SCC File No.: 39544

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

B E T W E E N :

ATTORNEY GENERAL OF QUEBEC and
HER MAJESTY THE QUEEN

APPELLANTS
(Respondents)

- and -

ALEXANDRE BISSONNETTE

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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Contents

PART I – OVERVIEW

A. Overview of Position

1. At the heart of this appeal is a simple question: is it cruel and unusual punishment that a person who murdered multiple people in a mosque, and injured many more, motivated by hate, should be eligible for parole in 25 years?

2. The intuitive answer to this question is not so simple to grapple with from the perspective of the National Council of Canadian Muslims, given that many Canadian Muslims have deep concerns about the relationship between incarceration and justice. This tension in the law and the jurisprudence is embodied in the case before the Court.

3. This appeal is with respect to section 745.51 of the *Criminal Code* ("*Code*") and whether it violates section 7 and 12 of the *Charter*. It raises important concerns about consecutive periods of parole ineligibility and how courts ought to assess the validity of the impugned provision, which is not mandatory, but discretionary in nature. These determinations are multifaceted. At its most basic purpose, section 745.51 allows for the imposition of consecutive parole ineligibility periods upon offenders guilty of multiple murders, thereby rendering such offenders subject to a more severe punishment than offenders guilty of a single murder. At the same time, it is important to consider the practicality or appropriateness of a discretionary provision that makes it possible for a court to prevent an offender from applying for parole for a period that exceeds the offender's life expectancy.

4. Recognizing that coherence and uniformity are central to the rule of law,[1] the National Council of Canadian Muslims ("**NCCM**") will make unique submissions that mitigates unpredictability in the law regarding the approach and application of section 12 of the *Charter*. As a national organization that maintains a collaborative relationship with Muslim communities across Canada, NCCM has a particular interest in ensuring that the law is stable and clear with respect to how section 12 is to be interpreted and applied, particularly in cases involving discretionary provisions and multiple murders.

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[1] *R v Ferguson*, 2008 SCC 6 at para 68.

5. NCCM submits two arguments in this intervention. First, courts must not offer a "discount" to offenders found guilty of multiple murders – and must carefully set a precedent when determining whether the impugned punishment outrages society's sense of decency in the context of hate-motivated killing. Second, there is a need in the case law for a clearer framework concerning the test for section 12 of the *Charter* particularly as it relates to discretionary provisions.

PART II – STATEMENT OF ISSUES

6. NCCM makes submissions that focus on the approach to section 12 of the *Charter* and how courts should balance and weigh various factors and sentencing principles in cases involving multiple murders. NCCM does not take a position on the outcome of this appeal.

PART III – STATEMENT OF ARGUMENT

A. Statement of Facts

7. We do not seek to expand the statement of facts set out by Justice Huot in his original sentencing decision.[2] Yet, although it is not the role of interveners to set out new facts for the Court or to try to expand the case, we at the National Council of Canadian Muslims cannot provide a useful and different submission to the Court that is different than the main parties without setting out the following.

8. The Quebec City Mosque massacre resulted in the most deadly attack on a religious institution in modern Canadian history.[3] Six people were killed in the attack. Their names cannot and will not be forgotten: Ibrahima Barry; Mamadou Tanou Barry; Khaled Belkacemi; Aboubaker Thabti; Abdelkrim Hassane; and Azzedine Soufiane.[4]

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[2] *R. c. Bissonnette*, 2019 QCCS 354 at para 31.
[3] Gada Mahrouse, "Minimizing and denying racial violence: Insights from the Québec mosque shooting" (2018) 30:3 CJWL 471. [Book of Authorities, Tab 1]
[4] *Ibid.*

9. This is without discussion of the families left behind, and of the many injured both physically and psychologically. This is further without discussion of the effect that the Quebec City Mosque massacre had on the feelings of safety and security of Canadian Muslims.[5]

10. The grounds for what constitutes cruel and unusual punishment, and whether section 12 and section 7 of the *Charter* are violated by effectively taking away an individual's prospect of parole, must not be alienated from the names of those whose lives were ended on January 29, 2017.

