



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Bissonnette,  
2022 SCC 23

**APPEAL HEARD:** March 24,  
2022

**JUDGMENT RENDERED:** May  
27, 2022

**DOCKET:** 39544

**BETWEEN:**

**Her Majesty The Queen and Attorney General of Quebec**  
Appellants

and

**Alexandre Bissonnette**  
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Alberta, Association des avocats de la défense de Montréal-Laval-Longueuil, Queen's Prison Law Clinic, Toronto Police Association, Canadian Police Association, Karen Fraser, Jennifer Sweet, Nicole Sweet, Kim Sweet, John Sweet, J. Robert Sweet, Charles Sweet, Patricia Corcoran, Ann Parker, Ted Baylis, Sharon Baylis, Cory Baylis, Michael Leone, Doug French, Donna French, Deborah Mahaffy, Observatory on National Security Measures, Independent Criminal Defence Advocacy Society, Canadian Prison Law Association, National Council of Canadian Muslims, Canadian Civil Liberties Association, British Columbia Civil Liberties Association and Canadian Association of Chiefs of Police**  
Interveners

**OFFICIAL ENGLISH TRANSLATION**

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**REASONS FOR** Wagner C.J. (Moldaver, Karakatsanis, Côté, Brown, Rowe,  
**JUDGMENT:** Martin, Kasirer and Jamal JJ. concurring)  
(paras. 1 to 148)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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**Her Majesty The Queen and  
Attorney General of Quebec**

*Appellants*

v.

**Alexandre Bissonnette**

*Respondent*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Attorney General of Nova Scotia,  
Attorney General of British Columbia,  
Attorney General of Alberta,  
Association des avocats de la défense de Montréal-Laval-Longueuil,  
Queen's Prison Law Clinic,  
Toronto Police Association,  
Canadian Police Association,  
Karen Fraser,  
Jennifer Sweet,  
Nicole Sweet,  
Kim Sweet,  
John Sweet,  
J. Robert Sweet,  
Charles Sweet,  
Patricia Corcoran,  
Ann Parker,  
Ted Baylis,  
Sharon Baylis,  
Cory Baylis,  
Michael Leone,  
Doug French,  
Donna French,  
Deborah Mahaffy,  
Observatory on National Security Measures,  
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*Intervenors*

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**2022 SCC 23**

File No.: 39544.

2022: March 24; 2022: May 27.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer  
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Constitutional law — Charter of Rights — Cruel and unusual treatment or  
punishment — Punishment that is cruel and unusual by nature — Remedy — Section  
745.51 of Criminal Code authorizing imposition of consecutive 25-year parole  
ineligibility periods in cases involving multiple first degree murders — Whether  
s. 745.51 infringes s. 12 of Charter, which guarantees right not to be subjected to cruel  
and unusual treatment or punishment — Appropriate remedy if s. 12 infringed —  
Constitution Act, 1982, s. 52(1) — Canadian Charter of Rights and Freedoms, s. 12 —  
Criminal Code, R.S.C. 1985, c. C-46, s. 745.51.*

On January 29, 2017, 46 people were gathered in the Great Mosque of Québec for evening prayer. B burst in and, armed with a semi-automatic rifle and a pistol, opened fire on the worshippers, causing the death of 6 people and seriously injuring 5 others. B pleaded guilty to the 12 charges laid against him, including 6 counts of first degree murder. An accused who is convicted of first degree murder will receive a minimum sentence of imprisonment for life and will be eligible for parole only after serving an ineligibility period of 25 years. B therefore received that sentence automatically. The Crown also asked that s. 745.51 of the *Criminal Code* be applied. This provision authorizes a court to order that the periods without eligibility for parole for each murder conviction be served consecutively rather than concurrently. In the context of first degree murders, the application of this provision allows a court to add up parole ineligibility periods of 25 years for each murder.

B challenged the constitutionality of s. 745.51. The trial judge held that this provision infringed the right not to be subjected to any cruel and unusual treatment or punishment and the right to liberty and security of the person guaranteed to B by s. 12 and s. 7 of the *Charter*, respectively, and that the provision could not be saved under s. 1. To remedy the unconstitutionality of the provision, the trial judge applied the technique of reading in and interpreted s. 745.51 as granting courts a discretion to choose the length of the additional ineligibility period to impose on an offender. He ordered that B serve a total ineligibility period of 40 years before being able to apply for parole. The Court of Appeal allowed B's appeal and declared s. 745.51 invalid and unconstitutional on the basis that it was contrary to ss. 12 and 7 of the *Charter*. It noted

that the declaration of unconstitutionality was to take effect immediately. It found that reading in was inappropriate, and it therefore struck down the unconstitutional provision. It accordingly ordered that B serve a 25-year parole ineligibility period on each count before being able to apply for parole and that these periods be served concurrently.

*Held:* The appeal should be dismissed.

Section 745.51 of the *Criminal Code* is contrary to s. 12 of the *Charter* and is not saved under s. 1. It must be declared to be of no force or effect immediately under s. 52(1) of the *Constitution Act, 1982*, and the declaration must strike down the impugned provision retroactively to the date it was enacted. In the case of multiple first degree murders, s. 745.51 authorizes the imposition of sentences of imprisonment that effectively deprive all offenders who receive such sentences of a realistic possibility of being granted parole before they die. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. B's total parole ineligibility period must therefore be 25 years, in accordance with the law as it existed prior to the enactment of s. 745.51.

Section 12 of the *Charter* guarantees the right not to be subjected to any cruel and unusual treatment or punishment. In essence, the purpose of s. 12 of the *Charter* is to protect human dignity and ensure respect for the inherent worth of each

individual. The protection afforded by s. 12 has two prongs. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity. The first prong of the s. 12 guarantee relates to punishment whose effect is grossly disproportionate to what would have been appropriate. The second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will always be grossly disproportionate because they are intrinsically incompatible with human dignity.

A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. To determine whether a punishment is intrinsically incompatible with human dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment. A punishment that is cruel and unusual by nature must always be excluded from the arsenal of punishments available to the state. It follows that the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*.

Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality. If the punishment that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be pointless to consider whether the punishment is grossly disproportionate in a given case, because it will by definition always be grossly disproportionate.

The parole ineligibility period constitutes punishment for the purposes of s. 12. State action is considered to be punishment for the purposes of s. 12 if it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either it is imposed in furtherance of the purpose and principles of sentencing, or it has a significant impact on an offender's liberty or security interests. The length of parole ineligibility is part of an offender's punishment given that it is a consequence of conviction and that it has a significant impact on the offender's interests in liberty and security of the person. It also furthers the objectives of denunciation and deterrence that underlie a sentence. The imposition of consecutive parole ineligibility periods authorized by s. 745.51 therefore constitutes punishment, the constitutionality of which must be determined under s. 12 of the *Charter*.

Section 745.51 effectively authorizes the imposition of a sentence of imprisonment for life without a realistic possibility of parole. This punishment is, by its very nature, intrinsically incompatible with human dignity. It is degrading in nature

in that it presupposes at the time of its imposition that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation. Although Parliament has latitude to establish sentences whose severity expresses society's condemnation of the offence committed, it may not prescribe a sentence that deprives every offender on whom it is imposed of any realistic possibility of parole from the outset. To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. The intent here is not to have the objective of rehabilitation prevail over all the others, but rather to preserve a certain place for it in a penal system based on respect for the inherent dignity of every individual, including the vilest of criminals. Where the offence of first degree murder is concerned, rehabilitation is already subordinate to the objectives of denunciation and deterrence, as can be seen from the severity of the mandatory minimum sentence for this offence.

The objectives of denunciation and deterrence are not better served by the imposition of excessive sentences. Beyond a certain threshold, these objectives lose all of their functional value, especially when the sentence far exceeds human life expectancy. The imposition of excessive sentences that fulfil no function does nothing more than bring the administration of justice into disrepute and undermine public confidence in the rationality and fairness of the criminal justice system. A punishment that can never be carried out is contrary to the fundamental values of Canadian society.

The effects of a sentence of imprisonment for life without a realistic possibility of parole support the conclusion that it is degrading in nature and thus intrinsically incompatible with human dignity. Offenders who have no realistic possibility of parole are deprived of any incentive to reform, and the psychological consequences flowing from this sentence are in some respects comparable to those experienced by inmates on death row, since only death will end their incarceration. For offenders who are sentenced to imprisonment for life without a realistic possibility of parole, the feeling of leading a monotonous, futile existence in isolation from their loved ones and from the outside world is very hard to tolerate, so much so that some prefer to put an end to their lives rather than die slowly and endure suffering that seems endless to them. Furthermore, in international and comparative law, a sentence that deprives offenders of any possibility of being released is generally considered to be incompatible with human dignity.

