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Making Room for a Serial Killer Within Canada's Faint Hope Statute: Clifford Olson, Master Manipulator in the Criminal Justice System

Sharon F. Carton
Nova Southeastern University Shepard Broad Law Center in Fort Lauderdale, Florida,

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Making Room for a Serial Killer Within Canada's Faint Hope Statute: Clifford Olson, Master Manipulator in the Criminal Justice System

Sharon F. Carton[*]

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* The author is an Assistant Professor of Law at Nova Southeastern University Shepard Broad Law Center in Fort Lauderdale, Florida, where she teaches Lawyering Skills and Values, Sports and Entertainment Law, Comparative Law, and Bias Crimes and Domestic Terrorism. She received her Juris Doctor from Hofstra University School of Law and her L.L.M. in International and Comparative Law from George Washington University Law School. She wishes to extend her appreciation to her research assistant, Laurel Wiley, for her efforts, energy, and enthusiasm throughout this project.

I. INTRODUCTION

Section 745.6 of the Canadian Criminal Code, also known as the "Faint Hope" clause,[1] dates back to a 1976 policy decision by the Canadian government to afford that modicum of hope to long-term prisoners who have evidenced sufficient rehabilitation to merit consideration and possible release.[2] The statute was meant to be limited to only the most extraordinary deserving cases; but because it was regularly abused, it was eventually denigrated as a "sure bet" clause.[3] As a result of this perceived flaw,[4] the statute was modified in 1996.[5] One of the modifications was to preclude application of the statute to serial killers.[6]

Nevertheless, the despised serial killer Clifford Raymond Olson slipped in through the grandfathering prohibition of retroactive application.[7] The controversy stirred by Olson's use of the clause[8] was two-fold: first, that it afforded him an opportunity for another proverbial day in court, allowing him to articulate his insane justifications and rationalizations; and second, that it demonstrated the vulnerability of the public to the potential premature release of murderers like Olson,[9] thus mitigating if not wholly vitiating the public confidence in conviction and sentencing of such threats to public safety.[10]

After reviewing the background and enactment of the Faint Hope statute,[11] the author discusses the statute's application, in what is considered the intended factual

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1. R.S.C. § 745.6 (1996). *See also A Killer's Bid to Go Free*, MACLEAN'S, Mar. 24, 1997, *available in* 1997 WL 8471962.

2. *See* CAVEAT, *Background Information on Section 745* (June 11, 1996) <http://caveat.org/news/1996-06-11_new_745_amend.html>; *see also* Allan Fotheringham, *Building a Bridge Over Sluggish Water*, MACLEAN'S, Aug. 25, 1997, *available in* 1997 WL 8473962; D'Arcy Jenish, *Good Intentions, Mixed Results*, MACLEAN'S, Aug. 18, 1997, *available in* 1997 WL 8473834; *New Moves On Parole and Rape*, MACLEAN'S, June 24, 1996, *available in* 1996 WL 8017235.

3. *See* Jenish, *supra* note 2; *See also Changes to Early Parole Law Promised by Rock*, STOPWATCH (CAVEAT, Burlington, Ont., Can.), vol. 2, 1996; *Repeal Section 745 of the Criminal Code*, CPA EXPRESS (Canadian Police Assoc.), Summer, 1996.

4. *See* CAVEAT, *CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745* (June 11, 1996) <http://caveat.org/news/1996-06-11_745_full.html>.

5. R.S.C. § 745.6 (1996)

6. *See id.*

7. *See Changes to Early Parole Law Promised by Rock*, *supra* note 3; *see also CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4; *Ribbons Worn in Memory of the Victims*, STOPWATCH (CAVEAT, Burlington, Ont., Can.), Apr. 1997; *Clifford Olson Tortures Again*, JUST. NEWSL. (Reform Justice Team, Ottawa, Ont. Can.), Oct. 1997; Jenish, *supra* note 2; *A Killer's Bid to Go Free*, *supra* note 1; *He Has No Concept of Reality*, MACLEAN'S, Sept. 1, 1997, *available in* 1997 WL 8474004.

8. *See* Chris McLeod, *Clifford Olson and Sec.* 745, FIREARMS DIGEST, Mar. 13, 1997; *see generally* Fotheringham, *supra* note 2.

9. *See generally Ribbons Worn in Memory of the Victims*, *supra* note 7.

10. *See Section 745 or 'The New Math': 15 Years Equals 25*, STOPWATCH (CAVEAT, Burlington, Ont., Can.), Mar. 1994; *Section 745: A 40% Discount on Life Sentences*, STOPWATCH (CAVEAT, Burlington, Ont., Can.), Mar. 1995. *See generally Changes to Early Parole Law Promised by Rock*, *supra* note 3; *Repeal Section 745 of the Criminal Code*, *supra* note 3.

11. *See infra* notes 87–98 and accompanying text.

and legal contexts,[12] before moving on to the widely regarded abomination of the Clifford Olson appeal under the provision.[13] Finally, the author attempts to determine whether Olson's use of its protection offers evidence that the statute was fatally drafted, as popular opinion in autumn 1997 seemed to hold,[14] or whether this was the extreme case that tested but did not exceed the permissible ambit of the statute.[15]

A. Background of Canada's Legal System

As a constitutional monarchy, Canada is part of Britain's commonwealth and a vestige of its decimated empire.[16] In 1967, Canada became a country with a Confederation status where the British monarch acted as

> head of state and as the privy council, the final constitutional court. This created the queer situation in which the highest constitutional authority was located in London rather than Ottawa. In 1981/82, . . . Pierre Trudeau repatriated the Constitution, [which] had the effect of keeping the Queen as head of state, but the arbiter of all that is true and politically Canadian now is in Ottawa.[17]

1. Bifurcated Nature

Like that of many nations including the United States, Canada's legal system is of a federalist nature[18] with the criminal justice operations both facilitated and occasionally flummoxed by cooperation and conflict between governmental entities on a local, provincial, and national level.[19] The Olson case would demonstrate the difficulties in the federalized police operations.[20] "British Columbia . . . maintained a contract with the federal government for provincial policing. The Mounties

12. *See infra* notes 87–93 and accompanying text.
13. *See infra* notes 106–18 and accompanying text.
14. *See infra* notes 106–18 and accompanying text.
15. *See infra* notes 84–126 and accompanying text.
16. *See* KENNETH MCNAUGHT, THE PENGUIN HISTORY OF CANADA 134 (1988); *see also* DAVID MILNE, THE CANADIAN CONSTITUTION 43 (1991).
17. E-mail from Ian Mulgrew, Author, FINAL PAYOFF: THE TRUE PRICE OF CONVICTING CLIFFORD ROBERT OLSON (Jan. 11, 1999) [hereinafter E-mail from Mulgrew] (on file with *The Transnational Lawyer*).
18. *See* MILNE, *supra* note 16, at 43 *passim*. *But cf.* PETER MCCORMICK, CANADA'S COURTS 23–24 (1994) ("In the United States . . . state courts deal with matters of state law, and federal courts . . . deal with matters of national law . . . . By contrast, the Canadian system is a single pyramid . . . [that] deals with all provincial laws and almost all federal laws, and any case may rise to any appropriate level.").
19. *See* MCCORMICK, *supra* note 18, at 24.
20. *See* IAN MULGREW, FINAL PAYOFF: THE TRUE PRICE OF CONVICTING CLIFFORD ROBERT OLSON 5 *passim* (1990).

provided the service, the province footed about 45 per cent of the bill, but Ottawa only grudgingly gave Victoria any say in the management of the Force."[21]

Nine of Canada's ten provinces[22] follow a common law jurisprudence. Just as the state of Louisiana is anomalous with the United States, in that it follows a civil code jurisprudence based on France's Napoleonic Code, so too is the province of Quebec an aberration in Canada, in that Quebec is a civil law province whose idiosyncratic nature within the country is so extreme and often fractious that the issue of separatism is one that has come to define the province.[23]

The police operations are also of a bifurcated nature. The Royal Canadian Mounted Police (RCMP), or the popularly referred to "Mounties," serve as the national police,[24] analogous to the U.S. Federal Bureau of Investigation, considered to be the U.S.' "national police force." In addition to the borrowed services of the RCMP, each province in Canada has its own local police force.[25]

As the Olson case proved,

> [t]he problem was that Mounties' natural career advancements, no matter where they were stationed, pointed to eastern Canada—where the power lay. Worrying about a provincial boss was irrelevant to senior Mounties' careers and it was difficult for provincial officials to change that. As a result, the two levels of government had created a line-of-command that increased the paperwork and forced senior police officers to spend too much time meeting with bureaucrats. Provincial authorities were responsible for making decisions involving criminal investigations while the federal government was responsible for the management of the Force.[26]

There is further a national security service, Canadian Security Intelligence System (CSIS),[27] that has powers reaching beyond the comparable Central

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21. *Id.* at 4–5.

22. The ten provinces are Ontario, British Columbia, Quebec, Newfoundland, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Nova Scotia, and Alberta. Canada also includes the Yukon Territory and the Northwest Territories. MCNAUGHT, *supra* note 16, at 7-19 *passim*. A third region, Nunavut, carved out of the eastern Arctic portion of the Northwest Territories, will gain territory status in April 1999, with its capital city, Iqualuit. MIAMI HERALD, Dec. 30, 1998, at 9B.

23. *See* MCCORMICK, *supra* note 18, at 75; *see also* Jim Fox, *Quebec Premier Rebels Against "Social Union" Plan*, MIAMI HERALD, Feb. 14, 1999, at 17A; *Bouchard, Chretien Trade Barbs*, (Feb. 16, 1999), <www.canada.com/newscafe>.

24. *See* Terence Morley, *Administering Justice*, *in* POLITICS, POLICY, AND GOVERNMENT IN BRITISH COLUMBIA 174, 177 (R.K. Carty ed. 1996).

25. *See id.*

26. MULGREW, *supra* note 20, at 4–5.

27. *See* Interview with Ian Mulgrew, Author, FINAL PAYOFF: THE TRUE PRICE OF CONVICTING CLIFFORD ROBERT OLSON, in Vancouver, B.C. (Oct. 16, 1998) [hereinafter Interview with Mulgrew] (on file with the author).

Intelligence Agency (CIA) of the U.S. Unlike the CIA, the CSIS is empowered to act domestically, as well as internationally in the interest of national security.[28]

2. *Freedom of the Press*

There is a written Constitution[29] in addition to the dictates of codified and common law ukase.[30] However, as became evident in the Olson case, freedom of speech and press are not comparable to the First Amendment protections of the US Constitution.[31] Canada has an Official Secrets Act (OSA), a counterpart to a similar law in the United Kingdom.[32] Ian Mulgrew, journalist with the Vancouver Sun Daily newspaper and author of *Final Payoff: The True Price of Convicting Clifford Robert Olson*, explained,

> [t]here is an Official Secrets Act and accompanying national security legislation . . . which fetter civil servants, military, police and other state employees and also extends to citizens. Modelled on the repressive British legislation, the OSA and its sister laws allow the government to do just about anything under the rubric of "national security." They've been used to prevent publication and even to derail criminal court proceedings (in the Air India bombing case circa 1986).[33]

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28. *See id.*

29. More specifically, the Constitution Act of 1867, also known as the British North America Acts, was amended by a second Constitution Act of 1982. The 1982 Constitution, which now governs the nation subject to the contemporaneously enacted Charter of Rights and Freedoms, resulted from the Meech Lake Accord and the Charlottetown Agreement.

