Unofficial English Translation of the Judgment of the Court

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF QUEBEC

Nos.: 200-10-003629-198, 200-10-003630-196
(200-01-207339-171)

DATE: November 26, 2020

CORAM: THE HONOURABLE FRANÇOIS DOYON, J.A.
GUY GAGNON, J.A.
DOMINIQUE BÉLANGER, J.A.

No.: 200-10-003629-198

ALEXANDRE BISSONNETTE
APPELLANT – Accused
v.

HER MAJESTY THE QUEEN
RESPONDENT – Prosecutor
and
ATTORNEY GENERAL OF QUEBEC
IMPLEADED PARTY – Impleaded Party
and
ATTORNEY GENERAL OF CANADA
IMPLEADED PARTY – Impleaded Party
and
ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL
INTERVENER

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JUDGMENT

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[1] This 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*. In 1976, Canada abolished the death penalty. For first degree murder, it replaced the death penalty with imprisonment for life with a 25-year parole ineligibility period, regardless of the number of victims. Things, however, changed in 2011. From that point on, in the event of multiple murders, judges could, in addition to imposing a life sentence, order parole ineligibility periods of 25 years to be served consecutively for each murder, for periods totalling 50, 75 or 100 years or even longer. The severity of these sentences was unprecedented. This is the context for the present judgment.

[2] Alexandre Bissonnette (the "appellant"), pleaded guilty to 12 counts, that is, six counts of first degree murder and six counts of attempted murder committed on January 29, 2017. He appeals against the sentence imposed on February 8, 2019 by the Honourable Mr. Justice François Huot of the Superior Court, which sentenced him to imprisonment for life while ordering that he not be eligible for parole [TRANSLATION] "until he has served at least 40 years of his sentence": *R. c. Bissonnette*, 2019 QCCS 354.

[3] Indeed, after ordering him to serve five concurrent minimum 25-year periods on counts 1 to 5, the judge ordered him to serve an additional (or consecutive) period of 15 years on count 6. The appellant asks the Court to set aside the order thus made pursuant to s. 745.51 *Cr.C.* (which provision allows for additional minimum 25-year periods of parole ineligibility for each first degree murder), to declare that section invalid and of no force or effect, and, accordingly, to order a total period of parole ineligibility of 25 years. While the appellant agrees with the judge that the provision is unconstitutional, he faults him for having selected the remedy he did, that is, reading in and rewriting the legislative provision, rather than simply striking it down.

[4] The Crown (the Director of Criminal and Penal Prosecutions, on behalf of Her Majesty The Queen), which also appeals, asks the Court to substitute a parole ineligibility period of 25 years for the 15-year period ordered by the judge on count 6. It therefore seeks a total parole ineligibility period of 50 years, on the ground that the judge committed overriding errors in concluding that a period of 40 years was sufficient.

[5] The Attorney General of Quebec, who also appeals, asks the Court to declare that s. 745.51 *Cr.C.* is constitutionally valid because it does not infringe ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). If the Court were to find that the provision is unconstitutional, he argues, subsidiarily, that the approach the judge selected, i.e., rewriting the provision (using the method sometimes referred to as "reading in"), was the correct remedy.

[6] Lastly, the Association des avocats de la défense de Montréal, which was authorized by the Court to intervene, argues that s. 745.51 *Cr.C.* is unconstitutional because it infringes ss. 7 and 12 of the *Charter*. In particular, it submits that there are no clear guidelines and that the total duration is excessive and disproportionate, being incompatible with human dignity and with the other sentencing principles.

I. CONTEXT

[7] There is no need to revisit all the facts of the case. The trial judge did so in detail in his judgment. It will suffice to situate the tragic events of January 29, 2017 within their context in order to understand the rest of this judgment. Of course, certain other facts put into evidence will be described in greater detail further on.

[8] In January 2017, Alexandre Bissonnette was 27 years old. He was on leave from work and from his studies due to an anxiety disorder. At that time, he visited a number of websites dealing with firearms and perpetrators of terrorist acts.

[9] He decided to take action following the federal government's announcement of its intention to increase the number of refugees admitted to Canada. On January 29, 2017, after the evening meal with his parents, he visited websites dealing with suicide and mass killings. At approximately 7 p.m., he left the house with two firearms and ammunition. He

headed towards the Quebec City mosque where, from 7:54 p.m. to 7:56 p.m., he fired on the worshippers present, hitting numerous victims, six of whom died, with others suffering severe injuries.

[10] After the attack, he left the site in his vehicle and headed towards the Parc national des Grands-Jardins with the intention of committing suicide there. He then began to doubt the legitimacy of his actions. He dialed 911 and spoke some 50 minutes with the dispatcher.

[11] At approximately 9 p.m., he was arrested by the police. He smelled of alcohol.

[12] He was questioned the following day. He mentioned his anxiety disorder and the intimidation he had suffered as an adolescent. He explained that he had often made plans to kill others and commit suicide. He stated that his goal was to save the lives of his fellow citizens. He said that, over the preceding months, he had developed a fear related to terrorist attacks for which religious groups had claimed responsibility.

[13] He also stated that he had been careful not to hurt any children when he committed the offences.

[14] On March 26, 2018, after first having pleaded not guilty, he indicated his intention to change his plea so as to assume full responsibility for the 12 counts. It should be noted that the twelfth count charged him with the attempted murder of 35 people, including three under the age of 16.

[15] For sentencing purposes, the defence filed the reports of three experts, who also testified before the trial judge.

[16] Dr. Lamontagne, a psychology expert, was of the opinion that the appellant has a fragile narcissistic personality and is not a psychopath. He pointed out that the appellant had been raised in a stable family. As regards the appellant's risk of reoffending and his dangerousness, he believed there was a possibility the appellant would one day be able to reintegrate into society. Dr. Faucher, a forensic psychiatry expert, was of the opinion that the risk of reoffending was not particularly significant. Dr. Allard, also a forensic psychiatry expert, found, at the end of her dangerousness analysis, that the risk was moderate.

[17] As a rebuttal witness, the Crown called Dr. Gilles Chamberland, a forensic psychiatry expert, in order to provide an additional perspective. In light of the expert reports presented by the defence, which he considered to be irreproachable, he gave his point of view on the appellant's risk of reoffending and his prospects for rehabilitation. He was of the opinion that the appellant's risk of reoffending could not be assessed on the basis of the usual criteria. Like the other experts, he stated that he was not in a position to predict the appellant's situation in 25 years, as his potential for rehabilitation was difficult to assess. He explained that it was difficult to understand the source of the

appellant's behaviour and anxiety. He suspected a borderline personality disorder, which is difficult to treat, but which can diminish over time. Only if the appellant strongly committed to therapy, with a great deal of effort, might he one day become fit to re-enter society without posing a risk.

II. THE TRIAL JUDGMENT

[18] In a particularly detailed judgment, the trial judge thoroughly summarized the evidence and stated that, pursuant to s. 745.51 *Cr.C.*, the Crown had requested that he sentence the appellant to six consecutive 25-year periods of parole ineligibility, for a total of 150 years. It should be noted that, on appeal, the Crown contests this perception, stating that it never suggested such a lengthy period. According to it, at most it requested that the provision be applied. Yet the Crown's application manifestly amounted to seeking a term of 150 years. In fact, that is what everyone understood. As it appears, however, the Crown has modified its approach on appeal, seeking, instead, the addition of only one consecutive period of 25 years, for a total of 50 years before the appellant is able to apply for parole.

[19] In this regard, this is what the judge had to say on the Crown's point of view:

> [TRANSLATION]
>
> [639] If Alexandre Bissonnette were to be sentenced to life imprisonment contingent on serving 150 years of the sentence before being eligible for parole, after causing the deaths of six people in less than two minutes while experiencing certain mental problems, what sentence could be contemplated, hypothetically, for someone having stabbed 10 people at a shopping centre? 250 years of ineligibility? 350 years? What about a hitman who, strictly for financial gain, killed 25 people over a 10-year period? 625 years of ineligibility? 800 years?

[20] There is a reason the judge mentioned 800 years: to demonstrate the excessiveness of the Crown's suggestion. The Crown is therefore grossly mistaken in writing, in its memorandum: [TRANSLATION] "we deplore the excess reflected in the trial judge's arguments […] where he hypothesizes periods of 800 years, which is light-years away from the period of 50 years acceptable to the Crown". In making this statement, it is distorting the judgment, while denying its own arguments, because a period of 50 years was not acceptable to the prosecution at first instance.

[21] The judge indicated that he was required to impose a sentence on the accused that is proportionate both to the gravity of the offences and to his degree of responsibility. He pointed out that first degree murder is at the top of the scale of gravity of indictable offences, while attempted murder falls within the category of offences whose objective gravity is, aside from murder, the greatest. As regards subjective gravity, the judge identified the following nine aggravating factors:

- Planning and premeditation;
- The large number of victims;
- The location, a place of worship;
- The vulnerability of the victims;
- The young age of four victims;
- The high degree of violence;
- Motivation (the judge referred to s. 718.2(*a*)(i) *Cr.C.*, which deals with crimes motivated by hate based on factors such as race, ethnic origin and religion);
- The physical and psychological consequences experienced by the victims of the attempted murder; and
- The consequences experienced by loved ones and the general public.

[22] He refused, however, to consider the accused's lack of empathy towards the victims or the offence of terrorism, with which the accused had not been charged.

[23] He also pointed to nine mitigating factors:

- The absence of a criminal record;
- Cooperation with the authorities;
- The guilty plea;
- Remorse;
- The appellant's vulnerability;
- His mental state;
- Family support;
- The prospects of rehabilitation; and
- The moderate risk of reoffending.

