9-2021

R. c. Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence: Why the QCCA Got It Right and Why Section 745.51 Should Never Be Re-Written

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Fall September, 2021

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Adelina Iftene[*]

1. Introduction

In 2011, *The Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act* (*MMA*)[1] amended the *Criminal Code* by adding s. 745.51.[2] This section gives sentencing judges discretion to "decide that the periods without eligibility for parole for each murder conviction are to be served consecutively" if "at the time of the sentencing under s. 745 [...] an offender is convicted of murder and [...] has already been convicted of one or more other murders."[3] Though the judge may decide that multiple terms of parole ineligibility will run concurrently, imposing, in effect, a single ineligibility period, the provision's consecutive option opens the door to de facto life imprisonment sentences without a realistic possibility of release (hereafter referred to as "lifelong imprisonment").

Though there has not been a lot of scholarly attention paid to this issue, a few commentators have raised concerns regarding the fact that s. 745.51 is incompatible with international human rights, the direction other jurisdictions have taken, and the *Canadian Charter*[4] *of*

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1. *The Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, S.C. 2011, c. 5 ["*MMA*"].
2. *Criminal Code,* R.S.C. 1985, c. C-46, s. 745.51 ["*Code*"].
3. *Ibid.*
4. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 1 ["*Charter*"].

Rights and Freedoms.[5] Most recently, Isabel Grant, Crystal Choi, and Debra Parkes (Grant et al) included a quantitative study of multiple murder cases in their broader study on parole ineligibility for murder.[6] In their review of 54 multiple murder cases, they raised concerns regarding the frequency with which consecutive periods of parole ineligibility were imposed, especially in some jurisdictions.[7]

Since 2011, s. 745.51 has been applied over 50 times, with nearly half of the accused being sentenced to what is effectively lifelong imprisonment. In late 2020, the Quebec Court of Appeal (QCCA) declared s. 745.51 unconstitutional and struck it down in *Bissonnette c. R.*[8] In doing so, the QCCA agreed with the trial judge, Justice Huot,[9] in holding that s. 745.51 violates ss. 7 and 12 of the *Charter*, but disagreed that it can be saved by reading it down to allow for judicial discretion in increasing parole ineligibility by any lesser amount (as opposed to the prescribed periods, such as 25 year blocks for first degree murders or 10-25 years for second degree murder). The QCCA also refused to read in a prohibition against applying s. 745.51 to anyone except the most incorrigible offenders, even if that may alleviate some constitutional concerns.[10] The QCCA held that these

5. Paul Calarco, "R. v. Bourque: Horrible Crimes, Illegal Sentence" (2014), 15 CR-ART 71 ["Calarco"]; Derek Spencer, "Hope for Murderers? International Guidance on Interpreting the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act" (2017), 22 Can Crim Law Rev 207 ["Spencer, "Hope for Murderers""]; Derek Spencer, "Does the Royal Prerogative of Mercy Offer Hope for Murdered? Further International Guidance for Interpreting the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act" (2019), 24 Can Crim L Rev 313 ["Spencer, "Royal Prerogative""]; Derek Spencer, "How Multiple Murder Sentencing Provisions May Violate the Charter" (2019), 55 CR-ART 165; Mary E. Campbell & David Cole, "Sentencing and Parole for Persons Convicted of Murder" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020), at 191-192 ["Campbell & Cole"].
6. Isabel Grant, Crystal Choi & Debra Parkes, "The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing" (2020), 52:1 Ottawa L Rev 133 ["Grant et al"].
7. *Ibid*., at 171-174.
8. *Bissonnette c. R.* (2020), 68 C.R. (7th) 1, 2020 CarswellQue 13124, 2020 CarswellQue 12129 (C.A. Que.), leave to appeal allowed *Attorney General of Quebec, et al. v. Alexandre Bissonnette*, 2021 CarswellQue 6391, 2021 CarswellQue 6392 (S.C.C.) ["*Bissonnette,* QCCA"].
9. *R. c. Bissonnette*, 2019 CarswellQue 6617, 2019 CarswellQue 750, EYB 2019-307088 (C.S. Que.), reversed *Bissonnette c. R.* (2020), 68 C.R. (7th) 1, 2020 CarswellQue 13124, 2020 CarswellQue 12129 (C.A. Que.), leave to appeal allowed *Attorney General of Quebec, et al. v. Alexandre Bissonnette*, 2021 CarswellQue 6391, 2021 CarswellQue 6392 (S.C.C.) ["*Bissonnette,* QCCS"].
10. *Bissonnette*, QCCA, *supra* note 8 at paras. 154-186.

constitutional issues are far too complex, and the powers required to ensure that this provision is not grossly disproportionate or overbroad are beyond what courts may do.[11] Rather, it is up to Parliament to decide if it wishes to rewrite and pass a new provision. The Crown has appealed this decision to the Supreme Court of Canada (SCC) and leave to appeal has been granted.[12]

This article reviews the constitutional arguments upheld by the QCCA in *Bissonnette* and weighs them against the challenges that trial judges have encountered in applying s. 745.51 since 2012. By drawing on a qualitative review of cases in which s. 745.51 has been applied, as well as *Charter* principles, sentencing case law, and international practices, this article posits that the QCCA was correct in its approach to s. 745.51, both in finding it unconstitutional and in finding that the provision should not be read down to render it constitutional. This article advances the central argument that, in the context of an already problematic sentencing regime for murder, a piece of legislation that allows for consecutive periods of parole ineligibility of any length, even when its application is circumscribed to certain offenders, will likely continue to raise issues in its application and effects. It is submitted, therefore, that when *Bissonnette* is heard by the SCC, the QCCA's decision should be upheld. Moreover, Parliament would be well advised to resist any attempts to rewrite this provision and pass another version of it.

For the remainder of Part 1, I will provide an overview of the sentencing regime for murder in Canada. While this article focuses on consecutive periods of parole ineligibility, many of the issues that arise from the application of s. 745.51 are not discrete, for the provision constitutes an aggravation of an already problematic sentencing regime for murder. After providing this background, I will set out the methodology used to review and analyze the cases and I will provide a brief demographic overview of the cases decided under s. 745.51. In Part 2, I will provide a review of the *Bissonnette* decisions, including the trial judge's reasons and the *Charter* arguments upheld by the QCCA. In Part 3, I will embark on a critique of the decisions and a thematic review of the s. 745.51 cases rendered between 2012 and 2020 to illustrate how the theoretical concerns raised by the

11. *Ibid.*, at paras. 169-186.
12. Supreme Court of Canada, "Docket 39544: Attorney General of Quebec, et al. v. Alexandre Bissonnette", *Supreme Court of Canada* (last updated May 29, 2021), online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=39544>; Supreme Court of Canada, "News Releases: Judgments to be Rendered in Leave Applications", *Supreme Court of Canada* (May 25, 2021), online: <https://scc-csc.lexum.com/scc-csc/news/en/item/7160/index.do>.

QCCA are reflected in the ways s. 745.51 has been applied in practice. This Part will demonstrate that the QCCA decision is aligned with both *Charter* principles and previous jurisprudence, and it responds to the issues that emerged from the case review. I will conclude by highlighting the reasons why any version of this provision will likely continue to raise problems, why the SCC should strike down this provision, and why Parliament should not attempt to pass another version of it.

(a) The Canadian Sentencing Regime for Murder

Since 1976, when capital punishment for murder was abolished, the harshest sentence in Canada has been the mandatory minimum sentence for first degree murder of life imprisonment without possibility of parole for 25 years (Life (25)).[13] For second degree murder, the mandatory minimum is also life, but the sentencing judge has discretion in setting parole ineligibility between 10 and 25 years.[14]

Eligibility for parole refers to the right of sentence-serving individuals to have their candidacy for release considered by the Parole Board of Canada (PBC) after having served a statutorily prescribed period in custody. This review is normally performed at a hearing, at which the PBC will decide if the individual presents a continuing risk that requires them to remain in custody. As just mentioned, persons convicted of first degree murder must wait 25 years for this moment; for second degree murder, 10 to 25 years. If the PBC deems they have succeeded in lowering their risk to an acceptably low level, they may continue to serve their life sentences in the community subject to conditions and under supervision until they die, and always vulnerable to re-incarceration should their risk increase. Release, therefore, is far from guaranteed, and indeed, many people are not released in response to their first parole application, while others are never successful.[15]

The Canadian sentencing regime for murder has been criticized as harsh and unprincipled.[16] Disparity in sentencing has been a regular

13. *Code, supra* note 2, s. 745(a).
14. *Ibid.*, s. 745(c).
15. Campbell & Cole, *supra* note 5 at 186-187.
16. See e.g. Cheryl Marie Webster & Anthony N. Doob, "Principles and Politics: Sentencing and Imprisonment Policy in Canada," in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020); Campbell & Cole, *ibid.*; Allan Manson, "A Trip from Thoughtful to Thoughtless: Murder Sentencing in Canada," in Karim Ismaili, Jane B. Sprott & Kim Varma, eds, *Canadian criminal justice policy: contemporary perspectives* (Don Mills, Ont: Oxford University Press, 2012),

issue for scholarly engagement. For example, the provisions concerning second degree murder provide judges with discretion in choosing a period of parole ineligibility of 10 years or more but give little guidance on how to interpret these provisions, which has led to heated debates in courts and among scholars regarding how this discretion should be exercised.[17] Moreover, the length of the mandatory period of ineligibility for first degree murder is one of the highest in comparable western common law and civil law jurisdictions.[18] The wisdom of imposing a mandatory life sentence regime has itself been called into question.[19] The severity of this regime is further heightened by the extremely limited access of persons serving life during their period of parole ineligibility to any form of compassionate or medical release on any grounds short of terminal illness (which requires medical proof that the individual has a few weeks to a few months left to live).[20]

(b) Methodology for the Case Review and Demographics

For this article, I reviewed all reported cases of multiple murders between December 2, 2011[21] and May 27, 2020, as well as any unreported cases that I could find information on, for a total of 53 cases.[22] The reported cases were identified through a Westlaw search.

at 58-78 ["Manson, "Thoughtful to Thoughtless""]; Allan Manson, "The Easy Acceptance of Long-term Confinement in Canada," (1990), 79 CR (3d) 265 ["Manson, "Easy Acceptance""].

17. See e.g *R. v. Shropshire*, [1995] 4 S.C.R. 227, 102 C.C.C. (3d) 193, 43 C.R. (4th) 269 (S.C.C.); *R. v. Ryan* (2015), 329 C.C.C. (3d) 285, [2016] 2 W.W.R. 437, 607 A.R. 47 (Alta. C.A.), leave to appeal refused 2016 CarswellAlta 979, 2016 CarswellAlta 980, [2016] S.C.C.A. No. 52 (S.C.C.); Nathan Gorham, "The Effects of Shropshire on Parole Eligibility for Second Degree Murder" (2002), 1 CR (6th) 324; Campbell & Cole*, ibid*., at 189-190.
18. Campbell & Cole, *ibid*., at 187. See also the comparative table for murder regimes in comparable Western countries in Barry Mitchell & Julian V. Roberts, *Exploring the Mandatory Life Sentence for Murder* (Oxford: Hart Publishing, 2011), at Appendix A ["Mitchell & Roberts"].
19. See e.g. Mitchell & Roberts, *ibid*.; Grant et al, *supra* note 6; Debra Parkes & Isabel Grant, "Incarceration without hope is cruel and unusual", *The Globe and Mail* (December 4, 2020), online: <https://www.theglobeandmail.com/opinion/article-incarceration-without-hope-is-cruel-and-unusual/>.
20. Outside of the virtually unavailable Royal Prerogative of Mercy, parole by exception (s. 121 of the *CCRA*) is the only form of compassionate release that exists in Canada, and it specifically excludes from its application (s. 121 (b)) those people serving life who are not terminally it. *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ["*CCRA*"]. On this see Adelina Iftene, "The Case for a New Compassionate Release Statutory Provision," (2017), 54:4 Alta L Rev 929.
21. The date the *MMA* came into force.