B. The legislative principles and purposes

11. Prior to the enactment of s. 745.51 of the *Criminal Code,* concurrent periods of parole ineligibility were required, regardless of how many victims may have been murdered by the offender. Effectively, this meant providing a sentencing "discount", where multiple murders resulted in the same sentence as a single murder.

12. At a time when western democracies are periodically witness to hateful, violent and horrific incidents of murderous rampage, including against members of religious and other marginalized groups,[6] in which many innocent victims are killed, it is difficult to reconcile that an offender who murdered 100 people would generally receive the same parole eligibility period as an offender who murdered one person. Section 745.51 of the *Criminal Code* presumably seeks to remedy this problem, thereby potentially rendering such offenders subject to a more severe punishment than offenders guilty of only a single murder.

13. While NCCM does not take a position on whether this legislative provision adequately addresses this gap, we are interested in the general sentencing principles and purposes, which need to be considered and preserved when assessing the constitutionality of the impugned provision.

14. It is important to remember that the crime of murder is the most serious offence known to the criminal law. Parliament has, accordingly, pursuant to s. 745 of the *Criminal Code*, required the mandatory imposition of a sentence of life imprisonment in all cases of murder. Periods of parole ineligibility may vary, depending on certain circumstances. But despite the possible variations in parole ineligibility periods, the mandatory sentence for *all* murder offences is life

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[5] Mahrouse at 474.
[6] *R v Tarrant*, [2020] NZHC 2192.

imprisonment. Moreover, this Court has already held that the imposition of such a sentence, even with a 25-year parole ineligibility period, is constitutionally valid legislation.

15. The court in *Luxton* also rejected the argument that the combined effect of ss. 231(5)(e) and 745(a) of the *Criminal Code* constituted "cruel and unusual punishment" in violation of s. 12 of the *Charter*.[7] In reaching this conclusion, the court stated:

> These sections provide for punishment of the most serious crime in our criminal law, that of first degree murder…The penalty is severe and deservedly so. The minimum 25 years to be served before eligibility for parole reflects society's condemnation of a person who has exploited a position of power and dominance to the gravest extent possible by murdering the person that he or she is forcibly confining. The punishment is not excessive and clearly does not outrage our standards of decency. In my view, it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat our most serious crime with a[n] appropriate degree of certainty and severity.[8]

16. The Quebec Court of Appeal in this case noted that well before s. 745.51 came into force, the Supreme Court had determined that when Parliament imposed a minimum period of physical confinement before making parole available, it did so in order to advance the causes of general denunciation and deterrence, even if the offender was rehabilitated and no longer posed a threat to society.[9] The Court of Appeal noted that "never before had Parliament contemplated a minimum period of detention as long as 50 years and more."[10]

C. There is a need for clarity when assessing the constitutionality of discretionary sentencing provisions

17. A central challenge before this Court is around whether discretion is the same as arbitrariness. A provision that allows a judge to exercise discretion does not automatically render the provision unconstitutional if it could cause unconstitutional effects.[11] The requirement to exercise discretion is to act consistently with the values underlying the grant of discretion, including *Charter* values.

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[7] *R v Luxton*, [1990] 2 SCR 711.
[8] *Ibid* at 724.
[9] *Bissonnette c. R.*, 2020 QCCA 1585 at para 1 [*Bissonnette QCA*] at para 70.
[10] *Ibid.*
[11] *Canada (Citizenship and Immigration) v Canadian Council for Refugees,* 2021 FCA 72 at para 88.

18. It is important to first recognize that section 745.51 deals with a discretionary, not mandatory, form of sentence as it relates to parole eligibility for multiple murders. It provides for potential consecutive parole ineligibility periods in multiple murder cases. The court may also order concurrent terms of parole ineligibility, or potentially even a mix of consecutive and concurrent parole ineligibility terms.