[24] Nevertheless, the judge disregarded the appellant's alcohol consumption, his age, which he could not describe as young, his good character, as well as the stigmatization he would suffer. Surprisingly, the Crown sees here an effort by the judge to achieve a form of parity, in terms of numbers, between the aggravating and mitigating factors. There is, however, no basis for this view.

[25] Once he had identified the aggravating and mitigating factors, the judge analyzed the factors specifically set out in s. 745.51 *Cr.C.* (the offender's character, the nature of the offence and the circumstances surrounding its commission), as well as the penological principles codified in ss. 718 to 718.2 *Cr.C.*, in order to determine whether it would be appropriate to order that two or more 25-year parole ineligibility periods be served consecutively.

[26] With regard to the totality of sentences, he indicated that he had to consider the accused's age, because a total ineligibility period exceeding the offender's life expectancy would fully exhaust the utilitarian and normative goals of sentences.

[27] At the end of his analysis of the sentencing principles, the judge concluded that the minimum period before parole eligibility should exceed 25 years, but should be less than 50 years, since, in his view, both were unacceptable. He therefore had to analyze the constitutionality of the provision, because it does not confer such discretion on the judge.

[28] Consequently, he examined s. 745.51 *Cr.C.* in light of ss. 7 and 12 of the *Charter*.

[29] As regards s. 12, although s. 745.51 *Cr.C.* does not impose a minimum sentence, the judge considered it appropriate to apply the test established by the Supreme Court in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

[30] In accordance with the first step of the test, he assessed what would constitute a period of ineligibility proportionate to the circumstances. He was of the opinion that a total parole ineligibility period ranging between 35 and 42 years would be just and appropriate.

[31] He had the following to say before concluding that the provision is unconstitutional:

> [TRANSLATION]
>
> [980] The Court considers that imposing two consecutive ineligibility periods of 25 years each on the accused would go against his s. 12 guaranteed rights. Such sentences are grossly disproportionate and totally incompatible with human dignity.
>
> [981] Despite the horror of his crime, Alexandre Bissonnette cannot be compared to a serial killer or a hitman. It took barely two minutes of his life to classify him as a killer, without any other gratification than that of having had the "moment of glory" that he wanted so badly.

> [982] Canadians would consider “abhorrent and intolerable” any sentence denying the accused a reasonable prospect of release on parole in the last years of his life. The effect of such a sentence would be grossly disproportionate to what is appropriate in the circumstances.
>
> [983] Despite all the deference the undersigned owes to Parliament and the strict and demanding constitutional standard set by s. 12 of the *Canadian Charter of Rights and Freedoms*, I consider that this is one of the very rare cases justifying the intervention of a court.
>
> [984] For all these reasons, the Court concludes that s. 745.51 of the *Criminal Code* would result in the imposition of a grossly disproportionate sentence on Alexandre Bissonnette and, as a result, one that is “cruel and unusual”.

[32] As regards s. 7 of the *Charter*, given his view that the provision infringed on the appellant’s right to liberty and security of the person, he determined whether this infringement was contrary to the principles of fundamental justice. He was of the opinion that the provision is overbroad and its impact grossly disproportionate to its purpose.

[33] The judge also considered the concepts of [TRANSLATION] “protection of hope” and [TRANSLATION] “protection of human dignity”. As regards the first, he concluded that the accused had failed to demonstrate, on a balance of probabilities, that the protection of the hope of one day being eligible for parole met the essential criteria identified in the case law for recognition as a principle of fundamental justice. He found, however, that the protection of human dignity is a principle of fundamental justice, particularly because of its importance in Canadian law, the consensus surrounding it and the fact that it is sufficiently precise to qualify as a “manageable standard”.

[34] Consequently, the judge decided that s. 745.51 *Cr.C.* also infringes the right to liberty and security of the person guaranteed by s. 7 of the *Charter*, because it is contrary to the following three principles of fundamental justice: overbreadth, grossly disproportionate negative impact and the protection of human dignity.

[35] With respect to s. 1 of the *Charter*, the judge concluded that the Attorney General of Quebec had failed to establish that the restrictions on the rights guaranteed under ss. 7 and 12 of the *Charter* were reasonable and demonstrably justified in a free and democratic society.

[36] He pointed out that when a statute is declared unconstitutional, the usual remedy is to invalidate it. There are instances, however, in which the statute is substantially constitutional and its unconstitutionality is marginal, which he considered to be the case here. He was of the view that when it is possible to remedy the unconstitutionality of a legislative provision without completely invalidating it, the court must consider the alternatives. Section 52 of the *Charter* provides, notably, for the possibility of reading in and reading down.

[37] The judge noted the conditions that must be met in order to apply reading in and, in this regard, he cited *Schachter v. Canada,* [1992] 2 S.C.R. 679.

[38] Taking these principles into account, the judge considered it appropriate to apply reading in to s. 745.51 *Cr.C.* so as to confer upon the court a genuine discretionary power to impose, when necessary, consecutive periods of parole ineligibility that, in the present case, could total 25 to 50 years, and not only 25 or 50 years, the whole in accordance with the principles of proportionality, of totality of sentences, of protection against overbreadth or grossly disproportionate impacts and of the preservation of human dignity.

[39] In short, after concluding that s. 745.51 *Cr.C.* is unconstitutional, the judge nevertheless decided that there was no need to declare it constitutionally invalid, but that it would be appropriate instead to read in new wording that would allow a court to impose consecutive periods of less than 25 years.

[40] Thus, on the first five counts of first degree murder, he ordered the appellant to serve a minimum of 25 years before being eligible for parole, such periods of ineligibility to be served concurrently. On the other hand, on the sixth count, in accordance with reading in, he sentenced the accused to serve a minimum of 15 years before being eligible for parole, such period of ineligibility to be served consecutively, after the five others periods, for a total of 40 years.

III. THE MOTION TO ADDUCE FRESH EVIDENCE

[41] The appellant filed a motion requesting that the Court accept the filing of fresh evidence. The evidence in question is a compilation of videos filmed at the Quebec City mosque on the evening of the crimes. This evidence was disclosed by the Crown, but was not filed into evidence at trial.

[42] The appellant submits that the judge erred regarding the circumstances in which the offences were committed, which errors impacted his decision to order a parole ineligibility period exceeding 25 years. More specifically, he argues that the judge erred in his assessment of the aggravating factor involving the young age of the victims, particularly because he wrongly accepted the testimony of Mr. Ech-Chahedy. The purpose of this evidence is to reassert his argument that he was careful not to harm any children. In view of the conclusions in this judgment, this aspect of the case is no longer really in dispute. Nevertheless, it needs to be addressed to demonstrate the weaknesses of the argument.

[43] Mr. Ech-Chahedy and his minor son are among the victims of the offence of attempted murder. He testified that the appellant fired in his direction and in that of his son and that the appellant therefore lied to the police when he said he had been careful about the children. On the plan filed into evidence, he indicated the place where he and his child were located when the appellant fired in their direction, towards the north wall.

The judge accepted his testimony and concluded that the appellant had aimed at and attempted to hit children.

[44] According to the appellant, the scenes recorded by the mosque's cameras on January 29, 2017, and filed into evidence at trial, themselves contradict this testimony. He alleges in his motion to adduce fresh evidence that when he is seen entering the prayer room, Mr. Ech-Chahedy and his son are out of the frame. He says that this is the same as regards the two other children seen on screen in the preceding seconds. According to him, the evidence therefore demonstrates that Mr. Ech-Chahedy was not in the prayer room when the appellant fired, which contradicts this witness's account.

[45] Yet the trial judge wrote:

> [TRANSLATION]
>
> [502] Regardless of how the ballistics evidence is interpreted, one brutal fact remains. Alexandre Bissonnette fired three times in the direction of the north wall while three small children were trying to flee with Mr. Ech-Chahedy.

[46] In his motion, the appellant suggests that the fresh evidence demonstrates that Mr. Ech-Chahedy was outside the prayer room when the appellant entered it. According to him, this would establish [TRANSLATION] "without any possible ambiguity or interpretation" that Mr. Ech-Chahedy was mistaken about decisive facts. In this sense, admitting the evidence would foster the search for the truth.

[47] The fresh evidence does indeed show that when the appellant entered the prayer room and fired there, at 7:55:04 p.m., Mr. Ech-Chahedy and his son were already outside the mosque. Furthermore, one can see, on camera 8, that when the two victims collapsed, there was no child near the north wall and Mr. Ech-Chahedy was no longer in the prayer room.

[48] The appellant is therefore correct in saying that the fresh evidence contradicts Mr. Ech-Chahedy's testimony on which the trial judge relied.

[49] This finding, however, must be nuanced. Indeed, whether or not Mr. Ech-Chahedy was mistaken, the fact remains that the appellant pleaded guilty to a charge of attempted murder of three children.

[50] Furthermore, according to this evidence, it appears that at the time the appellant fired in the direction of the mihrab, two children were hiding at the back of the room and a little girl was immobile nearby. While a man can be seen collapsing at the entrance to the mihrab, the little girl is standing, near the shots, completely frozen. It is only a few seconds later that another man shelters her behind a column, still very close to the mihrab.

[51] The evidence therefore establishes that Mr. Ech-Chahedy's testimony is not entirely consistent with reality. However, the guilty plea and the evidence as a whole show that the appellant attempted to kill young victims and that he was certainly not [TRANSLATION] "careful about the children", as he stated to the police officers. In short, the argument does not hold, even if the matter were still relevant, and the motion will therefore be dismissed.

[52] Let us now consider the constitutionality of the legislative provision.