22. *R. v. Guimond*, 2020 CarswellMan 183, 2020 MBQB 63, 163 W.C.B. (2d) 148 (Man. Q.B.) (concurrent) ["*Guimond*"]; *Bissonnette, supra* note 9 (consecutive); *R. v. McArthur*, 2019 CarswellOnt 2057, 2019 ONSC 963, 153 W.C.B. (2d) 201 (Ont. S.C.J.) (concurrent) ["*McArthur*"]; *R v. Downey*, 2019 CarswellAlta 1042, 2019 ABQB 365, 156 W.C.B. (2d) 393 (Alta. Q.B.) (consecutive) ["*Downey*"]; *R. v. Kyle Sparks MacKinnon*, 2019 CarswellOnt 9195, 2019 ONSC 3436, 156 W.C.B. (2d) 508 (Ont. S.C.J.) (concurrent) ["*MacKinnon*"]; *R. v. Delorme*, [2019] 7 W.W.R. 718, 82 Alta. L.R. (6th) 295, 2019 CarswellAlta 2 (Alta. Q.B.) (concurrent) ["*Delorme*"]; *R. v. Salehi*, 2019 CarswellBC 1218, 2019 BCSC 698, 155 W.C.B. (2d) 746 (B.C. S.C.) (concurrent) ["*Salehi*"]; *R. v. Forman*, 2019 CarswellBC 3680, 2019 BCSC 2165, 160 W.C.B. (2d) 202 (B.C. S.C.) (consecutive) ["*Forman*"]; *R. v. Zerbinos*, 2019 CarswellBC 1101, 2019 BCSC 584, 154 W.C.B. (2d) 596 (B.C. S.C.) (concurrent) ["*Zerbinos*"]; *R. v. Berry*, 2019 CarswellBC 4026, 2019 BCSC 2362, 162 W.C.B. (2d) 253 (B.C. S.C.) (concurrent) ["*Berry*"]; *R. v. Millard*, 2018 CarswellOnt 22708, 2018 ONSC 7578, 153 W.C.B. (2d) 82 (Ont. S.C.J.) (consecutive) ["*Millard*"]; *R. v. Zekarias*, 2018 CarswellOnt 22170, [2018] O.J. No. 6827, 152 W.C.B. (2d) 275 (Ont. S.C.J.) (consecutive) ["*Zekarias*"]; *R. v. Klaus*, [2018] 6 W.W.R. 386, 67 Alta. L.R. (6th) 328, 2018 CarswellAlta 256 (Alta. Q.B.), affirmed 2019 CarswellAlta 2636, [2019] A.J. No. 1669, 2019 ABCA 483 (Alta. C.A.) (concurrent) ["*Klaus*"]; *R. v. Mitchell*, 2019 Saskatchewan (unreported) (consecutive) ["*Mitchell*"]; *R. v. Marki*, 2018 CarswellOnt 15462, 2018 ONSC 5106, 150 W.C.B. (2d) 200 (Ont. S.C.J.) (concurrent) ["*Marki*"]; *R. c. Hudon-Barbeau*, 2018 CarswellQue 1170, EYB 2018-291183, 2018 QCCS 895, 145 W.C.B. (2d) 194 (C.S. Que.) (consecutive) ["*Hudon-Barbeau*"]; *R. v. Brass*, 2018 CarswellMan 590, 2018 MBQB 182, 152 W.C.B. (2d) 589 (Man. Q.B.) (consecutive) ["*Brass*"]; *R. v. Kionke*, 2018 CarswellMan 178, 2018 MBQB 71, 147 W.C.B. (2d) 411 (Man. Q.B.), affirmed (2020), 390 C.C.C. (3d) 376, 64 C.R. (7th) 136, 2020 CarswellMan 105 (Man. C.A.) (concurrent) ["*Kionke*"]; *R. v. McLeod*, 2018 CarswellMan 217, 2018 MBQB 73, 148 W.C.B. (2d) 110 (Man. Q.B.), affirmed (2019), 384 C.C.C. (3d) 204, 2019 CarswellMan 933, 2019 MBCA 124 (Man. C.A.) (concurrent) ["*McLeod*"]; *R. v. Kahsai*, 2018 Alberta (unreported) (consecutive) ["*Kahsai*"]; *R. v. Hay*, 2018 Ontario (unreported) (consecutive) ["*Hay*"]; *R. v. Bailey*, 2018 Alberta (unreported) (consecutive); *R. v. Millard*, 2018 CarswellOnt 2973, 2018 ONSC 1299, 146 W.C.B. (2d) 625 (Ont. S.C.J.) (consecutive) ["*Smich*"]; *R. v. Rogers*, 2018 Ontario (unreported) (consecutive) ["*Rogers*"]; *R. v. Granados-Arana* (2017), 356 C.C.C. (3d) 340, 43 C.R. (7th) 255, 397 C.R.R. (2d) 294 (Ont. S.C.J.) (consecutive) ["*Granados-Arana*"]; *R v. Saretzky*, 2017 CarswellAlta 1408, [2017] A.J. No. 831, 2017 ABQB 496 (Alta. Q.B.) (consecutive) ["*Saretzky*"]; *R. v. Garland*, 2017 CarswellAlta 2510, [2017] A.J. No. 853, 2017 ABQB 198, affirmed (2019), 386 C.C.C. (3d) 221, 4 Alta. L.R. (7th) 103, 2019 CarswellAlta 2595 (Alta. C.A.) (consecutive), affirmed 2021 CarswellAlta 252, 2021 ABCA 46 (Alta. C.A.) ["*Garland,* ABQB"]; *R. v. Basil Borutski*, 2017 CarswellOnt 21148, [2017] O.J. No. 6876, 2017 ONSC 7762 (Ont. S.C.J.) (consecutive) ["*Borutski*"]; *R. v. Sharpe*, 2017 CarswellMan 29, [2017] M.J. No. 22, 2017 MBQB 6 (Man. Q.B.) (concurrent) ["*Sharpe*"]; *R. c. Ramsurrun*, 2017 CarswellQue 11818, EYB 2017-288489, 2017 QCCS 5791 (C.S. Que.), affirmed 2019 CarswellQue 10800, EYB 2019-334076, 2019 QCCA 2133 (C.A. Que.) and *Ramsurrun c. R.*, 2019 CarswellQue 10781, EYB 2019-

The unreported cases were identified through a Google search of "multiple murders" and "s. 745.51". Next, I compiled basic information about the reviewed cases in order to understand how this provision has been applied by looking at: the age, gender and race of the accused; the jurisdiction in which the case was heard; the year; the number of convicted murders; whether the murders were first or

334075, 2019 QCCA 2134 (C.A. Que.) (concurrent) ["*Ramsurrun*"]; *R. v. Wettlaufer*, 2017 Ontario (unreported) (concurrent) ["*Wettlaufer*"]; *R. v. Pasieka*, 2017 Alberta (unreported) (consecutive); *R. v. Ryan*, 2017 Ontario (unreported) (concurrent); *R. v. Rushton*, 2016 CarswellNS 952, [2016] N.S.J. No. 463, 2016 NSSC 313 (N.S. S.C.) (concurrent) ["*Rushton*"]; *R. v. Ostamas* (2016), 329 Man. R. (2d) 203, 2016 CarswellMan 245, [2016] M.J. No. 197 (Man. Q.B.) (consecutive) ["*Ostamas*"]; *R. v. Addison*, 2016 CarswellBC 3561, 2016 BCSC 2352, 135 W.C.B. (2d) 401 (B.C. S.C.) (concurrent) ["*Addison*"]; *R. v. Eichler*, 2016 Saskatchewan (unreported) (concurrent); *R. v. Koopmans*, 2015 CarswellBC 3345, [2015] B.C.J. No. 2484, 2015 BCSC 2120 (B.C. S.C.), affirmed 2017 CarswellBC 43, 2017 BCCA 10, 135 W.C.B. (2d) 547 (B.C. C.A.) (concurrent) ["*Koopmans*"]; *R. v. Vuozzo* (2015), 1138 A.P.R. 181, 365 Nfld. & P.E.I.R. 181, 2015 CarswellPEI 24 (P.E.I. S.C.) (consecutive) ["*Vuozzo*"]; *R. v. C. (W.G.)*, 2015 CarswellAlta 721, [2015] A.J. No. 461, 2015 ABQB 252 (Alta. Q.B.) (*Clorina*) (consecutive) ["*WGC*"]; *R. v. Butorac*, 2015 CarswellBC 3994, [2015] B.C.J. No. 2974, 2015 BCSC 2551 (B.C. S.C.) (concurrent) ["*Butorac*"]; *R. v. Bains*, 2015 CarswellBC 3382, [2015] B.C.J. No. 2515, 2015 BCSC 2145 (B.C. S.C.) (concurrent); *R. v. Husbands*, 2015 CarswellOnt 7676, [2015] O.J. No. 2674, 121 W.C.B. (2d) 487 (Ont. S.C.J.) (consecutive), new trial ordered on appeal *R. v. Husbands* (2017), 353 C.C.C. (3d) 317, 2017 CarswellOnt 11089, [2017] O.J. No. 3795 (Ont. C.A.), leave to appeal refused *Her Majesty the Queen v. Christopher Husbands*, 2018 CarswellOnt 2060, 2018 CarswellOnt 2061, [2017] S.C.C.A. No. 364 (S.C.C.), sentenced concurrently in *R. v. Husbands* (2019), 451 C.R.R. (2d) 117, 2019 CarswellOnt 19785, [2019] O.J. No. 6073 (Ont. S.C.J.) ["*Husbands*"]; *R. v. O'Hagan*, 2015 Saskatchewan (unreported, publication ban) (consecutive); *R. v. Bourque* (2014), 15 C.R. (7th) 52, 1114 A.P.R. 259, 427 N.B.R. (2d) 259 (N.B. Q.B.) (consecutive) ["*Bourque*"]; *R. v. Preeper*, 2014 CarswellNS 562, [2014] N.S.J. No. 404, 2014 NSSC 284 (N.S. S.C.) (concurrent); *R. v. Legebokoff*, 2014 CarswellBC 2752, [2014] B.C.J. No. 2323, 2014 BCSC 1746 (B.C. S.C.), affirmed (2016), 341 C.C.C. (3d) 293, 2016 CarswellBC 2664, [2016] B.C.J. No. 1999 (B.C. C.A.) (concurrent); *R. v. Haevischer*, 2014 CarswellBC 4041, 2014 BCSC 2533, 119 W.C.B. (2d) 101 (B.C. S.C.) (concurrent); *R. v. Baumgartner* (2013), [2014] 5 W.W.R. 360, 578 A.R. 87, 94 Alta. L.R. (5th) 1 (Alta. Q.B.) (consecutive) ["*Baumgartner*"]; *R. v. Greenwood*, 2012 CarswellNS 344, [2012] N.S.J. No. 266, 2012 NSSC 194 (N.S. S.C.) (concurrent), conviction overturned on appeal *R. v. Greenwood* (2014), 315 C.C.C. (3d) 479, 1105 A.P.R. 315, 350 N.S.R. (2d) 315 (N.S. C.A.) ["*Greenwood*"]; *R. v. Crick*, 2012 CarswellOnt 12307, [2012] O.J. No. 4707, 2012 ONSC 5695 (Ont. S.C.J.) (concurrent) ["*Crick*"]; *R. v. W. (B.D.T.)*, 2012 CarswellMan 708, [2012] M.J. No. 392, 2012 MBQB 303, affirmed (2015), 630 W.A.C. 237, 315 Man. R. (2d) 237, 2015 CarswellMan 94 (Man. C.A.) (concurrent); *R. v. Cliff* (2011), 88 C.R. (6th) 175, 2011 CarswellBC 2289, 2011 BCSC 1177 (B.C. S.C.) (concurrent).

second degree; the length of the period of parole ineligibility; and whether the sentences were consecutive or concurrent.

