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DISCRETIONARY MANDATORY MINIMUM PENALTIES FOR MURDER

OFFICE OF THE PARLIAMENTARY BUDGET OFFICER
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The Parliamentary Budget Officer (PBO) supports Parliament by providing economic and financial analysis for the purposes of raising the quality of parliamentary debate and promoting greater budget transparency and accountability.

This report was prepared at the request of Senator Kim Pate. It estimates the impact of a proposed bill in the Senate, S-207, on sentencing for murder and the cost implications of those changes for the Correctional Service of Canada.

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Executive Summary

A proposed bill in the Senate, S-207, would give judges the discretion not to apply mandatory minimum sentences. While this bill would affect sentencing for all criminal offences, this report focuses specifically on its impact on sentencing for murder, and the cost implications of those changes for the Correctional Service of Canada.

This bill is expected to result in about 3% of persons convicted of murder receiving determinate sentences rather than life sentences. In the long-term this is expected to reduce the number of offenders on full parole by about 100 persons at a given point in time.

This bill is expected to result in about 87 more offenders convicted of murder serving their sentences in the community rather than in custody at a given point in time.

In total, the bill is expected to result in cost-savings of $8.3 million per year for the Correctional Service of Canada. These savings would be progressively realized over several decades.

1. Introduction

In Canada, persons convicted of murder are subject to a mandatory minimum sentence of imprisonment for life.[1] They are also subject to a mandatory minimum period of parole ineligibility of 10 or 25 years.[2]

Judges have the discretion to impose longer periods of parole ineligibility, and the Parole Board of Canada exercises judgement with respect to whether to grant parole. As a result, many persons convicted of murder are sentenced to longer periods of parole ineligibility, and many are not granted parole when they first become eligible.

Offenders convicted of murder represent about one fifth of all federal offenders. As of 2018, the Correctional Service of Canada was responsible for 1,234 offenders convicted of 1st degree murder, and 3,525 offenders convicted of 2nd degree murder out of a total of 23,223 offenders. Of those offenders, 989 offenders convicted of 1st degree murder and 1,950 offenders convicted of 2nd degree murder remained in custody in Correctional Service of Canada facilities out of a total of 14,092 offenders in custody.[3]

Bill S-207 (*An Act to amend the Criminal Code (independence of the judiciary)* would give judges the discretion not to apply mandatory minimum sentences.[4] The bill further requires judges to consider other options, to determine that no alternative would be just and reasonable, and to provide written reasons if they decide to impose the minimum sentence.[5] While this bill would affect sentencing for all criminal offences, this report focuses specifically on its impact on sentencing for murder, and the cost implications of those changes for the Correctional Service of Canada. The scope of this report was limited to sentencing for murder due to data limitations and with the consent of Senator Kim Pate.

2. Minimum Imprisonment

As noted above, persons convicted of murder are currently subject to a mandatory minimum sentence of imprisonment for life.[6] If Bill S-207 were passed, the Criminal Code would still nominally state that murder is subject to a mandatory minimum period of imprisonment for life, but judges would have a discretion to impose a lesser sentence if it consider it to be just and reasonable in the particular case.

Internationally, the most comparable sentencing regime is that which exists in New Zealand. Under New Zealand's 2002 *Sentencing Act*, "An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust."[7] Since 2002, 97% of offenders convicted of murder have been sentenced to life-imprisonment.

In the six exceptional cases where a determinate sentence has been imposed as of 2018, the average sentence imposed was 10.6 years.[8]

Some other jurisdictions have neither a mandatory minimum sentence of life imprisonment for murder, nor even a presumption of imprisonment for life for murder. In these jurisdictions, few offenders are sentenced to life imprisonment, or even sentences exceeding 25 years. [9] However, because Canadian law would continue to generally prescribe a mandatory minimum penalty of life imprisonment and has a long history of imposing life-imprisonment, New Zealand's sentencing distribution is more likely to be representative.