IV. CONSTITUTIONALITY OF S. 745.51 Cr.C.

1. Context

[53] Section 745.51 *Cr.C.* gives the judge the discretion to impose consecutive ineligibility periods. In this context, the issue is whether, in and of itself, a sentence of imprisonment for life, without the possibility of parole before a period of 50, 75, 100 or 125 years, or even longer, represents, by its very nature or because it is grossly disproportionate, a degrading and dehumanizing treatment that is intrinsically cruel and unusual within the meaning of s. 12 of the *Charter* or that infringes the right to life, liberty and security of the person within the meaning of s. 7 of the *Charter*.

[54] The analysis of the provision's constitutionality must be carried out independently of the appellant's case, notwithstanding the horror of his actions.

[55] It bears reminding that, until his death, the appellant will be subject to a sentence of imprisonment; this is the meaning of a life sentence, and he will carry the societal stigma of his conviction in perpetuity: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, p. 545.

[56] In order to clearly understand the legislative context, we must take a step back.

[57] When the death penalty was abolished, Parliament adopted the principle of two categories of murder: first degree murder and second degree murder. Both offences carried a sentence of imprisonment for life. A conviction for first degree murder resulted in a 25-year mandatory parole ineligibility period (although, at that time, the offender could ask a jury to reduce that period as of the fifteenth year: s. 745.6(1) *Cr.C.*), and a conviction for second degree murder resulted in a parole ineligibility period of 10 to 25 years.

[58] The 25-year ineligibility period was one of the most severe in Western countries at the time and was the fruit of a political compromise: *R. v. Swietlinski*, [1994] 3 S.C.R. 481, p. 492; *R. v. Simmonds*, 2018 BCCA 205, paras. 8-9. Opponents of the abolition of capital punishment argued that the only other reasonable possibility was imprisonment for life without the possibility of parole for a minimum of 25 years. Although data showed that the average mandatory term actually served at that time was from 10 to 15 years, Parliament

chose a 25-year period: Allan Manson, *The Easy Acceptance of Long Term Confinement in Canada*, (1990) 79 *C.R.* (3d) 265.

[59] In 1977, right after the abolition of the death penalty and the establishment of the mandatory sentences for murder that we have today, the House of Commons enacted the *Criminal Law Amendment Act*, which made significant amendments to the *Parole Act*. In short, those amendments restructured the prison system and expanded the role and functions of the Parole Board of Canada.

[60] The constitutionality of a life sentence coupled with a 25-year period of parole ineligibility for first degree murder was challenged. It was confirmed in *R. v. Luxton*, [1990] 2 S.C.R. 711. It should be noted that, in coming to that conclusion, Lamer, C.J. considered the existence of mechanisms for reviewing and reducing the ineligibility period, including "[…] the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and […] early parole": *Luxton*, *supra*, pp. 724-725.

[61] Until 2011, the state of the law remained unchanged, and offenders convicted of multiple murders were sentenced to life imprisonment, coupled with periods of ineligibility, all served concurrently. Thus, all those convicted of first degree murder, regardless of the number of murders, could hope to apply for parole after 25 years, and sometimes even 15 years in certain cases.

[62] Section 745.51 *Cr.C.* was introduced into the *Criminal Code* in 2011 by the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act / Loi protégeant les Canadiens en mettant fin aux peines à rabais en cas de meurtres multiples* (S.C. 2011, c. 5). It is worthwhile to set out the wording of the provision:

Ineligibility for parole — multiple murders	**Délai préalable à la libération conditionnelle — meurtres multiples**
745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made pursuant to section 745.21, by order, decide that the periods without eligibility for parole	**745.51 (1)** Au moment de prononcer la peine conformément à l'article 745, le juge qui préside le procès du délinquant qui est déclaré coupable de meurtre et qui a été déclaré coupable d'un ou plusieurs autres meurtres — ou en cas d'empêchement, tout juge du même tribunal — peut, compte tenu du caractère du délinquant, de la nature de l'infraction et des circonstances entourant sa perpétration ainsi que de toute recommandation formulée en vertu de l'article 745.21, ordonner que les périodes d'inadmissibilité à la

for each murder conviction are to be served consecutively.	libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement.
(2) The judge shall give, either orally or in writing, reasons for the decision to make or not to make an order under subsection (1).	**(2)** Le juge est tenu de motiver, oralement ou par écrit, sa décision de rendre ou de ne pas rendre l'ordonnance prévue au paragraphe (1).
(3) Subsections (1) and (2) apply to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the National Defence Act or the Crimes Against Humanity and War Crimes Act.	**(3)** Les paragraphes (1) et (2) s'appliquent aux meurtres commis au plus tôt le lendemain de l'entrée en vigueur du présent paragraphe pour lesquels le contrevenant est condamné à une peine d'emprisonnement en vertu de la présente loi, de la Loi sur la défense nationale ou de la Loi sur les crimes contre l'humanité et les crimes de guerre.

[63] Section 745.51 *Cr.C.* permits a judge who imposes a life sentence for more than one murder to order that all the parole ineligibility periods applicable to each murder be served consecutively, in situations in which the circumstances, the nature of the offence and the character of the offender justify it. The provision does not set a maximum duration for the total mandatory imprisonment that can thus be ordered.

[64] The interpretation of s. 745.51 *Cr.C.* does not pose a problem. All agree that the discretion conferred on the judge allows him to impose consecutive 25-year periods of ineligibility for each murder in the first degree. Thus, in the present case, the ineligibility periods involved are periods of 25, 50, 75 or 100 years or even more. What was sought here, at first instance, was an order preventing the appellant from applying for parole before he had served 150 years.

[65] All the 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.

[66] It is established that the parole ineligibility period is a constituent element of the punishment meted out on the offender and therefore forms part of the sentence. The greater objective gravity of first degree murder is reflected by the imposition of a longer mandatory period of ineligibility than that provided for in cases of second degree murder: *R. v. Shropshire,* [1995] 4 S.C.R. 227, paras. 21 and 23.

[67] The court, when examining the constitutionality, must therefore take into account the duration of the parole ineligibility and consider the actual effect of the sentence on the offender: *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, para. 41.

[68] It should be noted that an offender convicted of murder remains subject to a sentence for life, because the law imposes imprisonment in perpetuity. If parole is granted, it does not end or alter the sentence; it merely changes the conditions, including the location, under which it is served: *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, para. 1.

[69] The purpose of s. 745.51 *Cr.C.* is not to sentence the offender for life. Section 235(1) *Cr.C.* already deals with that aspect of the punishment. Rather, s. 745.51 *Cr.C.* seeks to prevent the Parole Board from exercising its discretionary power to release the offender on parole, for periods of 50, 75 or 100 years or more, rather than 25 years. Until the 2011 legislative amendment, imprisonment for life was intimately and legislatively tied to the possibility for the prisoner to apply for parole after 25 years.

[70] However, well before s. 745.51 *Cr.C.* 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: *R. v. M. (C.A.), supra*, p. 546. It is clear that never before had Parliament contemplated a minimum period of detention as long as 50 years and more.

[71] The coming into force of s. 745.51 *Cr.C.*, with its possibility of successive ineligibility periods, therefore significantly changed things, to such an extent that its constitutionality is now being challenged.

[72] The provision's constitutionality must be analyzed in light of the fact that, in Canada, even the worst criminal having committed the most heinous of crimes benefits at all times from the rights guaranteed under the *Charter*.

2. Section 12 of the *Charter*

[73] Section 12 of the *Charter* reads as follows:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12**. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[74] This section protects against any cruel and unusual punishment, namely, a sentence that is "'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society": *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, para. 45, citing *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, para. 24, and *Morrisey*, *supra*, para. 26. It is not sufficient that the sentence be merely disproportionate or excessive. The sentence or its effects must be grossly disproportionate to what would have been appropriate.

[75] In *R. v. Smith*, [1987] 1 S.C.R. 1045, pp. 1073-1074, Lamer, J. provided an overview of the considerations for determining whether a sentence is grossly disproportionate:

> 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 circumstances 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. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.
>
> One must also measure the effect of the sentence actually imposed. If it is grossly disproportionate to what would have been appropriate, then it infringes s. 12. The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. Sometimes it will be the result of the combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality. For example, twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement. Finally, I should add that some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders.

[76] These remarks, which are still relevant, indicate that a process that does not take into account the gravity of the offence, the characteristics of the offender and the particular circumstances of the case in order to determine the appropriate sentence to punish, rehabilitate or deter the offender could result in a grossly disproportionate sentence. It should be noted that, in his analysis, Lamer, J. was careful to include the possibility of the offender's rehabilitation.

[77] Section 12 also seeks to prevent sentences whose very nature is unacceptable, "such that Canadians would find the punishment abhorrent or intolerable": *Morrisey*,

supra, para. 26; Peter Hogg, *Constitutional Law of Canada*, 5th ed., Toronto, Thomson Reuters, 2016, vol. 2, ch. 53, p. 53-3; Dwight Newman, *Cruel and Unusual Treatment or Punishment* in *Halsbury's Laws of Canada – Constitutional Law, Charter of Rights*, Markham, LexisNexis, 2019; Lisa Kerr and Benjamin L. Berger, *Methods and Severity: The Two Tracks of Section 12*, (2020) 94 *S.C.L.R.* (2d) 235.

[78] Treatments which, from the outset, can be said to be incompatible in and of themselves with human dignity, such as the death penalty, torture and other corporal punishment (as Lamer, J. stated in *Smith, supra*, p. 1074: "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash"), were abolished before the advent of the *Charter*. Reference must be had to *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, [2002] 1 S.C.R. 3, a judgment that deals with deportation to a country that uses torture, for an indication of the notion of a sentence that is unacceptable by its very nature. This is a sentence that is "[…] so inherently repugnant that it could never be an appropriate punishment, however egregious the offence": *Suresh*, *supra*, para. 51.

