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March 9th, 2010

Faint Hope for the Faint Hope Clause?

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Cases Considered:

R. v. Ryan, 2010 ABQB 87

Parliament commenced a new session last week. When it was prorogued in December 2009, 14 bills containing amendments to the *Criminal Code* died on the order paper, including Bill C-36, the *Serious Time for the Most Serious Crime Act.* Bill C-36 would have repealed the "faint hope" clause, a provision in the *Criminal Code* that currently allows persons convicted of first or second degree murder to seek early release on parole after serving 15 years of their sentence. Bill C-36 had passed through three readings in the House of Commons, and was before the Liberal dominated Senate before prorogation, where the amendments to the *Criminal Code* were a matter of some controversy. Now, there is some indication that the government will ask the opposition to reinstate rather than reintroduce the crime bills this session. Reinstatement would require a majority vote in the House of Commons to allow the process of considering the bills to resume where it left off. The difference of course is that the Senate now has several more Conservative members, appointed during the period of prorogation. A recent Alberta case helps to illustrate the potential consequences of Bill C-36 should it become law.

In *R. v. Ryan*, Chief Justice Neil Wittman considered an application under the faint hope clause, section 745.6(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. That section provides as follows:

> 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
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> > (a) has been convicted of murder or high treason;
> >
> > (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. …
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> 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:
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> (a) the application;
> (b) any report provided by the Correctional Service of Canada or other correctional authorities;
> (c) and 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. ...
>
> (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. …
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> 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:
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> (a) the character of the applicant;
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> (b) the applicant's conduct while serving the sentence;
>
> (c) the nature of the offence for which the applicant was convicted;
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> (d) any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and
>
> (e) any other matters that the judge considers relevant in the circumstances. …

In *R. v. Swietlinksi*, [1994] 3 S.C.R. 481, the Supreme Court of Canada noted that the faint hope clause was introduced in 1976 after the death penalty was abolished, and was part of a "compromise … between the supporters and opponents of the death penalty" (at para. 11). The death penalty was replaced by life sentences without possibility of parole for significant periods of time for the most serious offences in the *Criminal Code*. At the same time, there was some recognition that offenders should be motivated to be on good behaviour while incarcerated and to take advantage of rehabilitation programs. The possibility of early release via the faint hope clause was to provide such motivation.

As noted by Chief Justice Wittman (*Ryan* at para. 14), a faint hope application consists of three steps. First, the applicant must prove on a balance of probabilities to the appropriate Chief Justice that there is a reasonable prospect that his application for a reduced sentence will succeed (section 745.61(1)). If so, the Chief Justice must order that a jury be empanelled to hear the application, the second step in the process (section 745.61(5)). If the jury unanimously finds that the period of imprisonment without parole eligibility should be reduced, the offender must then convince the National Parole Board that such a reduction is appropriate.

The nature of the faint hope procedure was set out in *Swietlinksi*, *supra* at para. 12, as follows:

> The purpose of a reassessment procedure, especially when it takes place 15 years after the initial decision, is necessarily to re-examine a decision in light of new information or factors which could not have been known initially. It follows that the primary purpose of a s. 745 hearing is to call attention to changes which have occurred in the applicant's situation and which might justify imposing a less harsh penalty upon the applicant. Accordingly, the jury's decision is not essentially different from the ordinary decision regarding length of a sentence (cited in *Ryan* at para. 6).

As of January 2010, Tristan Ryan had served over 18 years of a sentence of life imprisonment without parole for 25 years for first degree murder, thus meeting the requirements of section 745.6(1). Chief Justice Wittman examined the evidence and an assessment of the criteria listed in section 745.63, noting that his task was to undertake a "limited weighing of the evidence" to determine whether there was a reasonable possibility that a jury would conclude that the sentence should be reduced (at para. 7, citing *R. v. Dulay*, 2009 ABCA 12 at para. 5).

In terms of the first two criteria, Wittman C.J.Q.B. referenced materials from Correctional Services Canada which showed that Ryan "had a troubled childhood", and "developed into a confused, angry, jealous, and suicidal youth" (at para. 9). Psychological assessments conducted during Ryan's time in jail showed that he "continue[d] to have issues with control and anger", but had "enrolled in a number of programs aimed at addressing these problems, and his performance in these programs has generally been exemplary" (at para. 11). Ryan had also completed a number of high school and college level courses in jail, and had sought rehabilitation for a drug addiction. It was reported that he had been a "model prisoner" for the last 7 years of his incarceration (*ibid.*).

