SCC File No. 39544

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF QUEBEC
HER MAJESTY THE QUEEN

Appellants

-and-

ALEXANDRE BISSONNETTE

Respondent

-and -

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PARTS I & II - OVERVIEW AND STATEMENT OF POSITION

1. CDAS' position is that any parole ineligibility period beyond 25 years – even though imposed through exercise of a sentencing judge's discretion pursuant to s. 745.51 of the *Criminal Code* R.S.C. 1985 c. C-46 – imposes grossly disproportionate punishment and thus infringes s. 12 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). For the reasons advanced below, the 25-year ineligibility period for multiple murderers is already a significant sanction that gives effect to all relevant sentencing principles.

2. In determining whether ineligibility periods more than 25 years is constitutional, CDAS submits that it is critical to examine the nature of the parole process as set out in the *Corrections and Conditional Release Act*, S.C. 1992 c. 20 ("*CCRA*"). The parole process demonstrates that the public remains protected at all times even when an offender is past their ineligibility period.

3. CDAS further submits that an ineligibility period longer than 25 years violates s. 12 of *Charter* because it does not give effect to the wider principles and purposes of sentencing enshrined in ss. 718 – 718.2 of *Code.*

PART III: STATEMENT OF ARGUMENT

A. A non-discretionary 25-year parole ineligibility period is a significant sentence

4. CDAS highlights three reasons why a life sentence with 25-year period of ineligibility already represents a significant and adequate sanction for multiple murderers. As a consequence, CDAS submits any period longer than 25 years constitutes grossly disproportionate punishment contrary to s. 12 of the *Charter.*

(1) The parole eligibility period is always part of a life sentence

5. First, regardless of the ineligibility period, it must be remembered that these are life sentences. People can and do spend their rest of their lives behind bars, even if they are well past their parole ineligibility dates. The fact of a life sentence itself furthers the principles of denunciation, deterrence, and most importantly, the overarching principle of public protection.

(2) Viewed in the context of the evolution of sentences for murder in Canada, 25 years represents a significant sanction

6. Second, a 25-year period of ineligibility itself is significant. The oft-cited rationale for the imposition of the mandatory 25-year parole ineligibility period for first-degree murders was the "compromise" brought about by the abolishment of the death penalty in Canada in 1976.[1] As part of that legislative process, a mandatory 25-year period of parole ineligibility was imposed in combination with mandatory life sentence for murder, a period of time which has been described as "severe" and "unusually harsh".[2] The 25-year ineligibility period is substantially longer than the 10–15-year median term provided for in other western countries where life imprisonment was replaced capital punishment.[3] More significantly, the 25-year ineligibility period was substantially longer than the 15.8-year average time served in prison prior to their release on parole for those serving sentences in Canada for capital murder between 1961 and 1976.[4]

7. The high 25-year period of parole ineligibility was tempered by the existence of the so-called "faint hope" provisions in s. 745.6 of the *Criminal Code* which provided a safety valve for those serving life sentences with ineligibility periods longer than 15 years. This procedure provided that the offender could apply to a jury to shorten their ineligibility period once they had reached fifteen years of ineligibility. This fifteen-year eligibility period, was of course, based on the average time that people convicted of murder had served before being released on parole.

8. As this Court held in *R v. Swietlinski,* [1994] 3 S.C.R. 481, the faint hope process was a procedure designed to reassess, in the case of first-degree murder, the mandatory 25-year ineligibility period imposed by law (at pp. 491-492). The primary purpose of this reassessment procedure was to "call attention to changes in the applicant's situation which might justify imposing a less harsh penalty" (*Swietlinski,* at p. 492).

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[1] *Criminal Law Amendment (Capital Punishment) Act,* SC 1973-74, c 38, s 3.; at 492;
[2] *R v. Jenkins,* 2014 ONSC 3223, at para. 14, containing an excellent historical analysis of the faint hope regime.
[3] Allan Manson, "The Easy Acceptance of Long-Term Confinement in Canada" (1990) 79 Criminal Reports 3d 265 See also Appleton, C., & van Zyl Smit, D. (Sep. 2017) cited by the Office of the Correctional Investigator "Aging and Dying in Prison: An Investigation into Experiences of Older Individuals in Federal Custody" which notes that a survey released in September 2017 demonstrated that life sentences from 98 countries included an average minimum period before parole eligibility of 18.3 years, https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20190228-eng.aspx#ftn20.
[4] Review and Estimate of Time Spent in Prison by Offenders, CSC Publication B-27 November 2002), https://www.csc-scc.gc.ca/research/005008-b27-eng.shtml