[79] The discretion conferred on the judge by a legislative provision, such as s. 745.51 *Cr.C.*, cannot be used to confirm the provision's validity if the sentence resulting therefrom is intrinsically unacceptable *by nature*. In other words, 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 to impose such a sentence.

[80] The Supreme Court has often reiterated that the test for determining whether a sentence is severe to the point of being cruel and unusual is a stringent one, because Parliament may lawfully decide to punish certain behaviour by enacting heavy penalties. As we have seen, in order to infringe s. 12, a sentence must not merely be excessive; it must be grossly disproportionate to what is appropriate, having regard to the circumstances and the character of the offender: *Nur*, *supra*, para. 39; *Smith*, *supra*, p. 1072.

[81] For the past five years, Canadian courts have applied the test formulated in *Nur*, whose principles were developed for challenges of minimum sentences.

[82] The two-step inquiry adopted in that decision allows courts to determine whether the minimum sentence is grossly disproportionate. In the first step, the court determines what would constitute a proportionate sentence for the offence. In the second step, the court must ask whether the minimum sentence is grossly disproportionate when compared to what would be a fit sentence for the offender or for any other reasonable hypothetical offender: *Nur*, *supra*, paras. 46 and 77; *Boudreault*, *supra*, para. 46.

[83] This is the test the trial judge applied, an approach criticized by all the parties. Like them, the Court is of the opinion that the judge was not entitled to indiscriminately apply the *Nur* test, one developed to assess the constitutionality of minimum sentences, which, as we know, is not the case here. This was not the proper approach. Since s. 745.51 *Cr.C.* gives the judge the discretion to impose consecutive periods, without doing so being mandatory, the issue cannot be approached as if one were dealing with a minimum sentence. In other words, since the judge is not obliged to impose consecutive periods, a large part of the exercise described in *Nur* is irrelevant.

[84] In the present case, the process the judge followed consisted in determining that even only one 25-year consecutive period, resulting in a total of 50 years, would have a grossly disproportionate effect on the appellant. This approach led him to determine that the only option offered by Parliament, which is to add a 25-year period for each murder, was not appropriate.

[85] Justifiably, the judge was of the view that it would be unrealistic to believe that sentences would always be proportionate if he were forced to impose total ineligibility periods of 50 or 75 years. He wrote:

> [TRANSLATION]
>
> [1051] It is simply unrealistic, however, to think that sentences of 25, 50 or 75 years of ineligibility will always be proportionate. In the case of first degree murder, s. 745.51 does not allow for any alternative that would permit the court, using genuine discretionary power, to tailor the sentence to the offender's specific situation through intermediate sentences.

[86] In the appellant's opinion, the provision is unconstitutional not because the judge is obliged to make the order, but because it necessarily has grossly disproportionate effects if the order is made. He is of the view that the loss of the hope of obtaining parole after 25 years is an element that, in and of itself, could make the sentence grossly disproportionate. In other words, the mere possibility that a judge could impose a life sentence without the possibility of parole before 50 years or more would always be cruel and unusual, by the very nature of the sentence and its dehumanizing effects which deprive an accused of all realistic hope of one day being released. The intervener shares this point of view.

[87] According to the Attorney General of Quebec and the Crown, a life sentence without the possibility of parole before 50 years or more will not always be cruel and unusual, such that the provision is constitutionally valid. They argue that this sentence could be fit in certain cases.

[88] This approach is similar to the one the Supreme Court applied in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, paras. 167-168, in which it was held that, even in cases where Parliament has provided the possibility of imposing a sentence that

is usually grossly disproportionate, this will not necessarily lead to a finding of unconstitutionality if there is a possibility that, in some circumstances, the sentence will not be grossly disproportionate. Thus, a provision providing only the possibility of imposing a sentence that could be cruel and unusual would not infringe s. 12 of the *Charter*, because, presumably, a judge would not impose it, since he has a choice.

[89] Following this logic, 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?[1]

[90] To answer the question, one must consider the very broad spectrum the provision covers and the fact that it permits a court to prevent an offender from applying for parole for a period that greatly exceeds his life expectancy or even that of any human being.

[91] From the psychopathic serial killer who carries out murders over many years on victims who are tortured to death, to the mass murderer who, in a single event, takes the life of several persons, to the man who is wrathful after a breakup and murders his spouse and children, to the desperate mother who does the same, to the person afflicted with mental problems, the situations covered by s. 745.51 *Cr.C.* are numerous and varied. The provision can cover “a wide range of potential conduct”: *Lloyd*, *supra*, para. 27, citing *Nur*, *supra*, para. 82. Not only are the situations covered highly varied, but the number of victims may change considerably from one case to another and will not necessarily reflect the offender’s degree of moral responsibility or his chances of rehabilitation. In fact, the number of victims to be used as a basis for a judge to stack periods of ineligibility is a legislative choice that is difficult to reconcile with the sentencing criteria in place in Canada.

[92] First, the disproportionality is exaggerated and manifest in any case where there is a possibility of imposing a parole ineligibility period that highly exceeds the life expectancy of any human being.

[93] For example, in the event of an order deferring parole eligibility for 100, 125, 150 or even more years, given that a convicted offender cannot be less than 18 years old, he would be at least 118, 143 or 168 years old, or even older, before being eligible for parole. This mere statement is an aberration. An order of this nature is absurd. Such figures might give some people a sense of satisfaction, but they are deceptive nonetheless. A court must not make an order that can never be carried out. An order authorizing an offender to take a step that he will never be able to take, because the time for doing so will necessarily fall after his death, brings the administration of justice into disrepute. Parliament cannot allow such a hypothesis to serve as the basis for a judicial decision. Such senselessness cannot stand and is, in and of itself, cruel and unusual punishment

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[1] For example, the Christchurch massacre (51 victims) could have resulted in a period of 1,275 years, while that at the Polytechnique (14 victims) a period of 350 years.

that is degrading because of its absurdity. It is a sentence that will always be grossly disproportionate. It contemplates a possibility that will never be able to come to fruition. This is why the provision is absurd and constitutes an attack on human dignity.

[94] This disproportion may well satisfy a vengeful spirit. However, as Lamer, J. pointed out, vengeance has no role to play in a civilized system of sentencing. Unlike vengeance, retribution incorporates a principle of moderation and requires the application of a just and appropriate sentence: *R. v. M. (C.A.), supra*, p. 557.

[95] Some would argue that, in any event, it would be tantamount to a sentence of imprisonment for life without the possibility of parole. This is not a valid argument. First, imprisonment for life without the possibility of parole does not exist in Canada. Second, imprisonment for life is limited in time by the death of the offender. In other words, such a sentence is at least tied to the lifetime of a human being, while ineligibility periods totalling 100 years and more have nothing in common with the duration of a human life. That said, the provision's constitutionality must be examined in light of the legislative choice and not on the basis on what the provision might have meant had it been written differently.

[96] As regards periods totalling 75 years, the minimum age to become eligible for parole would be 93 years, although it would be much more in the vast majority of cases, since offenders are rarely 18 years old. While such an order, unlike the preceding ones, might come to fruition in extremely rare cases, it would still be cruel and unusual because of the unrealistic nature of the prospect. Although based on a court decision, the offender's hope of regaining freedom would be illusory. It bears reminding that parole is not automatic. Only the right to apply for parole is a given, which means that parole will likely only be authorized at a later date. The provision is odious and degrading, and courts cannot be used for the purposes of chimerical justice. The result is therefore just as grossly disproportionate as periods of 100 years or more, despite its apparent plausibility.

[97] There remains the possibility that the judge will decide to impose a single additional period of ineligibility, that is, to add a 25-year period of ineligibility for any of the other multiple murders, bringing the period up to 50 years. The drafting of the provision, however, causes a difficulty: limiting the order to only one other murder would not concretely recognize the value of each of the lives lost, contrary to Parliament's wishes. It might appear that this 50-year limit satisfies the fundamental test of proportionality in sentencing. However, this is not the case, as the trial judgment shows: the lack of discretion as to the additional duration and the result obtained (50 years) certainly do not satisfy the proportionality of sentences requirement.

[98] According to the appellant, an inmate who has no hope of ever regaining his freedom would be subjected to treatment which, by its very nature, is cruel and unusual. It is true that the hope of being released one day may be a motivation for rehabilitation. It also makes life inside prison walls more bearable, which, in turn, reduces the risk of violence in penitentiaries, an aspect that should not be overlooked.

[99] That being said, for the majority of accused persons, a 25-year period of parole ineligibility already represents a period equal to a good portion of their active life. Extending this period so it stands at 50 years 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.

[100] A convicted murderer's hope of one day being released is already limited by the fact that the sentence extends until his death. The conditions of the sentence may vary over time, but the person will never again be completely free. There will always be a connection between the offender and the prison system.

[101] Until now, Canadian courts have rejected the argument that the loss of hope of release may constitute an inhuman and degrading treatment within the meaning of s. 12 of the *Charter*: see, for example, *R. v. Husbands*, [2015] O.J. No. 2673, paras. 11-16 (Ont. S.C.J.); *R. v. Granados-Arana*, 2017 ONSC 6785, paras. 52-53; *R. v. Garland*, 2017 ABQB 198, paras. 35-36; *R. v. Downey*, 2019 ABQB 365, paras. 61-66.