19. In *R v Nur* and *R v Lloyd*, the Supreme Court of Canada clarified the necessary analysis for determining whether a mandatory minimum sentence constitutes "cruel and unusual punishment" in breach of s. 12 of the *Charter*.[12] There is a two-step analysis. First, the court must determine whether the provision imposes cruel and unusual punishment on the individual offender before the court, by requiring the imposition of a grossly disproportionate sentence, given the circumstances of the offences and the offender. The court must not only conduct this "particularized inquiry" focusing on the individual offence and circumstances of the offender, but also must determine whether a breach of s. 12 of the *Charter* arises from other reasonably foreseeable applications of the impugned legislation. This is the second step of the analysis. This exercise of considering "reasonable hypotheticals" must be guided by common sense and judicial experience, without relying on far-fetched speculation, or remotely imaginable factual scenarios.

20. Of course, s. 745.51 of the *Criminal Code* does not require sentencing courts to impose any mandatory minimum sentence. Further, it does not require the imposition of consecutive periods of parole ineligibility in cases of multiple murders. Rather, the provision only provides the *discretionary* jurisdiction to *permit* sentencing judges to order consecutive periods of parole ineligibility, in appropriate cases, where an offender has been convicted of multiple murders.

21. We concede that such a provision still has the potential of operating so as to impose cruel and unusual punishment. However, it would be the judge's sentence, not the provision, that could violate the *Charter*. While it is possible that an individual sentence imposed by a judge under a sentencing provision that allows for a high maximum sentence would be grossly disproportionate, this is a matter of error that can be corrected on appeal of the individual sentence. The validity of the underlying sentencing provision would not be in question.[13]

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[12] *R v Nur* [2015] 1 SCR 773 at paras 38-39, 47-77; *R v Lloyd*, [2016] 1 SCR 130 at paras 22-24.
[13] *R v Smith*, [1987] 1 SCR 1045 at para 67.

22. While judges have a discretionary power to refrain from imposing a cruel and unusual sentence under this provision, it is this discretion which also allows judges not to grant a sentencing "discount" to offenders who commit mass murders and grant a more severe and proportionate punishment considering the circumstances. The Court of Appeal refers to the Christchurch shooting, noting in a footnote that "the Christchurch massacre (51 victims) could have resulted in a period of 1,275 years" of parole ineligibility.[14] We agree that this would be self-evidently incoherent and absurd.

23. However, the possibility that the offender for the Christchurch shooting would receive life imprisonment with the possibility of parole after 25 years in Canada, equal to that of an offender who committed one murder, is likewise incoherent. As such, it is incumbent that the constitutional validity of the provision is not considered in isolation or in the abstract, but within the broader context of the legislation, the facts, and the relevant sentencing principles.

D. The analysis under Section 12 of the *Charter* should be a contextual exercise

24. The most fundamental flaw in the Quebec Court of Appeal's decision is its refusal to engage with the circumstances of the individual accused. The very first sentence of the Court's reasons is telling:

> [t]his judgment is not about the horror of Alexandre Bissonnette's actions on January 29, 2017, nor even about the impact of his crimes on an entire community and on society in general; it is, rather, first and foremost, about the constitutionality of a provision of the Criminal Code.[15]

25. The Court goes on to add that "[t]he analysis of the provision's constitutionality must be carried out independently of the appellant's case, notwithstanding the horror of his actions".[16] The Court of Appeal goes on to conclude that the fact that the stacking of parole ineligibility is not required and can be ordered at a judge's discretion does not remedy its constitutional defects: "notwithstanding the existence of a discretionary power by which the judge can refrain from imposing a cruel and unusual sentence, the provision is invalid simply because it authorizes a judge

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[14] *Bissonnette QCA* 1585 [see footnote 1].
[15] *Ibid* at para 1.
[16] *Ibid* at para 54.

to impose such a sentence".[17] Thus "the question to be resolved is this: are there situations in which it would not be cruel and unusual to impose minimum parole ineligibility periods of 50, 75, 100, 125, 150, indeed 1,000, years?"[18]