Based on this analogy to sentencing in New Zealand, it is assumed that the discretion added by Bill S-207 might result in about 3% of persons convicted of murder receiving sentences of less than life imprisonment due to exceptional mitigating circumstances in the particular case. Furthermore, it is assumed that these determinate sentences would be an average of 10 years, meaning that inmates would no longer be subject to parole supervision after that time. With 3,319 offenders convicted of murder currently supervised by Correctional Service of Canada in custody or in the community past the 10th year of their sentence commencement date, this suggests that in the long term about 100 fewer inmates would be subject to Correctional Service of Canada supervision.

3. Minimum Parole Ineligibility

As noted above, murder is subject to a mandatory minimum period of parole ineligibility. This period is 25 years for first-degree murder, 25 years for second-degree murder for persons previously convicted of murder or war crimes, and 10 years for all other second-degree murders.[10]

Being able to apply for parole doesn't mean that an inmate will necessarily receive it.

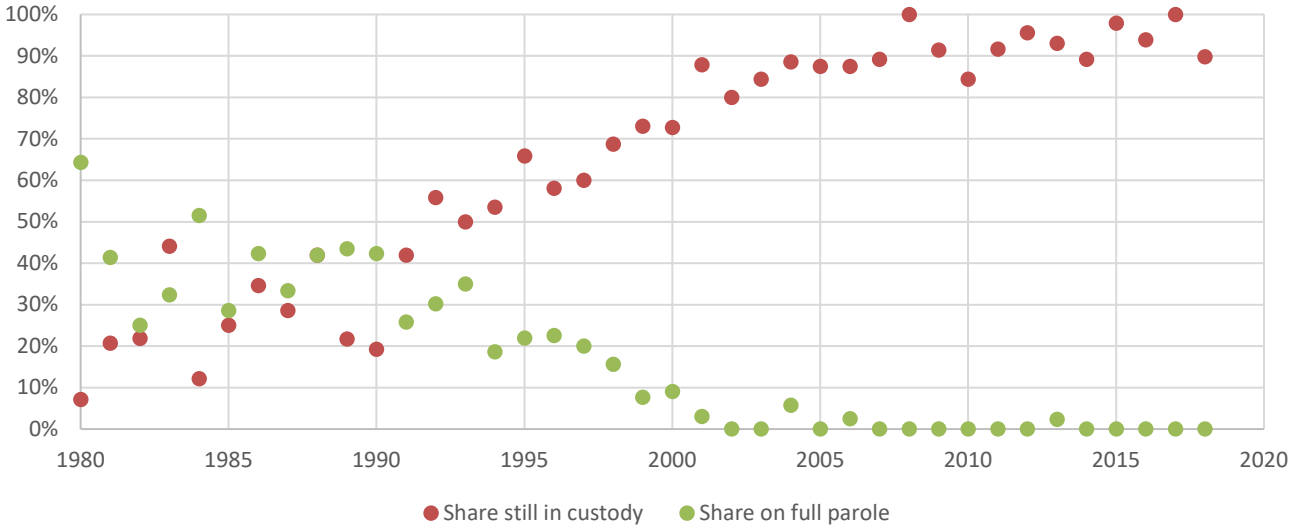
3.1. First-Degree Murder

For first-degree murder, the relationship between periods of parole ineligibility and time in custody is complicated by the Faint Hope Clause.

Historically, section 745.6 of the Criminal Code, commonly known as the "Faint Hope Clause", allowed parole ineligibility periods to be reconsidered. Specifically, persons convicted and sentenced to life imprisonment with a parole ineligibility period of greater than 15 years could apply for a judicial review. The application was made to a judge, who could decide to empanel a jury to consider whether to allow the offender to submit an application for parole to the Parole Board of Canada. This section was repealed in 2011 but continues to be available to offenders convicted before 2011. As a result, there are currently releases prior to 25 years which are phasing out.

The chart below shows the number of inmates convicted of first-degree murder in custody and on parole, based on the number of years elapsed since their convictions. This data is based on the current status of offenders convicted and the date of their conviction.