9. Indeed, this Court and other courts have found that the existence of the faint hope process assisted in insulating the mandatory 25-year ineligibility period from successful constitutional attack under s. 12 of the *Charter* (see *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 725). For example, in *R. v. Kay*, 1990 ABCA 317, the Alberta Court of Appeal dismissed a constitutional challenge to the 25-year ineligibility period by emphasizing an offender's ability to shorten the ineligibility period after 15 years. In light of the faint hope process, the Court of Appeal in *Kay* held that this the 25-year ineligibility period was a "more theoretical figure" (at para. 19).

10. The faint hope process was, however, abolished for those convicted of multiple murderers in 1997 (*An Act to amend the Criminal Code (judicial review of parole ineligibility) and another act*, S.C. 1996 c. 34).[5] In 2011, Parliament abolished the process completely on a prospective basis. Those who committed a murder after December 2, 2011 are no longer able to apply for a parole reduction (*An Act to amend the Criminal Code*, S.C. 2011, c. 2).

11. It has been argued that that the elimination of the faint hope regime, as well as other developments in sentencing law since *Luxton* was decided in 1990, ought to result in a reconsideration of the constitutionality of the 25-year ineligibility period (see Laura Metcalfe, "Reconsidering the Constitutionality of Mandatory Minimum Sentences Under Section 231(5)(e) Post-Luxton" (2016) 6:2 online: UWO J Leg Stud 2).

12. CDAS does not submit, on this appeal, that the abolition of the faint hope process results in the 25-year ineligibility period being grossly disproportionate punishment. That is an issue for another day. However, CDAS submits that the abolition of the faint hope regime for multiple murderers – and now combined with the abolition of a key moderating aspect of the process – only reinforces why the 25-year period of ineligibility represents a significant sanction and that any ineligibility period longer than 25 years is grossly disproportionate.

[5] This legislative amendment was, in large measure, prompted by public outcry due to Clifford Olson's faint hope application. The prospective transitional provisions of the 1997 repeal, however, did not apply to Olson and his application was still heard (and rejected in about 15 minutes) by a jury Supreme Court of British Columbia.

(3) The operation of the parole process is critical to the analysis of gross disproportionality in this case

13. Third, CDAS submits that the conditional release regime in the *CCRA* is a significant consideration in assessing whether an ineligibility period longer than 25 years is constitutional.

14. Because these are life sentences, even when an offender reaches their eligibility date, the Parole Board of Canada determines whether an offender can be safely released into the community. The Parole Board's "paramount consideration" under s. 100.1 of the *CCRA* is the protection of society. Given this regime, the public remains protected at all times even where an offender is well past their period of parole ineligibility. Viewed in the context of this wider statutory landscape of the conditional release regime, periods of parole ineligibility more than 25 years serve no "valid penological goals or sentencing principles" (*R. v. Latimer,* 2001 SCC 1, at para. 86).

15. This Court decided in *R v. Lyons,* [1987] 2 S.C.R. 309 that an "enlightened" inquiry into whether a sentence violates s. 12 of the *Charter* must concern itself with the way in which the effect of a punishment is likely to be <u>experienced</u> (at p. 312). This Court in *Lyons* found that, with life sentences, "the parole process assumes the utmost significance for it is that process alone that is capable of truly accommodating and tailoring the sentence to fit the circumstances of the individual offender" (at p. 341).

16. Where the possibility for parole is removed and with it any hope of release the "experience" of the sentence becomes crushing (Alison Liebling, "Moral Performance, Inhuman and Degrading Treatment and Prison Pain" (2011) 13:5 Punishment & Society 530 at 536).

17. CDAS submits that a single 25 year parole ineligibility period for a conviction for multiple murderers, with constituent elements of a life sentence, and current statutory regime governing parole adequately addresses all principles and purposes of sentencing. Such a sentence – with all its constituent elements – not only furthers all principles and purposes of sentencing, but it also provides for a full consideration of the rights of victims and the circumstances and severity of <u>each</u> offence in determining the risk that an offender poses if released into the community.

18. An offender will only be released, once they have reached their period of ineligibility, if under s. 102 of the *CCRA*, the Parole Board of Canada determines that they a not an "undue risk".