> Both of these were failed attempts to get Quebec to officially sign the new constitution. In 1982, the Quebec separatist government refused to sign the constitution. This is a fairly ceremonial but meaningful point. Prime Minister Brian Mulroney believed that getting Quebec to sign the document would be a historically important achievement and spent considerable energy during his administration trying to mollify the spoiled child of the confederation. The Meech Lake Accord was a deal struck between the federal government and the provinces that recognized Quebec was special. The deal had implications in terms of the delegation of powers between the provincial and federal levels of government and precipitated much hand-wringing that Quebec was getting too good a deal. As a result, the accord failed to receive the necessary support and was ultimately rejected. The federal government again tried to tidy up the constitution and the Quebec issue with an agreement hammered together in Charlottetown. But this agreement too foundered because public opinion was against giving Quebec special status and its government more autonomy.

E-mail from Mulgrew, *supra* note 17, (Jan. 13, 1999). *See also* MILNE, *supra* note 16, at 186–205; *but see "Ottawa Gives Up On Ratifying Calgary Declaration On Unity,"* MIAMI HERALD, Jan. 15, 1999, at 6B.

30. *See* MCCORMICK, *supra* note 18, at 133.

31. *See generally* E-mail from Mulgrew, *supra* note 17.

32. *See* R.S.C. § 183.4 (1985).

33. *See generally* E-mail from Mulgrew, *supra* note 17. *See also Obituary—Judge Francis Kovacs*, MIAMI HERALD, Jan. 13, 1999, at 7B (stating that Judge Francis Kovacs " came under national and international scrutiny when he imposed a sweeping publication ban on evidence at [the sensational sex-slaying trial of Karla Homolka]").

Government influence over the media is said to be so restrictive that it exceeds the limitations of Britain's statute, and indeed served as model for national security law during South Africa's apartheid rule.[34] It has been noted that

> We [Canadians] don't have the same level of public discussion as the United States does. We come from the British tradition; our level is much more oppressive even and brooks no discussion of national security. All of our files are sealed; even our World War II files are sealed . . . . Reporters don't have to sign anything [obliging them to secrecy]; it's national legislation, very Kafkaesque, no onus to do this [govern] in public, there are secret courts.[35]

As Mulgrew pointedly observed, Canada's government motto is "peace, order, and good government."[36] Indeed, Canada's criminal code, "when first proposed in the last century, was considered far too authoritarian to be used in India. Our [Canadian] Indian affairs legislation is the foundation of apartheid."[37]

3. Federalist system

Canadian federalism varies in several respects from American federalism.[38]

> [T]here is no set of parallel federal courts in Canada with overlapping jurisdiction in cases involving different provinces [comparable to America's diversity jurisdiction] . . . . In this sense, [Canada's] court system is more unified than that in the United States."[39] Further, the Supreme Court of Canada is the ultimate authority on provincial law; while in the United States, a state supreme court is the ultimate interpreter of its state statutes or common law, in Canada, the decision of the highest court in any province on the law of that province is still subject to review by Canada's Supreme Court.[40]

The Canadian court system reflects Canadian cultural norms, patterned after the British system.[41] Canadian judges, unlike their American counterparts, customarily assume a more limited role in "responding to legal questions in the cases before

34. *See generally* E-mail from Mulgrew, *supra* note 17.
35. *See generally* E-mail from Mulgrew, *supra* note 17.
36. *See generally* Interview with Mulgrew, *supra* note 27.
37. *Id.*
38. *See* Carl Baar, *Court Systems of the Provinces, in* PROVINCES: CANADIAN PROVINCIAL POLITICS 229, 231 (Christopher Dunn ed. 1996); *see also* MCCORMICK, *supra* note 18, at 23–24.
39. Baar, *supra* note 38, at 229, 231.
40. *Id.* at 231–32.
41. *See id.* at 234.

them and hesitating to rewrite statutes passed by elected legislative bodies."[42] More significantly is the fact that, instead of making courts in the provinces deferential to the federal courts and legislature, "[h]istorically, disengagement achieved by deference to government has made the courts' impact highly conservative, by reinforcing public authority against citizen challenges."[43] Although the enactment of the 1982 Charter of Rights and Freedoms has liberalized the system somewhat,[44] it was "the Supreme Court of Canada, rather than the provincial appeal courts, that led the way in Charter activism during the first decade after the Charter"[45] passed.

B. General Public's Attitude Toward the Olson Case

What also became evident to Vancouver Sun journalist Ian Mulgrew, as he researched the Olson case for his seminal book, *Final Payoff: The True Price of Convicting Clifford Robert Olson*, and to me, as I pursued my research for this article, was the unusual attitude of largely accepting and acceding to this repression of information about a case that potentially paints the government in an unfavorable light. Unlike Britons, who from my experiences, may be said to "love" the lurid tabloid reporting of "a good murder," and Americans, who bemoan but devour details of lurid homicides, most[46] Canadians—in my admittedly anecdotally acquired sampling—seem predisposed to fall silent with horror, bemusement, and even shame, when confronted with evidence of the existence of a man like Clifford Olson.[47]

Further, my foray into Vancouver in October 1998 to track down one or both of the only two books published about Olson, not only confirmed the reticence or outright inability or unwillingness to discuss the distasteful matter, but more than that: Canadians, or at least the dozens I encountered in my research both in Vancouver[48] and in Victoria on Vancouver Island, speak of the Olson case only in hushed tones or offer disclaimers of ignorance of one of the most notorious serial killers in Canadian history.

While no American bookstore had stocked or listed either Mulgrew's book or the only other on the case, Jon Ferry and Damian Inwood's *The Olson Murders*, I expected better fortune in the Pacific Northwest, and certainly in British Columbia, the Canadian province home to Olson[49] and his victims, if nowhere else. As it

42. *Id.*
43. *Id.*
44. *See id.*
45. *Id.*
46. It must be emphasized that this article would probably not have been possible had this been universally true among all Canadians. I am greatly indebted to those Canadians, from Mulgrew to those I encountered through the MacLeod's bookstore connection, for their candor and invaluable assistance.
47. *Cf.* ONT. HANSARD 6–7 (Apr. 18, 1996) (statement of Rep. Howard Hampton).
48. *See* R.S.C. § 183.4 (1985).
49. Olson lived in Coquitlam, a suburb of Vancouver. *See* MULGREW, *supra* note 20, at 11.

turned out, both books were listed in the University of British Columbia library online. However, when I traveled to Vancouver, I encountered a brick wall after hours of searching through major bookstores, one of which earned me the emphatic, "We have nothing like that here," as if speaking of skin magazines or other pornographic or perhaps politically subversive reading material. Finally, one shop clerk checked her records and revealed that Mulgrew's book and *The Olson Murders* were tabloid-style works rushed into print in 1982 and were out of print—sometimes described as exploitative by many, including the families of the victims. The shop clerk suggested I try a second-hand bookshop, one specializing in Canadiana.

The store, MacLeod's, on Vancouver's West Pender Street, was an old-fashioned shop that appeared as if it belonged on London's Charing Cross Road. It was stocked with dangerously poised mounds of books and magazines, making it seem like a sure-fire hit. I was informed, though, that the store was closing out its true crime section; this, in itself, seemed as unsurprising at this point as it was disappointing. Canada bookstore owners would be disinclined to allow an entire shelf or bookcase for the existence of violent crime. The shop manager noted, however, that Final Payoff's author was a journalist with the Vancouver Sun, which was located not far from the shop itself. During a telephone conversation, Mulgrew agreed to a meeting which yielded[50] a wealth of information, not only about Olson, but also about the way the country and the criminal justice system handled the original Olson investigation and its aftermath.[51]

As Mulgrew would later tell me,

> In Canada, reporters do not enjoy the same constitutional protection extended to U.S. journalists. We have no shield law and no First Amendment rights. Journalists are simply citizens in the eyes of our courts and can be compelled to identify sources guaranteed anonymity, to surrender their notebooks and to surrender field tapes never broadcast.[52]

He further explained that, as any other Canadian citizen, "[j]ournalists in Canada are bound by that [OSA and accompanying national security] legislation just as they are in the United Kingdom."[53] In contrast, he pointed out that while the United States has its own national security laws, its First Amendment extends to the

50. Mulgrew turned out to be a charming man, politically savvy, and facile with details about the case he will never forget.

51. *See generally* Interview with Mulgrew, *supra* note 27.

52. *Id.*

53. *Id.*

press protections, thus rendering the U.S. national security laws "not necessarily paramount."[54]

My hour or so in the bookstore, however, was enlightening in and of itself. Notwithstanding the manager's instrumental assistance in tracking down an Olson source, others in the shop gave me some background on Olson from the Canadian perspective while speaking in fearful, hushed tones. While much of this stemmed, I believe, from a permanent and pervasive public perception of Olson as an inhuman species of being and an unending source of terror despite his life imprisonment, Olson is also an embarrassment that belies the Canadian image as a peaceful, law-abiding nation that does not produce monsters like Olson.[55]

When I mentioned my difficulty in obtaining either his book or the sole other title, *The Olson Murders*,[56] Mulgrew noted that his book "lasted a week on the bestseller list, but you couldn't get people to talk, you couldn't go do author's tours, you were shut down."[57] He added that while the subject of Olson's crimes arises periodically (e.g., during the Faint Hope hearing), "[e]very time [Olson] comes up, one of the tabloids comes up here and [interviews] me. In this country, there's no discussion about it. They shut it down."[58] It should not go without mention that all proceeds from Mulgrew's book went directly to the families of Olson's victims.[59]

C. Investigation of the Olson Case

As I discuss infra, public frustration with the Olson case was not only caused by his abuse of the Faint Hope clause but was also due to Olson's manipulation of the legal system and, more particularly, the criminal justice system's egregious misconduct and lethal incompetence in the investigation of Clifford Olson.[60] As the Faint Hope hearing generated public fury at the failings of the system in denying Olson an absurd opportunity to garner the spotlight yet again,[61] it also afforded an unwelcome opportunity for the public, and the victims' families, to vent their rage

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54. *Id.*

55. *See* MULGREW, *supra* note 20, at 5; ONT. HANSARD 6-7 (Apr. 18, 1996) (statement of Rep. Howard Hampton); *see infra* note 118 and accompanying text.