Figure 1-1 Parole Status of Persons Convicted of 1st Degree Murder by Sentence Commencement Year



Source: PBO based on data extracted from Correctional Service of Canada's Offender Management System

Note: Credit for time served and the continuing impact of the Faint Hope Clause result in some offenders receiving parole before the current mandatory minimum of 25 years of parole ineligibility.

As of 2019, approximately 45 offenders out of the 1,234 convicted of first-degree murder were on parole despite having served less than 25 years of their sentence. This is presumed to be a result of the operation of the Faint Hope Clause.

The reductions in parole ineligibility granted under the Faint Hope clause suggest that given discretion by Bill S-207, some judges may choose to impose shorter parole ineligibility periods for first-degree murder in some cases when they otherwise would have granted the minimum parole ineligibility period of 25 years. As with reductions under the Faint Hope clause, it is likely that some of those offenders would in fact receive parole before 25 years.

For the purposes of our estimate, it is assumed that the releases currently occurring between 15 and 25 years under the Faint Hope Clause reflect the distribution of parole releases which would occur if judges were given discretion under Bill S-207.

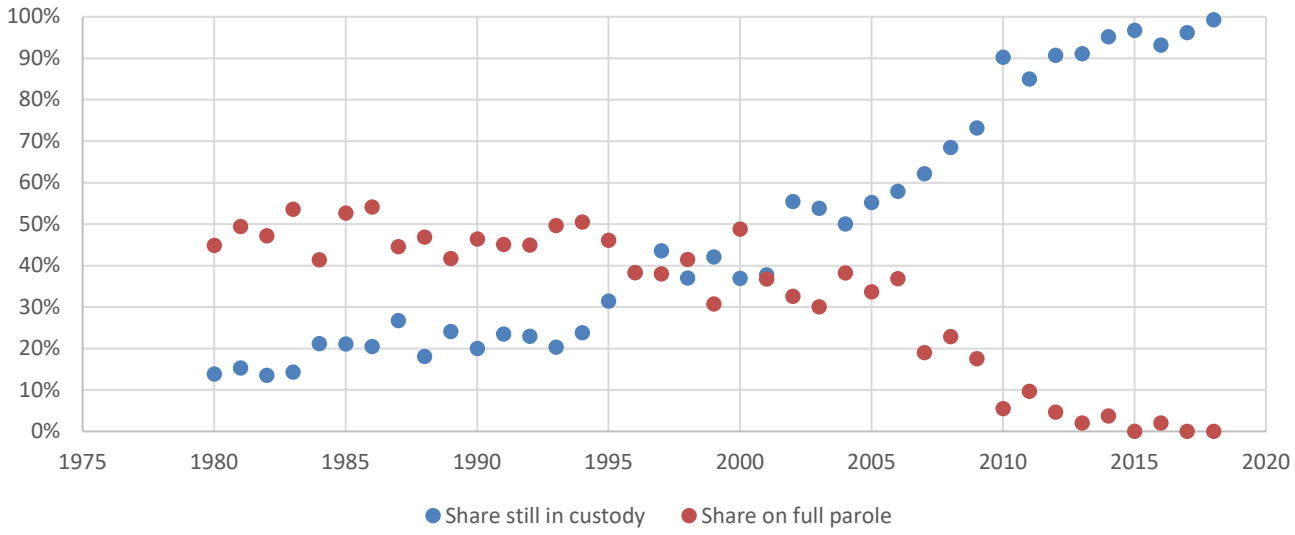
As a result, Bill S-207 is expected to reduce the number of persons serving sentences for first-degree murder by 45 at given moment in time. This effect would not be seen for many years (until offenders start receiving parole before their 25th year of incarceration). It would also not be an increase relative to current levels. Rather, it would offset the increase in time in

custody due to the 2011 abolition of the Faint Hope Clause, which has not yet been realized.