19. In making the "undue risk" determination under s. 102, the Parole Board's paramount consideration is the safety of the public. The Parole Board further is directed to consider a host of factors in assessing risk, pursuant to s. 101 of the *CCRA*, including the "nature and gravity of the offence" and "information obtained from victims":

> **101** The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:
>
> **(a)** parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;

20. CDAS submits that this statutory obligation on the part of the Parole Board to consider the "nature and severity of the offence" and "information obtained from victims" provides for an explicit recognition of circumstances of each individual offence and rights of victims. The Parole Board, in turn, takes these considerations in account in determining the question of risk. As a result, there is no "free pass" for those sentenced for committing multiple murderers.

21. In light of this statutory regime, the reality is that many multiple murderers will never be released because they will remain an undue risk to the public under s. 102 of the *CCRA*. Some offenders may take 30 or 40 years to sufficiently reduce their risk. Many never will never be released.[6]

[6] Corrections and Conditional Release, Statistical Overview, https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2019/ccrso-2019-en.pdfp. 66; Aging and Dying in Prison, Office of the Correctional Investigator; https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20190228-eng.a

22. In examining the parole process available to those sentenced for murder, it is also important to remember that, unlike other offenders in the federal correctional system, those serving life sentences are never eligible for "exceptional parole" under s. 121(1) of the *CCRA.* This provision provides that if an offender is terminally ill or whose health would suffer "serious damage" if held in custody, the offender can apply for parole even if they are not yet eligible. However, Parliament specifically provided that those serving life sentences are not eligible for this type of parole (s. 121(2)). They must wait until their eligibility period, and then establish that they are not an undue risk under s. 102 of the *CCRA.*

23. This underscores that the parole process and the provisions in the *CCRA* already take into account the seriousness the offending that led to the imposition of a life sentence in a manner that is entirely consistent with the Parole Board's primary objective of protecting the public.

24. CDAS submits that the parole process is a critical consideration in the assessment of whether ineligibility periods of longer than 25 years are constitutional. The fact remains that even when an offender is past their ineligibility period, the Parole Board determines release based on a thorough and searching analysis of all aspects of the case, including all the offender's behaviour, the gravity of the offence, and the views of victims (see s. 101 of the *CCRA*).

25. Neither of the appellants, nor any of the supporting interveners, have pointed to any evidence that the Parole Board has failed to live up to its statutory obligation to protect society, such that a longer ineligibility period is required for multiple murderers in order to protect the public. The fact remains that the public remains protected at all times.

B. Parole ineligibility periods longer than 25 years do not give effect to the wider purposes and principles of sentencing

26. Ineligibility periods longer than 25 years elevate the sentencing principles of denunciation, deterrence, and retribution to the exclusion of the wider principles and purposes of sentencing enshrined in ss. 718 – 718.2 of the *Code.* As this Court held in *R. v. M. (C.A.),* [1996] 1 S.C.R. 500, periods of parole ineligibility, as a general concept, are "principally motivated concerns of

denunciation and deterrence." Periods of parole ineligibility achieve the goals of denunciation and deterrence because they impose a necessary of period of confinement "even if the offender was completely rehabilitated and posed absolutely no threat to society" (*M. (C.A.)* at p. 64; see also *Canada (A.G.) v. Whaling*, 2014 SCC 20 at para. 61).

27. In *R. v. Nur*, 2015 SCC 15, this Court held that, to comply with s. 12 of the *Charter*, the sentence imposed should give effect to all principles and purposes of sentencing enshrined in s. 718-718.2 of the *Code* (at paras. 40-41). In addition to denunciation and deterrence, these sentencing principles include rehabilitation, restraint, as well as public protection. The sentencing principle of restraint in s. 718.2(e) includes, of course, a sentencing judge's duty to consider the circumstances of Aboriginal offenders.

28. Ineligibility periods longer than 25 years do not give effect to these wider sentencing principles.

29. Since the enactment of s. 745.51 in 2011, not only have courts-imposed ineligibility periods of longer than 25 years, but they have also imposed consecutive life sentences on offenders convicted of multiple murders. Consecutive life sentences of 25 years – totaling for example, 50 or 75 years - for those convicted of multiple murders has become the virtual norm in this country (see Isabel Grant *et al*., "The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing" 2021 52-1 *Ottawa Law Review* 133, at 165).