56. During our interview, Mulgrew described his book's only competition as "a quickie book that was exploiting the crimes.... It's got a lurid little cover, published here by a vanity press outfit. The guys who wrote it are still around... really nice guys. They published this real quick book, published it themselves... and it's all that monster stuff [about Olson]. Large portions of it are badly researched because it was done so quickly. My book was in about 1988 [six years after the earlier book] so there was time and I had access to a great deal of information and sources. The parents went around and protested [the *Murders* book during] media appearances. Duthie's Books [a major Canadian book chain] refused to carry it. Duthie's did the same to me. Contrary to my experiences with the other three books I've written, Duthie's wouldn't carry it. They would carry a couple of copies [only] if people went in and asked for it." *See generally* Interview with Mulgrew, *supra* note 27.

57. *Id.*

58. *Id.*

59. *See generally* MULGREW, *supra* note 20; Interview with Mulgrew, *supra* note 27.

60. *See* Fotheringham, *supra* note 2; *see also* MULGREW, *supra* note 20, at xii.

61. *See* Fotheringham, *supra* note 2; *see also* McLeod, *supra* note 8.

at Canadian law enforcement gaffes in capturing and prosecuting Olson.[62] "The parents of the victims [suffered renewed] anguish when they confronted the conspiracy of silence that bound the provincial government officials and a serial murderer."[63] The police continued to stonewall the parents of the missing children throughout the investigation: "When pressed, they hid behind police jargon, statistics about runaways and endless bafflegab about proper procedures being followed."[64] As Mulgrew pointed out, the cost of putting Olson away was, in part, the careers of good, dedicated law enforcement personnel whose public service reputations fell victim to the manipulative Olson.[65]

Some people believed that the extensive coverage in newspapers and on nightly newscasts stimulated the murderer. They theorized that he enjoyed reading or hearing about the panic his crimes caused, and the notoriety spurred him on. There is no question that the intensive press scrutiny greatly increased the pressure on both those trying to catch the serial killer and on those trying to quell the public hysteria, the RCMP and British Columbia's Attorney General Allan Williams respectively. *"But the revelation that stupefied the world came after the trial: The government had made a deal with the killer, Clifford Robert Olson, a 41-year-old habitual criminal and police informant. His family received Can$100,000, and, in exchange, he led police to the makeshift graves of his victims."*[66]

The more tangible cost, though, and the primary source of the blot on Canada's police image was that, as Olson led a convoy of police to the burial sites of his tortured and murdered victims, the police literally paid him Can$10,000 per corpse lead.[67] The police believed at the time that, as with hostage rescue situations, the money would be handed over to Olson[68] and then repossessed when the bodies themselves were located. Unfortunately, money was immediately wired offshore to the lawyer of Olson's estranged wife, and Mrs. Olson and the Olson son, a toddler at the time, gained Can$100,000 for the eleven graves Olson pointed out,[69] with Olson "throwing in one as a freebie."[70]

The police involved in the investigation cannot be faulted without highlighting the jurisdictional and logistical obstacles they were facing because of the different levels of law enforcement,[71] each only serendipitously, albeit tragically and

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62. *See generally Clifford Olson Tortures Again*, *supra* note 7.

63. MULGREW, *supra* note 20, at x.

64. *Id.* at 52.

65. *See generally* Interview with Mulgrew, *supra* note 27.

66. *See generally* MULGREW, *supra* note 20, at ix (emphasis added).

67. *See id.* at iv.

68. *See id.* at 93.

69. *See id.* at 107; *see also* Robert Lewis, *Why a 'Faint Hope' Clause?*, MACLEAN'S, Aug. 18, 1997, *available in* 1997 WL 8473800; *Mass Murderer Uses Inquest as Soapbox*, THE OTTAWA CITIZEN, Dec. 16, 1989, *available in* 1989 WL 5390482.

70. MULGREW, *supra* note 20, at 61; *see also* Ken MacQueen & Neal Hall, *Families of Children Slain By Olson See a 'Pathetic Little Man'*, VANCOUVER SUN, Aug. 20, 1997, at A1.

71. *See* MULGREW, *supra* note 20, at 5.

belatedly, coming together to compare notes on the children who were missing in different jurisdictions.[72]

British Columbia was covered by a skein of separate police jurisdictions. There were a dozen independent city forces and more than one hundred detachments staffed by the RCMP. Aside from the RCMP's role as a federal force, the Mounties also handled provincial and, in many areas, municipal policing under contract to the B.C. government.

There were roughly six thousand traffic cops, fraud investigators, homicide detectives, Indian special constables, political bodyguards, analysts and administrators in the province's law enforcement system. Each force and detachment was a separate and distinct entity with its own internal bureaucracy although they were expected to act in concert. Working together rarely happened.[73]

The more the law enforcement agencies coordinated, the clearer the Olson profile emerged.[74] In addition to his earlier history as a petty crook,[75] "he was currently facing two firearms charges, three impaired driving charges, one indecent assault charge and one contributing to juvenile delinquency charge."[76] In spite of the growing number of "accusations involving sexual assaults and child molestations,"[77] it was not enough to persuade the police that a "middle-aged man with a wife and child—admittedly a violent drunk with aggressive, predatory sexual tendencies—was also killing kids."[78] Even as Olson became the chief suspect, he continued to play the police, offering to become an informant.[79] Eventually the police dangled money as an incentive for information.[80] "Olson was just like any other con. They all want something. With the criminal element it's one of two things: get rid of this charge or pay me . . . . Olson could use either: money or a judicial favor."[81]

Olson used his history of selling out Marcoux in an attempt to solicit funds from the police.[82] He wanted to be put on a salary of Can$3,000 a month in "exchange . . . [for] information about the disappearances."[83]

72. *See id.* at 9.

73. *Id.* at 34. The problem of inter-detachment and inter-force communication was one of the reasons [Corporate Les] Forsythe [of Burnaby's RCMP] wanted everyone who had dealt with Olson or who might have an active missing-person file at a meeting.

74. *See id.*

75. *See id.* at 12.

76. *Id.* at 38.

77. *Id.*

78. *Id.*

79. *See id.* at 41.

80. *See id.* at 47.

81. *Id.*

82. *See id.*

83. MULGREW, *supra* note 20, at 47.

II. THE FAINT HOPE STATUTE

While apparently jurisprudential in nature, this issue of the applicability of a benign, ameliorative statute to such a heinous set of facts was governed by nothing if not passion and a desire for vengeance.[84] It seems fitting, therefore, to let the tale begin with a true story related by a legislative representative from the Ontario legislature, in arguing against the lenience toward multiple murderers that was deemed the amendment to the Faint Hope statute in 1976.[85]

> **Mr. Gerry Martiniuk (Cambridge):** It's my pleasure to rise this morning in support of Mr Tilson's resolution. As a young lawyer in the early 1970s I moved from the big city of Toronto to the small town of Preston, which is now part of Cambridge. This was a real contrast, I must say, from the big city, in that clients were your friends, not some impersonal file.
>
> It was through my practice that I met the Pelz family, and I consider the Pelz family my friends. Bertha Pelz and her husband raised their family, consisting of five sisters, Liza, Toni, Joy, Nancy, Linda and a son, William. This was an industrious family, a family that was a credit to their community. In due course, Liza married Ronald Dube, and they had a son called Jason.
>
> I'd like to report to you that this family lived happily ever after, but it did not. In 1979 the peace and serenity of this family was shattered permanently. On June 27,1979, Ronald Dube shot his wife in the back with a shotgun. As she lay on the ground dying, his confession says that she gurgled on her own blood while she repeated his name over and over again, but that wasn't enough. He then dragged the body to a pigsty to be ravaged by pigs.
>
> In 1979 the hopes and dreams of the Pelz family died by this act of brutality. But justice prevailed and on March 12,1980, Chief Justice G.T. Evans convicted Dube of first-degree murder, murder in cold blood, murder that was premeditated, and sentenced him to 25 years without parole, with release in the year 2005. At that trial, Mr Dube actually threatened to kill Toni Pelz, one of the members of the Pelz family, because she had adopted the son, Jason, of the marriage of Liza and Dube. At that trial, even the crown attorney told the family, "You better seek protection, because this man is very dangerous." But for 25 years, until the year 2005, they can go about their lives.

84. *See infra* notes 87–126 and accompanying text.

85. *See* ONT. HANSARD, 8 (Apr. 18, 1996) (statement of Rep. Gerry Martiniuk).

Unfortunately, that's not what happened. Section 745 intervened. Section 745, I believe, is a cruel hoax on an unsuspecting public. We Ontario taxpayers paid for Ronald Dube to make an application under section 745 in 1995,15 years into his sentence. We paid for the convicted murderer to present his case to a judge and jury. Of course no one represented the Pelz family, no one paid for them to attend the hearing. They did so at their own expense. Nor were they permitted to testify. They were not able to tell their story of how this had changed their lives.

Only Dube testified and now he conveniently forgot his confession. Now he didn't do the killing; it was someone else in his presence. Yes, this convicted murderer walks among us in our society today on unescorted passes and, in three short years, he will be applying for parole. What peace have we left the Pelz family? Where's the justice they deserve? We all want guarantees of safety and protection in our society. This family has bravely told their story to Canada. They've requested the opportunity to attend before the justice committee federally and, to date, have not received that opportunity. When will the Pelz family receive the justice they deserve from our society?

We can help prevent future problems of this kind. We can't help the Pelz family, quite frankly, but we can prevent the same thing happening to the Mahaffys and the Frenches and others who are innocent and suffer at the hands of brutality.[86]

A. *Its Origin*

Like many pieces of legislation, the origins of what came to be known as the "Faint Hope" statute[87] were political in nature, if nonetheless spurred by humanitarian and economic goals. When Canada abandoned the death penalty in 1976[88] as constituting cruel and unusual punishment, its reigning Liberal Government promulgated Section 745 of the Criminal Code. Section 745 was intended to provide hope in those rare instances in which a murderer had shown a "complete turnaround" during the murderer's incarceration.[89] The motivation for the clause was more than goodwill; a rehabilitated and released offender would save the public the annual cost of imprisonment per convict, to the tune of Can$80,000

86. *Id.* at 8-9.

87. *See generally* McLeod, *supra* note 8.

88. *See Background Information on Section 745, supra* note 2; *Section 745 or 'The New Math': 15 Years Equals 25, supra* note 10; *Section 745: A 40% Discount on Life Sentences, supra* note 10; *Repeal Section 745 of the Criminal Code, supra* note 3; Lewis, *supra* note 69.