The findings resulting from this first part of the analysis are aligned with those identified and discussed in detail by Grant et al.[23] Thus, I will only describe them briefly here, to provide context to the subsequent qualitative analysis. From the 53 cases reviewed, the accused was male in all but two instances.[24] The age at sentencing varied between 19 (the youngest) and 62 (the oldest). In nearly half (25) of the cases, the judges imposed consecutive periods of parole ineligibility. Eighty-nine percent of those who received a consecutive sentence saw a period of parole ineligibility greater than 25 years imposed, and 45% received parole ineligibility of, or greater than, 50 years. Sixty-six percent of all accused were convicted of two murders, 25% of three murders, and 9% of more than three murders. Most consecutive periods of parole ineligibility were imposed where at least one of the murders was first degree. It was uncommon to encounter this sentence for second degree murder only, though it did happen.[25] A sentence with parole ineligibility of 50 years or more should be reasonably deemed, in most cases, a lifelong imprisonment sentence.[26] That could be true for some cases with less than 50 years parole ineligibility as well, depending on the age of the individual at the time of sentencing. Thus, in at least half of the cases, the accused has been sentenced to a lifelong sentence. In practical terms, given the challenges in accessing discretionary release and the shorter life expectancy of incarcerated people,[27] it is likely that nearly all, if not all, of those who received consecutive periods of parole ineligibility will die in prison before being released.

For the second part of the analysis (which this article will focus on), I used the content analysis qualitative method to review the justifications provided by judges in choosing a consecutive or concurrent period of parole ineligibility, as well as the factors and circumstances they considered in reaching their decisions. I created themes that could be observed during the review (such as how judges defined what a lifelong prison sentence is, how they reflected on the concerns regarding opportunity for release, what role rehabilitation

23. Grant et al, *supra* note 6 at 165-174.
24. The accused was a woman in *Zerbinos*, *supra* note 22 and *Wettlaufer*, *supra* note 22.
25. *Husbands*, *supra* note 22; *Rogers*, *supra* note 22; *Mitchell*, *supra* note 22.
26. *Ramsurrun*, *supra* note 22 at para. 134. This is also the conclusion reached by the Quebec Court of Appeal in *Bissonnette*, QCCA, *supra* note 8 at para. 99.
27. See e.g.: Adelina Iftene & Jocelyn Downie, "End-of-Life Care for Federally Incarcerated Individuals in Canada" (2020), 14:1 McGill JL & Health 1 ["Iftene & Downie"].

was attributed in multiple murder cases). In doing so, I aimed to understand the judicial discourse around this provision, the judges' views of its role within the broader sentencing regime, as well as any challenges judges may face in reconciling s. 745.51 with sentencing principles and other provisions. Many of the patterns observed in the application of this provision were reflective of the concerns raised by the QCCA in *Bissonnette*, and thus their presentation in Part 3 is intertwined with a critique of the *Charter* arguments advanced in this case.

2. Review of the *Bissonnette* Decisions

(a) *R. c. Bissonnette*, QCCS, 2019[28]

The trial judge, Justice Huot, found that Mr. Bissonnette entered the Quebec City Great Mosque and attacked worshippers with two firearms. He shot 11 people, six of whom died.[29] The trial judge also found that Mr. Bissonnette had been obsessed with killing and suicide for some time, and that he claimed to have attacked the mosque because he was concerned about Muslim terrorist attacks.[30] Mr. Bissonnette was initially charged with 35 counts of attempted murder but pled guilty to six attempted murders and six first degree murders.[31]

A sentencing hearing was held to determine the duration of parole ineligibility for the automatic life sentence that Mr. Bissonnette was to receive. The Crown asked for a period of parole ineligibility of 150 years, 25 years for each life taken.[32] The sentencing judge found this request outrageous, although s. 745.51 would have allowed for the imposition of such a sentence. Justice Huot held that even 50 years of parole ineligibility (stacking two periods for first degree murder) would be grossly disproportionate.[33] Since s. 745.51 only allowed for the sentencing judge to stack blocks of parole ineligibility, Justice Huot found it to be in violation of s. 12 of the *Charter*.[34] He wished to impose a period of parole ineligibility between 35 and 42 years. More than that, he noted, would deny the accused (then 27 years old) a reasonable prospect of release in the last years of his life.[35] Justice

28. *Bissonnette*, QCCS, *supra* note 9.
29. *Ibid.*, at para. 588.
30. *Ibid.*, at paras. 177-181.
31. *Ibid.*, at paras. 46-53.
32. *Ibid.*, at para. 281.
33. *Ibid.*, at paras. 284-289.
34. *Ibid.*, at paras. 995-996.

Huot further held that the s. 745.51 requirement of imposing consecutive periods of parole ineligibility in blocks of 25 years violated s. 7 of the *Charter*, as it was incompatible with the protection of human dignity as a principle of fundamental justice.[36] Justice Huot held that the provision could not be saved under s. 1 as it was not reasonably or demonstrably justified and it was not a minimal impairment of rights.[37] Instead of striking it down, however, he read down the provision so as to allow judges to increase the period of ineligibility with any number of years they considered appropriate (not just in blocks).[38] He imposed a period of parole ineligibility of 40 years for Mr. Bissonnette.[39] Mr. Bissonnette appealed his sentence.

(b) *Bissonnette c. R*, QCCA, 2020[40]

The QCCA began its decision by noting that the case was not about the horrific acts of Alexandre Bissonnette, but rather it was concerned with the constitutionality of a *Criminal Code* provision.[41] This was an important reminder as the majority of people to whom s. 745.51 is applied have committed terrible acts, and Mr. Bissonnette's were perhaps near the top in terms of the enormity of the tragedy he caused. It was thus not surprising that the QCCA's decision was not popular with the public, and especially among the members of the Muslim community who were di
rectly affected by the violent and hate-driven actions of Mr. Bissonnette.[42] Yet, regardless of the devastating nature of the acts, the provisions that apply to them must comply with the *Charter* and the broader values embodied by the Canadian justice system.

The QCCA found that s. 745.51 violated s. 12 of the *Charter* because it allows for sentences that exceed the natural life span of an individual, and allows for incarceration without any possibility of parole past a time when an individual has been rehabilitated.[43] The QCCA rejected human dignity as a principle of fundamental justice, but nonetheless found that the provision was overbroad and not

35. *Ibid.*, at para. 982.
36. *Ibid.*, at para. 1104.
37. *Ibid.*, at paras. 1107-1160.
38. *Ibid.*, at paras. 1193-1197.
39. *Ibid.*, at para. 1227.
40. *Bissonnette,* QCCA, *supra* note 8.
41. *Ibid.*, at para. 1.
42. See e.g. Jonathan Montpetit, "Quebec mosque shooter's sentence reduced as Appeal Court finds consecutive life sentences are unconstitutional", *CBC News* (November 26, 2020), online: <https://www.cbc.ca/news/canada/montreal/court-of-appeal-decision-bissonnette-1.5816508>.
43. *Bissonnette,* QCCA, *supra* note 8 at paras. 109-112 & 144-150.

rationally connected to its objective.[44] Hence, it was also in violation of s. 7 of the *Charter*. The Crown did not advance any s. 1 arguments to show that the *Charter* breaches were justified.[45] The QCCA struck down the provision.[46]

(c) Section 12 Arguments: Parole Ineligibility Encroaching on Life Expectancy and the Opportunity for Rehabilitation

Section 12 of the *Charter* guarantees the right of individuals not to be subjected to any cruel and unusual treatment or punishment.[47] Section 12 seeks to prevent sentences that are grossly disproportionate in their length but also sentences that are, in their nature, unacceptable.[48] Section 12 has often been applied to assess the constitutionality of mandatory minimum sentences based on what is now known as the *Nur* test.[49] The SCC in *Nur* held that there are two issues that must be addressed when a mandatory minimum sentence is challenged under *Charter* s. 12. First, the court must assess whether the effect of the punishment is cruel and unusual on the individual making the claim. If it is not, the court must assess whether it is reasonably foreseeable that the punishment will have a cruel and unusual impact on other individuals. In either case, the provision will breach s. 12.[50]

The trial judge in *Bissonnett*e applied the *Nur* test to assess the constitutionality of s. 745.51[51] but the QCCA held this was the wrong approach.[52] Section 745.51 does not impose an obligation to order consecutive periods, rather it grants judges with the discretion to do so. Hence, "a large part of the exercise described in *Nur* is irrelevant."[53] In other words, the complaint against s. 745.51 is not that the judge

44. *Ibid.*, at paras. 151-153.
45. This probably would not have made a difference in the outcome. It would be very difficult if not impossible for courts to find that a cruel and unusual punishment could be justified under s. 1. See Allan Manson, "Answering Some Questions About Cruel and Unusual Punishment," (1987), 58 CR (3d) 247, at 251.
46. *Bissonnette,* QCCA*, supra* note 8 at paras. 184-186.
47. *Charter, supra* note 4, s. 12.
48. *Bissonnette,* QCCA, *supra* note 8 at paras. 76-77. See also Benjamin L. Berger & Lisa Kerr, "Methods and Severity: The Two Tracks of Section 12" (2020), 94 SCLR (2d) 235 ["Berger & Kerr"].
49. *R. v. Nur*, [2015] 1 S.C.R. 773, 322 C.C.C. (3d) 149, 18 C.R. (7th) 227 (S.C.C.).
50. *Ibid.*, at para. 77.
51. *Bissonnette,* QCCS, *supra* note 9 at paras. 800-814.
52. *Bissonnette,* QCCA, *supra* note 8 at para. 83.
53. *Ibid.*

must impose a sentence of a certain length, but that the option of imposing a sentence dehumanizing in its nature is cruel and unusual.

The QCCA engaged with two arguments as to why s. 745.51 opens the door to a sentence that is dehumanizing, and thus, is cruel and unusual. First, any period of parole ineligibility that exceeds the life expectancy of a person is invariably cruel and unusual.[54] The QCCA posited that imposing a period of parole ineligibility that would lead to someone being eligible to apply for release well into their 100s is "an aberration," "senseless," "absurd," and "an order authorizing an offender to take a step he will never [be able] to take [...] bring[ing] the administration of justice into disrepute."[55] A provision that provides an opportunity for the judge to impose a sentence that contemplates "a possibility that never comes to fruition" is necessarily "an attack on human dignity,"[56] and hence, in violation of s. 12.

The QCCA further held that even where the period of parole ineligibility does not exceed life expectancy, it will still push the individual into such an advanced old age that release would be unlikely, and it is thus dehumanizing. In the opinion of the court, allowing someone to apply for parole at 90 is no different than when the parole eligibility date is set past 100, despite being apparently plausible.[57] It is still "chimerical justice."[58] In some cases, even a 25-year period will push someone into advanced old age and make their release unlikely. As the court observed, when this period is further increased, it will "in almost all cases, make it impossible for the offender to apply for parole before reaching a very advanced age, thereby preventing any possibility of the offender re-entering society as an active member. Depending on the accused's age, this can also amount to an early denial of any parole whatsoever while he is alive."[59]

Second, the QCCA intertwined the arguments regarding the length of sentence and the realistic possibility of release with the overarching goal of rehabilitation. The QCCA did not find that hope for release, in and of itself, is a constitutional principle that must be protected.[60] However, not allowing someone to apply for parole even if they are rehabilitated will lead to a grossly disproportionate sentence. Thus, people must have realistic access to parole, keeping in mind that if

54. *Ibid.*, at para. 92.
55. *Ibid.*, at para. 93.
56. *Ibid.*
57. *Ibid.*, at para. 96.
58. *Ibid.*
59. *Ibid.*, at para. 99.
60. *Ibid.*, at paras. 101-103.

they are not rehabilitated by the time that they are eligible to apply, the PBC will reject their request.[61]

The QCCA highlighted that courts should not be asked to speculate on the likelihood of someone being rehabilitated decades down the road in order to decide how many decades of parole ineligibility they should impose. The court acknowledged that even dealing with one period of parole ineligibility requires a significant amount of speculation regarding rehabilitative potential. This exercise becomes even more speculative when it comes to periods of parole ineligibility longer than 25 years.[62] The panel noted that while there may be some extreme cases where it is possible to anticipate decades ahead that "a psychopath, serial killer, or incorrigible killer will never be rehabilitated," the provision would have to be re-written to limit its application to those individuals.[63] As it stands, s. 745.51 violates *Charter* s. 12.