30. Exercising their discretion under s. 745.51, some courts have gone so far as to impose consecutive ineligibility periods of up to 75 years. Such sentences expressly contemplate convicted persons spending the rest of their natural lives in prison, even if they are relatively young at the time of sentencing (see *R v. Bourque*, 2014 NBQB 237 (75 years); *R v. Ostamas*, 2016 MBQB 136 (75 years) and *R. v. Saretzky*, 2017 ABQB 496 (75 years).

31. As one example, the 75-year ineligibility period imposed in *Bourque* – resulting in a 24-year-old being eligible for parole when he is almost 100 years' old – can only logically serve the principles of purposes of denunciation, deterrence, and retribution and does not give any effect to wider sentencing principles of principles of rehabilitation and restraint. It is for this reason that

exceeding 25 years of ineligibility offends s. 12 of the *Charter*, even if the ultimate decision remains a matter of judicial discretion.

32. It is important to note as well that s. 745.51 allows a sentencing judge to impose higher ineligibility periods, not just for multiple first-degree murders, but for multiple second-degree murders (see the 75-year term in *Ostamas*). Previously, a person convicted of more than one count of second-degree murder would face a maximum 25-year ineligibility period, and a minimum period of 10 years. It would be up to the sentencing judge to fix the ineligibility anywhere between 10 and 25 years. In sentencing an offender for multiple counts of second-degree murder, while imposing concurrent life terms, courts tended to impose higher ineligibility periods on the basis that the multiple murders was an aggravating factor (the ineligibility periods for two counts of second-degree generally ranged from 15-23 years, see e.g. *R. v. Mafi*, 2000 BCCA 135 (15 years); *R. v. Koopmans*, 2015 BCSC 2120 (22 years); *R. v. Simard*, 2019 BCSC 741 (18 years); *R. v. Salah*, 2015 ONCA 23 (23 years)).

33. On the point of a sentencing judge's discretion, the appellants, supported by other interveners, emphasize that s. 745.51 of the *Code* merely gives sentencing judges the discretion to exceed the ineligibility period of 25 years if the circumstances warrant it. However, a mandatory life sentence with a period of 25 years of ineligibility for multiple murderers represents a significant sentence in its own right, and it is a sentence which already prioritizes the principles of denunciation and deterrence. But, at the same time, an ineligibility period that is capped at 25 years does not lose sight of other principles of sentencing principles like rehabilitation, restraint, and protection of the public.

34. The emphasis on the importance of a sentencing judge's having the discretion to impose periods of parole ineligibility longer than 25 years in cases of multiple murderers is, indeed, somewhat ironic. This is because there is a mandatory minimum of 25 years of parole ineligibility for first-degree murder. If the existence of sentencing discretion is so important in this context, then surely the sentencing judge should also have the discretion to impose a lower ineligibility period than 25 years if the circumstances warranted it, yet the law does not allow for such an

exercise of discretion, for example, an offender who is sentenced for committing one first-degree murder and their moral blameworthiness is reduced (see *R. v. Friesen*, 2020 SCC 9 at para 91).[7]

35. Even though it is a sentence fixed by law, CDAS submits that the 25-year period of ineligibility for both single (in the case of first-degree murder) and multiple murders balances all principles and purposes of sentencing.

36. Moreover, a 25-year period of ineligibility combined with the statutory regime governing release of those convicted of murder in the *CCRA* ensures that the public remains protected at all times even when an offender is past his or her ineligibility period.

37. CDAS submits that a life sentence with a 25-year ineligibility period already represents a lengthy sentence for multiple murders and it is that one that balances all principles and purposes of sentencing. By giving courts the discretion to increase the ineligibility period beyond 25 years, s. 745.51 of the *Code* results periods of parole ineligibility that no longer give effect to all sentencing principles and purposes and leads to a sentence which is unmoored from the historical genesis of the 25-year period ineligibility.

38. For all these reasons, CDAS submits that s. 745.51 infringes s. 12 of the *Charter*.

PART IV - COSTS

39. The Intervener seeks no order with respect to costs and asks that no costs be awarded against them.

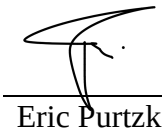
[7] First-degree murder is, of course, not limited to a murder that is planned and deliberate. Section 231(5) of the *Code* provides that certain murders will be determined first-degree if the murder is committed in the course of another offence, like unlawful confinement for example (s. 231(5)(e)).

PART V - ORDER SOUGHT

40. CDAS takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver this 24th day of November, 2021



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PART VI - LIST OF AUTHORITIES

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