[102] A number of judges, however, have used their discretion so as not to stack the periods of ineligibility, thereby preserving the possibility of the accused's rehabilitation: see *R. v. Klaus*, 2018 ABQB 97; *R. v. Delorme*, 2019 ABQB 2; *R. c. Ramsurrun*, 2017 QCCS 5791, upheld on appeal, 2019 QCCA 2133; *R. v. Sharpe*, 2017 MBQB 6; *R. v. Koopmans*, 2015 BCSC 2120.

[103] While the argument that protection of hope entails the unconstitutionality of the provision must be rejected, the principle that if an individual is rehabilitated after 25 years in prison, he must be able to apply for parole, otherwise the sentence would have all the attributes of a totally disproportionate sentence, must be preserved. If he is still a danger to society at that time, the Parole Board will not grant parole or will impose the appropriate conditions.

[104] In *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, para. 4, Wagner, J. (as he then was) noted that rehabilitation is a fundamental concept: "Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate".

[105] A number of international instruments and other documents issued by international organizations emphasize that the imprisonment regime should include a component whose aim is the reformation and social rehabilitation of individuals: *International Covenant on Civil and Political Rights*, December 16, 1966, (1976) 999 U.N.T.S. 187, came into force on March 23, 1976, art. 10, and was ratified by Canada in 1976; *American Convention on Human Rights*, November 22, 1969, O.A.S.T.S. no. 36, came into force

on July 18, 1978, art. 5; *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT), *25th General Report on the CPT's Activities (includes a section on the situation of life-sentenced prisoners)*, April 2016, p. 37, para. 73.

[106] It should also be noted that the *Rome Statute*, which governs the prosecution of the most serious crimes (war crimes, crimes against humanity, genocide) and with respect to which Canada played a key role, particularly in the establishment of the International Criminal Court, provides for a review of the sentence after 25 years if the individual has been sentenced to life in prison: *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 38544, came into force on July 1, 2002, art. 110(3), and was ratified by Canada on July 7, 2000. In *Quebec (Attorney General) v. 9147-0732 Québec inc.,* 2020 SCC 32, Brown and Rowe, JJ. wrote the following in this regard:

> [31] Continuing, Dickson C.J. then clarified that *not all* of these sources carry identical weight in *Charter* interpretation, stating that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified": p. 349 (emphasis added). This proposition has since become a firmly established interpretive principle in *Charter* interpretation, the presumption of conformity: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 65; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64; *Kazemi*, at para. 150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70.
>
> [32] Importantly, Dickson C.J. referred to instruments that Canada had *ratified*. […]

[107] An inmate rehabilitated after 25 years and not eligible to apply for parole before a second 25-year period would, in all cases, be subject to cruel and unusual treatment. The excessive length of the unnecessarily prolonged incarceration would be grossly disproportionate.

[108] One of the reasons that the indeterminate sentence imposed on dangerous offenders under s. 753(4.1) *Cr.C.* was not ruled unconstitutional is s. 761 *Cr.C.*, which provides for a review of the offender's situation by the Parole Board for the first time seven years after his detention and, thereafter, no later than every two years: *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, pp. 1408-1410; *R. v. Lyons*, [1987] 2 S.C.R. 309, p. 341. As La Forest, J. noted, imprisonment for life and indeterminate sentences are primarily imposed for the same purposes and on the same type of offender: *R. v. Lyons*, *supra*, p. 330.

[109] The provision is therefore excessive and its effect will be grossly disproportionate because it renders inapplicable certain fundamental components of Canadian criminal law, including the objectives of rehabilitation and proportionality. It is easy to conceive that a period of ineligibility of 50 years or more leaves no real room for the goal of rehabilitation, which is a vital value of our criminal justice system.

[110] Moreover, when passing sentence a few months or a few years after the commission of the multiple murders, the judge is not in a position, barring speculation, to genuinely know the likelihood that the accused will be rehabilitated in 25 years. He is in an even worse position, if that is possible, when dealing with a period of 50 years. The appellant's case is a good example.

[111] The provision, therefore, allows a court to impose cruel and unusual punishment, by preventing a reformed accused from having genuine access to the parole application process. It is worthwhile noting, once again, that access to the Parole Board does not mean the right to obtain parole, which many prisoners in Canada will, in fact, never obtain.

[112] Some might believe that, in very rare cases, it is possible to anticipate decades ahead that a psychopath, serial killer, or incorrigible killer will never be rehabilitated. Yet even for the worst murderer, the provision will lead to an absurd result if he is permitted to apply for parole after his death. Even life imprisonment does not give rise to such an aberration, because there is no pretense that the offender will be able to apply for parole after his death. Moreover, the provision cannot be saved by arguing that it would be constitutional in an exceptional or extremely rare case. As will be seen below, to save the provision, it would have to be rewritten, which is not appropriate in the present case.

[113] The discretion conferred on the judge cannot save the provision because, in almost all cases, the sentence will either be grossly disproportionate or unacceptable by nature.

[114] In short, s. 745.51 *Cr.C.* offends s. 12 of the *Charter*. The possibility of imposing periods by 25-year "leaps" is not a minimal impairment of the rights protected by the *Charter* and is not justified in a free and democratic society within the meaning of its s. 1, as the trial judge concluded in the appellant's case. The provision is clearly disproportionate in relation to the objectives of the legislation and the rights protected under the *Charter*.

[115] For reasons he explained well, the judge was of the view that stacking two 25-year periods, for a total of 50 years, would result in cruel and unusual treatment of the appellant and infringe s. 12 of the *Charter*. This finding is reasonable and should have led him to impose a 25-year ineligibility period in light of the actual wording of the provision, without rewriting it, as will be seen below.

3. Section 7 of the *Charter*

[116] Section 7 of the *Charter* protects against government interference with the right to life, liberty and security of the person except in accordance with the principles of fundamental justice:

Life, liberty and security of person	**Vie, liberté et sécurité**
7. 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.	**7**. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[117] The judge concluded that s. 745.51 *Cr.C.* infringes the right to liberty and security of the person protected under s. 7, a finding that is not challenged before the Court. Moreover, here is what he had to say on the subject, when he described the psychological impact that can result from an actual irreducible sentence of imprisonment for life:

> [TRANSLATION]
>
> [1011] Like the Defence, the undersigned also considers that the violation of bodily integrity and the severe psychological stress caused in this case by the provision cited above constitutes a violation of the offender's security.
>
> [1012] The prospect, for an accused convicted of multiple murders, of not being able to become eligible for parole before the foreseeable age of his death, regardless of any rehabilitation efforts he might make throughout his detention, can only create extremely prejudicial psychological stress for him, which could even lead him to commit irreversible acts with regard to his physical integrity or his own life.
>
> [1013] The evidence shows that the suicide rate in penitentiaries is about seven times higher than in the general population. Suicide is the leading cause of unnatural death among federal inmates.
>
> [1014] Most inmates who attempt suicide are Caucasian males between the ages of 31 and 40, who are serving either a life sentence or less than five years.
>
> [1015] Deprivation, isolation and separation from loved ones seem to be the main causes of suicide in the prison setting. Mental health problems are also a significant risk factor.
>
> [1016] In short, being sentenced to life imprisonment without any real possibility of parole leads to severe psychological stress. The loss of hope severs any connection with society, and offenders will consider themselves abandoned by society despite any efforts that they could make. Being truly rejected by the

> community in this way creates much more than ordinary anxiety; it infringes a personal right of fundamental importance.
>
> [References omitted]

[118] The question remains as to whether the rights are restricted in accordance with the principles of fundamental justice.

[119] A principle of fundamental justice must satisfy three conditions: (1) it must be a legal principle; (2) about which there is significant consensus that it is necessary to the way the legal system ought to fairly operate; and (3) that is identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security: *R. v. Malmo-Levine*, *supra*, para. 113, cited in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, para. 87; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, para. 29; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, para. 46; *Canadian Foundation for Children, Youth and the Law v. Canada*, 2004 SCC 4, [2004] 1 S.C.R. 76, para. 8.

[120] Principles of fundamental justice have in common that they are recognized as "essential elements of a system for the administration of justice which is founded upon the belief in 'the dignity and worth of the human person' and on 'the rule of law'": *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, pp. 503 and 512.

[121] The trial judge was of the opinion that the principle of protecting the hope of one day regaining one's liberty is not a principle of fundamental justice. This finding is not challenged here.

[122] The judge, however, concluded that the provision infringes three principles of fundamental justice: the principle of overbreadth, the principle of gross disproportionality and the principle of the protection of human dignity.

[123] Overbreadth and disproportionality may be examined in a single step: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, para. 40. To rule on this issue, courts must consider the scope of the legislation, determine its objective and ask whether the means selected by the legislation are broader than necessary to achieve the state objective or whether the impact of the legislation is grossly disproportionate to that objective.

[124] The objective of the provision must be found to be appropriate and lawful, and it must be stated succinctly and precisely: *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, para. 28, citing *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, para. 30.

[125] Characterizing the objective is based on "(1) statements of purpose in the legislation, if any; (2) the text, context, and scheme of the legislation; and (3) extrinsic

evidence such as legislative history and evolution": *R. v. Safarzadeh-Markhali*, *supra*, para. 31.

[126] The title of the statute enacting the addition of s. 745.51 *Cr.C.* provides a clue to Parliament's objectives: *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act/Loi protégeant les Canadiens en mettant fin aux peines à rabais en cas de meurtres multiples*. It therefore appears that the *Act* seeks to protect Canadians and, incidentally, to impose a harsher punishment on those who commit multiple murders.