As for the nature of the offence, Ryan was convicted of first degree murder on January 30, 1992 for the killing of a woman who appears to have been in an intimate relationship with him (although this is not explicitly identified in the decision). Chief Justice Wittman described the facts as follows:

> Prior to killing Ms. Spooner, Mr. Ryan was convicted of assault and possession of a weapon, after he used a knife to persuade her to go to a secluded area and then stabbed at her. After his release, he violated a no contact order and began to see Ms. Spooner again. He was charged with assault again in January 1991, in an incident once again arising out

> of his jealousy and control issues with Ms. Spooner. That charge did not proceed until after Mr. Ryan was convicted of Ms. Spooner's murder. He pleaded guilty to assault causing bodily harm and assault (at para. 10).

The facts of the actual murder of Ms. Spooner are not provided in this decision (nor was I able to locate the original trial or sentencing decisions in the case). Further, Chief Justice Wittman noted that no victim impact statement(s) were provided on the application, or at the original trial (at para. 13). Very little is known, then, about Ms. Spooner or the impact of this crime on her family.

As noted by Chief Justice Wittman, however:

> By definition, an offence that qualifies for a faint hope application must be serious. However, the fact that Parliament included this as an assessment factor indicates that it intended for juries, and by implication, judges hearing the screening application, to place the offence somewhere on a continuum. In this regard, I note only that while Mr. Ryan's offence was grave*, it would be open to a jury to consider all the surrounding circumstances*, including Mr. Ryan's relative youth at the time of the offence and the fact that, consequently, he has now spent nearly half of his life behind bars (at para. 12, emphasis added).

Presumably, a jury could also consider section 718.2(a)(ii) of the *Criminal Code*, which provides that evidence that an offender abused his spouse or common-law partner in the commission of the offence is an aggravating factor.

Based on the evidence provided, Wittman, C.J.Q.B. found that a jury could reasonably conclude that Ryan was entitled to a reduction of the period of incarceration before parole eligibility. It was also, perhaps, significant that the Crown did not oppose Ryan's application at the initial stage of the faint hope process. Chief Justice Wittman thus ordered that a jury be empanelled to hear Ryan's application.

If the faint hope clause is repealed on the same terms as originally proposed in Bill C-36, persons in the position of Tristan Ryan could still apply for early parole, as the repeal only applies to offenders who commit murder on or after the day the amendment comes into force. However, the amendments would also make it more difficult for persons currently serving time or awaiting sentencing for first or second degree murder to make a successful application, as they would impose the following requirements:

- a judge must be satisfied that there is a *substantial likelihood* that a jury would agree unanimously to reduce the applicant's period of parole ineligibility;
- an offender would have only *three months* after serving at least 15 years of their sentence in which to apply or re-apply to be considered for the faint hope regime; if they missed this period they would have to wait at least five years before applying;

- unsuccessful applicants would have to wait a minimum of *five years* before they could re-apply (see Department of Justice Backgrounder on the faint hope clause).

If Bill C-36 had come into force before the prorogation of Parliament, persons in the position of Ryan (i.e. having served at least 15 years of a life sentence) who had not yet applied for early release would be permitted to apply within 3 months of the law coming into effect. If they missed this window, they would have to wait another 5 years to apply. The timing of a faint hope application is thus no longer up to the offender, who may have previously timed such an application to coincide with progress towards rehabilitation. Those offenders who commit murder on or after the day Bill C-36 (or its successor) comes into force will have to serve their full sentence before they can apply for parole. Those serving a sentence for first degree murder must serve 25 years – there is no more faint hope for early release to motivate their rehabilitation.

When the legislation repealing the faint hope clause was first introduced, Justice Minister Rob Nicholson stated as follows:

> Our government believes murderers must serve serious time for the most serious crime… By ending 'faint hope' reviews, we are saying 'No' to early parole for murders. We are also sparing families the pain of attending repeated parole eligibility hearings and having to relive these unspeakable losses, over and over again.

This message was reiterated in the Throne Speech delivered on March 3, 2010 in more general terms:

> Our communities are built on the rule of law, the cornerstone of peace, order and good government. The law must protect everyone, and those who commit crimes must be held to account. Canadians want a justice system that delivers justice. We know we can protect ourselves without compromising the values that define our country. …

In contrast, Simon Fraser University criminologist Neil Boyd argues in a post on the Community of Interest blog that the repeal of the faint hope clause would be "cruel" and "neanderthal" (quoting Pierre Trudeau). According to Boyd, there is no evidence that the current provisions are not working, and in fact, the faint hope jury process gives "a greater voice for the average Canadian in matters of crime and justice", a voice that the Conservatives claim to value but now propose to silence.

Opposition parties state that they will not vote in favour of reinstatement of the crime bills, and will insist that the crime legislation be reviewed on a bill-by-bill basis. I would hope that the debate over the faint hope clause considers its role in achieving the fundamental objectives of the criminal justice system. Do we still value rehabilitation as one of the overarching goals of the criminal sentencing provisions? If we also place importance on protection of the public, does incarceration without motivation to rehabilitate actually serve that end? The fate of the faint hope clause and of our commitment to the principle of rehabilitation remains to be seen.

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