SCC File No.: 39544

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

B E T W E E N :

ATTORNEY GENERAL OF QUEBEC and
HER MAJESTY THE QUEEN

APPELLANTS
(Respondents)

- and -

ALEXANDRE BISSONNETTE

RESPONDENT
(Appellant)

- and -

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

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PART I: OVERVIEW

1. Section 745.51 of the *Criminal Code*, allowing for stacked periods of parole ineligibility for those convicted of murder, is fundamentally inconsistent with the purposes of the *Corrections and Conditional Release Act* ("*CCRA*"). This further demonstrates, as the Quebec Court of Appeal concluded, that the section is unconstitutional and must be struck down.

2. The Canadian Prison Law Association's ("CPLA") submissions focus on the federal correctional and parole systems, which must be considered in assessing the impugned provision in light of sections 7 and 12. Section 745.51 is fundamentally irreconcilable with the purposes of the correctional and parole systems (rehabilitation and reintegration), and inmates with stacked parole eligibility face particularly harsh conditions during their incarceration. Moreover, there is already a system in place (the Parole Board of Canada) to ensure that the public is protected from the release of those serving sentences for murder who may still pose a risk. This system appropriately balances the interests of victims and inmates and is sufficient to address the concerns that animated the creation of section 745.51.

PART II: POSITION ON THE QUESTION IN ISSUE

3. The CPLA's position is that section 745.51 violates both section 7 and 12 of the *Charter* and cannot be saved under section 1. The decision of the Quebec Court of Appeal should therefore be upheld.

PART III: ARGUMENT

A. Section 745.51 is contrary to section 12 of the *Charter*

Section 745.51 is irreconcilable with the rehabilitative purpose of the federal correctional and parole systems

4. The CPLA endorses the conclusion of the Quebec Court of Appeal and submits that section 745.51 of the *Criminal Code* is an intrinsically unacceptable method of punishment hat is "absurd and constitutes an attack on human dignity."[1] That the section constitutes an attack on human

[1] *Bissonnette c R*, 2020 QCCA 1585, at para 93.

dignity is even more apparent when considering how it conflicts with (and even undermines) the purposes of the correctional and parole systems. Moreover, it creates sentences that cannot properly be administered under the *CCRA*.

5. In addition to being contrary to the principle of rehabilitation that underpins sentencing,[2] section 745.51 is at odds with the very purpose of the correctional system. As set out in the *CCRA*:

> 3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
>
> (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
>
> (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.[3]

6. The correctional system is premised upon the principle that all inmates, with the appropriate interventions, have the opportunity to be rehabilitated. All inmates have correctional plans developed by Correctional Service Canada to "ensure that they receive the most effective programs at the appropriate time in their sentence to rehabilitate them and prepare them for reintegration into the community, on release, as law-abiding citizen".[4]

7. Section 745.51 is also at odds with the purpose of conditional release, which is to facilitate the rehabilitation and reintegration of inmates as law abiding members of society.[5] The conditional release regime is also premised upon the principle that all inmates have the opportunity to be rehabilitated and reintegrated. Given this, there always is (or should be) the possibility that, with the right interventions, an inmate can be paroled.

8. It is difficult, if not impossible, to reconcile the purpose of the federal correctional and parole systems (rehabilitation and reintegration of inmates) with the reality that section 745.51 of the *Criminal Code* creates a class of inmates who may have no hope of ever being reintegrated as

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[2] *R v Lacasse*, 2015 SCC 64, at para 4.
[3] *Corrections and Conditional Release Act*, SC 1992, c 20, s 3 ["*CCRA*"].
[4] *CCRA*, s 15.1(2); *Corrections and Conditional Release Regulations*, SOR/92-620, s 102(1) ["*CCRR*"].
[5] *CCRA*, s 100.

law abiding members of society, regardless of how low risk they may be.

9. As acknowledged by the Quebec Court of Appeal, parole ineligibility and the actual effect of the sentence on the prisoner must be considered when assessing whether the sentence is unconstitutional.[6]

10. Inmates with stacked parole ineligibility face particularly severe conditions during their incarceration. These conditions underscore how stacked parole eligibility is excessive, unnecessary, and ultimately an attack on human dignity. These conditions are equally relevant to the assessment of gross disproportionality under section 7.

11. First, inmates with life sentences, unlike inmates serving determinate sentence, are ineligible for compassionate release on parole by exception, no matter how ill and/or low risk.[7] While this is still a problem for an inmate serving a single life sentence, the problem is magnified for inmates who are not eligible for parole until 50, 75, or more years, given the advanced age they will be by that time and the deteriorating health associated with aging.