The royal prerogative of mercy, which gives Her Majesty the Queen an absolute discretion to grant a remission of sentence to any individual sentenced by a court, cannot save the impugned provision. The royal prerogative of mercy cannot be considered a true sentence review mechanism, because it is exercised only in exceptional circumstances. It is at best a release mechanism based on compassion and on the existence of humanitarian grounds, which means that individuals suffering the normal consequences of a properly imposed sentence are unlikely to obtain such a pardon. The existence of the royal prerogative of mercy therefore creates no realistic

possibility of parole for offenders serving a sentence of imprisonment for life for which there is no other review mechanism.

The infringement of s. 12 of the *Charter* is not justified under s. 1. In order to justify an infringement of a *Charter* right, the state is required to show that the impugned law addresses a pressing and substantial objective and that the means chosen to achieve that objective are proportional to it. In this case, since no arguments were made concerning the justification for the impugned provision, the state did not discharge the onus resting on it.

The appropriate remedy in this case is a declaration that s. 745.51 is of no force or effect immediately pursuant to s. 52(1) of the *Constitution Act, 1982*, under which any law that is inconsistent with the provisions of the Constitution can be declared to be of no force or effect to the extent of the inconsistency. The technique of reading in is inappropriate in the circumstances. This technique allows a court to extend the reach of a statute so that it includes what was wrongly excluded from it. When a court applies this interpretive technique, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations made by the court. In this case, however, the imposition of consecutive 25-year ineligibility periods is directly related to Parliament's objective in enacting s. 745.51, as shown by the words of the provision and the parliamentary debate. The words of s. 745.51 are clear as regards the length of the ineligibility periods that a court may make consecutive: for first degree murder, these periods must be 25

years under s. 745(a) of the *Criminal Code*. As well, the parliamentary debate clearly shows that Parliament's intention was to authorize courts to impose consecutive ineligibility periods in blocks of 25 years. In fact, Parliament specifically rejected a proposed amendment that would have given courts a discretion to determine the total length of the parole ineligibility period. It is therefore impossible to conclude that Parliament would likely have passed the impugned provision with the modifications that would result from applying the technique of reading in as the trial judge did.

The declaration of invalidity must have immediate effect given the seriousness of the infringement of the right of every individual not to be subjected to cruel and unusual punishment. The declaration must also strike down the impugned provision retroactively to the date it was enacted, in view of the continuing nature of the infringement of the right guaranteed by s. 12 of the *Charter*. The applicable law is therefore the law that existed prior to that date. The 25-year parole ineligibility periods imposed on B for each of the 6 counts of first degree murder must thus be served concurrently. As a result, B may not apply for parole until he has served a total ineligibility period of 25 years, in accordance with s. 745(a). The Parole Board of Canada remains the ultimate arbiter of whether B can be released on parole at the end of the ineligibility period.

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**considered:** *R. v. Luxton*, [1990] 2 S.C.R. 711; **referred to:** *Sherman Estate v. Donovan*, 2021 SCC 25; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Lacelle Belec v. R.*, 2019 QCCA 711; *R. v. Paré*, 2011 QCCA 2047; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Guiller* (1985), 48 C.R. (3d) 226; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Bourque*, 2014 NBQB 237, 427 N.B.R.

(2d) 259; *R. v. Saretzky*, 2017 ABQB 496; *R. v. Ostamas*, 2016 MBQB 136, 329 Man. R. (2d) 203; *R. v. Wilmott*, [1967] 1 C.C.C. 171; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Vinter v. United Kingdom* [GC], Nos. 66069/09 and 2 others, July 9, 2013 (HUDOC); *Murray v. Netherlands* [GC], No. 10511/10, April 26, 2016 (HUDOC); *Hutchinson v. United Kingdom* [GC], No. 57592/08, January 17, 2017 (HUDOC); *Kafkaris v. Cyprus* [GC], No. 21906/04, February 12, 2008 (HUDOC); *Bodein v. France*, No. 40014/10, November 13, 2014 (HUDOC); *Life Imprisonment Case* (1977), 45 BVerfGE 187 (Germany); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *R. v. McLoughlin*, [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964; *R. v. Millard*, 2018 ONSC 1299; *R. v. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. v. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL), rev'd 2017 ONCA 607, 353 C.C.C. (3d) 317; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Albashir*, 2021 SCC 48; *R. v. Sullivan*, 2022 SCC 19; *Ontario (Attorney General) v. G*, 2020 SCC 38; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54,

[2003] 2 S.C.R. 504; *R. v. Thomas*, [1990] 1 S.C.R. 713; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Wigman*, [1987] 1 S.C.R. 246; *R. v. Gamble*, [1988] 2 S.C.R. 595.

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*Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act*, S.C. 1996, c. 34.

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*Act to provide for the Conditional Liberation of Penitentiary Convicts*, S.C. 1899, c. 49.

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*Code pénal suisse*, s. 86 para. 5.

*Constitution Act, 1982*, s. 52.

Constitution of the Portuguese Republic, art. 30(1).

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APPEAL from a judgment of the Quebec Court of Appeal (Doyon, Gagnon and Bélanger JJ.A.), 2020 QCCA 1585, 405 C.C.C. (3d) 524, 68 C.R. (7th) 1, [2020] AZ-51725265, [2020] J.Q. n° 11243 (QL), 2020 CarswellQue 13124 (WL), setting aside in part a decision of Huot J., 2019 QCCS 354, [2019] AZ-51568159, [2019] Q.J. No. 758 (QL), 2019 CarswellQue 6617 (WL). Appeal dismissed.

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English version of the judgment of the Court delivered by

THE CHIEF JUSTICE —

## I. Introduction

[1] The crimes committed by the respondent in the Great Mosque of Québec on the fateful day of January 29, 2017 were of unspeakable horror and left deep and agonizing scars in the heart of the Muslim community and of Canadian society as a whole. We cannot help but feel sympathy for the victims and their loved ones for their irreparable losses and their indescribable pain.

[2] It is in the context of those crimes that this Court must rule on the constitutional limits on the state’s power to punish offenders. The appeal requires us to weigh fundamental values of our society enshrined in the *Canadian Charter of Rights*

*and Freedoms* and to reaffirm our commitment to upholding the rights it guarantees to every individual, including the vilest of criminals.

[3] More specifically, the question before the Court is whether s. 745.51 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), which was introduced in 2011 by the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, S.C. 2011, c. 5, s. 5, is contrary to ss. 7 and 12 of the *Charter*. The impugned provision authorizes the imposition of consecutive parole ineligibility periods in cases involving multiple murders. In the context of first degree murders, the application of this provision allows a court to impose a sentence of imprisonment without eligibility for parole for a period of 50, 75, 100 or even 150 years. In practice, the exercise of the court’s discretion will inevitably result in imprisonment for life without a realistic possibility of parole for every offender concerned who has been convicted of multiple first degree murders. Such a criminal sentence is one whose severity is without precedent in this country’s history since the abolition of the death penalty and corporal punishment in the 1970s.

[4] For the reasons that follow, I conclude that s. 745.51 *Cr. C.* is contrary to s. 12 of the *Charter* and is not saved under s. 1. In light of this conclusion, it will not be necessary to consider the alleged infringement of s. 7 of the *Charter*.

[5] Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual punishment or treatment. In essence, its purpose is to protect human dignity and ensure respect for the inherent worth of each individual. This Court recently

affirmed, albeit in a different context, that human dignity transcends the interests of the individual and concerns society at large (*Sherman Estate v. Donovan*, 2021 SCC 25, at para. 33). In this sense, the significance of this appeal extends well beyond its particular facts.

[6] Section 12 of the *Charter* prohibits the state from imposing a punishment that is grossly disproportionate in relation to the situation of a particular offender and from having recourse to punishments that, by their very nature, are intrinsically incompatible with human dignity.

[7] The provision challenged in this case allows the imposition of a sentence that falls into this latter category of punishments that are cruel and unusual by nature. All offenders subjected to stacked 25-year ineligibility periods under s. 745.51 *Cr. C.* are doomed to be incarcerated for the rest of their lives without a realistic possibility of being granted parole. The impugned provision, taken to its extreme, authorizes a court to order an offender to serve an ineligibility period that exceeds the life expectancy of any human being, a sentence so absurd that it would bring the administration of justice into disrepute.

[8] A sentence of imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity. Such a sentence is degrading insofar as it negates, in advance and irreversibly, the penological objective of rehabilitation. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. This conclusion

that a sentence of imprisonment for life without a realistic possibility of parole is incompatible with human dignity is not only reinforced by the effects that such a sentence may have on all offenders on whom it is imposed, but also finds support in international and comparative law.

[9] To ensure respect for the inherent dignity of every individual, s. 12 of the *Charter* requires that Parliament leave a door open for rehabilitation, even in cases where this objective is of secondary importance. In practical terms, this means that every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of an ineligibility period of 50 years, which is the minimum ineligibility period resulting from the exercise of judicial discretion under the impugned provision in cases involving first degree murders.