89. *See Section 745: A 40% Discount on Life Sentences, supra* note 10; *Repeal Section 745 of the Criminal Code, supra* note 3; *see also* Lewis, *supra* note 69; Jenish, *supra* note 2; Mary Nemeth, *Is a 'Faint Hope' Too Much?*, MACLEAN'S, Mar. 25, 1996, *available in* 1996 WL 8016067; Stephen Bindman, *'Faint Hope' Will Stay as is, McLellan Says*, THE OTTAWA CITIZEN, Aug. 24, 1997.

to Can$90,000.[90] Section 745.6(1), which contains the application for judicial review, states that:

> Where a person has served at least fifteen years of a 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 more than fifteen years of that person's sentence has been served, that person may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in the number of years of imprisonment without eligibility for parole.[91]

The statute then describes the procedure for this judicial hearing that is presided over by a superior criminal court judge who has empanelled a jury.[92] The factors to be considered are:

> (a) the character of the applicant,
> (b) the applicant's conduct while serving that sentence,
> (c) the nature of the offence for which that applicant was convicted,
> (d) any information provided by a victim, either at the time of the imprisonment of the sentence or at the time of the hearing under this subsection, and
> (e) such other matters as the judge deems relevant in the circumstances, and the determination shall be made by not less than two thirds of the jury.[93]

The statute has been controversial since its inception.[94] Different organizations, such as the Victims of Violence, the Canadian Association of Chiefs of Police, the Canadian Police Association, the Police Association of Ontario, and Citizens Against Violence Everywhere Advocating its Termination (CAVEAT),

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90. *See generally* Bindman, *supra* note 89.

91. R.S.C. § 745.6 (1996). *See also Changes to Early Parole Law Promised by Rock, supra* note 3; *CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745, supra* note 4; *Repeal Section 745 of the Criminal Code, supra* note 3; McLeod, *supra* note 8; Jenish, *supra* note 2.

92. R.S.C. § 745.6(2). *See Section 745 or 'The New Math': 15 Years Equals 25, supra* note 10; *Section 745: A 40% Discount on Life Sentences, supra* note 10; *CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745, supra* note 4.

93. R.S.C. § 745.6 (1996).; *See Section 745 or 'The New Math': 15 Years Equals 25, supra* note 10; *Section 745: A 40% Discount on Life Sentences, supra* note 10; *CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745, supra* note 4; *Repeal Section 745 of the Criminal Code, supra* note 3.

94. *See Clifford Olson Tortures Again, supra* note 7.

immediately argued for its repeal.[95] During an Ontario House debate on April 18, 1996 on the Parole System, it was noted that "the federal government has failed to pass a private member's bill that Liberal backbench member John Nunziata of Ontario tabled in the federal House of Commons[96] in the years 1991, 1994 and 1995, that calls for the repeal of section 745."[97] The history of section 745 and its ensuing problems was outlined as part of an attempt to convince the Ontario House to again urge the federal government to repeal 745.[98]

B. Its Flaw

The problem occasioned by the statute was its overuse, perhaps dictated by overinclusive language or ambiguous, even ambivalent, intent.[99]

> [The clause] was to be used only in the very rarest of circumstances. What has happened over the last 20 years has been anything but rare. Corrections Canada reports that 79% of first-degree murderers who have applied have received some form of early release. That's 50 out of the 63 cases dealt with up to December of [1995].[100]

The statute was arguably intended "to give lifers the possibility, however remote, of an early parole."[101] Through the Faint Hope clause, application for reduction of the parole ineligibility period is made first through the system of the province in which the crime took place.[102] If the provincial system approves, the application is sent on to the federal parole board.[103]

Statistics were bandied about during debates of the 1976 amendment to support arguments that the Faint Hope statute was widely abused.[104] In an April 18, 1996 Ontario House debate, the following numbers were offered:

95. *See* CAVEAT, *Changes to Section 745 Are Only a First Step*, <http://caveat.org/news/1996-06-11_new_745_amend.html> (visited June 11, 1996); *Background Information on Section 745*, *supra* note 2; *CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4; *Ribbons Worn in Memory of the Victims*, *supra* note 7; *Are Victims Being Exploited?*, STOPWATCH (CAVEAT, Burlington, Ont., Can.), Apr. 1997; *Repeal Section 745 of the Criminal Code*, *supra* note 3; Jack Ramsay, *Olson's 'Faint Hope' Review: Two Sides: This Hearing Should Not Happen*, MACLEAN'S, Aug. 18, 1997; Jenish, *supra* note 2.

96. *See Background Information on Section 745*, *supra* note 2; *CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4.

97. ONT. HANSARD 1 (Apr. 18, 1996). *See generally* Nemeth, *supra* note 89.

98. *See* ONT. HANSARD 1 (Apr. 18, 1996). *See generally* Jenish, *supra* note 2.

99. *See* ONT. HANSARD 2 (Apr. 18, 1996) (statement of Rep. David Tilson).

100. *Id.*

101. *Id.*

102. *See* R.S.C. § 745.6 (1996).

103. *See* ONT. HANSARD 5 (Apr. 18, 1996) (statement of Rep. Annamarie Castrilli).

104. *See* ONT. HANSARD 1 (Apr. 18, 1996).

> In New Brunswick, there has been one [actual application for judicial review under the provision], and in that case the parole eligibility was reduced to 20 years from 25. In Nova Scotia, there has been one, and parole eligibility was reduced from 25 years to 18 years. In Quebec, there has been a total of 28: 14 cases were reduced to 15 years for parole eligibility, four cases were reduced to 16 years, four to 17, one to 18, one to 19, two to 20, one to 22. In Ontario, there have been 16 applications since 1976: one was reduced to 15 years, one was reduced to 16 years, one reduced to 17, one to 18, three to 19, one to 20 and one to 21, and seven were given no reduction at all.[105]

As reported at the time, the criticism of the proposed amendment was twofold: that there existed even the possibility that a man such as Olson and others like him[106] could be released onto the streets[107] and the revisitation of the crimes in the memories of the victims' families.[108]

> [A]ll the victims' families are reduced to reliving the original nightmare when Olson receives the judicial review of his sentence. The families will only be eligible to submit a victim impact statement.[109] That's all they can do in order to maintain his incarceration, these families that go through these terrible trials....It will mean...that [victims' families] must relive the emotional agony in front of another jury. Section 745 requires that a jury be present to hear reasons for and against early parole. If a jury decides that people like Clifford Olson must be incarcerated another five years, then again in five years the [families] will have to go through another living hell, another jury, another victim impact statement.[110]

One defense to 745's amendment offered during the Ontario debate was that there was a procedure that needs to be followed before release of the offender.[111] "Regardless of the decision of the jury or the parole board, the life sentence continues for the natural life of the offender. Parole is subject to conditions and can be revoked for breach."[112] Contrary statistics were offered in its justification.

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105. ONT. HANSARD 8 (Apr. 18, 1996) (statement of Rep. Howard Hampton).

106. *See* ONT. HANSARD 3 (Apr. 18, 1996) (statement of Rep. David Tilson) (discussing other convicted murderers, such as Jonathon Yeo, who murdered a girl while out on bail).

107. *See id.*

108. *See* ONT HANSARD 9 (Apr. 18, 1996) (statement of Rep. Gerry Martiniuk); *See generally Section 745: A 40% Discount on Life Sentences*, *supra* note 10; Chris Wood, *A Killer's Plea*, MACLEAN'S, Aug. 18, 1997, *available in* 1997 WL 8473833; Ramsay, *supra* note 95; Jenish, *supra* note 2.

109. *See* D'Arcy Jenish, *Parole on Trial*, MACLEAN'S, Mar. 25, 1996, *available in* 1996 WL 8016064.

110. ONT. HANSARD, 3 (Apr. 18, 1996) (statement of Rep. David Tilson).

111. *See* ONT. HANSARD, 3 (Apr. 18, 1996) (statement of Rep. Annamarie Castrilli).

112. *See id.* at 5.

> We have currently in penitentiary some 2,085 murderers—that's about 15% of the penitentiary population—574 of whom are first-degree and therefore subject to 25 years in jail. A number of murderers have been eligible for parole under section 745. The stats up to December 1995 are as follows: 175 people have been eligible and only 74 have applied, that is, only 42% of those eligible have actually applied; and 63 reviews have been completed, with 13 refused a reduction in parole and 50 granted some partial reduction in parole.[113]

With regard to the "relatively new" statistics on repeat offenders among those released, it was argued that "of the 558 first- and second-degree murderers released between 1975 and 1990, only five committed another murder. That means less than 1% recommitted."[114] Admittedly, this argument was not as emotionally satisfying as the allusion to the people eligible for faint hope, such as women convicted of killing their abusive husbands, who perhaps, were more deserving characters than Clifford Olson.[115]

During this same debate, it was noted that as early as 1974, the Canadian criminal code had been amended to increase from ten to twenty-five years the maximum sentence without eligibility for parole.[116]

> In increasing that maximum sentence without eligibility for parole, Parliament put in a check and balance, and the check and balance was to say, if after 15 years of serving the maximum sentence someone wants to apply for a judicial review of the remainder of their [sic] sentence, they're [sic] eligible to do so. Why would Parliament do that? It's worthwhile looking at the statistical evidence.
>
> The fact is that most murders committed in Canada are not premeditated murders. In fact, most situations of murder happen between people who know one another. They happen, in most cases, when the individuals, whether through alcohol or . . . emotion, temporarily do something they would not otherwise do . . . .
>
> The statistical evidence shows that people who have been convicted of murder in Canada are the least likely to reoffend of any group or of any crime type. What Parliament was trying to get at was the irrationality of keeping someone locked up for a further 10 years when a review of their

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113. *Id.*
114. *Id.*
115. *See id.*
116. *See* ONT. HANSARD 6 at p. 120 (Apr. 18, 1996) (statement of Rep. Howard Hampton).

> sentence would indicate that (a) they are not likely to reoffend, and (b) there is clear evidence of rehabilitation and clear evidence of regret.[117]

As the Minister continued the argument, the better use of governmental resources was not "keep[ing] someone locked up for an additional 10 years at a cost of Can$50,000 a year."[118]

But perhaps the most potent argument made during that debate against the 1976 amendment was to avoid the "bad facts make bad law"[119] trap of legislating an aberration.[120]

> [T]o base a justice system . . . on a few hideous crimes which are designed to raise emotion is . . . simply headed in the wrong direction. The principles of our justice system should not be based upon the activities of a Homolka, or a Bernardo, or a Clifford Olson. They represent . . . the worst examples. But there are literally thousands in our justice system, and we must do justice to all of them.[121]

This notion that similar persons similarly situated must be treated similarly, which is embodied in the American constitutional doctrine of Equal Protection, is common among nations with comparable political foundations. "In liberal-democratic states, justice requires that individuals are treated equally. While equality is not a controversial component of justice, it is a component that gives rise to a difficult question, namely what is entailed in treating people equally?"[122] Avigail I. Eisenberg, in an article entitled Justice and Human Rights in the Provinces,[123] postulates three different brands of justice, "formal equality or *procedural justice;* systemic equality or *institutional justice*; egalitarianism or *distributive justice.*"[124] In examining these three components, Eisenberg notes that

> only issues of formal equality usually acquire the status of rights in state legislation. Conventionally, formal equality is protected in constitution and by rights while systemic equality and egalitarianism are addressed by social programs and are generally treated no more carefully than are other political interests. The Canadian Charter of Rights and Freedoms and