[127] This also emerges from the parliamentary debates, including the remarks of the Parliamentary Secretary to the Minister of Justice, who stated that the legislation has three objectives: (1) better reflect the tragedy of multiple murders by enabling a judge to acknowledge each and every life lost; (2) reinforce the denunciatory and retributive functions of the parole ineligibility period; and (3) enhance the protection of society by permitting judges to keep the most incorrigible multiple murderers in custody for longer periods of time: *House of Commons Debates*, February 1, 2011.

[128] The provision therefore allows judges to punish the most incorrigible multiple murderers more severely by prioritizing the denunciatory and retributive effects associated with parole ineligibility periods, so as to properly reflect the increased objective gravity of their actions and the value of each human life and to better protect society against the most dangerous murderers.

[129] It should also be noted that, throughout the provision's review process, parliamentarians pondered which offenders were targeted by the provisions. Time and again, it was apparent that the offenders who should be punished in this way are multiple murders who are the most incorrigible, hopeless and unable to be rehabilitated. The cases of Robert W. Pickton, Clifford Olson and Paul Bernardo were repeatedly mentioned: Standing Committee on Justice and Human Rights, *Evidence*, December 9, 2010; *House of Commons Debates*, November 15, 2010; *House of Commons Debates*, February 1, 2011.

[130] On December 9, 2010, when the Bill was studied before the Standing Committee on Justice and Human Rights, Mtre John Giokas, the representative of the Department of Justice, clearly stated the desired scope of s. 745.51 *Cr.C.*:

> The criteria in the bill are designed to militate against the imposition of these kinds of orders, except in the most extreme cases of remorseless serial killers or the type of organized crime killers whom Mr. Ménard has just mentioned. These are people who are unlikely candidates for parole in any event.
>
> I would suggest that the criteria in the bill will limit the number of times a judge will impose such an order.

[131] The remarks of Mr. Daniel Petit, Parliamentary Secretary to the Minister of Justice, the Honourable Robert Nicholson, also speak volumes:

> Bill C-48 would ensure that our communities are safe and that offenders convicted of multiple murders, who should never be released, will never be released.
>
> (*House of Commons Debates*, February 1, 2011).

[132] Finally, while it is important not to give undue weight to the means adopted by Parliament, those means may nevertheless throw light on the objective of the challenged provision: *R. v. Moriarity*, *supra*, para. 27. Here, Parliament decided that the means for achieving the objectives would consist in additional parole ineligibility periods of 25 years, without compromise, for each additional first degree murder, but also in the cases of second degree murder if the offender had previously been convicted of murder. When Bill C-48 was studied before the Standing Committee on Justice and Human Rights, Liberal M.P. Brian Murphy proposed an amendment for exactly the purpose of granting judges greater discretion in applying the provision. This amendment was strongly opposed and ultimately rejected: Standing Committee on Justice and Human Rights, *Evidence*, December 9, 2010.

[133] This provides a rather clear indication that the purpose of the provision, with a view to protecting the public, was not to ensure better proportionality of sentences for multiple murderers. If that had been the case, Parliament would have chosen different means providing for greater flexibility, even while seeking stiffer sentences.

[134] In addition to the objective of protecting the public, Parliament sought to restore a balance between the rights of collateral victims and the rights of offenders. Indeed, during the enactment process, parliamentarians had a clear concern for the collateral victims of these tragedies. The remarks of M.P. Daniel Petit were to this effect:

> In this vein, the proposed amendments would also protect the families and loved ones of multiple murder victims, who are forced to listen all over again to the details of these horrible crimes at parole hearings held after the maximum parole ineligibility period possible under the current act expires.

Shortly thereafter, he added:

> The ultimate aim of our bill was to restore the balance between victims' rights and offenders' rights, a balance that had been lacking for some time.
>
> (House of Commons Debates, February 1, 2011)

[135] Thus, s. 745.51 *Cr.C.* has two apparent legislative objectives: (1) protect society from the most incorrigible killers, and (2) restore the balance between the rights of victims and those of multiple murderers and acknowledge the value of "every life lost".

[136] To achieve these objectives, Parliament instituted a mathematical solution, believing that each of the lives lost was worth 25 years of parole ineligibility and allowing judges to stack those periods. One of the results of this approach is that the families of victims will not have to attend a hearing before the Parole Board after 25 years, which will likely preserve the peace of mind of collateral victims.

[137] Once the legislative objectives have been clearly identified, the provision can be examined to determine whether it is overbroad or grossly disproportionate in relation to those objectives.

[138] In the first situation, we must ascertain whether the provision "goes too far and interferes with some conduct that bears no connection to its objective" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, para. 101). In other words, a provision will be overbroad "where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts" (*Canada (Attorney General) v. Bedford*, *supra*, para. 112 [italics in the original]).

[139] The scope of s. 745.51 *Cr.C.* exceeds its objectives, because it applies to all multiple murderers, regardless of the specific circumstances of each case. Indeed, this possibility is contrary to what Mtre John Giokas, the representative of the Department of Justice, stated before the Standing Committee on Justice and Human Rights, namely, that the criteria provided for in the provision militate against the imposition of such orders "except in the most extreme cases".

[140] To paraphrase the remarks of McLachlin, C.J. in *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, para. 72, the overbreadth problem cannot be avoided by interpreting a provision so narrowly that doing so effectively amounts to disregarding its wording. That would be the case in the present matter if the provision had to be read as applying only to psychopaths, organized crime hitmen or incorrigible murderers. This would also be the case if it had to be understood as allowing a court to acknowledge only two of the lives lost (resulting in a 50-year order, which is a less excessive outcome than 75 years and more, but nevertheless disproportionate). That, however, is not what the provision provides for.

[141] Be that as it may, the impugned provision indisputably allows judges to order consecutive periods to be served by all multiple murderers, even those whose situation was not mentioned during the parliamentary proceedings. It allows for the imposition of as many 25-year periods as there are murders. The criteria in s. 745.51 *Cr.C.* (the offender's character, the nature of the offence and the circumstances surrounding its commission) are very broad and are not solely protective of society.

[142] To the extent that the provision is enforceable, and to the extent that it is conceivable that such an order could be granted without proof that the offender represents a very high and incurable level of dangerousness, all multiple murderers are likely to face actual irreducible prison sentences, even if the order is not necessary to

further protect the public. In this sense, there is no rational connection between some of the provision's impacts and Parliament's first objective.

[143] There is also a lack of rational connection between Parliament's wish to recognize "every life lost" and the concrete possibility that this wish will come true if the solution chosen is to stack 25-year ineligibility periods. The biological reality of human life expectancy means that Parliament's wish could not be fulfilled in the vast majority of cases, such that the families of victims may be even more disappointed by the judicial decision not to impose consecutive periods. It appears that the provision does not really achieve the objective.

[144] Moreover, the provision is also overbroad and disproportionate, as demonstrated by the analysis under s. 12 of the *Charter*, because it prohibits an offender from applying for parole until a time that far exceeds his life expectancy. This, in fact, is what the trial judge stated:

> [TRANSLATION]
>
> [1046] How can imposing a 50-year period of ineligibility more fully achieve the aforementioned objectives for an offender who was 40 years old at the time of committing the murders, considering that the average life expectancy for the Canadian population is 79 for men and 83 for women? Is it really necessary, out of concern for proportionality or denunciation, to impose a sentence of 75 years of ineligibility on a convicted offender who, regardless of his or her age, is thereby given the certainty, outside the very rare cases of exercise of the royal prerogative of mercy already addressed, of leaving the penitentiary only when it is time to go to the morgue? Do we sincerely believe that a period of 100 or 150 years of ineligibility will offer better protection of the public, which includes Correctional Services officers, than the prospect of seeing the perpetrator of multiple murders perhaps being released on parole after having met, in the opinion of the Parole Board members, all of the penological goals set for the offender? It should be mentioned here that about 99.7% of detainees serving a sentence for murder do not commit another homicide after being paroled.
>
> [1047] The reality is that a term of imprisonment that no longer serves any penological purpose is in itself excessive. In *M. (C.A.)*, Lamer, C.J. stated:
>
> > "[…] in the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the *Code*, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value. […]"

[145] The discretion is not sufficiently circumscribed to prevent all overbreadth of the provision. Not only should the provision have avoided unfeasible orders, but the discretion should have been better circumscribed to prevent all overbreadth. Properly circumscribing the discretionary power, so as to reflect the true scope of the provision, would have ensured that it does not overreach: *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, para. 77.

[146] Consequently, the right to liberty and security is limited to an extent that greatly exceeds what is required for the protection of the public.

[147] Moreover, imposing a sentence of imprisonment for life without the possibility of parole for 50 or 75 years or even more on an offender who has a moderate or low risk of reoffending and presents a likelihood of being rehabilitated will only create an imbalance between offenders' rights and victims' rights. That being said, since s. 745.51 *Cr.C.* allows for such an outcome, it goes too far and interferes with a situation that bears no connection to its second objective.

[148] In short, and for the reasons already expressed in the s. 12 analysis, s. 745.51 *Cr.C.* violates the accused's right to liberty and security of the person by its prejudicial effect that is grossly disproportionate to its objectives.

[149] Parliament's response to the problem identified is so extreme as to be disproportionate to any legitimate government interest: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, para. 133.

[150] The judge was therefore right to conclude that the scope of the provision is clearly broader than necessary to achieve the objectives of denunciation and protection of the public.

[151] However, the judge's conclusion that the protection of human dignity is a principle of fundamental justice is debatable. Although human dignity constitutes a fundamental notion in Canadian law and finds expression in almost all *Charter* rights, including in connection with s. 12, it has not yet been established as a principle of fundamental justice: *Blencoe v. British Columbia (Human Rights Commission*), 2000 SCC 44, [2000] 2 S.C.R. 307, para. 76; *R. v. O'Connor*, [1995] 4 S.C.R. 411, para. 63; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, para. 120; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, p. 166; *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, p. 336. Given that the provision is overbroad and disproportionate, it is not necessary, in the context of the present case, to address this issue.