## II. Background and Judicial History

### A. *Facts*

[10] Given that these reasons concern the constitutionality of s. 745.51 *Cr. C.* and that the resulting principles will apply to many multiple murder cases, I do not think it would be appropriate to refer at length to the horrible circumstances of this case, which were summarized well by the trial judge and widely publicized in the media. However, out of respect for the victims of this tragedy, it must be said that hatred, racism, ignorance and Islamophobia were behind the appalling acts committed

by the respondent on that fateful day of January 29, 2017, when he sowed terror and death in the Great Mosque of Québec.

[11] Forty-six people, including four children, had gathered in that place of worship for evening prayer. The respondent burst in and, armed with a semi-automatic rifle and a pistol, opened fire on the worshippers. In less than two minutes, he caused the death of six innocent people, Khaled Belkacemi, Ibrahima and Mamadou Tanou Barry, Abdelkrim Hassane, Azzeddine Soufiane and Aboubaker Thabti, seriously injured five others and left the survivors of the killings, and the victims' loved ones, with deep and permanent psychological scars.

[12] On March 26, 2018, the respondent pleaded guilty to the 12 charges laid against him, including 6 counts of first degree murder, an indictable offence provided for in ss. 231(2) and 235 *Cr. C.* As a consequence, he was automatically sentenced to imprisonment for life. The Crown then asked the court to apply s. 745.51 *Cr. C.* and sentence the respondent to 6 consecutive parole ineligibility periods of 25 years, for a total of 150 years. The trial judge thus had to determine the length of the parole ineligibility period to be imposed on the respondent, and also had to rule on the constitutionality of s. 745.51 *Cr. C.*

B. *Quebec Superior Court, 2019 QCCS 354 (Huot J.)*

[13] In particularly detailed reasons, the trial judge held that s. 745.51 *Cr. C.* infringed ss. 12 and 7 of the *Charter* and that it could not be saved under s. 1. As a

remedy for the unconstitutionality of the provision, he applied the technique of reading in and ordered the respondent to serve an ineligibility period of 40 years before applying for parole.

[14] Before ruling on the constitutionality of the impugned provision, the trial judge first asked [TRANSLATION] “whether there is a factual basis in this case to justify” such a constitutional analysis and concluded that there was (para. 472 (CanLII)). In his view, a certain parole ineligibility period had to be served consecutively having regard to the character of the respondent, the nature of the offences, the circumstances surrounding their commission, and the principles of sentencing. In this case, a period of more than 25 but less than 50 years would be appropriate. The judge noted, however, that s. 745.51 *Cr. C.* limited his exercise of discretion to the imposition of consecutive periods of 25 years each. He found that, in the circumstances, he had to review the constitutionality of the provision under ss. 7 and 12 of the *Charter*.

[15] To determine whether s. 745.51 *Cr. C.* created a sentence that constituted cruel and unusual punishment within the meaning of s. 12, the trial judge applied the analytical framework developed in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, although he observed that the impugned provision did not impose a minimum sentence (para. 810). He concluded at the first step of that analysis that, in the absence of the impugned provision, a total parole ineligibility period of between 35 and 42 years would be just and appropriate in this case (para. 843). At the second step of the analysis, which involves considering the effect of the prescribed sentence on the offender, he

found that the imposition of 2 consecutive ineligibility periods of 25 years each would violate the respondent's s. 12 rights and held that [TRANSLATION] "[s]uch sentences are grossly disproportionate and totally incompatible with human dignity" (para. 980). In his view, Canadian society would consider any sentence that denied the offender a reasonable prospect of conditional release in the last years of his life to be abhorrent and intolerable. Section 745.51 *Cr. C.* would therefore result in the imposition of a grossly disproportionate sentence on the respondent and, for this reason, constituted cruel and unusual punishment.

[16] The trial judge then turned to the analysis under s. 7 of the *Charter* and concluded that the impugned provision was overbroad and had effects that were grossly disproportionate to its objective, thereby infringing the respondent's liberty and security interests in a manner contrary to the principles of fundamental justice. In his analysis, he rejected the protection of hope as a principle of fundamental justice but found that fundamental justice does include the protection of human dignity, a principle that s. 745.51 *Cr. C.* violated.

[17] Regarding s. 1 of the *Charter*, the judge found that the Crown had not shown that the limits on the s. 7 and 12 rights were reasonable and justified in a free and democratic society.

[18] In the end, the judge noted that the appropriate remedy where a declaration of unconstitutionality is made is generally the invalidity of the legislative provision in question. However, he found that the impugned provision was substantially

constitutional and peripherally problematic, so the defect could be remedied by applying the technique of reading in. In his view, because the violation stemmed from an omission from the provision, the essential conditions for reading in were met in this case. He therefore interpreted s. 745.51 *Cr. C.* as granting courts a discretion to choose the length of the additional ineligibility period to impose on an offender, which could be less than 25 years.

[19] The trial judge accordingly imposed on the respondent the mandatory minimum sentence of imprisonment for life for the 6 counts of first degree murder and, applying the technique of reading in to s. 745.51 *Cr. C.*, ordered that the respondent serve a 25-year parole ineligibility period on each of the first 5 counts of which he had been convicted and that these periods be served concurrently. For the sixth count, the judge ordered that the respondent serve a minimum period of 15 years before being able to apply for parole and that this period be consecutive to the other periods he had ordered, for a total ineligibility period of 40 years.

C. *Quebec Court of Appeal, 2020 QCCA 1585, 405 C.C.C. (3d) 524 (Doyon, Gagnon and Bélanger J.J.A.)*

[20] In a unanimous decision, the Court of Appeal allowed the respondent's appeal, declared s. 745.51 *Cr. C.* invalid on the basis that it was contrary to ss. 12 and 7 of the *Charter* and found that the trial judge had erred by arrogating the discretion to reformulate s. 745.51 *Cr. C.* and, in so doing, ordering that the respondent serve a parole ineligibility period that had no basis in law.

[21] In its analysis under s. 12 of the *Charter*, the Court of Appeal began by considering the constitutionality of the provision by looking at various scenarios that might arise as a result of the application of s. 745.51 *Cr. C.* It concluded that the imposition of a parole ineligibility period that greatly exceeds the life expectancy of any human being is degrading because of its absurdity, and hence incompatible with human dignity. The Court of Appeal reached the same conclusion regarding the imposition of consecutive ineligibility periods totalling 75 years, an order that is unlikely to be carried out given that the minimum age at which an offender who started a sentence at the age of 18 could apply for parole would be 93. Likewise, the imposition of a sentence of imprisonment without eligibility for parole for 50 years does not satisfy the fundamental test of proportionality in sentencing. Although the Court of Appeal rejected the argument that loss of hope entails the unconstitutionality of the provision, it expressed the opinion that an individual who is rehabilitated after 25 years in prison must be able to apply for parole; if not, the sentence would have all the attributes of a totally disproportionate sentence. In the Court of Appeal's view, the fact that the imposition of consecutive ineligibility periods is discretionary could not save s. 745.51 *Cr. C.*, because in almost every case the sentence authorized by the section will be either grossly disproportionate or unacceptable by nature.

[22] Regarding s. 7 of the *Charter*, the Court of Appeal found that the impugned provision was overbroad and that its effects were disproportionate, as could be seen from the s. 12 analysis. However, the court declined to answer the question whether the protection of human dignity is a principle of fundamental justice.

[23] The possibility of imposing consecutive 25-year periods was not a minimal impairment of the *Charter* rights and was not justified in a free and democratic society within the meaning of s. 1. Given the constitutional invalidity of the provision, the Court of Appeal addressed the appropriate remedy and concluded that reading in was inappropriate in this case. The means chosen by Parliament — the fixed periods of 25 years — were so inextricably bound up with the legislative objectives that they could not be disregarded without unduly intruding on the legislative sphere. In the Court of Appeal's view, the trial judge had usurped Parliament's role in interpreting the provision as granting courts a discretion to choose the appropriate parole ineligibility period.

[24] The Court of Appeal accordingly declared s. 745.51 *Cr. C.* unconstitutional, noting that the declaration was to take effect immediately, and ordered that the respondent serve a 25-year parole ineligibility period on each count and that these periods be served concurrently.

### III. Issues

[25] This appeal raises the following issues:

1. Does s. 745.51 *Cr. C.* infringe s. 12 of the *Charter*?
2. Does s. 745.51 *Cr. C.* infringe s. 7 of the *Charter*?

3. If s. 12 or s. 7 is infringed, can the impugned provision be saved under s. 1 of the *Charter*?
4. In the event that the impugned provision cannot be saved under s. 1 of the *Charter*, what is the appropriate remedy?

[26] For the reasons that follow, I am of the view that s. 745.51 *Cr. C.* infringes s. 12 of the *Charter* and cannot be saved under s. 1. In light of this conclusion, there is no need to consider the alleged infringement of s. 7 of the *Charter*. The provision must be declared to be of no force or effect retroactively to the time it was enacted.