3.2. Second-Degree Murder

The chart below shows the number of inmates convicted of second-degree murder in custody and on parole, based on the number of years elapsed since their conviction. At the minimum period of parole ineligibility of 10 years, about 20% of offenders convicted of second-degree murder are on full parole. By 25 years, this rises to about 50% of offenders on full parole.

Figure 1-2 Parole Status of Persons Convicted of 2nd Degree Murder by sentence commencement year



Source: PBO based on data extracted from Correctional Service of Canada's Offender Management System

Note: Credit for time served results in some offenders receiving parole before the current mandatory minimum of 10 years of parole ineligibility from the date their sentence commenced.

Given discretion by Bill S-207, some judges may choose to impose shorter parole ineligibility periods for second-degree murder in some cases when they otherwise would have granted the minimum parole ineligibility period of 10 years. It is likely that some of those offenders would in fact receive parole before 10 years.

For the purposes of a rough estimate, it is assumed that about half of the 20% of inmates being released at the 10-year mark might receive a shorter parole ineligibility period and be released an average of 5 years earlier. This is equivalent to a 50% reduction in the time in custody for 10% of offenders.

With 848 of the 3,525 offenders convicted of second-degree murder currently before the tenth year of their sentence, this suggest about 42 inmates (50% of 10%) in custody at a given point in time would be released on parole.

4. Cost implications

The above analysis suggests that under Bill S-207:

1. Discretion regarding the minimum period of imprisonment will reduce the number of inmates on full parole by 100 and increase the number of inmates who have completed their sentence by the same number

2. Discretion regarding the minimum period of parole ineligibility will reduce the number of offenders in custody at a given point in time by about 87 offenders and increase the number of offenders on full parole by the same number.

Correctional Service of Canada reports that the cost of maintaining a male offender in minimum security in 2016-17 was $83,450/year ($191,843/year for women, who were 3% of those in custody for murder), compared with $30,639/year for inmates on full parole. The cost of a minimum-security offender is assumed to be most applicable because it is assumed that offenders judged low enough risk to be released on parole but for a mandatory minimum period of parole ineligibility would be low enough risk for a placement in minimum security.

This suggests total cost savings of $8.3 million/year. These cost savings will be progressively realized over several decades.

Notes

1. *Criminal Code*, RSC 1985, c C-46, s 235(1-2).
2. *Criminal Code*, RSC 1985, c C-46, s 745.
3. 2018 Corrections and Conditional Release Statistical Overview at Table C14.
4. Bill S-207 (2nd Sess, 43 Parl), cl 1: "(2) If an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, despite the limitations prescribed in the enactment, including a punishment declared to be a minimum punishment, in the discretion of the court that convicts a person who commits the offence."
5. Bill S-207 (2nd Sess, 43 Parl), cl 2.
6. *Criminal Code*, RSC 1985, c C-46, s 235(1-2).
7. New Zealand Sentencing Act 2002, subpart 4, clause 102, s 1.
8. Sentences in individual cases varied from a high of 18 years in the case of a 13-year old offender, to a low of 1.5 years, in the case of a man who euthanized his wife suffering from advanced Alzheimer's. R v Law (2002) 19 CRNZ 500 (HC); R v Nelson [2012] NZHC 3570.

   12-year sentences were imposed in two cases of women who were cognitively impaired and had suffered abuse. R v Wihongi [2011] NZCA 592, [2012] 1 NZLR 775 (Leave to appeal denied in R v Wihongi [2012] NZSC 12]); R v Rihia [2012] NZHC 2720.

   Finally, 10-year sentences were imposed in two cases of diminished responsibility: one where the offender was convicted only as a party to the murder without direct responsibility and another where the offender was suffering out-of-character paranoid delusions due to schizophrenia. R v McNaughton [2012] NZHC 815; R v Reid HC Auckland CRI 2008-090-2203, 4 February 2011.
9. For example, the Australian state of Victoria, Sweden, and Norway.
10. *Criminal Code*, RSC 1985, c C-46, s 745.