117. ONT. HANSARD, 6-7 (Apr. 18, 1996) (statement of Rep. Howard Hampton).
118. ONT. HANSARD, 7 at p. 1130 (Apr. 18, 1996) (statement of Rep. Howard Hampton).
119. *See infra* notes 188, 329 accompanying text.
120. *See* ONT. HANSARD, 8 (Apr. 18, 1996) (statement of Rep. Howard Hampton).
121. *Id.*
122. Avigail I. Eisenberg, *Justice and Human Rights in the Provinces, in* PROVINCES: CANADIAN PROVINCIAL POLITICS 478 (Christopher Dunn ed., 1996).
123. *See id.*
124. *Id.*

human rights acts deviate from this convention to a modest degree by addressing systemic equality as well.[125]

Eisenberg suggests, however,

Canadian human rights law is designed to favour issues of formal equality and procedural justice over other types of equality and justice. As important as procedural justice is, an institution which can merely address this form of justice is severely debilitated in meeting the challenges to rights and the demands of justice posed in Canada today.[126]

C. The 1996 Amendment

The Faint Hope statute as amended was only meant to apply "to those murderers who have made a 'complete turnaround' in their lives while in prison. Where someone has been rehabilitated, and everybody agrees with that, why should the person continue to be incarcerated at the cost of what—$80,000 to $90,000 a year to the Canadian taxpayer."[127] Still there are those who reject the idea of any hope, however faint, for convicted murderers.[128] "Many groups representing victims and police want the section scrapped entirely, saying a life sentence should mean life."[129]

The 1997 amendment provided in Section 745.6 (1) that

[s]ubject to subsection (2), a person may apply, in writing,[130] to the appropriate Chief Justice in the province in which their [sic] conviction took place for a reduction in the number of years of imprisonment without eligibility for parole[131] if the person

(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 [sic] sentence has been served; and
(c) has served at least fifteen years of their [sic] sentence.[132]

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125. *Id.*
126. *Id.* at 479.
127. *See generally* Bindman, *supra* note 89.
128. *See id.*; *see also* Jenish, *supra* note 2.
129. *See generally* Bindman, *supra* note 89. *See also* Jenish, *supra* note 2.
130. *See CAVEAT*, *supra* note 4.
131. *See Clifford Olson Tortures Again*, *supra* note 7; Jenish, *supra* note 2.
132. R.S.C. § 745.6 (1996). *See also* Neil Boyd, *Olson's 'Faint Hope' Review: Two Sides: He is Eligible for this Review*, MACLEAN'S, Aug. 18, 1997.

To this point, the amendment flawlessly tracks the meaning, and to a large extent, the language of the original statute. Subsection 2, however, is another matter altogether:

> *Exception—multiple murderers*
>
> *(3) 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.*[133]

It is surprising to note that those guilty of high treason against the nation of Canada are entitled to the faint hope while those guilty of "more than one murder." are not.[134] Moreover, the amendment makes neither provision for extenuating circumstances, nor does it distinguish between one who murders serially, or sequentially, and one who kills more than one person on a single occasion.[135] This author does not suggest that one of these types of miscreants is more deserving of that small measure of mitigation, but finds it curious that the statute does not even consider such issues.

As for factors which are to be considered in making this determination of reduction of the sentence, the amendment's subsections 745.63(1)(a) through (d) track the factors enumerated in the original statute.[136] Where the original statute's subsection (e) allowed the consideration of "such other matters as the judge deems relevant in the circumstances,"[137] and noted that "the determination shall be made by not less than two thirds of the jury,"[138] the amendment's subsection (e) does not significantly vary, in allowing for the consideration of "any other matters that the judge considers relevant in the circumstances;"[139] however, section 745.63(3) now provides that any "determination to reduce the number of years *must be by unanimous vote.*"[140]

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133. R.S.C. § 745.6 (1996) (emphasis added); *see also CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4; Boyd, *supra* note 132; Jenish, *supra* note 2.

134. R.S.C. § 745.6(2) (1996).

135. *See id*; *see also CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4.

136. *See* R.S.C. § 745.63 (1996). *See also CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4.

137. R.S.C. § 745.63(1)(e) (1990).

138. *Id; see also Section 745 or 'The New Math': 15 Years Equals 25*, *supra* note 10; *Section 745: A 40% Discount on Life Sentences*, *supra* note 10.

139. R.S.C. § 745.63(1)(e) (1996).

140. R.S.C. § 745.63(3) (1996)(emphasis added); *see also CAVEAT's Preliminary Analysis of the Amendments Concerning Section 745*, *supra* note 4. *See generally* Jenish, *supra* note 2; Bindman, *supra* note 89.

III. CLIFFORD OLSON

A. *The man and the crimes*

The scrutiny of a known serial killer invariably alters whatever objective reality his earlier life possessed. What is known about Olson's former life caused surprise at the turn his life took, although he had never been a choir boy.[141] Olson "seemed to be little more than a small-time hood, a mouthy punk grown into a middle-aged con."[142] He began his criminal career at an early age, but only later in life did he turn to murder.[143]

> I used to live in the house next door to Olson's in-laws, and during those years he was probably courting his wife-to-be [Joan] . . . and committing his murders, but I never saw him, at least not to my knowledge. His wife's parents owned the house next door, and we were "over-the-fence friendly with them. The old man was arthritic or something and had a hard time walking; his wife was a plump, pleasant-looking woman. Both around 70, I'd guess, and that was in about 1975–1977 or so. They had an adult son who lived with them, pasty faced and overweight and, after I moved away from there, my friends who lived on the top floor of that house caught the son sneaking up their fire escape ladder to peep into their windows at night. They were very scared of him. They caught him a few times. And I think this was before the Olson murders. But I'm not sure.
>
> I moved out of the immediate neighborhood before Olson's arrest and conviction and only heard later that the neighbor's daughter had moved back to her parents' place with Olson's baby . . . . One other possibly meaningless tidbit: I work at the Open Learning Agency and we offer university degrees by correspondence. Quite a few years ago, maybe 15 or more, Olson took a course from us. Just one, I think. It was Abnormal Psychology....[Another source] thinks this is a good sign, that he was trying to gain some insight into his problems . . . . I'm not so sure . . . he's such a manipulative person . . . .[144]

Mulgrew summarized Olson as a "forty-one-year-old habitual criminal who ha[d] been let out on parole because while inside he acted as a rat."[145] Olson was the

141. Interview with Mulgrew, *supra* note 27.
142. MULGREW, *supra* note 20, at 14.
143. *See id.* at 12–13.
144. Interview with anonymous source, in Vancouver, B.C. (Oct. 15, 1998) (on file with the author).
145. Interview with Mulgrew, *supra* note 27.

very definition of a recidivist.[146] "As a teenager, Olson was branded a troublemaker and identified as someone obviously bent. His incorrigibility...confirmed that initial judgment. During his adulthood, Olson spent barely 50 months free from 24-hour supervision."[147] When I asked what triggered Olson's transition from a petty crook and a child molester, Mulgrew attributed the change to Olson's nature as "an institutionalized being [informed by a prison cellmate that] there are pleasures and excitement [he'd] never experienced,"[148] and once Olson tried it, "he kept doing it again, experimenting with the kids he killed, putting embolisms [injecting air bubbles] into them, got caught up with the narcissism of being an infamous serial killer, started calling himself Maxwell Silver Hammer,"[149] using the hammer as his trademark weapon in bludgeoning his victims.[150]

According to Mulgrew, Olson got

> caught up in [his] fantasy world..., giv[ing] out business cards to people, pumping Halcions, tripped out on them, slip[ping] them into girls' drinks. You can track how he became who he ended up being, how he got his ideas, then the ideas became more than just intellectual theory with his first killing.[151]

When I asked Mulgrew whether he had ever met Olson in person, I received an emphatic no in response.[152] "The guy's a liar, so there's no way to know where you stand with him, he's nonstop, he'll lie about everything. [He lives] completely in the now, no past, no future... Clifford Olson is an example of a pure existentialist. Complete nihilis[t]."[153]

By conservative estimates, Olson killed eleven boys and girls in southwestern British Columbia in 1980 and 1981.[154] Olson claimed to have plans to travel to the United States, either after his release or part of some prearranged deal with U.S. government officials, to "testify in the Green River case," a still unresolved investigation involving a Seattle serial murderer.[155]

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146. *See* MULGREW, *supra* note 20, at xi.
147. *Id.*; *see also* Wood, *supra* note 108.
148. Interview with Mulgrew, *supra* note 27.
149. *Id*; *see also* MULGREW, *supra* note 20, at 104.
150. *See* Fotheringham, *supra* note 2; MULGREW, *supra* note 20, at 104.
151. Interview with Mulgrew, *supra* note 27.
152. *See id.*
153. *Id.*
154. *See* Ramsay, *supra* note 95; Fotheringham, *supra* note 2; *A Killer's Bid to Go Free*, *supra* note 1; *see also* MacQueen &Hall, *supra* note 70, at A1.
155. *See generally* CARLTON SMITH & TOMAS GUILLEN, THE SEARCH FOR THE GREEN RIVER KILLER (1991); *See also* ROBERT D. KEPPEL, PH.D. & WILLIAM J. BIRNES, THE RIVERMAN: TED BUNDY AND I HUNT FOR THE GREEN RIVER KILLER (1995).

> Olson was a criminal with a varied past, he had a total of 92 previous convictions ranging from fraud to armed robbery and even rape. [At the time of his arrest,] [h]e was forty two years old and was married with a baby son. They lived on the outskirts of Vancouver. [Even after the police began to suspect Olson, among others,] in late July he was responsible for the murder of Louise Chartrand and Terri Lyn Carson. He also murdered a German tourist by the name of Sigrun Arnd.[156]

What triggered the murderous spree, according to Mulgrew, was a concordance of events. Olson's imprisonment had left him too institutionalized to function outside the regimented life to which he had become accustomed.[157] His marriage had been deteriorating, worsened with the birth of their son, and Olson was able to parlay what he had learned in prison into coin of the realm, not money—not yet—but attention and even a sense of appreciation and approval from the police when he gave them details about his own crimes while attributing them to other perpetrators.[158] Olson befriended, learned from, and then rolled over on Gary Francis Marcoux, his next-cell neighbor in 1976 in Prince Albert Penitentiary.[159] Marcoux, a rapist and child killer, was being prosecuted by Robert Shantz, the man who would later represent Olson and Olson's wife in arranging the dollars-for-corpses deal.[160] It was Olson's betrayal of Marcoux, securing a victory for Shantz, that led the lawyer to lead the authorities to release Olson when his case came up for review.[161] The police's underestimation of the risk Olson posed to the public enabled him to leave an undetected gory trail of young bodies while the police, for too long, regarded him as a petty crook.[162] The story of his cat-and-mouse game with the police goes a long way toward explaining the Canadian government's alleged efforts, which were largely successful, to suppress the truth about how Olson was belatedly brought to justice.[163]

The mutilated corpse of Olson's first victim, the twelve-year-old Christine Weller, was found on Christmas Day 1980 in Vancouver.[164] Thirteen-year-old Colleen Daignault disappeared in the Spring of 1981,[165] almost the same time the police found the body of sixteen-year-old Darren Johnsrud, his skull fractured.[166]

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156. Interview with Mulgrew, *supra* note 27.
157. *See id.*
158. *See id.*
159. *See* MULGREW, *supra* note 20, at 16–17.
160. *See id.*
161. *See id.*
162. *See id.* at 15.
163. *See id.* at 33–34.
164. *See id.* at 7–9.
165. *See id.* at 20–21.
166. *See id.* at 21–25.