#### IV. Analysis

##### A. *History of Section 745.51 Cr. C.*

[27] It is helpful to begin the analysis by outlining the manner in which the treatment of people convicted of murder in Canada has changed over time, since these changes inform our understanding of the impugned provision.

[28] Until 1961, there was no legal classification of types of murder in this country. Any person convicted of murder was sentenced to death, and the sentence was carried out unless the Governor General, acting on the advice of Cabinet, commuted it to life imprisonment. In actual fact, the royal prerogative of mercy was exercised frequently and operated flexibly at that time (Library of Parliament, *Bill S-6: An Act to*

*amend the Criminal Code and another Act*, Legislative Summary 40-3-S6-E, April 30, 2010, at pp. 4-5; Correctional Service of Canada, *A review and estimate of time spent in prison by offenders sentenced for murder*, November 2002 (online)).

[29] In 1961, Parliament established a distinction between capital murder and non-capital murder. The former, which included murder that was planned and deliberate, was punishable by death by hanging in the case of an offender 18 years of age or older. The latter, which was similar to second degree murder, was punishable by imprisonment for life (*Act to amend the Criminal Code (Capital Murder)*, S.C. 1960-61, c. 44, ss. 1 and 2; Library of Parliament, at pp. 5-6).

[30] From 1961 to 1976, offenders whose sentences had been commuted and those whose crimes fell into the second category — non-capital murder — could apply for parole following a minimum period of incarceration (Correctional Service of Canada).

[31] In July 1976, Parliament abolished the death penalty for *Criminal Code* offences (*Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76, c. 105).<sup>1</sup> As a result of a political compromise, it replaced the death penalty with a mandatory minimum life sentence for the two categories of murder now defined in the *Criminal Code*: first degree murder and second degree murder. In the case of second degree murder, the parole ineligibility period varied from 10 to 25 years. For first degree murder, the parole

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<sup>1</sup> The death penalty continued to apply for service offences until 1999 (*An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35).

ineligibility period was 25 years without regard to the number of victims. There was no provision at that time concerning the imposition of consecutive ineligibility periods in cases involving multiple murders.

[32] The mandatory 25-year parole ineligibility period for first degree murder was presumably established to satisfy proponents of the death penalty (A. Manson, “The Easy Acceptance of Long Term Confinement in Canada” (1990), 79 C.R. (3d) 265, at p. 266). Indeed, it was particularly severe when compared with the ineligibility periods provided for in other Western countries at the time for similar offences (Manson, at pp. 266-67). Moreover, from 1961 to 1976, the average time served in prison for the offence of capital murder had been 15.8 years, well below the newly enacted 25-year period of imprisonment (Correctional Service of Canada).

[33] When the death penalty was abolished, Parliament also established a right to judicial review of the parole ineligibility period, commonly known as the “faint hope” clause (*Criminal Law Amendment Act (No. 2), 1976*, s. 21). This clause allowed persons who had been sentenced to life in prison for first or second degree murder without eligibility for parole for more than 15 years to apply for a review of their parole ineligibility period once they had been incarcerated for at least 15 years. The clause was added to the *Criminal Code* in the hope of encouraging the rehabilitation of offenders serving long prison sentences and, as a result, of creating a safer prison environment. As well, it tempered the increased harshness of parole ineligibility

periods (Department of Justice Canada, *An Analysis of the Use of the Faint Hope Clause* (2010), at p. 1; Library of Parliament, at pp. 3-4).

[34] In 1996, Parliament amended the faint hope clause such that, among other things, persons convicted of multiple murders would no longer be able to apply for judicial review (*An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act*, S.C. 1996, c. 34). Then, in 2011, Parliament passed legislation that abolished the clause for all intents and purposes by making it inapplicable to anyone who committed a murder on or after the day on which the legislation came into force (*An Act to amend the Criminal Code and another Act*, S.C. 2011, c. 2).

[35] The impugned provision was also introduced into the *Criminal Code* in 2011 (*Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, s. 5). The relevant subsection of s. 745.51 *Cr. C.* reads as follows:

**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 for each murder conviction are to be served consecutively.

[36] Given the fact that the impugned provision concerns the imposition of consecutive parole ineligibility periods, a discussion of the parole system is in order. It

should be noted, however, that this appeal does not relate to the process by which an offender may apply for parole at the end of the ineligibility period.

B. *The Parole System in Canada*

[37] The parole system involves a process that is independent of and distinct from the sentencing process (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 1). Before this system was set up in the last century, there was no general sentence review mechanism in Canada. During the pre-Confederation period, the only relief an offender could obtain was the reduction of a prison sentence or commutation of a death sentence by way of the royal prerogative of mercy (D. P. Cole and A. Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (1990), at p. 159).

[38] In 1868, *The Penitentiary Act of 1868*, S.C. 1868, c. 75, s. 62, introduced a sentence remission mechanism that enabled prisoners to obtain a reduction in the length of their sentence upon proof of good behaviour (Cole and Manson, at p. 163). But it was not until 1899 that the first administrative parole mechanism came into existence through the enactment of what was known as the *Ticket of Leave Act (An Act to provide for the Conditional Liberation of Penitentiary Convicts)*, S.C. 1899, c. 49), under which prisoners who met the eligibility criteria could be conditionally released (Cole and Manson, at pp. 164-66).

[39] In the 1950s, Parliament appointed an advisory committee to inquire into the use of the royal prerogative of mercy and into the parole system (Department of Justice Canada, *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (1956) (“Fauteux Report”). The committee made its recommendations in 1956, and the most important of them were implemented in 1958 through the enactment of the first modern parole legislation, the *Parole Act*, S.C. 1958, c. 38. That Act created an independent agency, now known as the Parole Board of Canada (“Board”), that had the power to review and vary conditions for release. Major amendments were made to the *Parole Act* in 1977, the year after the death penalty was abolished. The Board’s role and functions were expanded at that time (*Criminal Law Amendment Act, 1977*, S.C. 1976-1977, c. 53). Finally, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“*Conditional Release Act*”), was passed in 1992 to replace, among others, the *Parole Act*. The *Conditional Release Act* defines the purpose of and principles underlying conditional release, and gives particular prominence to the protection of society by making it the paramount consideration.

[40] The Board is an independent administrative tribunal whose primary role is to make decisions on conditional release (*Conditional Release Act*, ss. 103 and 107). It has exclusive jurisdiction to grant day parole and full parole to persons serving a sentence of two years or more in Canada (ss. 122 and 123(1)). Offenders with fixed-term sentences are generally eligible to apply for full parole after serving the lesser of one third of their sentence and seven years (s. 120(1)). That being said,

offenders who have been convicted of first or second degree murder are not eligible for full parole until they have served 25 years or 10 to 25 years, respectively, of their sentence (s. 745(a) and (c) *Cr. C.*).

[41] There is no guarantee that offenders will be granted parole when their ineligibility period expires (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 34; M. E. Campbell and D. Cole, “Sentencing and Parole for Persons Convicted of Murder”, in D. Cole and J. Roberts, eds., *Sentencing in Canada: Essays in Law, Policy and Practice* (2020), 183, at pp. 185-87). Offenders must prove to the Board that they no longer represent a danger to society and that it is therefore no longer necessary to keep them in custody (*Conditional Release Act*, s. 102). Parole is a statutory privilege and not a right (*Nur*, at para. 98).

[42] The Board exercises a discretion when it makes a decision with respect to parole. In exercising that discretion, the Board is guided by its purpose: “to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens” (*Conditional Release Act*, s. 100; see also *Nur*, at para. 98). The *Conditional Release Act*’s primary emphasis is on protecting the public (see *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, at para. 19), and since 2012 this concern has been formally recognized as the paramount consideration in decisions on release (*Safe Streets and Communities Act*, S.C. 2012, c. 1; *Conditional Release Act*, s. 100.1).

[43] The Board's broad discretion means that it may attach conditions to an offender's release (*Conditional Release Act*, s. 133(3)), including to protect victims who have safety concerns (s. 133(3.1)). The Board may also suspend or revoke the parole of an offender who breaches the conditions imposed (s. 135). Where the Board decides not to grant parole, it generally reviews the case every two years (s. 123(5)). However, this is done only every five years in the case of offenders who have been convicted of murder or another offence involving violence (s. 123(5.01)).

[44] Victims are taken into consideration in the parole process. To determine whether an offender presents an "undue risk to society" (*Conditional Release Act*, s. 102), the Board is to consider, among other things, the nature and gravity of the offence as well as information obtained from victims (s. 101(a)). Victims may apply to attend parole hearings and may present statements to the Board (s. 140(4), (5.1), (5.2) and (10) to (12)). Although such hearings can awaken painful memories for victims and for their loved ones, they do serve to reiterate the suffering an offender has caused and to condemn the acts committed once again (D. Spencer, "How Multiple Murder Sentencing Provisions May Violate the *Charter*" (2019), 55 C.R. (7th) 165).

