code* to include rehabilitation, help for crime victims and greater rights for police officers would have to be considered.⁹ The same member, C.A. Gauthier, expressed the concern that “[a]s long as we persist in shutting up our criminals in the schools of crime that our prisons now are ... they will come out even more rebellious, and I would even say even more refined in their future actions.”¹⁰ But, the argument

⁷ House of Commons, *Debates*, 1st Session, 30th Parliament, 3 May 1976, p. 13091.

⁸ Karin Stein and Dan Antonowicz, “Section 745.6 – The ‘Faint Hope Clause,’” Research and Statistics Division, Department of Justice, December 2001, <http://dsp-psd.pwgsc.gc.ca/Collection/J2-291-2001E.pdf>.

⁹ House of Commons (3 May 1976), p. 13097.

¹⁰ Ibid.

went, if the government is responsible for the welfare of the inmates, it is all the more so for that of the victims of criminals. Another member of Parliament, Norman A. Cafik, noted that there was a feeling among the public that more attention was paid to the rehabilitation of criminals than to the protection of society. This MP thought that society should ensure that penalties match the crime and guarantee that sentences be served in order to maximize the deterrent effect of the criminal law. He also stated that the perception of the public was extremely important and that governments needed to behave in a way that would restore the fundamental confidence of the public.¹¹

The first judicial review hearing under the “faint hope” clause was held in 1987. As of 13 April 2009, 991 offenders had been deemed eligible to apply for a judicial review. Court decisions had been rendered in 174 cases, and 144 inmates had been declared eligible to apply for earlier parole. Of these, 131 were granted parole, representing just over 13% of those who had been deemed eligible to apply for a review of their parole date.¹²

The most recent published Correctional Service of Canada statistics concerning the fate of prisoners released on parole under the “faint hope” clause, for April 2008,¹³ show that of the 125 offenders who had been released by that date, 95 were being actively supervised in the community, 15 had been returned to custody, 11 were deceased, 1 was unlawfully at large and 3 had been deported.¹⁴ These statistics also show that of a total of 22,831 offenders under Correctional Service of Canada jurisdiction at the time, 4,429 or 19.4% were serving life sentences, almost all of them for murder.¹⁵ By comparison, a study published in July 2009 showed that 140,610 people or 9% of the total prison population were serving life sentences in the United States.¹⁶

¹¹ Ibid., p. 13099.

¹² National Parole Board, *NPB QuickStats*, “Parole, Pardons and Clemency,” http://www.npb-cnrc.gc.ca/infocntr/factsh/parole_stats-eng.shtml#15.

¹³ The next set of these statistics is scheduled for publication in December 2009.

¹⁴ Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview 2008*, December 2008, Figure E2, <http://www.publicsafety.gc.ca/res/cor/rep/fl/2008-04-ccrso-eng.pdf>.

¹⁵ Ibid., Table C14.

¹⁶ Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, The Sentencing Project, Washington, DC, July 2009.

D. History of Imprisonment for Murder in Canada

While the *Criminal Code* has a single definition of murder and one specification of the punishment that applies throughout Canada, the legislation pertaining to the sentencing for murder has changed considerably in the course of the past 50 years. In November 2002, Correctional Service of Canada published a study on the average time offenders sentenced for murder spent in prison.¹⁷ This study took into account three periods defined by the murder-related legislation that was in force:

- pre-1961 (persons convicted of murder automatically sentenced to death);
- 1961 to 1976 (capital/non-capital murder designations in effect); and
- 1976 to 2002 (first- and second-degree murder designations in effect).

Before 1 September 1961, any person convicted of murder in Canada was automatically sentenced to death and the sentence carried out unless the Governor General, acting on the advice of Cabinet, commuted the sentence to life imprisonment. This was called the royal prerogative of mercy. Historical evidence indicates that the royal prerogative was exercised frequently and operated flexibly. Between Confederation (1867) and 1962, the year of the last execution in Canada, the federal Cabinet commuted just under half of all death sentences to life imprisonment.¹⁸ Decisions to execute or spare were made on a case-by-case basis, not according to formal rules of evaluation. The Governor General was not obliged to justify his decisions, and the deliberations in Cabinet were not recorded. In fact, it has been said that “clemency decisions were a macabre balancing act in which personal prejudices and political expediency often tipped the scales.”¹⁹

Meanwhile, from 1899 to 1959, the *Ticket of Leave Act* operated on the principle that release was an important part of the rehabilitative process. Under the terms of this Act, the Governor General could grant a conditional release to any prisoner serving a term of imprisonment. Although not applied to death sentences, conditional release later became possible for those sentences commuted to life imprisonment. On 15 February 1959, the proclamation of the *Parole Act* resulted in the abolition of the *Ticket of Leave Act*. The new Act enshrined the principle of rehabilitation and created the National Parole Board.