[152] In summary, by reason of its wording, s. 745.51 *Cr.C.* is not valid and offends ss. 7 and 12 of the *Charter*.

[153] As for s. 1 of the *Charter*, on which the parties placed little or no emphasis, the effects of the provision are so disproportionate that the interference with the rights

protected under the *Charter* cannot be considered minimal and there is no proportionality between the provision's objectives and its effects. Consequently, s. 745.51 *Cr.C.* cannot be saved by s. 1.

V. READING DOWN AND READING IN

[154] We know that after concluding that the provision was invalid, the judge opted for reading in as a remedial measure, by adding the discretionary power to impose periods of less than 25 years. In the present case, this approach was not appropriate.

[155] As Cory and Iacobucci, JJ. wrote in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 144, and McLachlin, C.J. wrote in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, para. 114, the leading case on constitutional remedies is *Schachter*, *supra*. In that decision, Lamer, C.J. pointed out that once the incompatibility or unconstitutionality of a statute or provision has been determined and defined, the courts have a variety of solutions available to them: (1) reading down (or severance), (2) reading in, or (3) purely and simply striking down the provision; in all cases, the court can temporarily suspend the effects of the measure chosen.

[156] There are cases in which only part of the statute or provision is offending or unconstitutional. If that part can be severed and the remaining portion is constitutional, it is logical to only declare that part inoperative through reading down, without having to strike down the entire statute or provision. This avoids declaring an otherwise valid part of the statute inoperative. For example, the offending portion of a statute that wrongly includes a discriminatory provision within a set of provisions that are constitutional could, through reading down, be struck down, while retaining a statute that otherwise serves the public interest. The exercise therefore consists in removing the defective portions (which is why it is sometimes referred to as severance).

[157] Reading in has the opposite effect: the court extends the scope of the legislation by adding to it what it wrongly excludes. For example, the court could include a group of people that the legislation does not specifically target. Reading in would be the logical solution, because simply striking down the statute could be contrary to the public interest. Indeed, if the entire statute were struck down, the persons it seeks to protect would no longer be protected until new legislation was enacted.

[158] To use either of these techniques, the inconsistency must be such that it can "be dealt with alone", which, in principle, will not be the case if there "are other parts of the legislation inextricably linked to" the offending portion: *Schachter*, *supra*, p. 717. As the Chief Justice wrote at page 697:

> Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized.

[159] Nonetheless, he provided this word of caution, also on page 697: “However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are”.

[160] These two techniques (reading down and reading in) make it possible to respect the role of the legislature if their use does not constitute an undue intrusion by the courts into the legislative sphere. In other words, it entails being “as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature”: *Schachter*, *supra*, p. 700, so that the legislation is in harmony with the *Charter* protections.

[161] In *Sharpe*, *supra*, para. 111, the Chief Justice was of the view that it is possible to rewrite “a law that is substantially constitutional and peripherally problematic” or “a law that is valid in most of its applications”. This clearly shows the spirit of a technique that seeks to solve a defined and isolated problem within an otherwise valid whole.

[162] The assumption is that Parliament would have enacted the statute, with the alterations made by the court, if it had known that it mistakenly excluded or included certain points: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, para. 51. By reading down or reading in, the wishes and role of the legislature are respected. The question is what the legislature would probably have done if it had been aware of the provision’s unconstitutionality. In other words, in a way, reading down or in allows the courts to rewrite the text of the statute as the legislature would have enacted it had it been aware of the problem.

[163] But that is not always the case, as the Chief Justice pointed out again on page 700 of *Schachter*:

> In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

[164] In short, there is no universal rule for determining the appropriate remedy. As stated in *Schachter*, p. 715: “[…] there is no easy formula” nor are there hard and fast rules. A slew of considerations must be taken into account. Without limiting the meaning of this statement, these include the extent and scope of the incompatibility, the purposes of the *Charter*, respect for the role of the legislature, undue intrusion into the legislative sphere, the choice of methods determined by the legislature, the text of the statute in question and the evidence filed. Nonetheless, reading down and reading in should be used “only in the clearest of cases”, and reading in is a “limited power”: *Schachter*, p. 725.

[165] It should be added that, despite the large number of factors to be taken into consideration, respect for the role of the legislature and the purposes of the *Charter* are

the twin guiding principles: *Sharpe*, *supra*, para. 114; *Vriend*, *supra*, para. 148; *Schachter*, *supra*, p. 715.

[166] The Attorney General of Quebec argues, subsidiarily, that reading in is appropriate in the present case because Parliament would likely have enacted the provision as rewritten by the trial judge had it been aware of the problem. He adds that this is particularly true since the stacking of 25-year periods of parole ineligibility is but one means of achieving the real objective, which is the imposition of harsher sentences that reflect the importance of each human life. He argues that this method merely forms part of the mechanism envisaged by Parliament, but is not the real objective of the legislation, its essence. He adds that the choice of methods, if they prove to be unconstitutional, does not prevent the use of this type of interpretation, and the measure chosen by the trial judge favours the attainment of Parliament's objectives without intruding on the legislative sphere. The Court does not agree with this argument.

[167] In *Vriend*, *supra*, Iacobucci, J. provided an important clarification. Even if the choice of methods used does not preclude any possibility of reading in, reading in cannot be used if the methods identified by the legislature are essential to the scheme and spirit of the law:

> 167 […] As I see the matter, a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them.

[168] The trial judge was of the opinion that the constitutional incompatibility does not go to the very heart of the provision, such that reading in is appropriate.

[169] Yet, in the present matter, the constitutional incompatibility identified by the judge does indeed go to the very heart of the provision. Admittedly, the law seeks to impose harsher sentences, so as to bolster the objectives of denunciation and retribution and, especially, thereby ensure the protection of society. However, the means chosen by Parliament—the fixed periods of 25 years—are so inextricably bound up with that objective that they form a part thereof to such an extent that they cannot be disregarded without unduly intruding on the legislative sphere. In reality, in the present case, the judge usurped the role of Parliament.

[170] Both the text of the statute and all of the evidence demonstrate that the 25-year "leaps" are part of the objective, which is to give the same value to every life taken after the first and, consequently, provide the possibility to punish all of these crimes in the same manner, that is, by 25-year minimum periods that can be stacked. However, as the Chief Justice stated in *Schachter*, *supra*, p. 708, reading in cannot be used when, to achieve its objectives, Parliament has "deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test […]".

[171] Altering such means would constitute an undue intrusion on the legislative sphere, since those means constitute Parliament's intention or, rather, "a second level of legislative intention": *Schachter*, *supra*, p. 708, referring to *R. v. Swain*, [1991] 1 S.C.R. 933. This was the case in *R. v. Seaboyer,* [1991] 2 S.C.R. 577, and *Ferguson*, *supra*, where Parliament had specifically chosen to exclude the trial judge's discretionary power. In other words, as has just been shown, reading in is not an appropriate remedy when "the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them": *Vriend*, *supra*, para. 167. As we know, that is the case here. Reading in squarely thwarted Parliament's intention: *Ontario (Attorney General) v. G*, 2020 SCC 38, para. 116.

[172] The text of the provision is simple and clear: "may […] by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively / *peut* […] *ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement*". For first degree murder, the period is necessarily 25 years according to s. 745 *Cr.C.*, such that the periods of ineligibility that may be imposed consecutively can only be 25-year periods. This cannot be an oversight on the part of Parliament, which clearly identified only fixed periods of 25 years. (The situation may differ for second degree murder, but the principle is the same.) Moreover, as seen above, the evidence establishes that this was a firm choice, despite the questions asked in Parliament and the concerns expressed by some.

[173] With respect to such exchanges, in *Villeneuve c. Ville de Montréal,* 2018 QCCA 321, paras. 46-47, the Court noted the usefulness, even if limited, of parliamentary proceedings to learn the intention of the legislature. In *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, para. 81, Gascon, J. reiterated that the debates, when unambiguous, form part of the indicia pointing to legislative intent.

[174] In the present case, they are particularly important to show that one absolutely cannot assume that Parliament would have accepted the text as rewritten by the judge had it been aware of the provision's invalidity. In fact, everything indicates that it was a deliberate, considered and conscious choice.

[175] Thus, Mr. Daniel Petit, who, as we know, was Parliamentary Secretary to the Minister of Justice, the Honourable Robert Nicholson, stated the following in the House of Commons on November 15, 2010:

> As I mentioned earlier, Bill C-48 will accomplish this by authorizing judges to add separate 25-year periods of parole ineligibility to the sentence of a multiple murderer, one for each murder after the first. These extra periods of ineligibility for parole would be added to the parole ineligibility period imposed for the first murder […].

[176] The Minister of Justice himself made such remarks when he testified before the Standing Senate Committee on Legal and Constitutional Affairs on March 2, 2011:

> Bill C-48 seeks to amend the Criminal Code to authorize a judge to sentence convicted multiple murderers to serve separate, concurrent 25-year periods of parole ineligibility to account for the second and each subsequent victim of their crimes. More importantly, these additional 25-year periods would run consecutively to the period of parole ineligibility imposed for the first murder.