### C. *Sentencing Objectives in Canadian Law*

[45] Before I begin the s. 12 analysis, an overview of the objectives of sentencing will be essential to the adjudication of the case before the Court. In Canadian law, the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just,

peaceful and safe society by imposing just sanctions that have one or more objectives, including denunciation, deterrence and rehabilitation, which it will be helpful to discuss (s. 718 *Cr. C.*).

[46] First of all, the penological objective of denunciation requires that a sentence express society's condemnation of the offence that was committed. The sentence is the means by which society communicates its moral values (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81). This objective must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity (*C. C. Ruby, Sentencing* (10th ed. 2020), at §1.22).

[47] As for the objective of deterrence, it has two forms. The first, specific deterrence, is meant to discourage the offender before the court from reoffending. The second, general deterrence, is intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted (*R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941, at para. 2). When this objective is being pursued, the offender is punished more harshly in order to send a message to the public or, in other words, to serve as an example. General deterrence is an objective that must be weighed by a court, but the effectiveness of which has often been questioned. These legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible

offenders (Ruby, at §1.31; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), at pp. 136-38).

[48] Lastly, the objective of rehabilitation is designed to reform offenders with a view to their reintegration into society so that they can become law-abiding citizens. This penological objective presupposes that offenders are capable of gaining control over their lives and improving themselves, which ultimately leads to a better protection of society. M. Manning and P. Sankoff note that rehabilitation “is probably the most economical in the long run and the most humanitarian objective of punishment” (*Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at ¶1.155). Along the same lines, I would reiterate my comment in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, that “[r]ehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world” (para. 4).

[49] The relative importance of each of the sentencing objectives varies with the nature of the crime and the characteristics of the offender (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329). There is no mathematical formula for determining what constitutes a just and appropriate sentence. That is why this Court has described sentencing as a “delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community” (*M. (C.A.)*, at para. 91).

[50] But sentencing must in all circumstances be guided by the cardinal principle of proportionality. The sentence must be severe enough to denounce the offence but must not exceed “what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence” (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42; see also *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37). Proportionality in sentencing is considered to be an essential factor in maintaining public confidence in the fairness and rationality of the criminal justice system. The application of this principle assures the public that the offender deserves the punishment received (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533, per Wilson J., concurring).

[51] It follows that “a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending” (*Nur*, at para. 45). In a similar vein, Vauclair J.A. aptly stated that [TRANSLATION] “striving for exemplarity to the detriment of evidence of the merit of rehabilitation objectives is incompatible with the principle of individualization” (*Lacelle Belec v. R.*, 2019 QCCA 711, at para. 30 (CanLII), citing *R. v. Paré*, 2011 QCCA 2047, at para. 48 (CanLII), per Doyon J.A.). Proportionality has a restraining function, and in this sense serves to guarantee that a sentence is individualized, just and appropriate.

[52] The principle of proportionality is so fundamental that it has a constitutional dimension under s. 12 of the *Charter*, which forbids the imposition of a sentence that is so grossly disproportionate as to be incompatible with human dignity

(*Nasogaluak*, at para. 41; *Ipeelee*, at para. 36). However, proportionality as a sentencing principle has no constitutional status as such, since it is not recognized to be a principle of fundamental justice under s. 7 of the *Charter* (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 71).

[53] Nor do the other sentencing principles and objectives have their own constitutional status. It follows that “Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the *Charter*” (*Safarzadeh-Markhali*, at para. 71).

D. *The Right Under Section 12 of the Charter Not to Be Subjected to Cruel and Unusual Punishment*

[54] Section 12 of the *Charter*, which appears under the heading “Legal Rights”, provides that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” Although these reasons apply to both punishment and treatment, I will, for the sake of brevity, refer solely to punishment.

[55] It will therefore be appropriate, first, to determine whether the parole ineligibility period constitutes punishment and, second, to clarify the two prongs of the protection afforded by this constitutional guarantee.

(1) The Parole Ineligibility Period Constitutes Punishment

[56] Section 12 of the *Charter* grants individuals a right not to be subjected to cruel and unusual punishment. A precondition for applying this section is therefore that the impugned action constitute punishment. Such is the case here.

[57] State action is considered to be punishment for the purposes of s. 12 if it “(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an offender’s liberty or security interests” (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 39, quoting *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41).

[58] The length of parole ineligibility is part of an offender’s punishment (*Shropshire*, at para. 23; see also *Zinck*, at para. 31). It is a consequence of conviction and has a significant impact on the offender’s interests in liberty and security of the person. What is more, the parole ineligibility period furthers the objectives of denunciation and deterrence that underlie a sentence (*Shropshire*, at paras. 21-23; *M. (C.A.)*, at para. 64; *R. v. Simmonds*, 2018 BCCA 205, 362 C.C.C. (3d) 215, at para. 10). It follows that the imposition of consecutive parole ineligibility periods authorized by s. 745.51 *Cr. C.* constitutes punishment, the constitutionality of which must be determined under s. 12 of the *Charter*.

(2) The Two Prongs of the Right Not to Be Subjected to Cruel and Unusual Punishment

[59] For a proper understanding of the two prongs of the protection afforded by s. 12 of the *Charter*, it is necessary to refocus the analysis on the purpose of this provision. This Court recently stated that the purpose of s. 12 is “to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals” (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 51; the Court was unanimous on this point). Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all *Charter* rights (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 77). Generally speaking, the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect (*Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at para. 56; *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 105). This respect is owed to every individual, irrespective of their actions (see C. Brunelle, “La dignité dans la *Charte des droits et libertés de la personne*: de l’ubiquité à l’ambiguïté d’une notion fondamentale”, [2006] *R. du B.* (numéro thématique) 143, at pp. 150-51).

[60] Against this backdrop, the two prongs of the right not to be subjected to cruel and unusual punishment may now be considered. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically

incompatible with human dignity (*R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-74; L. Kerr and B. L. Berger, “Methods and Severity: The Two Tracks of Section 12” (2020), 94 *S.C.L.R.* (2d) 235, at pp. 235-36). This distinction is often blurred, and it would be helpful in the context of this appeal to clarify certain points in this regard.

[61] The first form of cruel and unusual punishment involves punishment whose effect is grossly disproportionate to what would have been appropriate (*Smith*, at p. 1072). A punishment oversteps constitutional limits when it is grossly disproportionate, and not merely excessive (*Smith*, at p. 1072). A grossly disproportionate sentence is cruel and unusual in that it shows the state’s complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them.

[62] Determining whether a punishment is grossly disproportionate requires a contextual and comparative analysis: a punishment is found to be so in the specific circumstances of a particular case, in relation to the punishment that would have been just and appropriate having regard to the offender’s personal characteristics and the circumstances surrounding the commission of the offence. However, the nature of the punishment inflicted is not problematic from a constitutional perspective. For example, it is accepted that the state may have recourse to fixed-term imprisonment or to the imposition of a fine as punishment. Such punishment is therefore not in itself cruel and unusual, but can become so if its effects make it grossly disproportionate.

[63] The case law on grossly disproportionate punishment has been developed in the context of mandatory sentences imposed without regard for the offender's particular circumstances (e.g., mandatory minimum prison sentences in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Nur*; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Smith*; a mandatory victim surcharge in *Boudreault*; a mandatory weapons prohibition order in *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895). In *Nur*, this Court noted that, to determine whether a minimum sentence is grossly disproportionate, a court must first consider “what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*” (para. 46). The court must then ask whether the impugned provision requires it to impose a sentence that is grossly disproportionate to one that would be just and appropriate for the offender or for another offender in a reasonable hypothetical case; if the provision does so, it infringes s. 12 of the *Charter* (*Nur*, at para. 46). The *Nur* framework does not apply to discretionary sentences. Where there is no mandatory minimum sentence, the imposition of a sentence that is acceptable by its nature but that proves to be disproportionate in a particular case can be rectified by way of an appeal against sentence rather than a declaration of unconstitutionality (*Malmo-Levine*, at paras. 167-68).

[64] The second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will “always be grossly disproportionate” because they are intrinsically incompatible with human dignity (*Smith*, at p. 1073). These punishments are in themselves contrary to

human dignity because of their “degrading and dehumanizing” nature, as this Court put it in 9147-0732 *Québec inc.* (para. 51; the Court was unanimous on this point). A degrading or dehumanizing punishment, by its very nature, outrages “our standards of decency” (*Luxton*, at p. 724).