12. Second, inmates serving life sentences are ineligible for Unescorted Temporary Absences, Work Release, and day parole until three years before their full parole eligibility dates.[8] Inmates serving sentences for murder also face restrictions on Escorted Temporary Absences.[9] So not only does an inmate with stacked parole ineligibility have effectively no prospects of parole, they are also *de facto* exposed to a severe level of isolation from the community and an inability to access the sorts of resources and opportunities that would help them maintain contact with the outside world and prepare them for release into the community for 47 years, 72 years, 97 years or more.

13. Third, inmates with life sentences and distant parole eligibility periods are generally not prioritized for programming.[10] Correctional Service Canada focuses on those with sentences of

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[6] *Bissonnette*, *supra*, at para 67, citing *R v Morrisey*, 2000 SCC 39, at para 41.
[7] *CCRA*, s 121(2)(a). See Adelina Iftene, "The Case for a New Compassionate Release Statutory Provision" (2017) 54:4 Alta L Rev 929.
[8] *CCRA*, ss 18, 115(1)(a), 119(1.1); *Criminal Code*, RSC 1985, c C-46, s 746.1(2) ["*CCC*"].
[9] *CCC* 746.1(2)(c); *CCRA*, s 9.
[10] Correctional Service Canada, "National Correctional program Management Guidelines", https://www.csc-scc.gc.ca/lois-et-reglements/726-3-gl-eng.shtml#s23, paras 84-85.

four years or less.[11] The further an inmate's parole eligibility date is into the future, the less they are prioritized for programming and the problem this presents is that inmates who do not have the benefit of correctional programming (which is designed to help them manage their thinking and behaviour) are more likely to have behavioural issues while in prison, which can contribute to their further institutionalization. The longer the inmate goes without programming, the more institutionalized they can become.

14. Fourth, inmates with stacked parole eligibility may have challenges, if not effectively be blocked, from lowering their security level, based on the length of their sentence. Security level is dictated by an inmate's institutional adjustment, escape risk, and public safety ratings.[12] One of the factors to be considered in assessing the escape risk rating is the length of sentence and time to be served before eligibility for unescorted temporary absence. [13] An inmate who is likely to die before they have any chance to be released could always be said to have a heightened escape risk rating, because escape would be their only opportunity to avoid dying in prison.

15. Fifth, as noted by the Quebec Court of Appeal,[14] it is important to remember that if an inmate with a life sentence is granted parole, their liberty will already be curtailed for the rest of their life, even without section 745.51. An inmate serving any life sentence, regardless of their initial period of parole ineligibility, "remains under the shadow of re-incarceration if he or she commits another crime, and continues to carry the stigma of being a convicted offender for the rest of their life".[15]

16. In fact, a paroled murderer already faces, again, even without section 745.51, the risk of having their parole suspended not just for a new offence, but for any violation of a condition of their parole or if there is merely a concern that suspension is necessary to prevent a breach or protect society.[16] The Parole Board of Canada must then conduct a review and revoke or terminate

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[11] Correctional Service Canada, "National Correctional Program Referral Guidelines", https://www.csc-scc.gc.ca/lois-et-reglements/726-2-gl-eng.shtml, para 7(c).
[12] *CCRA*, s 30(1); *CCRR*, s 18
[13] Correctional Service Canada, Commissioner's Directive 705-7, "Security Classification and Penitentiary Placement", at paras 1, Annex B.
[14] *Bissonnette*, *supra*, at para 100.
[15] *R v M(CA)*, [1996] 1 S.C.R. 500, at para 62.
[16] *CCRA*, s 135(1).

the inmate's parole, or cancel the suspension.[17] So not only does the Parole Board perform an initial gatekeeper function with respect to inmates serving life sentences, they are also responsible for continuing to assess the inmate's suitability for parole for the remainder of their life.

17. Sixth, having to serve lengthy periods of incarceration without any meaningful contact with the outside world can have profound emotional and psychological impacts on inmates. Long before section 745.51 was enacted, the Supreme Court recognized that a lengthy period of incarceration can have an "institutionalizing effect" on inmates,[18] which can make it more challenging for them to successfully reintegrate into the community, in the unlikely event that they ever achieve parole in their lifetime.

18. Seventh, since 2015, violent offenders may be required to wait up to five years for a new parole hearing if denied parole,[19] which is all the more significant if an inmate has already had to wait at least 50 years.