¹⁷ Mark Nafekh, Jillian Flight, “A review and estimate of time spent in prison by offenders sentenced for murder,” Research Branch, Correctional Service of Canada, November 2002, <http://www.csc-scc.gc.ca/text/rsrch/briefs/b27/b27-eng.shtml>.

¹⁸ Ibid.

¹⁹ National Parole Board, “History of Parole in Canada,” <http://www.npb-cnrc.gc.ca/about/hist-eng.shtml>.

Parole was defined as the authority granted to inmates to be at large during their terms of imprisonment.²⁰ The legislation set out the new criteria for parole: the Parole Board could release an inmate when he or she had “derived the maximum benefit from imprisonment,” when “the reform and rehabilitation of the inmate will be aided by parole,” and when “release would not be an undue risk to society.”²¹ Under the *Parole Act*, the Parole Board would, at particular times prescribed by the regulations, review the case of every inmate serving a sentence of imprisonment of two years or more, whether or not an application had been made by, or on behalf of, the inmate. Inmates sentenced for murder were still eligible for release only under mechanisms such as reduced sentences, pardons, and the royal prerogative of mercy.

Amendments made to the *Criminal Code* in 1961 formally differentiated between death and life sentences. These changes resulted in murder being divided into capital and non-capital murder. With these amendments, capital murder was defined as “murder that is planned and deliberate, murder committed in the course of certain crimes of violence by the direct intervention or upon the counselling of the accused; and murder of a police officer or prison warden, acting in the course of duty, resulting from such direct intervention or counselling.”²² Such murder was still punishable by mandatory hanging, except if the accused was under 18 years of age. All other murder, referred to as non-capital, was punished by life imprisonment. In addition to this amendment, in 1961 an automatic review of all capital convictions by the provincial Court of Appeal was established as well as a full right of appeal to the Supreme Court of Canada. This was a review of fact or law alone, since the sentence was mandatory and could be reduced only by the Cabinet.

As outlined above, in July 1976, Parliament voted to abolish capital punishment for *Criminal Code* offences. The *Criminal Code* was amended and the previous categories of capital and non-capital murder were replaced with first- and second-degree murder. Mandatory minimum sentences for murderers were introduced, with lengthy periods of parole ineligibility.

The Correctional Service of Canada study²³ revealed that the average length of incarceration for offenders given murder sentences before 1961 was 19.6 years. In the study, the length of incarceration was defined as the interval beginning with the start of the murder

²⁰ *Parole Act*, S.C. 1958, c. 38, s. 2.

²¹ National Parole Board, “History of Parole in Canada.”

²² Part of this definition is the basis of the current definition of first-degree murder in section 231 of the *Criminal Code*.

²³ Nafekh and Flight (November 2002).

sentence and ending with one of the following events: death, court-ordered freedom, royal prerogative of mercy, or conditional release. Between 1961 and 1976, the average time served in prison was found to be 15.8 years for those serving sentences for capital murder and 14.6 years for those imprisoned for non-capital murder. This decline compared with the length of incarceration before 1961 was most likely associated with legislative changes and the introduction of the *Parole Act* in 1959.

The most dramatic effects on the length of incarceration for offenders serving sentences for murder occurred after the abolition of capital punishment in 1976. The average incarceration time for offenders serving sentences for first-degree murder was found to be 22.4 years, an increase of 6.6 years over sentences that fell under the capital murder definition. The authors of the study point out, however, that this figure is probably an underestimate, because insufficient time had passed to permit observation of the maximum length of incarceration.

During the period covered by this study, the length of incarceration varied due to differing mechanisms affecting release. Prior to 1961, murder sentences ended in death or were commuted to life, resulting in a wide-ranging distribution of sentence lengths. From 1961 to 1976 commuted sentences and the new non-capital murder sentences were eligible for parole. The shortest average incarceration times are observed during this period, particularly for capital cases. Since 1976, the parole ineligibility period for first-degree murder sentences has been extended to 25 years, with the “faint hope” clause providing for the possibility of parole after 15 years in some cases. Average incarceration periods are the longest they have ever been for the more serious murder sentences; those for second-degree murder sentences have increased slightly.²⁴

E. Murder Sentences in Other Countries

As seen in Table 1, a 1999 international comparison of the average time served in custody by an offender given a life sentence for first-degree murder showed that the average time served in Canada – 28.4 years²⁵ – is greater than in all countries surveyed, including the United States (with the exception of offenders serving life sentences without parole).

²⁴ Ibid.

²⁵ Daniel Beavon, Unpublished data, Performance Measurement, Correctional Service of Canada, Ottawa, 1995.