[65] Since a society’s standards of decency are not frozen in time, what constitutes punishment that is cruel and unusual by nature will necessarily evolve, in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 22; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). As Cory J. pointed out more than 30 years ago while dissenting on another point in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, “[w]hat is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity” (p. 818). Punishments that we regard as incompatible with human dignity today were common and accepted in the past. Professor A. N. Doob rightly states that “[t]he reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values” (Department of Justice Canada, *A Values and Evidence Approach to Sentencing Purposes and Principles* (2017), at p. 4).

[66] Among the punishments and treatments that have so far been held to be intrinsically incompatible with human dignity are “the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed . . . the lobotomisation of certain dangerous offenders or the castration of sexual offenders” (*Smith*, at p. 1074). Torture also falls into this category, for it has as its end “the denial of a person’s humanity” (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 51).

[67] A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. A punishment that is cruel and unusual by nature is “so inherently repugnant that it could never be an appropriate punishment, however egregious the offence” (*Suresh*, at para. 51). To determine whether a punishment is intrinsically incompatible with dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment.

[68] The court’s analysis must remain focused on the nature of the punishment rather than on considerations of proportionality between the punishment and the offender’s moral culpability. A punishment that is cruel and unusual by nature will by definition “always be grossly disproportionate” (*Smith*, at p. 1073). Such a punishment

must quite simply be excluded from the arsenal of sanctions available to the state, which means that the state cannot circumvent s. 12 by providing for specific exemptions for the imposition of the punishment or by making its imposition subject to judicial discretion. In other words, the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*.

[69] In sum, a punishment may infringe s. 12 for two distinct reasons, either because it is grossly disproportionate in a given case or because it is intrinsically incompatible with human dignity. Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality. If the punishment that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be unnecessary — and I would even say pointless — to consider whether it is grossly disproportionate in a given case, because a punishment that is cruel and unusual by nature will “always be grossly disproportionate” (*Smith*, at p. 1073; see also Kerr and Berger, at p. 238).

[70] In their analysis under s. 12 of the *Charter*, the courts must show deference to Parliament’s policy decisions with respect to sentencing (*Lloyd*, at para. 45). The limit set by the Constitution for a sentence to be found grossly disproportionate is intended to be demanding and will be attained only rarely (*Boudreault*, at para. 45; *Lloyd*, at para. 24; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417; *Lyons*, at p. 345). Likewise, the courts must be cautious and deferential when a sentence

is contested on the basis that it falls into the narrow category of punishment that is cruel and unusual by nature. Nevertheless, “the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function” (*Lloyd*, at para. 45, quoting *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238). That is the analysis we must now undertake.

E. *Does Section 745.51 Cr. C. Infringe Section 12 of the Charter?*

[71] I will begin by observing that this appeal concerns only the constitutionality, under s. 12 of the *Charter*, of a provision that allows a court to impose consecutive parole ineligibility periods in a context involving multiple murders. Specifically, in the case of first degree murders, the court is authorized, through the combined effect of ss. 745.51 and 745(a) *Cr. C.*, to add up ineligibility periods of 25 years for each murder. Whether it is unconstitutional for a court to impose any ineligibility period greater than 25 years is therefore not at issue in this case.

[72] To answer the question before the Court, I will begin by defining the scope of s. 745.51 *Cr. C.* and the punishment that flows from it. I will then inquire into the nature of that punishment to determine whether it is intrinsically incompatible with human dignity and thus cruel and unusual by nature. To support my analysis of the nature of the punishment, I will consider the potential effects of the punishment on all offenders and I will also look at international and comparative law. I will finish on this topic by discussing whether the judicial discretion and the royal prerogative of mercy affect the constitutionality of the impugned provision.

[73] For the reasons that follow, I conclude that, by allowing consecutive 25-year parole ineligibility periods to be imposed in cases involving first degree murders, s. 745.51 *Cr. C.* authorizes the imposition of sentences of imprisonment for life without a realistic possibility of parole before death for all offenders who must serve such periods consecutively. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. The conclusion that a sentence of imprisonment without a realistic possibility of parole is incompatible with human dignity is supported by an analysis of the effects that such a sentence may have on all offenders on whom it is imposed, as well as by a review of international and comparative law. Finally, the judicial discretion cannot save the impugned provision, and the royal prerogative of mercy does not offer a realistic possibility of release for an individual serving a sentence of imprisonment for which there is no other review mechanism.

(1) Scope of Section 745.51 *Cr. C.*

[74] An accused who is convicted of first or second degree murder will be sentenced to imprisonment for life (s. 235(2) *Cr. C.*) and will be eligible for full parole only after serving an ineligibility period of, respectively, 25 years or 10 to 25 years (s. 745(a) and (c) *Cr. C.*). Section 745.51 *Cr. C.* provides that the judge who presided at the trial may, by order, decide that the periods without eligibility for parole for each

murder conviction are to be served consecutively, in a departure from the general principle that parole ineligibility periods are to be served concurrently (ss. 718.2(c) and 718.3(4) *Cr. C.*). According to the interpretation proposed by the parties — which we will assume to be correct for the purposes of this appeal, insofar as it is not determinative — s. 745.51 *Cr. C.* applies regardless of whether the multiple murders were committed at the same time or during separate events, and it applies in the absence of a previous conviction.

[75] I agree with the trial judge and the Court of Appeal in this case that s. 745.51 *Cr. C.* does not authorize a court to order that an offender convicted of first degree murder serve only a portion of a 25-year ineligibility period consecutively to another period imposed for another first degree murder (Sup. Ct. reasons, at para. 824; C.A. reasons, at para. 64). The provision in question allows only the imposition of consecutive 25-year periods. Parliament's intention, which I will discuss below, was clear on this point. I would add that s. 745.51 *Cr. C.* sets no ceiling for the total length of the ineligibility period a court may impose. This provision merely states the criteria that are to guide the court in exercising its discretion, to which I will return later in these reasons.

[76] In the case of multiple first degree murders, the impugned provision authorizes the imposition of sentences of imprisonment that effectively deprive all offenders who receive such sentences of a realistic possibility of being granted parole. In the scenario that is most favourable to the Crown, but that would in fact be quite

rare, an 18-year-old offender who goes to prison and remains there for the next 50 years of their life could theoretically be paroled at the age of 68. For reference, it should be noted that the average life expectancy of inmates who die of natural causes is about 60 years (Office of the Correctional Investigator of Canada and Canadian Human Rights Commission, *Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody* (2019), at p. 57), which is far lower than the average life expectancy of the general public (for context, the average life expectancy of Canadians, both sexes combined, was 81.7 years in 2020; see Statistics Canada, “Deaths, 2020”, in *The Daily*, January 24, 2022 (online)).

[77] Therefore, at the end of the 50-year period of incarceration, some offenders will have died, while others will perhaps be released after the significant years of their life are over, making them what some authors have called “virtual lifers” (A. Iftene, “R. c. Bissonnette and the (Un)Constitutionality of Consecutive Periods of Parole Ineligibility for a Life Sentence: Why the QCCA Got It Right and Why Section 745.51 Should Never Be Re-Written” (2021), 69 *Crim. L.Q.* 312, at p. 331). For the purposes of analyzing the constitutionality of the impugned provision, this situation can be likened to a sentence of imprisonment for life without a realistic possibility of parole, in that the individual in question will never be able to re-enter society and contribute to it as an active citizen, especially given the fact that long prison sentences impair, more than they favour, the reintegration of offenders into society (*R. v. Gladue*, [1999] 1 S.C.R. 688, at paras. 54-57; *Ruby*, at §1.63).

[78] As for the other possible cases, which involve the imposition of a sentence of imprisonment for life without eligibility for parole for 75, 100, 125 or even 800 years, the conclusion is self-evident: the individual is sentenced to die in prison, deprived of any possibility of one day recovering a portion of their liberty.

[79] Such cases are far from being hypothetical, as can be seen from the jurisprudence. In *R. v. Bourque*, 2014 NBQB 237, 427 N.B.R. (2d) 259, for example, a 24-year-old accused was sentenced to imprisonment for life with no possibility of applying for parole before the expiration of a 75-year ineligibility period (see also *R. v. Saretzky*, 2017 ABQB 496; *R. v. Ostamas*, 2016 MBQB 136, 329 Man. R. (2d) 203).

[80] I will therefore analyze the constitutionality of the impugned provision on the basis that it effectively authorizes the imposition of a sentence of imprisonment for life without a realistic possibility of parole.

(2) Imprisonment for Life Without a Realistic Possibility of Parole Constitutes Punishment That Is Cruel and Unusual by Nature

[81] An examination of the nature of a sentence of imprisonment for life without a realistic possibility of parole leads to the conclusion that it is incompatible with human dignity, a value that underlies the protection conferred by s. 12 of the *Charter*. This punishment is degrading in nature in that it presupposes at the time of its imposition, in a definitive and irreversible way, that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation. This alone justifies the

conclusion that this punishment is cruel and unusual by nature. It will nonetheless be helpful to review in addition the effects that this sentence may have on all offenders on whom it is imposed.