(d) Section 7 Arguments: Overbreadth, Arbitrariness, and Gross Disproportionality

Section 7 holds that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[64] All parties in *Bissonnette* agreed with the trial judge's finding that s. 745.51 infringes the liberty and security of the person.[65] In addition to the regular liberty infringements associated with criminal convictions, s. 745.51 also violates bodily integrity and causes severe psychological stress due to the imposition of an irreducible life sentence. The prospect of dying in prison regardless of any rehabilitation effort leads to hopelessness, mental deterioration, and increases the risk of suicide.[66]

Accordingly, the QCCA's main task under s. 7 was to determine whether the legislative provision infringed any principle of fundamental justice. As the established substantive principles of fundamental justice are purpose-based (i.e. they take into account how the impugned provision relates to its purpose), the court began with an assessment of the legislation's objectives. The QCCA found that the purpose of the *MMA*, and thus of s. 745.51, is to protect

61. *Ibid.*, at paras. 103 & 107.
62. *Ibid.*, at para. 110.
63. *Ibid.*, at para. 112.
64. *Charter*, *supra* note 4, s. 7.
65. *Bissonnette,* QCCA, *supra* note 8 at para. 117.
66. *Ibid.*; *Bissonnette,* QCCS, *supra* note 9 at paras. 1011-1016.

Canadians by prioritizing denunciation and retribution for multiple murders and allowing judges to punish the most incorrigible offenders more severely.[67] It also serves the purpose of acknowledging the value of every life lost.[68] After reviewing Parliamentary debates, as well as the language of the Bill, the QCCA rejected the idea that one of the *MMA*'s purposes is to achieve proportionality in sentencing. Had that been the purpose, "Parliament would have chosen different means providing for greater flexibility, even while seeking stiffer sentences."[69]

The QCCA found that, in relation to its first purpose, s. 745.51 is overbroad and grossly disproportionate. It is overbroad because it applies to all multiple murderers, regardless of their specific circumstances or whether the individuals are truly incorrigible.[70] Furthermore, it is not possible to read this provision in a manner that restricts its application to the category of people who might fit within this purpose.[71] This would usurp the role of Parliament.[72]

Section 745.51 was found grossly disproportionate under s. 7 for similar reasons to those provided in the s. 12 analysis. Specifically, this provision allows for sentences that prevent an individual from applying for parole until after death. Additionally, s. 745.51 may lead to an individual being denied the opportunity to apply for parole until decades after he has been rehabilitated.[73]

The QCCA also found that s. 745.51 is not rationally connected to its second purpose, that of accounting for "every life lost." Rational connection is generally part of a s. 1 analysis,[74] so presumably, what the QCCA meant here is that the provision is arbitrary (the lack of arbitrariness being a principle of fundamental justice),[75] as it cannot achieve its objective. Because human life is limited, it is not physically possible, "in the vast majority of cases," to account for each life lost through the time the individual spends in custody.[76]

67. *Bissonnette*, QCCA, *ibid.*, at para. 126.
68. *Ibid.*, at paras. 128 & 135.
69. *Ibid.*, at para. 133.
70. *Ibid.*, at paras. 140-141.
71. *Ibid.*, at para. 140.
72. *Ibid.*, at para. 169.
73. *Ibid.*, at paras. 144-147.
74. *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.).
75. *Bedford v. Canada (Attorney General)*, (*sub nom.* Canada (Attorney General) v. Bedford) [2013] 3 S.C.R. 1101, 303 C.C.C. (3d) 146, 7 C.R. (7th) 1 (S.C.C.) ["*Bedford*"].
76. *Bissonnette,* QCCA, *supra* note 8 at para. 143.

3. Why the QCCA Got It Right: Critique and Thematic Review of the Application of s. 745.51

(a) Section 12 and Parole Ineligibility Encroaching on Life Expectancy

(i) Charter S. 12 Jurisprudence

The QCCA in *Bissonnette* recognized that, under *Charter* s. 12, the main issue with s. 745.51 is not that the duration of the resulting sentence may be excessive compared to the blameworthiness of the offender. Rather, the defect is that lifelong imprisonment is in and of itself an unacceptable, cruel type of punishment. Neither the idea that the nature of a punishment (as opposed to its mandatory length) may offend s. 12, nor that lifelong prison sentences are cruel and unusual, is new to the *Charter* jurisprudence. In both respects, the QCCA's decision is very much aligned with previous *Charter* decisions and with recent scholarship on this issue.

Benjamin Berger & Lisa Kerr (Berger & Kerr) refer to the distinction between the severity and the nature of a punishment as the "two tracks of section 12" and argued that it is crucial that the analyses for the two tracks be kept distinct.[77] In assessing severity under s. 12, as when it is done for mandatory minimum sentences, a proportionality analysis applying the *Nur* test will be required. In assessing whether the nature of the offence under s. 12 is cruel and unusual ("the methods track"), "questions of proportionality, the existence of [judicial] discretion" and "comparisons to the harm inflicted or the culpability of the offender"[78] distract from the real issue, which is whether the type of sentence itself is unacceptable.

Going as far back as *R. v. Smith*, the SCC has recognized that both severity and the nature of the penalty may violate s. 12.[79] In *R. v. Lyons*,[80] the SCC reviewed the constitutionality of indeterminate sentences (essentially, life sentences that may be imposed when an individual is designated a "dangerous offender" following conviction).[81] Much as it previously did in *R. v. Smith*[82] and as the

77. Berger & Kerr, *supra* note 48.
78. *Ibid.*
79. *R. v. Smith*, [1987] 1 S.C.R. 1045, (*sub nom.* Smith v. R.) 34 C.C.C. (3d) 97, 58 C.R. (3d) 193 (S.C.C.) at paras. 54-57 ["*Smith*"].
80. *R. v. Lyons*, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1, 61 C.R. (3d) 1 (S.C.C.) at 336-337 [S.C.R.] ["*Lyons*"].
81. The dangerous offender designation may be imposed on someone who has committed two or more of the designated violent offences in s. 752 of the

QCCA later held in *Bissonnette*,[83] the SCC in *Lyons* found that the quantum of the sentence is not the only thing that may render the sentence grossly disproportionate. In fact, in the case of an indeterminate sentence, it is not the length of detention itself that is the problem, as much as its "indeterminate quality."[84] Knowing that the sentence never ends renders this type of sentence qualitatively different from determinate sentences, even long ones.[85] Essentially, in assessing the constitutionality of indeterminate sentences, the SCC applied "the methods track,"[86] and held that "an enlightened inquiry [into indeterminate sentences] under s. 12 must concern itself, with the way in which the effects of punishment are likely experienced."[87] Based on this analysis, the SCC found that the indeterminate nature of the prison sentence would render it, "at least occasionally" grossly disproportionate.[88] Yet it found that indeterminate sentences do not breach s. 12 because of the existence of a parole system that provides a timely opportunity for release to prevent someone from being incarcerated for longer than their circumstances require. [89] An individual serving an indeterminate sentence may apply for early

Code, *supra* note 2. An individual who receives this designation may be sentenced to serve an indeterminate sentence. This is a life sentence in that it never ends. However, someone serving an indeterminate sentence is eligible to apply for parole after seven years served, and every second year after that (s. 761 (1)). In practice, very few people serving this type of sentence are ever released.

82. *Smith*, *supra* note 79.
83. *Bissonnette*, QCCA, *supra* note 8 at para. 109.
84. *Lyons, supra* note 80 at 339.
85. *Ibid.*
86. Berger & Kerr, *supra* note 48 at 2.
87. *Lyons*, *supra* note 80 at 341.
88. *Ibid.*
89. *Ibid.* More recently, s. 753(1) (establishing the requirements to be met for the imposition of a dangerous offender designation) was challenged under *Charter* ss. 7 and 12 for leading to indeterminate sentences, especially when lesser measures would suffice for protecting the public (*R. v. Boutilier*, [2017] 2 S.C.R. 936, 358 C.C.C. (3d) 285, 42 C.R. (7th) 251 (S.C.C.)). The indeterminate sentences themselves were not in dispute. In citing *Lyons*, the majority found that, if read correctly, the judge would have to consider other options and the application of indeterminate sentences should be limited to confinement of "habitual criminals who are dangerous to others" (para. 34). Karakastanis J. in dissent found that in its sole focus on public safety, s. 753(1) is grossly disproportionate and violates *Charter* s. 12. The dissent held that judges have no discretion in attributing the dangerous offender designation and the discretion they do have to impose an indeterminate sentence is significantly constricted by the "singular focus on public safety" (para. 91).

release after seven years served, and, if denied, every second year thereon.[90]

In *R. v. Luxton*,[91] the court reviewed the constitutionality of the mandatory minimum sentence of Life (25).[92] The SCC held that the regime was not so excessive as to outrage the standard of decency and hence was not grossly disproportionate. This was, at least in part, due to the realistic chance of early release after 25 years, and to the additional possibility of seeking permission through a review before judge and jury, to apply for parole after 15 years, [93] a process created at s. 745.6 of the *Criminal Code*, and cynically dubbed by the press, the "faint hope clause." The SCC also noted that individuals could also apply for release on humanitarian grounds or under the Royal Prerogative of Mercy (RPM).[94]

Thus, in both *Lyons* and *Luxton*, the constitutionality of a lifelong sentence under s. 12 hinged on the opportunity for review and release. Much has changed since these cases were decided, both legislatively, and in terms of available research demonstrating that the existing release mechanisms do not actually provide a realistic opportunity for release. The safeguards which coloured the SCC's reviews in *Lyons* and *Luxton* are unavailable in many cases where consecutive periods of parole ineligibility are imposed. Moreover, in light of the changes briefly discussed below, it is unclear whether the mandatory minimum sentence for first degree murder would itself survive a *Charter* challenge today.[95]

First, individuals serving life sentences have no meaningful access to the compassionate and humanitarian early release program created at s. 121 of the *Corrections and Conditional Release Act* (*CCRA*). While other federal prisoners may qualify on several exceptional grounds to put their case to the PBC in advance of their ordinary eligibility date, those serving life may make an early approach only in the case of medically proven terminal illness, and then, only close to the end, so that the sole benefit on offer is death outside prison.[96] In addition, recent scholarly research, as well as reports from the Office of the Correctional Investigator (OCI), show that parole by exception is rarely used in practice and it is a deeply

90. *Code*, *supra* note 2, s. 761(1).
91. *R. v. Luxton*, [1990] 2 S.C.R. 711, 58 C.C.C. (3d) 449, 79 C.R. (3d) 193 (S.C.C.) ["*Luxton*"].
92. Manson, "Easy Acceptance", *supra* note 16.
93. *Luxton*, *supra* note 91 at 720.
94. *Ibid.*, at 723-724; *Code*, *supra* note 2, s. 745.6(1).
95. For an in depth, recent critique of the mandatory minimum sentences for murder generally see Grant et al, *supra* note 6 at 174-176.
96. *CCRA*, *supra* note 20, s. 121.

dysfunctional system.[97] The *CCRA* indicates, and indeed *Luxton* itself[98] noted this, that those serving life sentences can apply for the RPM. This is a purely discretionary power of the executive where the individual has no procedural rights, there are no criteria to ensure a successful application, and recent research shows that the RPM has not been granted in the last 15 years.[99] Finally, one recalls that the SCC in both *Lyons*[100] and *Luxton*,[101] was reassured by the opportunity to apply for permission after 15 years to set aside the remaining ineligibility period and bring a case to the PBC, the so-called "faint hope clause" under s. 745.6. Yet this program was abolished for most prisoners in 2011, while those convicted of multiple murders had been disqualified from applying since 1997.[102] Thus, it is fair to say that for prisoners serving life, regardless of their progress, regardless of the depth of their difficulties, there exists no avenue which will bring them to serving their sentence outside prison prior to their statutory eligibility dates.