26. This approach is in contrast to that articulated in *R v Smith*, 1 SCR 1045, involving the Supreme Court's first explication of section 12 of the Charter, where Justice Lamer (as he then was) wrote:

> In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular characteristics of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender…Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances.[19]

27. In other words, contrary to the Court of Appeal's approach, the offence and the offender — including "the horror of his actions" are the important considerations in assessing an alleged infringement of section 12. While the Quebec Court of Appeal did consider *Smith,* the Court of Appeal erred by drawing only on the importance of Justice Lamer's notations on rehabilitation, while not engaging with the nuanced framework set out by Justice Lamer.

28. We agree with the Quebec Court of Appeal that "even the worst criminal having committed the most heinous of crimes benefits at all times from the rights guaranteed under the *Charter*."[20] However, the provision's constitutionality must not be assessed in isolation – there is a reason why Canadian courts normally assess the constitutionality of legislation on the facts of the particular case rather than *entirely* in the abstract, as was done in this case.

29. We suggest that the decision of the New Zealand High Court in the sentencing of the Christchurch shooter is of persuasive relevance to this Court.[21] In that decision, the first imposition in New Zealand of a life-sentence without the possibility of parole was imposed on the Christchurch shooter, who massacred 51 people at the Al Noor Mosque.

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[17] *Ibid* at para 79.
[18] *Ibid* at para 89.
[19] *R. v. Smith (Edward Dewey),* [1987] 1 SCR 1045 at para 56.
[20] *Bissonnette QCA* at para 72.
[21] *R v Tarrant*, [2020] NZHC 2192.

30. Justice Mander spent significant time in the case examining the precise question that is before this Court. In Justice Mander's ruling, the notion of "grossly disproportionate" punishments was the key to reconciling the "the tension between the imposition of a sentence of life imprisonment without parole, as mandated by Parliament, and the need to avoid a disproportionately severe punishment".[22] Justice Mander specifically looked at the circumstances of the impugned conduct in determining what a constitutionally valid sentence should be, such as the effect of such a hate crime, the vulnerability of victims at a place of worship, and the nature of the mass killing.[23]

31. Turning our attention back to this case in front of this Court, in concluding that s. 745.51 violates s. 12 of the Charter, the Quebec Court of Appeal focused on the fact that the section permits a sentencing judge to sentence an offender to a period of imprisonment, without eligibility of parole, that would exceed the general life span of a human being.[24] The Court found that not providing an offender with a realistic prospect of parole, at least in a case where the offender could demonstrate that they had been "rehabilitated", was cruel and unusual punishment in violating of section 12.[25]

32. The Court of Appeal ought to have remembered that — as Justice Lamer suggested in *Smith* — that the focus should be on the facts before the court,[26] and that rehabilitation is not necessarily the primary factor in deciding on a fit sentence. Sometimes, the need to denounce and deter will dominate.

33. Assume, for instance, that a 75-year-old individual goes on a murdering rampage and commits first degree murder, killing 10 people. He or she would be sentenced to life imprisonment without eligibility for release on parole for 25 years. The parole ineligibility period would, at a minimum, likely exceed his or her life expectancy. Yet this provision of the *Code* has been determined to be constitutionally valid by the Supreme Court of Canada.[27]

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[22] *Ibid* at para 141.
[23] *Ibid* at paras 145-158.
[24] *Bissonnette QCA* at paras 90 to 100.
[25] Ibid at paras. 107 and 111.
[26] *R. v. Smith (Edward Dewey),* [1987] 1 SCR 1045 at para 56.
[27] *R. v. Luxton* [1990] 2 S.C.R. 711.