Table 1 – Average Time Spent in Custody

Country	Time Served (Years)
New Zealand	11.0
Scotland	11.2
Sweden	12.0
Belgium	12.7
Australia	14.8
United States Life sentence with parole	18.5
United States Life sentence without parole	29.0

Source: Department of Justice Canada, “Fair and Effective Sentencing: A Canadian Approach to Sentencing Policy,” October 2005, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31690.html.

The countries with the shortest and longest incarceration periods for people serving murder sentences provide points of comparison with Canada. In New Zealand, prisoners become eligible for release on parole after seven years if sentenced prior to 1 August 1987, or after 10 years if sentenced after that date, unless a minimum term was imposed by the court. The most recent published statistics, covering the period from 1 July 2002 to 30 June 2003, shows that the average number of years served in custody by this class of inmates was 12.1 years.²⁶

In the United States, while every state provides for life sentences, there is a broad range in the severity and implementation of the statutes. In six states – Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota – and the federal system, all life sentences are imposed without the possibility of parole. Only Alaska provides the possibility of parole for all life sentences, while the remaining 43 states have laws that permit sentencing most defendants to life with or without parole.

In the case of life sentences with the possibility of parole, the time that must be served prior to eligibility for release varies greatly, from under 10 years in Utah and California to 40 and 50 years in Colorado and Kansas. The median length of time served prior to parole eligibility nationally is in the range of 25 years. However, eligibility does not mean release and, owing to the reticence of review boards and governors, it has become increasingly difficult for persons serving a life sentence to be released on parole.²⁷

²⁶ New Zealand Parole Board, *Report of the New Zealand Parole Board for the year ended 30 June, 2003*, http://www.paroleboard.govt.nz/_data/assets/pdf_file/0005/283505/ar-june-03-new.pdf.

²⁷ Nellis and King (July 2009).

DESCRIPTION AND ANALYSIS

Bill C-36 consists of seven clauses. This section contains discussion of the most important of these clauses.

A. Clause 2: Addition of Subsection 745.01(2) to the *Criminal Code*

The current section 745.01 of the *Criminal Code* requires a trial judge to read out at the time of sentencing a notice respecting the availability of a judicial review of the parole ineligibility period. This statement indicates that the offender, after having served at least 15 years of the sentence, may apply under section 745.6 of the *Criminal Code* for a reduction in the number of years of imprisonment without eligibility for parole. This section does not apply where the person has been convicted of more than one murder in the circumstances set out in subsection 745.6(2). Clause 2 of the bill adds subsection 745.01(2) to the *Criminal Code*, indicating that this statement will not be made if the bill is in force when the offence is committed.

B. Clause 3: Amendments to Section 745.6 of the *Criminal Code* – Application for Judicial Review

Clause 3 adds a number of paragraphs to section 745.6 of the *Criminal Code*, changing certain aspects of the process of applying for judicial review of a life sentence. First, new paragraph 745.6(1)(a.1) makes it clear that the provisions of the “faint hope” clause apply only if the murder or high treason was committed before the day on which the provisions of Bill C-36 come into force. This means that the effect of the bill is not retroactive: the “faint hope” regime will continue to apply to those who are currently serving or awaiting sentencing for murder. It will not be available to those who commit offences once the bill is in force.

For those who are able to make an application for judicial review, clause 3 imposes a number of additional restrictions. New applications must be made within 90 days of the day on which the offender has served 15 years of his or her sentence or within 90 days of the coming into force of the bill; repeat applications must be made within 90 days of the fifth anniversary of the last application or the date set by the judge or jury. If no such application is made or if an applicant is unsuccessful, five years must pass before a fresh application may be made, an increased length of time from the current two-year period. The offender will have to apply within 90 days of that date.

Under the new regime, therefore, unsuccessful applicants for judicial review will be able to apply twice: once when they become eligible after serving 15 years of their sentence and once more at the 20-year mark. Under the current regime, unsuccessful applicants may apply a total of five times: when they have been incarcerated for 15, 17, 19, 21 and 23 years (as long as these further applications are permitted by a judge or jury).

C. Clauses 4 and 5: Addition of the Words “Substantial Likelihood”
to the Judge’s Decision and Changes to Time Periods

Section 745.61 of the *Criminal Code* sets out the procedure to be followed by a chief justice or designated judge of the superior court in determining whether an applicant for judicial review of his or her sentence has shown, on a balance of probabilities, that there is a reasonable prospect that the application will succeed. Clause 4 of Bill C-36 will change the words “reasonable prospect” of success to a “substantial likelihood” of success. This change in language sets a more stringent requirement for proving the possible success of the application. The words “reasonable prospect” are replaced with “substantial likelihood” in subsections 745.61(1), **745.61(2)**, 745.61(3), 745.61(4), and 745.61(5).