(ii) Sentencing Jurisprudence

Sentences that encroach on someone's life expectancy have, at times, been described by courts as too harsh and misaligned with Canadian sentencing principles. In Canada, the fundamental principle of sentencing is proportionality. Section 718.1 states that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender.[103] This principle works in tandem with restraint, which requires the imposition of the least restrictive measures that are appropriate in the circumstances.[104] For consecutive periods of parole ineligibility, a third basic notion is at play: the *Criminal Code* rule that consecutive sentences may not

97. Iftene & Downie, *supra* note 27; Canada, OCI, *Annual Report of the Office of the Correctional Investigator 2013-2014* (Ottawa: OCI, 2014), at 31.
98. *Luxton*, *supra* note 91 at 723-724.
99. Mark Prieur, Response to Access to Information Request No. A-2020-00012, Parole Board of Canada (July 20, 2020). See also Spencer, "Royal Prerogative", *supra* note 5.
100. *Lyons*, *supra* note 80 at 362-363.
101. *Luxton*, *supra* note 91 at 719-720.
102. The abolition of the "faint hope clause" applied to offences committed after those dates, while access to the 745.6 reviews was severely reduced for those whose offences were prior. On how s. 745.6 functioned and a brief history and critique of its abolition see Allan S. Manson et al, *Sentencing and Penal Policy in Canada*: *Cases, Materials and Commentary*, 3rd ed. (Toronto: Emond Montgomery, 2016), at 636-657 ["Manson et al"].
103. *Code*, *supra* note 2, s. 718.1.
104. *Ibid*., s. 718.2(d). On the principles governing sentencing see generally Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2002), at 83-97.

produce a combined sentence which is unduly long and harsh (i.e. the totality principle).[105]

In *R. v. M. (C.A.)*, the SCC reiterated that the totality principle requires that the cumulative sentence for multiple sentences is not excessive.[106] An excessive sentence is one that is "crushing" and not aligned with prospects of reintegration and rehabilitation.[107] This will always be the case where the sentence "threatens to encroach upon – or exceed - the offender's reasonable life expectancy."[108] More recently, the Ontario Court of Appeal found that an unduly long or harsh sentence, as defined by Lamer C.J. in *M. (C.A.)*, not only fails to reach sentencing goals but it undermines them.[109] When the individual is left without hope of release or rehabilitation, "the functional value of [the] sentencing principles meets the point of diminishing returns."[110]

One immediately notices that these principles directly conflict with s. 745.5. Imposing a sentence that exceeds someone's life expectancy, regardless of the crime, is the opposite of exercising restraint, and shows a blatant disregard for the principle of proportionality.[111] As the sentencing judge in *R. v. Delorme* aptly remarked in refusing to impose consecutive periods of parole ineligibility, s. 745.51's conflict with proportionality and totality is a potential issue with the mandatory minimum for murder generally. Section 745.51 magnifies this problem.[112]

(iii) The Role of Lifelong Imprisonment in the Application of S. 745.51

If an issue with s. 745.51 is the fact that it may lead to sentences that exceed or come dangerously close to exceeding the life expectancy of an individual, one may think that interpreting the provision to ensure it is only applied where the person maintains a reasonable prospect of release would render consecutive periods of parole ineligibility

105. *Code*, *supra* note 2, s. 718.2(c).
106. *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269 (S.C.C.) at para. 42 ["*M(CA)*"].
107. *Ibid.* See also *R. v. Adams* (2010), 255 C.C.C. (3d) 150, 922 A.P.R. 206, 291 N.S.R. (2d) 206 (N.S. C.A.) at para. 21. On this see generally Clayton C. Ruby, *Sentencing*, 10th ed. (Toronto: LexisNexis Canada, 2020).
108. *M(CA), ibid.*, at para. 74.
109. *R. v. Johnson* (2012), 285 C.C.C. (3d) 120, 291 O.A.C. 350, 2012 CarswellOnt 6276 (Ont. C.A.) at paras. 17-20 ["*Johnston*"].
110. *Ibid.*
111. Campbell & Cole, *supra* note 5 at 191. See also Mitchell & Roberts, *supra* note 18 at 63-64.
112. *Delorme*, *supra* note 22 at para. 91.

constitutional. Assessing the reasonable prospects of release, however, may be easier to do in theory than in practice. As discussed above, the QCCA noted that when it comes to very long periods of incarceration, the difference between someone having an option of release 10 years earlier or later may be more of a theoretical exercise.[113] Even 25 years is a formidable period of parole ineligibility which will bring people up to an advanced old age in some cases; on top of which in no case is parole guaranteed.[114] More than that (and on occasion, even that) will often result in parole not being a realistic option, as there is no meaningful difference between, to take QCCA's example, someone being eligible for release at 90, or at over 100.

The above discussion could be seen as a conservative understanding of what entails a lifelong prison sentence. For instance, Marc Mauer & Ashley Nellis (Mauer & Nellis) use the term "virtual lifers" for all individuals sentenced to 50 years or more in prison, even if it is not a life sentence and even when the individual has the possibility of early release after serving 30 years. One finds that for these American scholars, "life sentence," seen as a practical category, includes terms that are much shorter than a technical life sentence with eligibility set at 50 years, irrespective of the age of the offender at the time of sentencing.[115]

The Mauer & Nellis's "virtual lifers" definition is attuned with the realities of living and growing old in prison. Recent scholarship shows that every incarcerated individual goes through a process of accelerated aging and consequently, presents the health conditions of someone 10-15 years older than those in the community.[116] Moreover, the mortality reviews conducted by the OCI show that the average age at death by natural causes for incarcerated people (i.e. not inflicted by someone else or themselves) is 62.[117] Life expectancy in the community in Canada is 82.[118] This means that the vast majority of incarcerated people will not survive nearly as long as their

113. *Bissonnette*, QCCA, *supra* note 8 at para. 96.

114. *Ibid.*

115. Marc Mauer & Ashley Nellis, *The Meaning of Life. The Case for Abolishing Life Sentences* (New York: The New Press, 2018), at 9-10 & 73-74 ["Mauer & Nellis"]. Also, at least one case applying s. 745.51 found a 50 year period of parole ineligibility to amount to a lifelong prison sentence, see e.g. *Ramsurrun*, *supra* note 22 at para. 134.

116. See e.g. Iftene & Downie, *supra* note 27. For a detailed discussion of the health issues that incarcerated people face see Adelina Iftene, *Vulnerability, Rights and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press, 2019), at 31-77.

117. Canada, OCI, *Annual Report of the Office of the Correctional Investigator 2014-2015* (Ottawa: OCI, 2015), at 23.

118. Statistics Canada, *Table 39-10-0007-01 Life expectancy and other elements of*

equivalents in the community, and that it is wrong to use the community measure in assessing the life expectancy of an individual serving a lengthy term in custody. If we accept this argument, it means that the majority of sentences rendered under s. 745.51 impinge dramatically on the individual's life and are dehumanizing and therefore, cruel and unusual. By combining the individual's age at sentencing and the duration of the period of parole ineligibility imposed in the case, it appears that, since 2011, most of those who received consecutive periods of parole ineligibility[119] (and some who have received concurrent[120]) have, in effect, received a sentence that realistically either exceeds or encroaches on their life expectancy.

In reviewing the cases that have applied s. 745.51, a number of patterns can be observed in the judicial discourse around lifelong imprisonment and its implications. For instance, it appears that even the judges who wished to avoid the imposition of consecutive periods of parole ineligibility which might encroach on someone's life expectancy struggled in defining what that is. In many cases, judges were aware such encroachment should be avoided because that would be unduly harsh.[121] Yet, the manner in which judges distinguished between what constitutes a sentence of lifelong imprisonment and what does not is inconsistent at best, and leads one to believe that asking judges to make this distinction is neither reasonable nor practical.

For example, in *R. v. Forman*, *R. v. Brass*, and *R. v. Vuozzo*, the judges use the same argument (i.e. the sentence should not amount to lifelong imprisonment) to decide on consecutive periods of parole ineligibility shorter than what the Crown had recommended.[122] In defining what lifelong imprisonment is, however, each judge came to

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the life table, Canada and provinces (last updated May 29, 2021), online: <https://doi.org/10.25318/3910000701-eng>.

119. *Bissonnette,* QCCS, *supra* note 9; *Downey*, *supra* note 22; *Forman*, *supra* note 22; *Millard*, *supra* note 22; *Zekarias*, *supra* note 22; *Hudon-Barbeau*, *supra* note 22; *Brass*, *supra* note 22; *Hay*, *supra* note 22; *Kahsai*, *supra* note 22; *Smich*, *supra* note 22; *Granados-Arana*, *supra* note 22; *Saretzky*, *supra* note 22; *Garland*, ABQB, *supra* note 22; *Borutski*, *supra* note 22; *Ostamas*, *supra* note 22; *Vuozzo, supra* note 22; *WGC*, *supra* note 22; *Bourque*, *supra* note 22; *Baumgartner*, *supra* note 22.
120. *Guimond*, *supra* note 22; *McArthur*, *supra* note 22; *Salehi*, *supra* note 22; *Berry*, *supra* note 22; *Klaus*, *supra* note 22; *Marki*, *supra* note 22; *Kionke*, *supra* note 22; *Sharpe*, *supra* note 22; *Wettlaufer*, *supra* note 22; *Rushton*, *supra* note 22; *Addison*, *supra* note 22; *Koopmans*, *supra* note 22; *Butorac*, *supra* note 22; *Greenwood*, *supra* note 22; *Crick*, *supra* note 22.
121. *M(CA)*, *supra* note 106 at paras. 73-74; *Johnston*, *supra* note 109 at paras. 20-24.
122. *Forman*, *supra* note 22; *Brass*, *supra* note 22; *Vuozzo*, *supra* note 22.

a different conclusion. In *Forman*, the judge found that a sentence which leaves someone in his late 70s by his first parole eligibility date was a lifelong prison sentence.[123] In *Brass*, the judge found that fixing a parole eligibility date in someone's mid-80s amounted to a lifelong prison sentence, but not if it was set in their mid-70s.[124] Finally, in *Vuozzo*, the judge held that the possibility of someone being released at 86 did not amount to a lifelong prison sentence, but at 96 it would.[125] It appears these judges were of the opinion that 10 years difference at a (very) advanced old age makes a difference in defining lifelong imprisonment, though their views were inconsistent on the cut off age. These approaches are in contrast with those of some judges who, in applying s. 745.51, rejected consecutive periods of parole ineligibility altogether because they viewed hope for release early in someone's life as paramount in sentencing (e.g. *Delorme*[126] and *R. v. Kyle Sparks MacKinnon*[127]). For these judges, a reasonable chance of release meant that the individual must be eligible to apply for parole at a fairly young age, in their 50s or sometimes even earlier than that.

Other judges did not believe there was a practical difference between the chance of release at 70 or at 90. In some cases where even one period of parole ineligibility would have seen the individual in his old age by his eligibility date, the judges decided that imposing consecutive periods would make no difference to the individual but would send a strong denunciatory message. For example, in *R. v. Garland*, the judge noted that there was no difference if an individual had a chance of release at the age of 79 or 120 and used this as a justification *for* imposing a consecutive period of parole ineligibility.[128] In contrast, Justice McMahon in *McArthur* acknowledged that Life (25) will result in a low chance of release because Mr. McArthur would be 91 in 25 years. He used this fact as an argument *against* providing consecutive parole ineligibility periods. Even though Mr. McArthur was convicted of eight counts of first degree murder, Justice McMahon felt that a consecutive sentence would serve no purpose. He emphasized the fact that the main justification for imposing a long sentence, the protection of the public, was no longer a consideration because at 91, Mr. McArthur would not be a threat, even in the unlikely scenario that he would be

123. *Forman*, *ibid*., at para. 38.
124. *Brass*, *supra* note 22 at paras. 59-62.
125. *Vuozzo*, *supra* note 22 at para. 115.
126. *Delorme*, *supra* note 22 at para. 93.
127. *MacKinnon*, *supra* note 22 at para. 80.
128. *Garland*, ABQB *supra* note 22 at para. 35.

released.[129] Justice McMahon's idea seems to be that if concurrent periods achieve the relevant sentencing goals, there is no need to impose an outrageously absurd sentence that even on paper exceeds the life expectancy of an individual.[130] Using this logic, even one mandatory sentence of Life (25) raises significant issues in some cases, and this is one reason why, in this author's opinion, the constitutionality of mandatory life sentences is in need of review by the courts.