34. For there to be consistency in the law, we submit that this Court must clarify that we cannot provide a discount to mass murders. An analysis of the provision's constitutional validity cannot, and should not, be conducted in isolation of the facts of the case, particularly given that it involves a case of mass murder. As Justice Lamer wrote:

> In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular characteristics of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.[28]

35. The Supreme Court has never directly defined an underlying purpose for section 12. However, it is clear from the case law that section 12 prohibits the imposition of certain treatments or punishments, through a contextual assessment of "the effect that the [treatment or] punishment may have on the person on whom it is imposed" balanced against the objective for that treatment or punishment.

36. It is well-established that for a measure to constitute as cruel and unusual, the treatment or punishment must be "grossly disproportionate". Grossly disproportionate treatment is treatment, "so excessive as to outrage standards of decency", and be "abhorrent or intolerable to society".[29] The phrase "cruel and unusual" is a "statement of a compendious norm", one that is meant to be context-specific.[30]

37. The decision regarding whether to make the parole ineligibility periods concurrent or consecutive, is legislatively left within the *discretion* of the sentencing court, to be determined upon a judicious application of all of the relevant sentencing principles in the unique factual context of each individual case. These principles require judges to consider the gravity of the crime and the degree of responsibility of the offender when handing down a sentence as well as the background of the offender (especially in the case of Indigenous and Black people).[31]

38. Unlike with mandatory minimum sentences, which have been found to disproportionally affect disadvantaged persons and members of minority groups, a global and contextual approach

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[28] *R. v. Smith (Edward Dewey),* [1987] 1 SCR 1045 at para 56.
[29] *Smith*, supra, at 56; *R v Morrisey*, [2000] 2 SCR 90, at paragraph 26.
[30] *Smith*, supra, at 46.
[31] *R v Morris*, 2021 ONCA 680; *R v Gladue,* [1999] 1 SCR 688.

to section 12 in the context of mass murders can allow judges to consider the role of social context in criminal sentencing and, as a result, prevent marginalized and vulnerable people from being impacted adversely and disproportionately. In some cases, where appropriate, the parole ineligibility periods may be made *consecutive*. In others, where inappropriate, the parole ineligibility periods may be made *concurrent*.

39. The number of victims or the nature of the circumstances are relevant when considering the sentencing for offenders and the constitutional validity of section 745.51. Indeed, this was a significant aspect of the Christchurch mosque shooting, where the offender sought to kill as many worshippers as possible who were attending the mosques.[32] It is important for this Court to indicate that marginalized communities who are often victims of violent attacks and/or hate in society will be protected from dangerous offenders.[33] Such concerns can be considered where judges are given the discretion to determine appropriate sentencing on a case-by-case basis.

PART IV – SUBMISSIONS ON COSTS

40. NCCM does not seek costs and asks that costs not be awarded against it.

PART V – ORDER

41. NCCM has been granted leave to intervene and present oral submissions not exceeding five minutes. No other order is requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2021.

Per:

Sameha Omer

Counsel for the Intervener National Council of Canadian Muslims

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[32] *R v Tarrant* at para. 2.

[33] *Paramount Fine Foods v Johnston,* 2021 ONSC 6558 at para 100.

PART VI – AUTHORITIES

Case law:

No.	Authority	Paragraph Reference
1.	*Canada (Citizenship and Immigration) v Canadian Council for Refugees,* 2021 FCA 72	11
2.	*Paramount Fine Foods v Johnston,* 2021 ONSC 6558	39
3.	*R v Ferguson*, 2008 SCC 6	4
4.	*R v Luxton*, [1990] 2 SCR 711	15
5.	*R v Morris*, 2021 ONCA 680	37
6.	*R v Morrisey*, [2000] 2 SCR 90	29
7.	*R v Tarrant*, [2020] NZHC 2192	12, 29, 30, 39.
8.	*R. v. Smith (Edward Dewey),* [1987] 1 SCR 1045	7, 12, 16, 17, 18, 24, 25, 26, 32

OTHER:

No.	Secondary Source	Paragraph Reference
9.	Gada Mahrouse, "Minimizing and denying racial violence: Insights from the Québec mosque shooting" (2018) 30:3 CJWL 471.	8