The police had few leads, but already believed they were witnessing the work of a serial killer.[167]

The victims' families were not passive throughout this period.[168] The police were too eager for too long to dismiss the disappearances of children as instances of typical runaways.[169] Later that Spring, sixteen-year-old Sandra Wolfsteiner disappeared after last being seen hitching a ride in a car.[170] In June, thirteen-year-old Ada Court disappeared while walking home.[171] Simon Partington, nine-years-old, disappeared from a shopping center.[172] Raymond King disappeared in July,[173] followed soon after by Judy Kozma.[174] Judy Kozma was fourteen years old when she was found, stabbed to death.[175] Raymond King's corpse was found soon after.[176] With nine-year-old Simon Partington's disappearance, however, the "runaway" theory had lost all credibility to the police.[177]

Olson's apprehension was not in time to save those eleven children, but doubtless saved others.[178] Belatedly, he was finally caught under surveillance "whilst trying to pick up two girls in his van."[179] Evidence against him included a notebook found in his van which contained the address of his victim Judy Kozma.[180] When taken into custody, Olson was charged with the eleven murders, but even then "it was suspected that he may have been responsible for more than this. He eventually pleaded guilty to all charges and was sentenced by Justice McKay to eleven concurrent life sentences."[181]

What this brief summary of the capture and abbreviated trial omits is the fact that Olson used and manipulated the police investigation, initially passing himself off as an informant regarding another killer's actions, deluding the police into believing that he was a petty, largely nonviolent villain, thereby releasing him to begin his vicious serial of murders.[182] It also ignores the reason Olson pleaded guilty, anomalous behavior in a sociopath craving public attention.[183] He chose to present a defense[184] but changed his plea after he realized that taking the stand

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167. *See id.* at 31.
168. *See id.* at 52.
169. *See id.* at 5.
170. *See id.* at 28–29.
171. *See id.* at 31.
172. *See id.* at 32.
173. *See id.* at 42.
174. *See id.* at 46.
175. *See id.* at 57.
176. *See id.* at 53.
177. *See id.* at 29.
178. *See* Interview with Mulgrew, *supra* note 27.
179. *Id.*
180. *See id. But cf.* MULGREW, *supra* note 20, at 56–57.
181. Interview with Mulgrew, *supra* note 27; *see also* Wood, *supra* note 108.
182. *See* MULGREW, *supra* note 20, at 29–31.
183. *See id.* at x.
184. *See id.* at 121.

would open the door for the police to play the tapes of his confession, which would show the hideous brutality of his actions, thereby embarrassing and disgracing him.[185] Confessing seemed to Olson the lesser of two evils.[186]

> The parents were denied relief of any form and at every turn.[187]
>
> Several of the parents of Olson's victims sued the killer, his family and his lawyers in an effort to learn the details of the deal and to recover the "blood money." Ultimately, the families failed in recovering the money. The Supreme Court of Canada refused to review the case, even though it appeared to contradict the legal axiom that a criminal should not profit from his or her crime. The legal establishment took solace in the hoary maxim: "Hard cases make bad law," the profession's condescending banner of pragmatism. It was a judicial shrug: Like other human endeavors, the administration of justice sometimes fails—usually when faced with a thorny moral thicket.[188]

Nor was discreet silence from Olson to follow. Even before the Faint Hope hearing,[189] Olson went so far as to bring libel suits against the families of his victims, claiming he had been defamed by their accusations.[190] He even claimed to have secreted the remains of other victims, and offered to allow the police to drive him according to his directions to these sites.[191] It was a ploy: Olson had no other bodies to lead them to,[192] but his cell was claustrophobic and his prison life routine. Olson's goal was to get new attention, along with a day trip in the fresh air while he led the police on the proverbial goose chase,[193] his reward for yet again abusing the police's desire to close out missing persons' cases and offer comfort and closure to the families of still missing children.[194] Olson was able to deceive the police by combing through legal records, knowing more about a case than the investigators, and feeding the police details that could have been previously made public.[195] To this day, Olson remains true to form.[196] He tried to market ten-to-fifteen hours'

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185. *See id.* at 122–123.
186. *See id.* at 124.
187. *See id.* at x.
188. *Id.* at xii; *see also supra* note 119 and accompanying text.
189. *See* Interview with Mulgrew, *supra* note 27.
190. *See id.*
191. *See* MULGREW, *supra* note 20, at 153.
192. *See id.* at 153–54 (stating that Olson manipulated the police to obtain a free visit with his wife and child).
193. *See id.* at 153.
194. *See* Interview with Mulgrew, *supra* note 27.
195. *See id.*
196. *See id.*

worth of videotaped sessions with prison psychiatrists,[197] after he required the authorities to sign a contract to allow him to have copies of, and copyright to, those tapes.[198] Journalist Mulgrew's latest contact with Olson came in the form of a photograph Olson sent him, depicting Olson, sixty-years-old now, in his shorts, running around the prison track.[199] "He's in great shape," Mulgrew mused. "He'll live another thirty years."[200]

B. Clifford Robert Olson's Faint Hope

"This jury has the power to say yes; I have a right to the law."[201]

Thus Clifford Olson rationalized his use of the Faint Hope clause to subject the families of his victims, and the public at large, to his rambling descriptions of his life of crime.[202] On March 11, 1997, at a Vancouver court house, Olson began the process of application for early release under the Faint Hope section with his preliminary hearing.[203]

On the first day of his testimony in Surrey Provincial Court, on August 18, 1997,[204] a man characterized as "Olson the charmer, Olson the beast, Olson the brilliant manipulator"[205] began to choose his jury, a task he was said to savor.[206] Presiding judge, B.C. Supreme Court Justice Richard Low, struggled to limit the scope of Olson's arguments.[207] "[T]he court is not interested in your memoirs,"[208] Justice Low held, rejecting Olson's attempts to introduce his forty-page Profile of a Serial Killer[209] and a "rambling series of video tapes Mr. Olson produced while in prison."[210]

Olson acted as his own counsel, with as many as twenty peremptory challenges available to him,[211] in his hopeless search for a sympathetic jury.[212] The jury would consist of a panel chosen from 130 people in British Columbia's Lower Mainland

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197. *See id. See also* MacQueen & Hall, *supra* note 70, at A1.
198. *See* Interview with Mulgrew, *supra* note 27.
199. *See id*; *see also* Fotheringham, *supra* note 2.
200. Interview with Mulgrew, *supra* note 27.
201. Greg Joyce, *Crown Attorney Pokes Holes in Olson's 'Fantastic Lies'*, TORONTO GLOBE AND MAIL, AUG. 21, 1997, A4.
202. *See Are Victims Being Exploited?*, *supra* note 95.
203. *See id.*; McLeod, *supra* note 8; *A Killer's Bid to Go Free*, *supra* note 1.
204. *See* Ramsay, *supra* note 95.
205. Ken MacQueen, *Clifford Olson Myth on Trial in B.C. Court*, VANCOUVER SUN, Aug. 18, 1997.
206. *See id.*
207. *See id.*
208. *Id.*
209. *See id.*
210. *Id*; *see also* MacQueen & Hall, *supra* note 70, at A1; *see also supra* notes 196–97 and accompanying text.
211. *See* MacQueen, *supra* note 205.
212. *See id.*

municipal voter list.[213] Provision was made for each juror to be paid Can$30 a day,[214] "but it [was] unclear if they w[ere] . . . offered counselling, as is sometimes what happens after particularly long or ugly cases."[215]

As to whether the effort was indeed fruitless, commentators noted that Olson primarily viewed this hearing as "the ultimate play for attention."[216] According to Steve Sullivan, executive director of the Ottawa-based Resource Centre for Victims of Crime, the hearing was "a kind of... holiday for [Olson]. It's kind of a change of pace from his normal 23 of 24 hours in his cell."[217]

But Olson possessed a kind of outsized reputation about his personality that preceded the hearing.[218] "The press on Olson has sort of built him into some kind of a supernatural ogre, with supernatural powers almost, says retired judge Lloyd McKenzie, court information officer. You get into a sort of an area of mysticism about him, which is largely nonsense."[219]

Given that Olson ended his 1982 trial by pleading guilty,[220] the Faint Hope hearing would be "the performance he never gave . . . . The public is likely to be surprised,"[221] predicted one victim's stepfather, Gary Rosenfeldt.[222] "[Those who know Olson or witnessed his March testimony, remarked that Olson's] speech is often unfocused, riddled with grammatical errors or bizarre leaps of logic[223] . . . . He was almost pitiful in his stupidity."[224]

Similarly, Justice Low refused to allow his courtroom to become a forum for a political debate on the merits of the Faint Hope clause.[225] But the Reform Party was accused by Justice Minister Allan Rock of "exploiting victims for 'narrow partisan purposes' through their activities relating to Olson's Section 745.6 application."[226] Rock, who called the display of the victims' families suffering a "shameless attempt to capitalize on the pain of victims,"[227] was himself then subject to criticism for arguably "deflect[ing] attention from the tragic events being relived by the victims' families and mov[ing] the focus to the political arena."[228]

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213. *See id.*; *see also* Fotheringham, *supra* note 2.
214. *See* MacQueen, *supra* note 205.
215. *Id.*
216. *Id*; *see also* Peter F. Dawson, *Olson and the Media*, TORONTO GLOBE AND MAIL, Aug. 25, 1996.
217. MacQueen, *supra* note 205.
218. *See id.*
219. *Id.*
220. *See* MULGREW, *supra* note 20, at 124–25.
221. MacQueen, *supra* note 205.
222. *See id.*
223. *See* MacQueen & Hall, *supra* note 70, at A1.
224. MacQueen, *supra* note 205.
225. *See id.*
226. *Are Victims Being Exploited?*, *supra* note 95.
227. *Id.*
228. *Id.*

In the end, after a week-long hearing, the jury took less than fifteen minutes to deny Olson parole until he has served 25 years of his life sentence.[229] He will not be eligible for ordinary parole until August 2006.[230] While ministers of the Reform Party used the hearing as an opportunity to express their "outrage,"[231] Justice Minister Anne McLellan denied that the government has any intention to repeal the Faint Hope clause as amended,[232] because it "strikes the right balance now."[233]

IV. PUBLIC OUTCRY

None of the previous public protest reached the level engendered by the Clifford Olson case,[234] in part because of the publicity Olson's case itself garnered, and in part because of the nature of his repeated atrocities.[235] Moreover, the fact that those victims were children[236] rallied the public in a mass outcry against a law that could permit Olson an opportunity to remind the victims' surviving friends and families of those horrors,[237] and to give Olson a forum with no practical purpose, given the virtual impossibility of his coming within the purview of the statute's intended delivery of hope, albeit faint, to a reformed convict.[238]

One victim's father, Ray King, whose son Raymond was one of Olson's victims, spoke months before Olson's hearing about the impact of the pending hearing:

> Somehow, the children who are gone and those of us left behind to grieve have been lost in the shuffle and forgotten. While no effort or expense has been spared to ensure that this individual, who has destroyed so many lives, is afforded rights that boggle and offend our sensibilities, we are denied closure. It is difficult enough to deal with the losses we have suffered without his constant intrusion into our lives through the media and the numerous suits he has brought against the corrections system over the past 16 years—suits which have been frivolous at best and designed only to amuse him and inflict more pain on us. The amendments to Section 745 . . . were implemented too late by the government to prevent him from

229. *See He Has No Concept of Reality*, *supra* note 7; Bindman, *supra* note 89.