The individuals discussed in the paragraphs above received quantitatively and qualitatively different sentences, even though most judges attempted to reconcile the sentences with the view that lifelong prison sentences are unduly harsh and thus should never be imposed. The differences seem to be at least in part due to the judge's understanding of what a lifelong prison sentence is and where the line should be drawn. It should also be noted that many of the other cases where s. 745.51 was applied did not even engage with concerns regarding lifelong imprisonment, despite the fact that the sentence may have amounted to one.[131]

The patterns observed in the judges' engagement with the concept of lifelong imprisonment raise a number of concerns. First, several judges imposed periods of parole ineligibility that exceeded someone's life expectancy, and, in some cases, they did not acknowledge that they were doing so. Second, the inconsistency observed in how judges defined lifelong imprisonment is indicative of how artificial the distinction between what is and what is not a lifelong prison sentence can be. Asking judges to define lifelong imprisonment invites assessments of life expectancy that they are not trained to make. Thus, the QCCA was correct, not just in finding that s. 745.51 is cruel and unusual, but also in refusing to follow Justice Huot's decision to read the provision down to allow judges to increase parole ineligibility by any number of years.[132] While the QCCA's stated reason for refusing to do so was based on concerns around the separation of powers and the proper role of the judiciary, in light of the practical challenges raised by assessing what a lifelong prison sentence is, and given the existing mandatory minimum life sentences for murder, reading it down would not have made this provision *Charter*-compliant.

129. *McArthur*, *supra* note 22 at para. 95.
130. For a similar argument see Campbell & Cole, *supra* note 5 at 191.
131. See e.g *Baumgartner*, *supra* note 22; *Bourque*, *supra* note 22; *Ostamas*, *supra* note 22; *Borutski*, *supra* note 22.
132. *Bissonnette*, QCCA, *supra* note 8 at paras. 169-186.

(b) Section 12 and Rehabilitation

The issue of excessive sentences is inherently intertwined with the goals of rehabilitation and the need to provide individuals with the opportunity to reform. The QCCA acknowledged this in *Bissonnette* by discussing the lack of opportunity for rehabilitation as an issue that informs a finding that s. 745.51 is grossly disproportionate.[133] This approach is attuned to previous Canadian jurisprudence and the approach other jurisdictions have taken.

Rehabilitation, often referred to as reformation, has been defined in a penal sense as the goal of fostering better, law-abiding habits by changing an individual's inclinations.[134] In one of its forms, it claims that it is an approach to preventing crime and reoffending by changing people's attitudes. In another form, rehabilitation is understood as a harm reduction goal: a penal sentence may not change offenders but should aim to avoid unnecessary harm resulting from damaging penalties.[135] Regardless, in relation to custody, rehabilitation often relates to the treatment and programs available to individuals with the understanding that they will one day be released back into society. Outside custody, rehabilitation takes the form of re-socializing (Europe) and reintegration (Canada). The idea is to help individuals re-enter and become productive members of society.[136]

The sentencing regime in Canada draws upon both retributivist principles and utilitarian goals, which include rehabilitation.[137] One finds that where sentencing courts are dealing with serious, violent crimes, it is retributivist ends, and utilitarian goals other than

133. *Ibid.*, at paras. 109-115.

134. Andrew von Hirsch, Andrew Ashworth & Julian Roberts, "Rehabilitation," in Andrew von Hirsch, Andrew Ashworth & Julian Roberts (eds), *Principled Sentencing. Readings on Theory and Policy* (Oxford: Hart Publishing, 2009), at 2. ["von Hirsch et al"]

135. On this see e.g. P. Raynor & G. Robinson, Rehabilitation, *Crime and Justice* (Basingstoke: MacMillan, 2005).

136. See e.g. von Hirsch et al, *supra* note 134 at 2; Shadd Maruna, *Making Good: How Convicts Reform and Build Their Lives* (Washington: American Psychological Association, 2001); Stephen Farrall, *Rethinking What Works with Offenders: Probation, Social context, and Desistance from Crime* (Collumpton: Willan, 2002).

137. *Code*, *supra* note 2. For instance, the *Code* refers specifically to utilitarian goals such as denunciation, deterrence, incapacitation, and rehabilitation at s. 718. At the same time, proportionality, a retributivist principle that guides the punishment of the individual according to their moral blameworthiness and the seriousness of their offence, is the fundamental principle in Canadian sentencing (s. 718.1). On the goals and principles of the Canadian sentencing regime, see Manson et al, *supra* note 102, at 37-132.

rehabilitation, such as deterrence and denunciation, which command the courts' attention.[138] This is not surprising; we now have a good understanding that the rehabilitative value (in the sense of transforming people into law-abiding citizens and thus preventing crime) of prison and prison programs are, at best, hard to assess or limited.[139] At worst, prison may in fact harm reintegration goals.[140] It is, thus, challenging to claim that rehabilitation or reintegration can serve as the main goals of imprisonment. That does not mean they should ever be completely ignored: indeed, there is a significant body of literature demonstrating that harsh or long sentences do not deter crime, despite the fact that deterrence is often identified as a main goal of sentencing for violent crimes.[141] Rehabilitation has an essential role in pushing back against the notion that harsh punishments will mitigate the spectre of crime.[142]

In relation to retributivist goals, the SCC has long emphasized that these cannot be the only objectives considered in sentencing, regardless of the seriousness of the crime. In a commentary on *R. v. Smith*, Kent Roach noted that a main contribution of this case, outside of the mandatory minimum sentences discussion, is the fact that it constitutes an important limitation on using "just dessert or retributive rationales for punishment."[143] By looking at the impact

138. See e.g. *ibid.*, ss. 718.01-718.04.

139. Francis Allen, "The Decline of the Rehabilitative Ideal" in von Hirsch et al, *supra* note 134 at 11-15; Anthony Bottoms, "Empirical Research Relevant to Sentencing Frameworks: Reform and Rehabilitation" in von Hirsch et al, *supra* note 134 at 16-17; Alison Liebling, "The Uses of Imprisonment," in Sue Rex & Michael Tonry, *Reform and Punishment. The Future of Sentencing* (London: Routledge, 2011), at 111-127.

140. See e.g. Victoria Law, *"Prisons Make Us Safer" and 20 Other Myths about Mass Incarceration* (Boston: Beacon Press, 2021); Angela Y. Davis, *Are Prison Obsolete* (New York: Seven Stories Press, 2003).

141. . See e.g. Cheryl M. Webster & Anthony N. Doob, *Searching for Sasquatch: Deterrence of Crime Through Sentence Severity*, ed. by Joan Petersilia & Kevin Reitz (New York: Oxford University Press, 2012); Anthony Doob, Cheryl Webster, & Rosemary Gartner, "Issues Related to harsh Sentences and Mandatory Minimum Sentences: General deterrence and Incapacitation" (2014), Criminological Highlights at A-3; Anthony Doob & Marie Cheryl Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003), 30 Crime and Justice 143; Daniel S. Nagin, "Criminal deterrence research at the outset of the twenty first century" (1998), 23 J Crim Justice 1; Donald Lewis, "The General Deterrence Effect of Longer Sentences" (1986), 26 Br J Criminol 47; Alfred Blumstein, Jacqueline Cohen, & Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Criminal Rates* (Washington, DC: National academy of Science, 1978); Mauer & Nellis, *supra* note 115 at 136-139.

142. See e.g. Francis T. Cullen and Karen E. Gilbert, "Reaffirming Rehabilitation," in von Hirsch et al, *supra* note 134 at 30 ["Cullen & Gilbert"].

sentences have on individuals and emphasizing the role of offenders' personal characteristics in sentencing, Lamer J. (as he then was) in his s. 12 analysis in *Smith* rejected retributivism as the only foundation for any sentencing decision.[144] As noted by Roach, the concern with "the continuing treatment of the individual at the hands of the state"[145] and the inclusion of utilitarian values, such as rehabilitation, in sentencing considerations, show that an assessment of the constitutionality of a sentence is more than just a review of its justness. It is also concerned with its humanity.[146] Theoretically grounded in the idea that social and personal circumstances influence the commission of crimes, rehabilitation has a role to play, at minimum, in ensuring sentences avoid excessive harm, minimize suffering, and leave the door open for an individual to change.[147] A sentence that contemplates an individual dying in prison completely undermines rehabilitative goals.

Rehabilitation has regularly been discussed in Canadian jurisprudence since *Smith*, in and outside the context of s. 12. As mentioned in the previous section, sentencing jurisprudence has noted that harsh sentences, such as those that encroach on someone's life expectancy, will undermine the goals of rehabilitation and reintegration (and hence they must be avoided).[148] *Charter* jurisprudence has noted that the chance of parole is what ensures that an individual will not spend time in prison long after they have been rehabilitated and it is thus key in upholding the constitutionality of life sentences.[149] Thus, the availability of at least a theoretical opportunity of being released once rehabilitated (i.e. once the punishment is unnecessary because the criminal tendencies have been minimized or the individual is no longer a threat) informs the assessment of when a sentence becomes too harsh. It then follows that preserving some rehabilitative goals for any form of punishment is essential for it to be found constitutional.

(i) The Role of Rehabilitation in Other Jurisdictions

In illustrating the importance of rehabilitation, the QCCA drew upon international instruments to which Canada is a party and which

143. Kent Roach, "Smith and the Supreme Court: Implications for Sentencing Policy and Reform," (1989), 11 SCLR 433 at 442 ["Roach"].
144. *Smith*, *supra* note 79.
145. Roach, *supra* note 143.
146. *Ibid.*, at 442.
147. Cullen & Gilbert, *supra* note 142 at 30-31.
148. *M(CA)*, *supra* note 106 at paras. 71-74; *Johnston*, *supra* note 109 at paras. 20-24.
149. *Lyons*, *supra* note 80 at 340-341.

emphasize that all imprisonment regimes must have a rehabilitative component.[150] Even the *Rome Statute* to which Canada contributed, and which governs the prosecution of people accused of genocide and other mass atrocities in the International Criminal Court, allows for a sentence review after 25 years.[151]

The approach taken by the QCCA regarding lifelong imprisonment and rehabilitation is aligned with that of other western jurisdictions. A notable example is *Vinter and Other v. United Kingdom*,[152] a case where the European Court of Human Rights (ECHR) held that a life sentence is incompatible with article 3 of the *European Convention of Human Rights*[153] (the right to be free from torture and unusual treatment and punishment) if there is no realistic and predictable possibility of release and an opportunity for review of the sentence. In other words, the absence of these two circumstances renders a life sentence for any crime akin to torture. It is unlikely that some of the sentences rendered under s. 745.51 would pass this threshold, given that there is no opportunity for sentence review and the only possibility of release (hardly realistic or predictable) rests with Canada's moribund RPM.[154]

It may also be worth noting here that other western countries have found options to denounce and account for the harm inflicted by multiple murders without condemning the offender to an unreviewable term of lifelong imprisonment. For instance, Germany has life sentences but, regardless of the number of crimes, "the prisoner must be given a realistic and legally-based opportunity to be released."[155] Denmark, Finland, and Sweden also have life sentences but the longest periods of parole ineligibility are 12 years for the former two and 18 years for the latter.[156] England and Wales have a judicial body that reviews life sentences after a number of years, depending on the offence.[157] Other countries do not have life sentences for any crimes, nor do they allow for consecutive sentences

150. *Ibid.*, at 371.

151. *Ibid.*, at 371-372. See *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 38544 (came into force July 1, 2002) at Article 110(3).

152. *Vinter and Other v. United Kingdom*, No. 66069/09 130/10 and 3896/10, [2016] III ECHR 317 (9 July 2013).

153. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos 11 and 14, November 4, 1950 (came into force September 3, 1953) at Article 3.

154. On why the RPM would not pass the *Vinter* requirements see Spencer, "Royal Prerogative", *supra* note 5.

155. Mauer & Nellis, *supra* note 115 at 87.

156. *Ibid.*, at 88.