19. Eighth, with the repeal of the faint hope clause, inmates serving sentences for murder already have limited hope for the future.[20] For those with stacked parole eligibility, this hope is virtually non-existent since parole eligibility is likely to exceed the diminished life expectancy of federal inmates.[21] This is cruel and degrading, and the protection of society (which is already the paramount consideration of the correctional[22] and parole[23] systems) is not furthered by creating inmates with no hope and no motivation to abide by correctional rules and their correctional plans.[24]

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[17] *CCRA*, s 135(5).
[18] *Steele v Mountain Institution*, [1990] 2 S.C.R. 1385.
[19] *An Act to Bring Fairness for the Victims of Violent Offenders*, SC 2015, c 11, s 2; *CCRA*, s 123(5.01).
[20] Adelina Iftene, "R v Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence: Why the QCCA Got It Right and Why s. 745.51 Should Never Be Re-Written" (2021) 69:3 CLQ (forthcoming), [Book of Authorities "BOA", Tab 1].
[21] Adelina Iftene, "R v Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence: Why the QCCA Got It Right and Why s. 745.51 Should Never Be Re-Written" (2021) 69:3 CLQ (forthcoming), [BOA, Tab 1].
[22] *CCRA*, s 3.1.
[23] *CCRA*, s 100.1.
[24] *Bissonnette*, *supra*, at para 98.

B. Section 745.51 is contrary to section 7 of the *Charter*

20. The CPLA endorses the Quebec Court of Appeal's conclusion that section 745.51 infringes liberty and security of the person as protected by section 7[25] since it is grossly disproportionate as well as overbroad with respect to its two objects: 1) to protect society from the most incorrigible killers and 2) to restore the balance between the rights of victims and those of multiple murderers and acknowledge the value of every life lost.[26]

a) Section 745.51 is overbroad considering the Parole Board of Canada's role in protecting the public

21. Instead of leaving parole decisions to the expert tribunal created specifically for that purpose—the Parole Board of Canada—Parliament has bluntly allowed judges to condemn those convicted of multiple murders (no matter how low risk they actually are) to spend the rest of their lives with little or no hope of eventual release.

22. Concerns about the release of dangerous murderers are unfounded. Simply being eligible does not mean one is going to be granted parole. Parole eligibility is distinct from statutory release (presumptive release at two-thirds of an inmate's determinate sentence, unless a detention order is sought).[27] Inmates with life sentences are ineligible for statutory release, and they must instead prove to the Board that they meet the strict statutory criteria to be granted parole.

23. While the purpose of conditional release is to facilitate the rehabilitation and reintegration of inmates,[28] "[t]he protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases."[29] The Board has developed nuanced policies to guide its decision-making and help ensure dangerous inmates are not paroled.[30]

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[25] *Bissonnette*, *supra*, at para 117.
[26] *Bissonnette, supra*, at paras 135, 138.
[27] *CCRA*, s 127, 129.
[28] *CCRA*, s 100.
[29] CCRA, s 100.1.
[30] Parole Board of Canada, Decision-Making Policy Manual for Board Members, https://www.canada.ca/en/parole-board/corporate/publications-and-forms/decision-making-policy-manual-for-board-members.html.

24. Those serving sentences for murder in Canada already serve more time in prison, on average, than in other countries: those serving sentences for first-degree murder spend 28 years before being released or dying.[31] Statistically, those who are released are not particularly dangerous: only about 3% of inmates serving indeterminate sentences were revoked for any form of violence in one study from 1994-2009. Moreover, only a very small number of murders released on parole murder again, far less than 1%.[32]

25. Section 745.51 requires judges to essentially guess which inmates have no hope of rehabilitation more than 25 years in the future (even though, as discussed above, the correctional and parole systems are premised on the belief that all inmates have the potential for rehabilitation). With respect, this is a task judges are ill-positioned to do.[33]

26. Conversely, the Parole Board of Canada is designed to consider the inmate's rehabilitative progress and risk to public safety at the time the inmate is eligible for parole. The Board is required to consider all relevant information,[34] and it has access to not only court information, but to a range of correctional documents, including a Correctional Plan (detailing the inmate's progress), Community Strategies, Psychological Risk Assessments, etc.[35]

27. Parliament has entrusted the Parole Board of Canada with reviewing the inmates who arguably are the most incorrigible and pose the greatest risk to public safety: Dangerous Offenders serving indeterminate sentences. The Board is perfectly capable of also protecting the public from murderers (who, as mentioned, statistically actually present a very limited risk of reoffending). Moreover, the very constitutionality of indeterminate sentences for Dangerous Offenders hinges on this parole review and ensuring rehabilitated inmates are not incarcerated longer than necessary.[36] On the other hand, inmates with stacked parole ineligibility are effectively denied of