[177] One could not be clearer. In fact, on March 3, 2011, the Minister acknowledged the criticism levelled at the lack of flexibility in the tailoring of the additional periods, a criticism that was nevertheless rejected:

> Senator Baker: I imagine, minister, that you get some criticism from some circles. You have implemented a regime whereby, although the judge has discretion, the judge must decide between 25, 50, 75; there is no in-between. A judge cannot say 35 years to 40 years. Am I correct that you have received some representation about that?
>
> Mr. Nicholson: I know there was representation, but under the existing law now, if you commit a second-degree murder a second time, you are looking at 25 years. It is already built in. This is consistent with provisions already in the Criminal Code.
>
> Senator Baker**:** Yes, but that only applies to a murder that has been committed, for which you have been convicted of in the past, and then do you one in the future.
>
> Mr. Nicholson: On the second murder, even if it were a second-degree murder, the parole ineligibility would be 25 years, starting at that point.
>
> No matter what we do, senator, there are always those who do not agree, but I can tell you that I have received very favourable reviews. As you know, your colleague, Albina Guarnieri, has championed this particular cause for a number of years. I know she is watching us with great interest and is supportive of our moving ahead on this.

[178] The lack of flexibility in the provision was also brought up by Mtre John Giokas, the representative of the Minister of Justice, on November 30, 2010:

> Mr. John Giokas:
>
> In essence, the bill before you today proposes to amend the Criminal Code to authorize a judge to impose multiple periods of parole ineligibility on convicted multiple murderers, to account for each murder victim, and to use exactly the same criteria in making his or her decision in this regard.
>
> Let me be more specific. Bill C-48 would amend section 745.5 and related provisions of the Criminal Code to authorize a sentencing judge to impose on an offender sentenced for more than one first- or second-degree murder, or any

> combination of first- and second-degree murders, a separate 25-year period of parole ineligibility for the second and for each subsequent murder.
>
> […]
>
> Mr. Derek Lee:
>
> Okay.
>
> Second, in your remarks, you said the second period of consecutive ineligibility was 15 years. Could a second period of parole ineligibility be less than 25 years but greater than 10 years? In other words, the first given parole ineligibility period was, let's say, 20 years on a second-degree murder—
>
> Mr. John Giokas:
>
> No. The proposal as set out requires a mandatory 25 years for the second and any subsequent murder.
>
> Mr. Derek Lee:
>
> That answers my question. There is no flexibility, no matter what the first period of parole ineligibility was. A second one, under this legislation, must be a 25-year ineligibility period.
>
> Mr. John Giokas:
>
> Yes, that's right. It's based on the existing provisions of the Criminal Code in section 745.

[179] As previously mentioned, on December 9, 2010, M.P. Brian Murphy proposed an amendment for exactly the purpose of granting judges greater discretion:

> Throughout the testimony we were struck I think by the idea that in some cases we would like a judge to have the discretion, as the bill indicates, to go up to 50 years—and I'll talk about first-degree murder first—in terms of parole ineligibility, if there were two murders, say.
>
> I was also struck, however, that the judge would have a choice between 25 and 50 in the case of first degree. It was very telling testimony from a seasoned defence lawyer, and I don't think there was any bias in his remark when he said that given the choice between 25 and 50, in most circumstances a judge is going to choose, under the principle of judicial restraint, the 25. I thought the baby would go out with the bathwater. If we wanted to give judges real discretion, the idea would be to give them something between 25 and 50.

[180] This question dealt squarely with the choice to be made by Parliament. As it happens, the proposed amendment was defeated after this intervention by M.P. Bob Derchert:

> Then, Mr. Chair, I'd like to say that for three reasons I'm not supporting the amendment.
>
> The first reason is that, as Mr. Giokas pointed out, the bill requires the judges to consider these additional parole ineligibility periods when they're dealing with a remorseless serial killer or a contract killer. Those are the most serious kinds of crimes that are committed in our country. We're seeking to amend public policy and to amend the legislation to reflect that these are the most abhorrent kinds of crimes a person can commit against an individual or victims in our country.
>
> We want to make a case that each life taken is equal, and we feel that the need for public confidence in the criminal justice system requires us to allow the judges to make multiple parole ineligibility periods in cases of remorseless serial killers such as Clifford Olson, Robert Pickton, Russell Williams, and, unfortunately, a few others. These situations aren't going to arise very often, but when they do, the public requires us to deal with these people harshly and to give the judges the ability to impose those kinds of sentences.

[181] The following exchange took place in the House of Commons during the third reading:

> Mr. Brian Murphy:
>
> Madam Speaker, the amendment, as I thought I covered in my speech, was an amendment to allow periods without eligibility to be given over to judicial discretion for the choice between 25 years and 50 years. The difference would be that a judge would be given the discretion to choose a period between 25 and 50 years. The bill, as it currently stands, chooses either 25 years or 50 years. The amendment was with regard to that issue.
>
> I would say that the department did not look into this at all and that the government never thought of it at all, but after five years it rushes to the six o'clock news to say it is going to prevent Clifford Olson from getting out when he would never get out anyway.
>
> The government did not do its homework to see if the bill could have this sliding discretion in it because judges, under judicial restraint in Quebec and in the rest of Canada, would choose 25 years instead of 50 years. They might have chosen something in between. It was a good amendment. The government should have crafted it in its bill, and it should do more homework.
>
> […]
>
> Mr. Serge Ménard:
>
> It would be better, as the hon. member for Moncton—Riverview—Dieppe suggested, if the judge had a bit more discretionary power to vary the sentence in some cases and did not have to decide between 25 and 50 years, as is currently the case. But it does not matter that much in the end. In any case, if the judge did not do it, the National Parole Board would ultimately take it into account.

[182] When the bill was presented before the Senate, Senator George Baker highlighted the importance of the issue:

> I think the witnesses that we will hear from will make a big point of the fact that the judge is restricted in his discretion to add on only 25-year periods. In other words, a judge cannot say, “It is 25 years for the first murder, 10 years for the second one, and 5 years for the next one.” No, that discretion is not there. The discretion is only there to consider 25 years added on to the first murder conviction.

[183] As seen above, during his testimony on March 3, 2011, the Minister of Justice replied that, notwithstanding the criticism, there needed to be fixed periods of 25 years.

[184] In short, both the text of the provision and the evidence of the parliamentary proceedings demonstrate that Parliament’s choice to limit the exercise to fixed periods of 25 years was deliberate and at the very heart of the provision, such that the measure the trial judge chose intruded on the legislative sphere and the outcome should, instead, have been a declaration that the provision is invalid, leaving it up to Parliament to enact new legislation if it so wished.

[185] For the same reasons, reading down cannot be used to reduce the number of successive periods that may be imposed, a mechanism with multiple consequences that must be left to the lawmakers. Parliament might, at the same time, wish to consider the possibility of allowing periods of less than 25 years and would surely have to consider the broader impact of an amendment to the provision, including its effects on the sanction for second degree murder, where periods of parole ineligibility may also be consecutive. The issue of second degree murder is not directly involved in this case, but remains an important consideration if the rule is to be changed.

[186] In short, the provision is unconstitutional and must quite simply be struck down, without being rewritten by the courts. This striking down must take effect immediately, given that there are no grounds justifying a stay of the effects of the declaration of unconstitutionality: *Ontario (Attorney General) v. G*, *supra*, para. 139.

VI. SUMMARY AND CONCLUSIONS

[187] In summary, s. 745.51 *Cr.C.* is invalid, and reading in or reading down was not the appropriate method for addressing this finding. It must be declared unconstitutional, such declaration being effective immediately.

[188] Consequently, the Court must revert to the law as it stood before the amendment that enacted s. 745.51 *Cr.C.* and order that the parole ineligibility periods be served concurrently, resulting in a total period of 25 years before such eligibility.

[189] In this regard, it is important to note that the sentence is not one that imposes 25 years of imprisonment, but rather a sentence of imprisonment for life, without the possibility of applying for parole before 25 years. In other words, there is no guarantee that the Parole Board will grant parole in 25 years. This will depend on the circumstances at the time, including the appellant's level of dangerousness, his potential for rehabilitation and the manner in which his personality has evolved. Furthermore, as with any parole, if it is granted, it will include the necessary conditions for adequately ensuring the security of the public, failing which it will not be granted.

[190] In these circumstances, it is not appropriate to rule on the other sentencing issues.

FOR THESE REASONS, THE COURT:

[191] **DISMISSES** the motion by Alexandre Bissonnette to adduce fresh evidence;

[192] **ALLOWS** the appeal of Alexandre Bissonnette;

[193] **GRANTS** the *de bene esse* Motion for leave by Her Majesty The Queen and the Attorney General of Quebec in file 200-10-003630-196;

[194] **DISMISSES** the appeal of Her Majesty The Queen and of the Attorney General of Quebec;

[195] **OVERTURNS** the trial judgment in part;

[196] **DECLARES** s. 745.51 *Cr.C.* invalid and unconstitutional;

[197] **ORDERS** that this declaration of unconstitutionality take effect immediately;

[198] **ORDERS**, accordingly, that the 25-year parole ineligibility periods be served concurrently and that the possibility of parole for Alexandre Bissonnette be subject to him serving at least 25 years of the sentence of imprisonment for life.

(S) FRANÇOIS DOYON
FRANÇOIS DOYON, J.A.

(S) GUY GAGNON
GUY GAGNON, J.A.

(S) DOMINIQUE BÉLANGER
DOMINIQUE BÉLANGER, J.A.

Mtre Charles-Olivier Gosselin
Mtre Jean-Claude Gingras
CENTRE COMMUNAUTAIRE JURIDIQUE DE QUÉBEC
For Alexandre Bissonnette

Mtre Pierre Bienvenue
Mtre Thomas Jacques
Mtre François Godin
DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS
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Mtre Stéphanie Quirion-Cantin
Mtre Jean-François Paré
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For the Association des avocats de la défense de Montréal

Date of hearing: January 27, 2020