157. Catherine Appleton & Ben Grover, "The Pros and Cons of Life Without Parole" (2007), 47:4 Br J Criminol 597 at 606. For a critique of the

for multiple crimes. Rather, they allow for a limited increase of the sentence (which often ranges between 15 to 25 years for murder) to reflect the commission of the additional crimes.[158] Furthermore, some countries (e.g. Norway) provide a possibility of extending the term of imprisonment if the individual is deemed dangerous at the conclusion of the sentence. The state would need to prove this danger before an extension is granted.[159] While international jurisprudence has no direct bearing in Canada, it is an important reminder that other western jurisdictions and international forums have also found lifelong prison sentences that disregard any rehabilitative goals to be dehumanizing.[160]

(ii) The Role of Rehabilitation in the Application of S. 745.51

Not surprisingly given the role these concepts still play in Canadian law and internationally, the issues of rehabilitation and reintegration were raised regularly in the application of s. 745.51 in the cases reviewed. However, the judicial discourse and reasoning surrounding these sentencing goals were as diverse as the individuals rendering the decisions. In some, the hope for release as a sentencing factor was raised in connection with the room the court wished to allow for the importance of rehabilitation, no matter how horrendous the murders committed. In the cases where rehabilitation was given some weight, the judges were significantly more likely to impose a concurrent sentence. In these cases, the judges acknowledged that if individuals did not actually rehabilitate, when they reached their parole eligibility date, they would simply not be granted release, so that judges need not and should not forestall that outcome by imposing a crushing period of parole ineligibility.[161]

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mandatory life sentence regime in England generally see Mitchell & Roberts, *supra* note 18.

158. *Ibid*. See also Dirk van Zyl Smit & Catherine Appleton, eds, *Life Imprisonment and Human Rights* (Oxford: Hart Publishing, 2016), Part IV at 289-351 ["van Zyl Smit & Appleton"]. For the maximum penalties around the world see NationMaster, "Crime > Punishment > maximum length sentence: Countries Compared," *NationMaster*, online: <https://www.nationmaster.com/country-info/stats/Crime/Punishment/Maximum-length-of-sentenc>.

159. Mauer & Nellis, *supra* note 115 at 88. See also Tapio lappi-Seppala, "Life Imprisonment and Related Institutions in the Nordic Countries," in van Zyl Smit & Appleton, *ibid*., at 461-506.

160. On the ECHR jurisprudence on this issue and the impact it had on sentencing in Western European countries see van Zyl Smit & Appleton, *ibid*., Part III. For a more detailed discussion on how s. 745.51 squares with the international approaches on lifelong prison sentences see Spencer, "Hope for Murderers", *supra* note 5.

In *MacLeod*, for example, the judge specified that it is essentially impossible to predict whether or not someone will rehabilitate decades down the road. As a result, assessing rehabilitation is not the job of the sentencing judge but the job of the PBC which must be provided with the opportunity to do so after the individual has served some time in custody.[162] In *Klaus*, the judge referenced the international recognition of the value of allowing individuals to retain hope of release in the event of rehabilitation, and noted that parole ineligibility periods of 50 years or more will almost certainly extinguish the hope of release. This hope is important because rehabilitation is more likely when it exists. [163]

In contrast, there were numerous decisions where the fact that concurrent periods of parole ineligibility are still part of a life sentence was not acknowledged. Instead, judges emphasized retribution and denunciation in imposing consecutive periods of parole ineligibility, without meaningful consideration of whether rehabilitation should carry some weight. In cases such as *Borutski*,[164] *Millard*,[165] *Bourque*[166] and *Rushton,*[167] the judges noted that denunciation, retribution, and sometimes deterrence ought to be the singular considerations guiding sentencing given the crimes committed. In these cases, consecutive periods of parole ineligibility were imposed. In *Downey*,[168] the judge noted that rehabilitation is less relevant because the individual was already older and had committed terrible crimes, hence consecutive periods of parole ineligibility were justified. This approach is contrasted with that taken by the judge in *McArthur*,[169] who, as discussed in the previous section, believed the older age of an individual justified concurrent periods of parole ineligibility despite the terrible crimes committed.

It is not surprising that some judges would emphasize deterrence and denunciation, especially for violent crimes. Yet the issue remains that as long as judges when performing this function are inconsistent in their views of rehabilitation as a valid goal, the outcomes will differ. For crimes as atrocious as these, a judge will have a hard time concluding whether or not someone has rehabilitative potential.

161. *McLeod*, *supra* note 22 at para. 36; *Sharpe*, *supra* note 22 at para. 23; *Ramsurrun*, *supra* note 22 at para. 172; *Klaus*, *supra* note 22 at para. 134.
162. *McLeod*, *ibid.*, at para. 36.
163. *Klaus*, *supra* note 22 at para. 134.
164. *Borutski*, *supra* note 22 at para. 134.
165. *Millard*, *supra* note 22 at para. 36.
166. *Bourque*, *supra* note 22 at para. 52.
167. *Rushton*, *supra* note 22 at para. 47.
168. *Downey*, *supra* note 22 at para. 93.
169. *McArthur*, *supra* note 22 at paras. 94-102.

Rather, as correctly phrased by some judges,[170] the issue is whether somewhere down the road an offender's rehabilitative progress should be assessed with an eye for potential release. In this situation, allowing room for rehabilitation considerations in the far future does not depend on the circumstances of the case; it is simply a matter of principle. Thus, it appears that where the sentencing judge believes that hope for release and the potential for rehabilitation (even where very slim) are essential, the judge will not impose consecutive periods of parole ineligibility. In contrast, judges who believe that rehabilitation plays an insignificant role in sentencing for very serious crimes will be more likely to render consecutive periods of parole ineligibility. This leads to unpredictable and inconsistent sentences as the difference between being sentenced to die in prison (or being considered for release in your 70s or 80s) versus being considered for release in your 40s or 50s might hinge on the judge's own stance on rehabilitation as a valid goal for multiple murders sentences.

The QCCA in *Bissonnette* was clear that the *Charter* does not protect the hope of release, but rather it protects the importance of rehabilitation as a goal. More precisely, a sentence that allows for the incarceration of someone past the moment when they have been rehabilitated is dehumanizing.[171] Arguably, this is a significant issue in the application of any long sentence to be served in prison – whether 25 years or longer. Thus, the issue of the predictability of rehabilitative potential and of holding someone in prison beyond the moment where they were rehabilitated may not be unique to s. 745.51. Indeed, it may be just as applicable to even one lengthy period of parole ineligibility. Yet, approached intuitively, the longer the sentence, the more likely it is that this phenomenon will be encountered, as the inaccuracies creeping into the exercise of assessing the likelihood of rehabilitation down the road increase with the length of that road (being the effect of the duration of the sentence or the ineligibility period or both). Given the high degree of inconsistency seen in assessing what constitutes a lifelong prison sentence; given the different takes judges have on the role of rehabilitation; and given the already lengthy mandatory ineligibility period; Justice Huot's suggestion of a new duty on judges to increase that period only to a point which does not encroach on the offender's life expectancy would be unlikely to resolve the constitutional issues identified by the QCCA.

170. See e.g. *Delorme*, *supra* note 22 at para. 93 and *MacKinnon*, *supra* note 22 at para. 80.

171. *Bissonnette,* QCCA, *supra* note 8 at para. 81.

(c) Section 7 and the Overbreadth of S. 745.51

(i) Charter S. 7 Jurisprudence

The QCCA found that s. 745.51 violates the principle prohibiting a criminal provision from being overbroad. Overbreadth becomes a concern where the law may infringe the life, liberty or security of the person by being broader than necessary in achieving its objective, thereby interfering with conduct that has no connection to its objective.[172] One of the purposes of s. 745.51 that the QCCA identified was the protection of the public by punishing the worst individuals – psychopaths and those who are incorrigible – more severely than anyone else.[173] There is no reason to question this finding. The QCCA looked at all relevant factors in assessing the legislation's objective (including context, language used, legislative history, and judicial interpretation).[174] This objective was raised a number of times in Hansard[175] and it would, in theory, be aligned with the principle that those who have the highest degree of moral blameworthiness should be punished the harshest.[176]

The QCCA was also correct in finding that the provision exceeds this purpose and restricts rights more than needed for this objective to be met. The approach taken by the QCCA is aligned with the understanding of overbreadth that the SCC has taken in the past.[177] For instance, in *Bedford*, the SCC found that the prohibition of living on the avails of prostitution is overbroad because it goes beyond the intended purpose of protecting sex workers from exploitative pimps, but also impacts those people who help sex workers (like bodyguards

172. *Bedford*, *supra* note 75 at 125; *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 320 C.C.C. (3d) 1, 17 C.R. (7th) 1 (S.C.C.) at para. 89 ["*Carter*"].

173. *Bissonnette*, QCCA, *supra* note 8 at paras. 126-128.

174. *R. v. J. (K.R.)*, [2016] 1 S.C.R. 906, 337 C.C.C. (3d) 285, 30 C.R. (7th) 1 (S.C.C.) at para. 64; *R. v. Moriarity*, [2015] 3 S.C.R. 485, 332 C.C.C. (3d) 38, 24 C.R. (7th) 357 (S.C.C.) at paras. 24-30.

175. See e.g. "Bill C-48, Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act", 2nd reading, *House of Commons Debates*, 40-3, No. 96 (November 15, 2010) at 1520 (Mr. Daniel Petit); "Bill C-48, Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act", 2nd reading, *House of Commons Debates*, 40-3, No. 97 (November 16, 2010) at 1105 (Hon Rob Nicholson).

176. *R. c. Vaillancourt*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 (S.C.C.) at 645 [S.C.R.]; *R. v. Martineau*, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129 (S.C.C.) at 643-648 [S.C.R.].

177. *R. v. Heywood*, [1994] 3 S.C.R. 761, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133 (S.C.C.); *R. c. Demers*, [2004] 2 S.C.R. 489, (*sub nom.* R. v. Demers) 185 C.C.C. (3d) 257, 20 C.R. (6th) 241 (S.C.C.); *Bedford*, *supra* note 75 at 125; *Carter*, *supra* note 172 at para. 89.

and book keepers).[178] Similarly, the QCCA in *Bissonnette* found that by allowing s. 745.51 to be applied to anyone who has committed at least two murders, it may be applied to people who are not psychopaths or who can be rehabilitated.[179] While multiple murders are by nature horrendous crimes, there is no evidence to suggest that anyone committing multiple murders, irrespective of their circumstances at the time, will be a danger to society for the rest of their lives or that they are otherwise incorrigible. Of course, s. 745.51 does not mandate the imposition of consecutive periods of parole ineligibility for all multiple murders. But the reality remains that, regardless of the circumstances, judges have the discretion to impose consecutive periods for anyone who commits multiple murders, whether incorrigible or not.[180]

(ii) Overbreadth and the Application of S. 745.51

The QCCA refused to save the provision by reading in limitations to ensure it only applies to a certain category of people.[181] Once again, it is unlikely that this limitation would have rendered it constitutional. To illustrate the variations in what judges have deemed "the worst," and indeed who deserves consecutive periods of parole ineligibility, I will turn again to the cases that have applied s. 745.51. The case review demonstrates that trial judges struggle in assessing the importance of various sentencing factors and their role in determining whether consecutive or concurrent periods of ineligibility are warranted. While the role of various aggravating or mitigating factors is hard to assess without seeing the evidence before the judge, the patterns that arise upon the review of the information contained in the sentencing decisions may suggest some inconsistency in how these circumstances are considered.

Only 20 out of 53 decisions mentioned any specific aggravating circumstances listed in s. 718.2,[182] such as hate crimes (2), murder of a minor (7), abuse of a position of trust (6), and related to gang or organized crime (3). Most crimes were committed against an

178. *Bedford*, *ibid*., at paras. 139-144.

179. *Bissonnette*, QCCA, *supra* note 8 at paras. 139-142.

180. Certainly, overbreadth may be a concern for other sentencing provisions as well, such as those for second degree murder. The judge may impose anywhere between 10 to 25 years parole ineligibility, based on the seriousness of the crime and the blameworthiness of the offender, the upper limit being reserved for the worst offenders. This can also prove very difficult to assess in practice and the disparity in sentencing for second degree murder has been criticized by others (see e.g. Campbell & Cole, *supra* note 5).

181. *Bissonnette*, QCCA, *supra* note 8 at para. 112.

182. *Code*, *supra* note 2, s. 718.2.

acquaintance (38%), with the second most common crimes committed against a family member (34%). Two cases also included sexual violence. Even where listed, aggravating and mitigating factors were not consistently discussed. In most instances, the decision listed some factors but did not provide a discussion on how or if they influenced the decision.