230. *See He Has No Concept of Reality*, *supra* note 7; *The Insanity Finally Ends: Jury Sends Olson Away in 15 Minutes*, REFORMWEEK (National Reform Caucus), Aug. 22, 1997.

231. *See The Insanity Finally Ends: Jury Sends Olson Away in 15 Minutes*, *supra* note 230.

232. *See* Bindman, *supra* note 89.

233. *See id*; *see also The Insanity Finally Ends: Jury Sends Olson Away in 15 Minutes*, *supra* note 230.

234. *See supra* notes 95–127 and accompanying text.

235. *See supra* notes 169–201 and accompanying text.

236. *Id.*

237. *See* Wood, *supra* note 108.

238. Fotheringham, *supra* note 2; Lewis, *supra* note 69.

> having a platform from which he will be able to heap more indignities on an already revolted Canadian public.[239]

One of the most outrageous elements of Olson's courtroom performance during his hearing was his allegation that he had been involved in additional unsolved murders.[240] It was an allegation consistent with his self-aggrandizing craving for attention. Since no evidence, no bodies or specific information was ever adduced to corroborate his claims, his number of victims remains at eleven.[241]

Is Olson silent now? I asked Mulgrew. "No, he tries every chance he can get. He's an incredible dissembler. That's what everyone misses or forgets. Everyone thinks he's a really bad asshole, but he's really nutty, weird sense of humor . . . ."[242] Author Mulgrew, who came to know the man not only through research but also through a series of letters from Olson himself,[243] summarized

> [T]hey changed the law because of him, but . . .the change in the clause is not substantive, the procedure changed, it never occurred to [the lawmakers] that they would have someone within their custody who would want to use the process as a means of promotion, rather than a means of arguing their issue of law. Olson has no intention of arguing he should be let loose, no desire to discuss that, no hope of that, either. He only sees the process as another means of exploiting his narcissistic tendency to be the center of attention and to promote himself. . . . He's very voluble, sends cards[244] to, and indeed, bringing suit against, the families of the children for libel for their statements that he was a child killer.[245]

Olson, who is currently held in a Saskatchewan prison, regarded the Faint Hope hearing as a joke.[246] The law

> dealt with his case . . . , he still falls under it, the law was written to give prisoners a chance to face those who wanted to keep them in jail, written

239. *Ribbons Worn in Memory of the Victims*, *supra* note 7.

240. *See generally* SMITH & GUILLEN, *supra* note 155; KEPPEL & BIRNES, *supra* note 155; *see also supra* text accompanying note 156.

241. *See, e.g.*, MULGREW, *supra* note 20, at 153.

242. Interview with Mulgrew, *supra* note 27.

243. *See id.*

244. Mulgrew asserted that the government had to invoke some constitutionally questionable laws to "shut him up," to stop him from writing to the families of his victims, and from sending cards, including pornographic cards, to Members of Parliament. Interview with Mulgrew, *supra* note 27.

245. *Id.*

246. *See id.*

> as if there was some integrity to the process, that the prisoner was participating and wanted a process, not a soapbox.[247]

When I asked why Olson had never been "crazied" out of the system, Mulgrew replied that Olson was indeed "clinically insane, living on another planet, [confronting] a rational system of legal process . . . designed to deal with legal issues."[248] However Canadian law was not equipped or prepared for a man like Olson,[249] or perhaps the view was, "Maybe you are nuts, maybe you belong in a hospital where people would be compassionate toward you, but tough, you belong in a jail, mainstreamed with all the really bad asses and the guys with the machine guns on the towers making sure you don't get out."[250]

V. WHAT THE OLSON CASE SAYS ABOUT CANADIAN LAW

> Formal equality is often associated with procedural justice[,] which requires that procedures of the state or societal institutions (such as businesses and universities), do not discriminate against individuals or groups. For example, through a state's commitment to rights, it ensures that all individuals have equal opportunities to participate in democratic politics and are treated as equals by the justice system. Formal equality is secured by ensuring that state processes and institutions treat all individuals alike. This does not mean that the outcomes of processes must have a similar impact on each individual to be considered fair. For instance, procedural justice requires that each individual has the *opportunity* to have the same input into an election, not that each approves of the outcome.[251]

Does this suggest that the Faint Hope law is meritorious both on its face and application because it serves the majority of circumstances? The neutrality and generalization of judicial process is not intrinsically a guarantor of justice.[252]

"Public policies will perpetuate inequality unless they are sensitive to the identity-constituting characteristics that distinguish individuals."[253] While Eisenberg wrote those words in the context of protecting the rights of the politically or economically disadvantaged[254] it may be said that the emphasis on uniform procedure over individual participant or set of circumstances in the Olson case[255]

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247. *Id.*
248. *Id.*
249. *See id.*
250. *Id.*
251. Eisenberg, *supra* note 122, at 478, 480.
252. *See id.*
253. *Id.*
254. *See id.*
255. *See infra* text accompanying note 284–88.

has equal application. Furthermore, because of Olson's unique character and personality, he led the government to extraordinary measures to deprive him of certain constitutional and Charter rights to silence his monstrous—yet legally guaranteed—correspondence from his prison cell.[256]

One Canadian scholar analyzes the nature of Canadian law, focusing on its court system, and notes that "power [can be thought of] as the joint product of impact and discretion."[257]

> *Impact*—the extent to which an action or circumstance intrudes upon the lives of others and obliges them to take a particular course of action they would not otherwise have taken—is the most obvious dimension, but it is not sufficient in itself. The second dimension, *discretion*, is the extent to which the actor who had the impact on the lives of others had any choice, any alternative that would have had a different impact.[258]

Peter McCormick, in writing the above in *Canada's Courts: A Social Scientist's Groundbreaking Account of the Canadian Judicial System*, had in mind the effect courts and particular judges have on individuals finding themselves involved with the Canada legal system.[259] His theories, however, as to the essence of law as being a separate world unto itself,[260] concerned less with the way the outside world functions than with law's internal mechanisms,[261] have particular application in the Olson case.

> This . . . process requires a progressive stripping away of idiosyncratic detail to transform the situation into one that can be described in increasingly abstract and general terms. As Scheingold points out, "the key to understanding is, of course, simplification. The legal approach simplifies complex situations by stripping away all those elements which do not pertain." At its best, this stripping away of irrelevant detail to reveal the basic elements of the dispute is the proudest achievement of our legal order; it does not matter whether the person's skin is black or white or whatever, if they are male or female, if they are popular leaders of the community of shunned outsiders; the only concern is how the facts direct the assimilation to a particular legal category.[262]

256. *See* Interview with Mulgrew, *supra* note 27.
257. MCCORMICK, *supra* note 18, at 3.
258. *Id.* (emphasis in original).
259. *See id.*
260. *Id.* at 4–5, *quoting* ETHAN M. KATSCH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989)).
261. *See id.*
262. *Id.* at 5–6.

Thus, law creates its paradigm irrespective of what it considers irrelevancies, the system being more important to, and incompatible with, an ad hoc approach based on a case-by-case method of rulemaking.[263] As McCormick points out, this has both merit and flaw.[264] "[I]t makes lawyers and judges the slaves of whatever the previously defined legal categories happen to be. If the categories are benign, logical, and principled, then this is an asset rather than liability."[265] Of course, as McCormick follows the thought to its reasonable conclusion, with no dearth of historical example to offer as support, such is not the case when the law is "morally objectionable."[266] In the latter instances, "the rigorous logic of the legal process is the servant, not the opponent, of the morally objectionable principles embedded in the law."[267]

While few would argue that a case should be decided without rules or a system of procedure to administer those rules, this strict adherence to consistency over justice,[268] as illustrated by fitting the Olson case into Canada's penal code and its criminal procedure strictures, does not promote the rule of law or public perception of the virtue of the rule of law. McCormick addressed the problems created by law's emphasis on procedure.[269] "The process of abstraction often means that we strip away the human overtones and the social context that is a part of what goes on around us."[270] This "law in a vacuum" approach is not inherently without merit; if our only two choices are law in which law allows for consideration of "irrelevancies" such as ethnicity, gender, money, or perhaps geography, or, in the alternative, a system which does not allow for judges to remove their blindfolds, the latter may be said to be preferable in that it is more likely to foster objectivity in a world peopled by subjective human beings.[271] Although Olson was an aberration and not the intended beneficiary of the Faint Hope clause,[272] he was not precluded from its benefits because the system did not allow such individual exception.[273]

And, indeed, a rule-bound system functions effectively in the main.[274]

> [B]y definition, rules provide a general course of action that is the optimal outcome most of the time but the suboptimal outcome some of the time.

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263. *See id.*
264. *See id.* at 6.
265. *Id.*
266. *Id.*
267. *Id.*
268. *See infra* notes 284–89 and accompanying text.
269. *See* McCORMICK, *supra* note 18, at 8, *quoting* SCHEINGOLD, STUART A., THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE (1974).
270. *Id.*
271. *See id.* at 9.
272. *See infra* note 106 and accompanying text.
273. *See infra* note 120 and accompanying text.
274. *See* McCORMICK, *supra* note 18, at 9.