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[31] Canada, "Standing Committee on Justice and Human Rights", 40th Parliament, 3rd Sess, no 041 (December 7, 2010), s 1605.
32 Canada, "Standing Committee on Justice and Human Rights", 40th Parliament, 3rd Sess, no 041 (December 7, 2010), s 1540 per Dr Anthony Doob; *Bissonnette*, *supra*, at para 144.
[33] *Bissonnette*, *supra*, at paras 110-111.
[34] *CCRA*, s 101(a).
[35] Correctional Service Canada, Commissioner's Directive 712-1 "Pre-Release Decision-Making"; Parole Board of Canada, Decision-Making Policy Manual for Board Members, "1.1. Information Standards for Conditional Release Decision-Making".
[36] *R v Lyons*, [1987] 2 S.C.R. 309, at paras 47-49.

the one mechanism (parole review) that can protect against grossly disproportionate dangerous offender sentences. The availability of an opportunity for parole if rehabilitated (even if theoretical) must inform the constitutional assessment of section 745.51.[37]

28. The Board considers a wide range of factors,[38] and it cannot be said that there is a "discount" for multiple murders at the parole stage. The Board will consider "the nature and gravity of the offence", and multiple victims will therefore certainly impact the Board's assessment of risk and its decision to grant or deny parole.

29. Ultimately, the Parole Board is perfectly capable of managing the release of convicted murderers into the community. Section 745.51 is an overbroad solution, and one that is also grossly disproportionate and simply unnecessary.

b) Victim's concerns must be balanced with the constitutional rights of inmates

30. The second objective in enacting section 745.51 was to restore a balance between the rights of victims and those of inmates.[39] While the impacts of parole hearings on victims cannot be ignored, these consequences are a necessary by-product of the parole system.

31. Victims are entitled to request certain information from Correctional Service Canada[40] and the Parole Board of Canada.[41] No victim is required to attend a parole hearing. Victims can request to attend, and the Board is required to permit the victim or member of his or her family as an observer, except in select circumstances.[42] They are allowed to present a statement, in whatever format the Board deems appropriate,[43] which includes having it considered at the hearing without necessitating their presence. The Board is also required to consider conditions appropriate to

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[37] Iftene, supra.
[38] Decision-Making Policy Manual for Board Members, "1.1. Information Standards for Conditional Release Decision-Making"; Decision-Making Policy Manual for Board Members, "2.1 Assessment for Pre-Release Decisions", at paras 4, 8.
[39] *Bissonnette*, *supra*, at para 134
[40] *CCRA*, s 26.
[41] *CCRA*, s 142.
[42] *CCRA*, s 140(4).
[43] Decision-Making Policy Manual for Board Members, "1.2 Information from Victims", paras 8-10.

protect victims.[44]

32. In 2011, when Bill C-48, was being debated, memories of Clifford Olson's parole hearing dominated much of the discourse, with reference to the trauma victims experience when an inmate is eligible for parole every two years. Notably, in 2015 Parliament then amended the *CCRA* to increase the period an inmate serving a sentence for a violent offence may have to wait for another parole hearing,[45] so even if section 745.51 is struck down, a multiple murder will still have to wait 25 years for a parole hearing and (if denied) up to 5 years for another hearing[46].

33. However, going further than that and making inmates ineligible for parole for 50, 75, or more years goes too far and creates what the Quebec Court of Appeal concluded was an unacceptable balance between the rights of victims and inmates.[47]

PART IV: SUBMISSIONS CONCERNING COSTS

34. The Canadian Prison Law Association does not seek costs and asks that none be ordered against it.

PART V: ORDER SOUGHT

35. The Prison Law Association has been granted leave to intervene and present oral submissions not exceeding five minutes. No other order is requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Kingston, Ontario, November 18, 2021.

Simon Borys
Counsel for the Intervener, Canadian Prison Law Association

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[44] *CCRA*, s 133(3.1).
[45] *An Act to Bring Fairness for the Victims of Violent Offenders*, SC 2015, c 11, s 2; *CCRA*, s 123(5.01).
[46] *CCRA*, s 123(5.01).
[47] *Bissonnette*, *supra*, at para 147.

PART VI: TABLE OF AUTHORITIES

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Case	Paragraph Numbers
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Correctional Service Canada, "National Correctional Program Referral Guidelines", https://www.csc-scc.gc.ca/lois-et-reglements/726-2-gl-eng.shtml, para 7(c)	13
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ss 1, 7, 12
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ss 1, 7, 12

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Règlement sur le système correctionnel et la mise en liberté sous condition, DORS/92-620, s 102(1)

Criminal Code, RSC 1985, c C-46, ss 745.51, 746.1(2)
Code criminal, L.R.C. (1985), ch. C-46, ss 745.51, 746.1(2)

An Act to Bring Fairness for the Victims of Violent Offenders, SC 2015, c 11, s 2
Loi sur l'équité à l'égard des victimes de délinquants violents, L.C. 2015, ch. 11, s 2