(a) *Examination of the Nature of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole*

[82] A sentence of imprisonment for life without a realistic possibility of parole is different in nature from a sentence of incarceration for which a review mechanism exists, in that the former deprives the offender of any prospect of reforming and re-entering society (see *Lyons*, at pp. 340-41; I. Grant, C. Choi and D. Parkes, “*The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing*” (2020), 52 *Ottawa L. Rev.* 133, at p. 172, citing A. Liebling, “Moral performance, inhuman and degrading treatment and prison pain” (2011), 13 *Punishm. & Soc.* 530, at p. 536). A variety of expressions, all of which allude to the fact that the offender will inevitably die behind bars, have been used to describe the nature of a sentence of life in prison without the possibility of parole (e.g., “living death sentence”, “death by incarceration”, “virtual death sentence”, “prolonged death penalty”, “delayed death penalty”, “death sentence without an execution date” and “the other death penalty”; see J. S. Henry, “Death-in-Prison Sentences: Overutilized and Underscrutinized”, in C. J. Ogletree, Jr. and A. Sarat, eds., *Life without Parole: America’s New Death Penalty?* (2012), 66, at p. 66). Once behind prison walls, the offender is doomed to remain there until death regardless of any efforts at rehabilitation, despite the devastating effects that this causes.

[83] The objective of rehabilitation is intimately linked to human dignity in that it reflects the conviction that all individuals carry within themselves the capacity to reform and re-enter society. As J. Desrosiers and C. Bernard aptly write, criminal law is based, and must be based, [TRANSLATION] “on a conception of the human being as an agent who is free and autonomous and, as a result, capable of change” (“L’emprisonnement à perpétuité sans possibilité de libération conditionnelle: une peine inconstitutionnelle?” (2021), 25 *Can. Crim. L.R.* 275, at p. 303).

[84] It is difficult if not impossible to predict an offender’s capacity for reform over a period of 50 years or more, let alone to predict whether the offender will actually be able to reform during their many years of incarceration. By depriving offenders in advance of any possibility of reintegration into society, the impugned provision shakes the very foundations of Canadian criminal law. It thereby negates the objective of rehabilitation from the time of sentencing, which has the effect of denying offenders any autonomy and imposing on them a degrading punishment that is incompatible with human dignity.

[85] To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance. Offenders who are by chance able to rehabilitate themselves must have access to a sentence review mechanism after having served a period of incarceration that is sufficiently long to denounce the gravity of their offence. This last point is important, as Parliament has latitude to establish sentences whose severity expresses society’s

condemnation of the offence committed, and while such sentences may in some circumstances have the effect of dooming offenders to die behind bars, they are not necessarily contrary to s. 12 of the *Charter*.

[86] As an illustration, in *Luxton*, this Court rejected the argument that the mandatory sentence for first degree murder infringes s. 12 of the *Charter*. The Court considered it proper for Parliament to treat this crime — the most serious of all — with an appropriate degree of severity. The 25-year parole ineligibility period reflects society’s condemnation of the commission of such a crime and does not outrage our standards of decency (*Luxton*, at pp. 724-25). Because of the 25-year mandatory ineligibility period, an elderly offender who is convicted of first degree murder will thus have little or no hope of getting out of prison. As was decided in *Luxton*, that sentence is nonetheless compatible with s. 12 of the *Charter*, since it is within the purview of Parliament to sanction the most heinous crime with a sentence that sufficiently denounces the gravity of the offence, but that does not exceed constitutional limits by depriving every offender of any possibility of parole from the outset.

[87] In the case at bar, on the other hand, the impugned provision authorizes the imposition of consecutive parole ineligibility periods of 25 years each, for each first degree murder, which has the result of depriving every offender who must serve such periods of the possibility of reforming and re-entering society. J. S. Henry rightly states that “[death-in-prison] sentences are severe and degrading because, like capital sentences, they fail to recognize the intrinsic worth of the incarcerated person. The

absence of all redemptive possibility denies human dignity” (p. 76). As Martin J. observed in *Boudreault*, in which the Court struck down the victim surcharge provision, “[t]he inability of offenders to repay their full debt to society and to apply for reintegration and forgiveness strikes at the very foundations of our criminal justice system” (para. 79). Although the context of that case was different from the present one, the principle it lays down that every offender should have the opportunity to reform and be reintegrated into society is of general application. The foundations of our criminal justice system, as discussed in *Boudreault*, require respect for the inherent worth of every individual, including the vilest of criminals.

[88] Contrary to what the appellants argue, the intent here is not to have the objective of rehabilitation prevail over all the others, but rather to preserve a certain place for it in a penal system based on respect for the inherent dignity of every individual. Where the offence of first degree murder is concerned, rehabilitation is already subordinate to the objectives of denunciation and deterrence, as can be seen from the severity of the punishment.

[89] The objectives of denunciation and deterrence are already attained by imposing the harshest mandatory minimum sentence provided for in the *Criminal Code*: imprisonment for life (s. 235 *Cr. C.*). The idea that parole puts an end to an offender’s sentence is a myth. Conditional release only alters the conditions under which a sentence is served; the sentence itself remains in effect for its entire term, that is, until the offender’s death (*M. (C.A.)*, at para. 57). An offender who is granted parole

“still carries the societal stigma of being a convicted offender who is serving a criminal sentence” (*M. (C.A.)*, at para. 62). Moreover, an offender who is granted parole on the basis that they no longer pose a danger to society remains “under the strict control of the parole system, and the offender’s liberty remains significantly curtailed” (*M (C.A.)*, at para. 62). The threat of reincarceration — should a condition be breached — hangs over the offender at all times (*Conditional Release Act*, s. 135). Contrary to popular belief, “[a] person on parole is not a free man” (*R. v. Wilmott*, [1967] 1 C.C.C. 171 (Ont. C.A.), at p. 181).

[90] The 25-year parole ineligibility period must also be placed in perspective in order to clearly illustrate its severity. It must be borne in mind that this 25-year period, although constitutional, is far from lenient. In a report published in 1987, the Canadian Sentencing Commission noted that “[t]here has been extensive criticism of the 25 year term of custody without the possibility of parole. Many see it as inhumane: inmates have no opportunity to mitigate their sentences” (p. 262). Furthermore, inmates on whom this term is imposed have no incentive to conform to prison rules (p. 262).

[91] To put this in context, in a number of countries similar to Canada — countries governed by the rule of law where the sentence of imprisonment for life exists — there is a sentence review mechanism that is accessible to life prisoners following a minimum ineligibility period shorter than the one provided for in Canadian law for first degree murder. Some European countries have adopted a sentence review mechanism that is available to offenders upon completion of various ineligibility periods: Denmark

and Finland (12 years), Germany (15 years), Switzerland (15 years, exceptionally 10 years) and France (normally 18 years, up to 22 years in the case of legal recidivism, but 30 years for certain types of murder).<sup>2</sup> There are other European countries where life imprisonment quite simply does not exist. For example, Portugal's constitution includes an article that prohibits sentences of imprisonment for life (Constitution of the Portuguese Republic, art. 30(1); D. van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink?" (2010), 23 *Fed. Sentencing Rep.* 39, at p. 40), while Norway has provided that the longest prison sentence that can be imposed is 21 years, except with respect to the crime of genocide, crimes against humanity and war crimes, for which the maximum sentence is increased to 30 years.<sup>3</sup>

[92] This overview highlights the severity of Canada's mandatory minimum sentence for first degree murder. There can be no doubt that the preponderant objectives of this sentence are denunciation and deterrence and that the place of rehabilitation is secondary. The only effect of s. 745.51 *Cr. C.* is to completely negate the last of these objectives, which is incompatible with human dignity for the reasons set out above.

[93] The appellants stress the importance of denouncing multiple murders more strongly by imposing a sentence that reflects the value of each human life that was lost. Such a sentence is based on a retributivist approach that could, on its own, justify a sentence of unlimited severity, and even a sentence establishing a true correspondence

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<sup>2</sup> *Straffeloven* (Denmark), s. 41; *Rikoslaki* (Finland), c. 2(c), s. 10; *Strafgesetzbuch* (Germany), s. 57a; *Code pénal suisse*, art. 86 para. 5; *Code de procédure pénale* (France), art. 729 para. 4 and art. 720-4 para. 2.

<sup>3</sup> *Straffeloven* (Norway), s. 43.

between the crime and the punishment. However, as Desrosiers and Bernard put it, [TRANSLATION] “in a legal system based on respect for rights and freedoms, the ‘eye for an eye’ principle does not apply” (p. 292). The courts must establish a limit on the state’s power to sanction offenders, in keeping with the *Charter*.