Even where the circumstances were discussed, the outcome is not necessarily predictable because it appeared more influenced by the role the judge assigned to rehabilitation than by the concrete circumstances. For example, in *Berry* and *Downey*, both accused were convicted of two murders, at least one of the victims was a child in both cases, and neither accused had a prior record. Mr. Berry killed his own children toward whom he was in a position of trust, which is an aggravating factor.[183] Violence against a family member is also an aggravating factor under s. 718.2(ii). The judge recognized the atrocities of the crime, but decided that, not being able to assess the rehabilitative potential of this individual, she would not shut that door. Rather, she imposed concurrent periods of parole ineligibility.[184]

In contrast, the individual in *Downey* murdered a mother and her child (not his own, hence no position of trust and no family relationship). No additional factors were discussed. The judge, however, did not believe that rehabilitation had a role in such crimes and, relying on denunciation and deterrence, imposed consecutive periods of parole ineligibility.[185] The distinction between the sentences for these two cases is, at least on its face, surprising and hard to explain based on the factors described in the sentencing decisions. One explanation could be, as discussed in the previous section, that judges who put weight on rehabilitation will be more likely to impose concurrent periods of parole ineligibility than those who do not, regardless of the circumstances. Another explanation, specific to this example, may be linked to the statistical finding of Grant et al that, despite the fact that domestic violence is aggravating under s. 718.2, judges tend to be more lenient when victims are family members than when they are strangers.[186]

In addition, in nearly all of the decisions, regardless of the sentence imposed, the judge held that the manner in which the crime took place,[187] the violence, and the bad character of the offender[188] were

183. *Berry*, *supra* note 22 at para. 54.
184. *Ibid.*, at para. 69.
185. *Downey*, *supra* note 22 at para. 45.
186. Grant et al, *supra* note 6 at 170.
187. The manner covers basically any form: by knife, by shotgun, during sleep,

aggravating factors. It is beyond dispute that all of these crimes (multiple murders of which, generally, at least one is first degree) are particularly horrendous and raise significant questions about the offender's character. But, given their omnipresence in multiple murder cases, these may be unhelpful factors in distinguishing between accused persons who are deserving of consecutive rather than concurrent periods of parole ineligibility. It is, therefore, surprising that these factors are consistently invoked in consecutive decisions as if they are distinguishing factors.[189]

Arguably, even had there been a requirement that this provision be applied only to a specified category of people who have committed multiple murders, the result may not have been vastly different in the cases reviewed. It is unclear how a judge would assess incorrigibility other than by looking at various sentencing factors such as the character of the individual and the circumstances of the crime. Yet, as discussed, these factors are likely unhelpful in distinguishing between people convicted of multiple first degree murders. In addition, assessing incorrigibility implicitly invites a qualitative assessment of the potential for rehabilitation decades down the road, which judges should not be asked to make.

In conclusion, first, a review of the manner in which sentencing courts have executed their 745.51 function to date does indeed disclose the overbreadth concerns the QCCA raised in *Bissonnette*. Second, it is questionable whether narrowing the scope of this provision to apply solely to "psychopaths" and "incorrigible" offenders would truly mitigate those overbreadth concerns. Third, the restriction of s. 745.51 to these types of offenders would result in its application mostly to first degree murders, for which people already serve most of their lives in prison, with dismal parole prospects. Given the mandatory ineligibility period for first degree murder, further lengthy postponement of parole eligibility is likely to

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while awake, with preparation, without notice. It is very difficult to identify a pattern of what "in the manner the crimes took place" means in this line of jurisprudence. See for example: *Forman*, *supra* note 22 at para. 40 (consecutive); *Salehi*, *supra* note 22 at para. 51 (concurrent); *Sharpe*, *supra* note 22 at para. 21 (concurrent); *Berry*, *supra* note 22 at para. 68 (concurrent); *Hudon-Barbeau*, *supra* note 22 at para. 310 (consecutive); *Addison*, *supra* note 22 at para. 34 (concurrent), *Butorac*, *supra* note 22 at para. 20 (concurrent).

188. See for example: *McArthur*, *supra* note 22 at para. 93 (concurrent); *Downey*, *supra* note 22 at para. 65 (consecutive); *Husbands*, *supra* note 22 at para. 19 (consecutive).

189. See for example: *Downey*, *ibid.*; *Husbands*, *ibid.*; *Forman*, *supra* note 22; *Hudon-Barbeau*, *supra* note 22.

encroach on individuals' life expectancy, far more so than would be the case for most second degree murder cases. Even setting aside other issues discussed earlier, one is forced to conclude that when dealing with the Life (25) regime, if a concerted effort is made to alleviate constitutional concerns by simultaneously restricting application of the measure to the worst possible offenders and by stacking ineligibility periods only where it does not encroach on their life expectancy, the reality is that those two requirements would often be in conflict with each other. Adherence to either one would violate the other, rendering the exercise nugatory.

(d) A Final Issue With S. 745.51

There appears to be some inconsistency in how judges defined the scope of s. 745.51. The QCCA noted, without any explanation, that "all parties *rightly* agree that the provision applies regardless of whether the multiple murders were committed during one and the same criminal event or during separate events"[190] [emphasis added]. It is not clear why this is the right approach.

Section 745.51 states, in what appears to be clear terms, that consecutive periods of parole ineligibility for life sentences are available where the individual has already been convicted of another murder, as opposed to where the two murders are tried together.[191] While the legislation appears to refer specifically to the timing of when the offences are tried, this is aligned with broader Canadian sentencing practices which generally seem to distinguish between offences committed in a single transaction and those committed in multiple transactions (i.e. offences committed over a period of time and at various locations). In the former scenario, a judge will normally render concurrent sentences, whereas in the latter they may render consecutive ones.[192] One might think that this distinction would guide the sentencing outcome in the application of s. 745.51.

Yet very few judges discussed the number of transactions. In *MacKinnon*, the judge specifically noted that the number of transactions is a distinguishing feature in multiple murder cases.[193] As *MacKinnon* involved a single transaction event, Justice MacDonnell held the period of parole ineligibility must be between 18 to 25 years.[194] Similarly, the judge in *Zerbinos* acknowledged that

190. *Bissonnette*, QCCA, *supra* note 8 at para. 65.
191. *Code*, *supra* note 2, s. 745.51. On this see Calarco, *supra* note 5.
192. Manson et al, *supra* note 102.
193. *MacKinnon*, *supra* note 22 at paras. 62-67.
194. *Ibid.*, at paras. 77-79.

he could apply consecutive periods of parole ineligibility because the murders in that case did not arise of out the same series of events.[195] However, he refused to exercise that discretion and imposed a single period of parole ineligibility.[196] The number of transactions was discussed in two additional cases, both involving different events and both used this to justify the consecutive periods of parole ineligibility imposed.[197] In all other cases, the issue of single versus multiple transactions was not mentioned at all, regardless of whether the period of parole ineligibility imposed was consecutive or concurrent. Indeed, if this distinction would have been made in all cases, consecutive periods of parole ineligibility would have hardly ever been imposed, since the murders were part of the same transaction and were tried together in the majority of cases reviewed (47 out of 53 of the cases reviewed).

In February 2021, the Alberta Court of Appeal (ABCA) in *Garland* addressed the issue of whether s. 745.51 applies to convictions for multiple murders tried together or to those that occur subsequent to another murder conviction. The ABCA noted that the latter was a "recidivist" interpretation of s. 745.51 and would result in the provision applying very rarely. [198] The court proceeded with a statutory interpretation of the language of s. 745.51[199] and concluded that the application of this provision does not hinge on whether the individual had a prior murder conviction nor on whether the murders are tried separately or together.[200] After reviewing the language and Hansard, the court concluded that these are non-factors because "put bluntly, Parliament intended to empower judges with a discretion to decide if the declaratory objective of sentencing required consecutive parole ineligibility periods amounting to a "whole life" sentence, whatever the arithmetic. There can be no serious doubt about this being the intent of Parliament."[201] In other words, it was the ABCA's position that Parliament's intention was to allow judges discretion in imposing, on a case-by-case basis, a sentence that would effectively see an individual who committed more than one murder die in prison. If this position is correct, this argument likely also applies to the

195. *Zerbinos*, *supra* note 22 at para. 38.
196. *Ibid.*
197. *Baumgartner*, *supra* note 22 at para. 58; *Granados-Arana*, *supra* note 22 at para. 75.
198. *R. v. Garland*, 2021 CarswellAlta 252, 2021 ABCA 46 (Alta. C.A.) at para. 46.
199. *Ibid.*, at paras. 50-65.
200. *Ibid.*, at paras. 70-72.
201. *Ibid.*, at para. 103.

distinction between single and multiple transactions during which the murders were committed.

The inconsistency with which the timing of the murders was addressed in s. 745.51 decisions fuels the confusion regarding the scope of the provision. While the QCCA's statement in *Bissonnette* was not convincing on this issue, the ABCA's decision in *Garland* may have settled the matter. However, if the *Garland* interpretation is correct, it would only strengthen the position that s. 745.51 cannot be saved by reading it down as Justice Huot suggested in the *Bissonnette* trial decision. Put differently, if the ABCA's reading that Parliament indisputably intended to allow for lifelong imprisonment is sound; and if, as discussed in this article and in the QCCA decision in *Bissonnette*, imprisoning someone without giving them a realistic opportunity to be released is unconstitutional, then s. 745.51 cannot be interpreted in a manner that could render it constitutional, regardless of whom it applies to.

4. Concluding Thoughts

The *Bissonnette* decision was a long time coming. When the SCC hears this appeal, it should carefully consider how s. 745.51 accords with the previous jurisprudence on excessive and harsh sentences; the concerns raised nationally and internationally about lifelong prison sentences, and the lack of opportunity for rehabilitation; the newer body of scholarship on release mechanisms in Canada, and whether they in fact provide a realistic opportunity for release; the body of literature discussing the reality and consequences of aging and dying in prisons; as well as the interplay between the constitutional concerns raised by s. 745.51 and those raised by the current murder sentencing regime more broadly.

The SCC should uphold the QCCA's finding of unconstitutionality in *Bissonnette* and strike down the provision as opposed to reading it down. Nor should Parliament adopt a narrower version of this provision. As the QCCA pointed out, Life (25) already means that most individuals will spend the bulk of their life in prison, and release after 25 years is by no means guaranteed.[202] Further, it is questionable whether the mandatory minimum for first degree murder (i.e. Life (25)) would still be found constitutional, in light of new research illuminating the significant issues surrounding release options and the abolition of the "faint hope clause". Given this context, a new s. 745.51, narrower, but still empowering judges to increase (but not decrease) a mandatory Life (25) sentence, would

202. *Bissonnette*, QCCA, *supra* note 8 at para. 99.

continue to exacerbate the ills besetting an already questionable regime.

This is not meant to argue that Canada's sentencing regime should make no distinction between the taking of a single life and the commission of multiple murders. Nor can one deny that the latter entails in most cases a greater level of blameworthiness. Yet the response to those varying levels should not assail *Charter* values by seeking to increase already questionably severe terms of imprisonment. Some countries have found the solution is to eliminate the mandatory life sentence for murder; others allow judges to impose shorter periods of parole ineligibility when they do render a life sentence.[203] Removal of the mandatory sentence for murder would afford Canadian judges a superior opportunity to account for individual blameworthiness and make principled distinctions between the quantity and quality of the harm inflicted without extending already lengthy periods of parole ineligibility in defiance of the *Charter*.

It is beyond the scope of this article to canvas the earnest discussions others have published of the need for reform of the sentencing regime for murder, and of the wisdom of mandatory life sentences generally.[204] For the present, I can but insist on the critical importance for these broader examinations to be consulted and respected during any future legislative or policy debate touching on narrower variations of the present s. 745.51.

203. This is also something that the QCCA seems to suggest in passing, as a recommendation for Parliament to consider. *Ibid.*, at para. 185.

204. See e.g. Grant et al, *supra* note 6; Campbell & Cole, *supra* note 5; Mitchell & Roberts, *supra* note 18; Manson, "Thoughtful to Thoughtless", *supra* note 16; Manson, "Easy Acceptance," *supra* note 16; Mauer & Nellis, *supra* note 115.