Clause 4 also changes the amount of time applicants for judicial review must wait before making a second application, should they not succeed the first time. Currently, subsection 745.61(3) states that, if the judge determines that there is not a reasonable prospect that the application will succeed, he or she may set a time, not earlier than two years, at or after which another application may be made, or decide that no other such application may be made. This will be amended to extend the period before which another application may be made to five years. Current subsection 745.61(4) states that, if the judge sets no time, the applicant may make another application no earlier than two years after the date of the denied application. This “default” period will also be extended to five years by the provisions of Bill C-36.

Clause 5 makes similar changes in the case where a jury has been empanelled. Here the current two-year period that a jury may set before another application for judicial review may be made is extended to five years. Similarly, if the jury makes no decision, the applicant may make another application no earlier than five years (as opposed to the current two years) after the jury has made its determination.

D. Clause 6: Transitional Provisions

Clause 6 reinforces the point that applications under the “faint hope” clause that are not finally disposed of on the date Bill C-36 comes into force are to be dealt with under the current provisions of the *Criminal Code*. If the applicant is unsuccessful, the current two-year delay will apply, but the offender must re-apply within 90 days of that date. The same 90-day time limit applies if a judge or jury has set a specific time before which a re-application may not be made.

COMMENTARY

Vigorous debate has surrounded Bill C-36 concerning the place of the “faint hope” clause in the criminal justice system. This section of the legislative summary attempts to present the points of view on these matters as they have been expressed, with particular emphasis on media reports.

The Canadian Resource Centre for the Victims of Crime has supported Bill C-36. Heidi Illingworth of that group has been quoted as saying, “The process [of parole reviews] is tantamount to cruel and unusual punishment for survivors.”²⁸ Teresa McQuaig, whose grandson Sylvain Leduc was murdered in 1995, has applauded the introduction of Bill C-36, saying it may mean her family won’t have to go through the agony of testifying to prevent Leduc’s assailants from being released from prison. She said: “The horrible crimes they committed does not call for a freebie, go-home pass.”²⁹

The abolition of the “faint hope” clause is also supported by those who advocate “truth in sentencing.” As one editorial has framed it, when a judge sentences a person to life in prison with no chance of parole for 25 years, and the faint-hope clause allows that offender the opportunity of freedom 10 years earlier, the judge’s sentence is a “lie” from the moment he or she utters it.³⁰ This editorial goes on to say that murderers who have wilfully taken a life ought to give up a significant portion of their own in exchange. Mitigating the punishment should not be an option.

²⁸ Norma Greenaway, “Tories seek to repeal ‘faint hope’ clause for murderers,” *Ottawa Citizen*, 6 June 2009, p. A3.

²⁹ Terry Pedwell, “‘Faint hope’ clause for murder could be killed,” *Waterloo Region Record*, 6 June 2009, p. A11.

³⁰ “Faint-hope clause should have no hope of surviving,” Editorial, *Calgary Herald*, 15 June 2009, p. A12.

Those who favour the retention of the “faint hope” clause argue that the judges and juries who consider whether to reduce the parole ineligibility period often take into consideration the circumstances that have led criminals down the wrong path – factors like poverty and fetal alcohol syndrome. They also recognize that mistakes are made in courtrooms from time to time, resulting in innocent people being convicted. While acknowledging that those who commit murder deserve to be treated severely, people who favour retaining section 745.6 of the *Criminal Code* state that offenders should not be utterly robbed of hope, since one of the aims of punishment is rehabilitation. They believe, in other words, that justice must be tempered with mercy.³¹

The John Howard Society does not support Bill C-36. Its representatives say that the availability of the “faint hope” clause may provide incentive for prisoners to rehabilitate themselves. They add that the repeal of the clause could lead to increased violence in Canada’s prisons, saying that if one takes away even a faint hope, there is the potential that the incentive to behave well will go with it.³²

William Trudell, chair of the Canadian Council of Criminal Defence Lawyers, has pointed out that no offender can be released from prison under faint-hope provisions unless a jury agrees it is appropriate. He characterizes the bill as an “erosion of discretion in the system moving towards rigidity that is really changing the criminal justice system as we know it,” adding that “[e]very situation has got a human story to it and you have got to allow some discretion and weighing of circumstances.”³³

³¹ Lee Giles, “Mercy essential to justice,” *Red Deer Advocate*, 16 June 2009, p. A4.

³² Remo Zaccagna, “Society slams faint hope plans,” *The North Bay Nugget*, 11 June 2009, p. A9.

³³ Gloria Galloway, “Criminal Code: Tories look to deny murderers ‘faint hope’ for early parole,” *Globe and Mail* [Toronto], 6 June 2009, p. A7.