> The advantage of rules is that they simplify the job of the decision-maker by precluding the necessity of responding to the idiosyncratic details of the particular case, and to say the rule is a good one is to say that usually it yields a fair result even in the light of those details. *But "usually" is not "always," and sometimes the general rule results in the sort of intuitively unsatisfactory outcome that journalists love because it sells newspapers.*[275]

It is this exceptional case that demonstrates the weakness in our Western form of "blindfolded" justice,[276] and Olson's use of the Faint Hope clause offers an ideal example of such a case.[277]

VI. CONCLUSION

> [F]or everything [Olson] does, for everything he wants to do, this country and its establishment nevertheless have suppressed the book that attempted to explain his case. They tried to suppress my book, they've suppressed every attempt to make a television or film documentary on this story and they refuse to discuss what went down in 1980 and 1981. . . . But my book was optioned a couple of times and [squelched] every time out of the gate. The CBC [Canadian Broadcasting Corporation] tried to do it. Bernie Zuckerman, who is a famous producer here with the CBC who did major documentaries on all sorts of things in this country, tried to do it. He was shut down. Alliance Films, which is the biggest film producer—their L.A. office wanted to do it and they bought the rights from Pacific Motion Pictures here who had it. They were shut down. It is a story that Canada does not want to talk about.[278]

The reaction to the serial murders of children is a visceral, not a jurisprudential, one. Such crimes cannot be prevented by the amendment to the Faint Hope provision, nor can they be undone in any legislature or court of law. But the cry for revenge and retribution translated into a cry for justice unmet, and in this instance the justice settled for was not to inflict greater harm on Olson—the outcome of the hearing was a foregone conclusion[279]—but to protest the further harm he could inflict on them, the survivors.[280] There was no justice that could be exacted that would come near to retribution; the closest the protesters could approximate was

275. *Id.* (emphasis added).

276. *See id.*

277. *See infra* note 259 and accompanying text.

278. Interview with Mulgrew, *supra* note 27.

279. *See, e.g., Child Killer Uses "Faint Hope" Clause,* JUST. NEWSL. (Reform Justice Team, Ottawa, Ont. Can.), Mar. 7, 1997.

280. *See* ONT. HANSARD 3 (Apr. 18, 1996) (statement by Rep. David Tilson).

to decry allowing Olson the forum he craved, and to display for the world the monstrosity of the man,[281] and, by extension, the absurdity of a system that would deem him entitled to additional due process.[282]

The oversight of the legislature in not specifying that those guilty of treason or serial murder would never be considered sufficiently rehabilitated to merit early release[283] seems an obvious one in retrospect, and one scarcely vulnerable to the excoriation it earned, particularly in the Olson case.

Indeed, the point of the amendment was perhaps less a response to the Olson media frenzy than the simple recognition of a simple fact: What was meant to offer faint hope to the few worthies in prison was being abused to offer meaningless hope to the many hopeless.[284] Olson made a laughing stock of the legislature and gave rise to a renewal of the nightmare for those trying to recover from a pain that would never fade.[285] The amendment prevented what could have been a rare recurrence of such abuses.[286] Had its passage been timely, to the families of the victims, who had to suffer through the agony of those hearings[287], justice quite possibly could have remained a word with a meaning other than irony.[288]

But the story does not end there. The role of Canada's courts, at the provincial and federal levels, is changing.[289] A "feature of contemporary [Canadian] politics [is] the judicialization of policy processes."[290] Arguments about the policy-making or activist role of courts are being heard in Canada,[291] arguments familiar in American political and legal arenas. Some argue against this role for Canadian courts,[292] and "are usually also concerned that Canadians are becoming too enamoured with rights, that they now look to the courts rather than the elected legislatures to vindicate their interests, that Canadian political culture is becoming more litigious and that it is losing its democratic character."[293] Similarly, Canadians are becoming more willing to confront a system's perceived inequities.[294]

> Governmental policies and procedures are increasingly subject to judicial scrutiny and influence, giving rise to a policy style that is more formal and

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281. *See* Dawson, *supra* note 216; Fotheringham, *supra* note 2.
282. *See* Fotheringham, *supra* note 2.
283. *See* R.S.C. § 745.6 (1996).
284. *See infra* notes 99–100, 104 and accompanying text.
285. *See Clifford Olson Tortures Again*, *supra* note 7.
286. *See* Jenish, *supra* note 2.
287. *Id.*
288. *See Clifford Olson Tortures Again*, *supra* note 7; Ramsay, *supra* note 95.
289. *See* Michael J. Prince, *At the Edge of Canada's Welfare State: Social Policy-Making in British Columbia*, *in* POLITICS, POLICY, AND GOVERNMENT IN BRITISH COLUMBIA 236, 259 (R.K. Carty ed., 1996).
290. *Id.*
291. *See id.*
292. *See* Eisenberg, *supra* note 122, at 478.
293. *Id.* (citation omitted in original).
294. *See* Prince, *supra* note 289, at 236, 258.

> legalistic. [But] [s]ince the inclusion in 1982 of the Charter of Rights and Freedoms in the Canadian constitution, judicial decisions have become more important in political and policy systems. . . . Interest groups and individuals are taking issues to the courts to seek redress of perceived policy wrongs and to establish claims to perceived rights. Judges at both the federal and provincial levels are reaching decisions that are highly political and social in nature. To the extent that judges give authoritative meaning to laws and regulations in their rulings, the courts are (re)making or unmaking public policies.[295]

A recent article in the Canadian magazine, "The Next City," announces in Rory Leishman's cover story, "Legislators for Life," a so-called "coup from the courtroom."[296] On the cover are pictured four judges, one bearing a button, "For a Smarter Charter," another, "Why Vote?" and a third, "Don't Judge Me."[297] The article begins with a reference to the United States' Dred Scott's "political bombshell,"[298] as it begins to make its case for its argument that a comparable Canadian "coup from the courtroom has usurped our democracy."[299] According to Leishman, the blame lies in the courts' interpretation of the Canadian Charter of Rights and Freedoms.[300] Offered as example is a pair of abortion cases, the first of which was Morgentaler v, The Queen, in 1976, in which the Supreme Court of Canada refused to abolish the Criminal Code's abortion law provisions "on the grounds that they violated a woman's right to individual liberty as guaranteed by Section 1 of the 1960 Canadian Bill of Rights."[301] Chief Justice Bora Laskin "rejected the argument out of hand, declaring 'how foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review was any interference by a Court with the substantive content.'"[302] A second Morgentaler prosecution

> reached the Supreme Court of Canada in R. v. Morgentaler (1988). This time, the counsel for Morgentaler contended that the abortion law encroached upon a woman's right to individual liberty as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms. In an about-face, a majority of judges on the court considered the substantive content

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295. *Id.*
296. Rory Leishman, *Legislators for Life*, THE NEXT CITY, Fall 1998, at 35.
297. *Id.*
298. *Id.*
299. *Id.*
300. *See id.* at 36.
301. *Id.*
302. *Id.*

of the abortion law, decided that it was ill advised, and, on this basis, struck it down.[303]

Scholarly commentary on the second opinion was scathing:[304] "[The court's Madam] Justice [Bertha] Wilson is admirably frank in admitting that this is only [her view], which raises the troublesome issue of why 'her view' should be preferred to the collective view of Parliament."[305] Leishman goes on to cite case after case in which the courts have taken on a new role after the Charter.[306]

> While the courts have always adapted the law and the Constitution to changing social and economic circumstances, the overriding aim of Canadian judges prior to the Charter was to uphold the law's essential purposes and principles in accordance with judicial precedents and the legislative branch's original intentions. Certainly, no judge would have dreamed of amending the plain text of a law as enacted by Parliament.[307]

And while Leishman notes that the second abortion ruling may have been welcomed by liberals for its outcome,[308] he warns that an activist court could as easily swing to the right if "conservatives one day regain . . . ascendancy on the Supreme Court and defy . . . Parliament by banning all abortions."[309] As Leishman explains, at that point "many of today's shortsighted Supreme Court supporters would likely insist, and rightly so, that crucial public policy questions should be resolved by elected representatives of the people, not by judge-politicians."[310]

If the Canadian judicial institutions are becoming more activist and influential,[311] and its citizenry more litigious, then perhaps the process that led to Clifford Olson's abuse of the Faint Hope statute will soon be rendered an anomaly. Cases of obvious inapplicability of the spirit, if not the letter, of the law, will be subject to judicially-created exceptions.[312] Whether this can be achieved without sacrificing the rule of law will depend as much on the nature of Canadian federalism as on the mood and spirit among Canadians today.

In the epilogue to his best-selling book, *The Canadian Revolution: From Deference to Defiance*, Peter C. Newman suggests that, in what he calls the

303. *Id.*
304. *See id.*
305. *Id.*
306. *See id.*
307. *Id.*
308. *See id.*
309. *Id.*
310. *Id.* at 36–37.
311. *See id.* at 36.
312. *See id.*

"Canadian Revolution, 1985-1995,"[313] "Canadians took a break from lugging around the cumbersome baggage of their national virtues and became Latin, finding strict morality tedious, tidy living boring, frivolity endearing and passion inviting."[314] Newman quotes pollster Michael Adams, "Deference is absolutely at odds with these transformational tendencies slowly establishing themselves in Canada's culture . . . . Suddenly, we can give ourselves to the future by divorcing ourselves from the past—jettisoning the old-fashioned reflexes of deference and blind loyalty."[315] Leishman, on the other hand, paints the more alarmist picture of the change[316] in arguing that "[t]hanks to the arbitrary will of Supreme Court judges, the law in Canada is no longer permanent, fixed and knowable. The law is no longer changeable exclusively by Parliament or a provincial legislature. In essence, the rule of law no longer applies in Canada."[317]

Regardless of one's characterization of the rigidity of Canadian adherence to the process, if not the intent, of Canadian law, the Olson case exacted a price in the lives of the individuals impacted by the strict application of the faint hope statute in a case its drafters did not anticipate.[318] The cost Mulgrew writes about in *Final Payoff* is not just the lives of Olson's murder victims but also the careers of some capable, even exemplary figures in Canadian law enforcement.[319]

> But what lies ahead for Canada's rule of law is still a mystery.[320]
>
> Canadians' new-found liberation was that, left untended, . . . could easily turn into anarchy: collective conscience finds few outlets in the mere defiance of authority. Selfish bedlam was not what most Canadians had in mind. The aspect of deference worth preserving was the civility that usually accompanied it. While they were firmly set against the old style of leadership, Canadians were determined not to abandon the mutual respect that had always separated them from Americans.[321]

Canada has endured and survived the Olson legal ordeal.[322] A meritorious statute remains on the books.[323] A confessed serial killer remains imprisoned for

313. PETER C. NEWMAN, THE CANADIAN REVOLUTION: FROM DEFERENCE TO DEFIANCE 469 (1995).
314. *Id.* at 470.
315. *Id.*
316. *See* Leishman, *Legislators for Life*, *supra* note 296, at 39.
317. *Id.*
318. *See* note 15 and accompanying text.
319. *See* MULGREW, *supra* note 20, at xiii.
320. *See* NEWMAN, *supra* note 313, at 470.
321. *Id.*
322. *See infra* notes 230–32 and accompanying text.
323. *See* R.S.C. § 745.6 (1996); *see also infra* notes 233–34 and accompanying text.

life.[324] Careers were ruined,[325] horrendous and irreparable personal losses borne,[326] lives altered irrevocably,[327] but the legal system was unchanged.[328] If law is to avoid falling prey to the dictum "bad facts make bad law,"[329] then perhaps all is as it should be.

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324. *See infra* notes 233–34 and accompanying text.
325. *See* MULGREW, *supra* note 20, at xiii.
326. *See id.*
327. *See id.*
328. *See infra* notes 233–34 and accompanying text.
329. *See infra* notes 119, 188 and accompanying text.