[94] Furthermore, the objectives of denunciation and deterrence are not better served by the imposition of excessive sentences. Beyond a certain threshold, these objectives lose all of their functional value, especially when the sentence far exceeds human life expectancy. The imposition of excessive sentences that fulfil no function, like the 150-year parole ineligibility period initially sought by the Crown in this case, does nothing more than bring the administration of justice into disrepute and undermine public confidence in the rationality and fairness of the criminal justice system. And this is leaving aside the fact that the imposition of extremely severe sentences tends to normalize such sentences and to have an inflationary effect on sentencing generally (Grant, Choi and Parkes, at p. 138, citing M. Hamilton, “Extreme Prison Sentences: Legal and Normative Consequences” (2016), 38 *Cardozo L. Rev.* 59, at pp. 106-11).

[95] As the Court of Appeal aptly stated, the imposition of a parole ineligibility period that exceeds human life expectancy [TRANSLATION] “is absurd. . . . A court must not make an order that can never be carried out” (para. 93). Although such a punishment could well be popular, it is contrary to the fundamental values of Canadian society. The thirst for vengeance that can drive us when a heinous crime is committed

by one of our fellow citizens cannot justify imposing a sentence that, no matter how harsh it is, can never erase the horror of what the person has done.

(b) *Effects of a Sentence of Imprisonment for Life Without a Realistic Possibility of Parole*

[96] As far as effects are concerned, offenders who have no realistic possibility of parole are deprived of any incentive to reform. As early as 1956, the Fauteux Report clearly stated that “[a]t no time should any prisoner have reason to feel that he is a forgotten man. . . . Prisoners should have some hope that imprisonment will end and thereby have some incentive for reformation and rehabilitation” (pp. 48-49).

[97] The psychological consequences flowing from a sentence of imprisonment for life without a realistic possibility of parole are in some respects comparable to those experienced by inmates on death row, since only death will end their incarceration. In any event, “[w]hile there may not be universal agreement that [death-in-prison] sentences are *worse* than death, it is clear that [such] sentences are uniquely severe and degrading in their own right” (Henry, at p. 75 (emphasis in original)). For offenders who are sentenced to imprisonment for life without a realistic possibility of parole, the feeling of leading a monotonous, futile existence in isolation from their loved ones and from the outside world is very hard to tolerate. Some of them prefer to put an end to their lives rather than die slowly and endure suffering that seems endless to them (R. Johnson and S. McGunigall-Smith, “Life Without Parole, America’s Other Death Penalty” (2008), 88 *Prison J.* 328, at pp. 332-36; see also R. Kleinstuber and

J. Coldsmith, “Is life without parole an effective way to reduce violent crime? An empirical assessment” (2020), 19 *Criminol. & Pub. Pol’y* 617, at p. 620). Effects like these support the conclusion that a sentence of imprisonment for life without a realistic possibility of parole is degrading in nature and thus intrinsically incompatible with human dignity. It is an inherently cruel and unusual punishment that infringes s. 12 of the *Charter*.

(c) *Dignity and Imprisonment for Life Without the Possibility of Parole: International and Comparative Law Perspectives*

[98] Support for the conclusion that this sentence is unconstitutional can also be found in international and comparative law, under which a sentence of imprisonment for life without the possibility of parole is generally considered to be incompatible with human dignity. As Brown and Rowe JJ. noted recently in *9147-0732 Québec inc.*, there is a role for international and comparative law in the interpretation of *Charter* rights (para. 28). However, “this role has properly been to *support* or *confirm* an interpretation arrived at through the [purposive] approach [established in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295]; the Court has never relied on such tools to define the scope of *Charter* rights” (*9147-0732 Québec inc.*, at para. 28 (emphasis in original)).

[99] Human dignity has been the central focus in the development of the international system for the protection of human rights since the end of the Second World War. The atrocities committed during that war led to international recognition of the fundamental importance of human dignity (*Ward*, at para. 57). It was specifically

stated in the preamble to the *Charter of the United Nations*, Can. T.S. 1945 No. 7, that the peoples of the United Nations were determined to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person”. Two decades or so later, the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“ICCPR”), which Canada ratified in 1976, reiterated the importance of dignity as the foundation of fundamental rights and freedoms. The preamble to the ICCPR states that all the rights guaranteed therein “derive from the inherent dignity of the human person”. While the preamble is not binding as such in Canadian law, it does shed light on the way in which dignity is understood in relation to human rights, that is, as a value that underlies the recognized rights rather than as a right in itself.

[100] In the context of sentencing, in international law, the concept of dignity finds expression through the commitment to reintegrating offenders into society by offering them a possibility of being released. For example, art. 10 of the ICCPR states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (art. 10(1)) and that the “essential aim” of the penitentiary system is the “reformation” and “social rehabilitation” of prisoners (art. 10(3)). Because the ICCPR is an international treaty ratified by Canada, Canadian law is presumed to be in conformity with the commitments set out in it (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64). The ICCPR

is therefore a relevant source for the interpretation of the *Charter*'s provisions (9147-0732 *Québec inc.*, at paras. 32-34).

[101] Moreover, although criminal law is, generally speaking, a matter of domestic law, it is appropriate in this case to consider the approach to reviewing sentences taken by the International Criminal Court (“ICC”) and set out in the *Rome Statute of the International Criminal Court*, Can. T.S. 2002 No. 13. Canada played an important role in the creation of that court and was the first country to incorporate the obligations flowing from that treaty into its national legislation. The ICC was established by the *Rome Statute*, which Canada ratified in July 2000. That international court conducts investigations and, where necessary, tries persons charged with “the most serious crimes of concern to the international community as a whole”: the crime of genocide, crimes against humanity, war crimes and the crime of aggression (*Rome Statute*, art. 5(1)). In June 2000, one month before the ratification of that treaty, Parliament enacted the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 (“*Crimes Against Humanity Act*”), which criminalized genocide, crimes against humanity and war crimes under domestic law.

[102] The *Crimes Against Humanity Act* sets out the sentences that apply in Canadian law and the rules on parole eligibility for these three types of crimes. If an intentional killing forms the basis of the offence, the sentence is the same as for the offence of first or second degree murder, namely imprisonment for life (s. 4(2) of the *Crimes Against Humanity Act*). In the case of parole, however, Parliament enacted rules

that differ from the ones in the *Rome Statute*. The *Crimes Against Humanity Act* states that the same ineligibility periods as in the *Criminal Code* apply, that is, 25 years for first degree murder and 10 to 25 years for second degree murder (s. 15(1) of the *Crimes Against Humanity Act*). In contrast, the *Rome Statute* establishes a mechanism for reviewing the sentences for these crimes: where the ICC has imposed a term of life imprisonment (art. 77), it must review that sentence after 25 years “to determine whether it should be reduced” (art. 110(3)). The ICC’s sentence review process has to do with sentence reduction, not with parole as is the case under Canadian law. In this context, the *Rome Statute* is relevant in the instant case only insofar as, like Canadian law, it recognizes the need to give offenders, including those who have committed the most serious crimes, an opportunity for rehabilitation.

[103] European law also provides useful guidance on the concept of dehumanizing and degrading punishments and on the importance of rehabilitation in criminal law. However, the weight to be given to the principles of European law is limited, because decisions of international and foreign courts are not binding sources in Canadian law (9147-0732 *Québec inc.*, at paras. 35 and 43).

[104] The decisions of the Grand Chamber of the European Court of Human Rights (“ECHR”) recognize the principle of rehabilitation in sentencing (*Vinter v. United Kingdom* [GC], Nos. 66069/09 and 2 others, at § 114, July 9, 2013 (HUDOC); *Murray v. Netherlands* [GC], No. 10511/10, at § 102, April 26, 2016 (HUDOC); *Hutchinson v. United Kingdom* [GC], No. 57592/08, at §§ 42-43, January 17, 2017

(HUDOC)). Article 3 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, provides that “[n]o one shall be subjected . . . to inhuman or degrading treatment or punishment”. In a number of cases, the Grand Chamber has had to consider whether a sentence of imprisonment for life without the possibility of parole is contrary to art. 3. In general terms, it has accepted that a sentence of imprisonment for life is not in itself contrary to that provision (*Kafkaris v. Cyprus* [GC], No. 21906/04, at § 97, February 12, 2008 (HUDOC); *Murray*, at § 99; *Hutchinson*, at § 42). However, it has found that, to be compatible with art. 3, such a sentence must be “*de jure* and *de facto* reducible”, which means that every prisoner must have a possibility of being released (*Vinter*, at § 108; *Hutchinson*, at § 42; see also *Bodein v. France*, No. 40014/10, at § 56, November 13, 2014 (HUDOC); *Murray*, at § 99). The review process “must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds” (*Hutchinson*, at § 43; see also *Vinter*, at §§ 113-16).

[105] Comparative law is relevant as well in showing the different perspectives that exist with respect to a sentence of imprisonment for life without the possibility of parole. While the domestic law of countries similar to Canada is instructive in this regard, it is not binding in Canadian law (9147-0932 *Québec inc.*, at para. 43). In this appeal, I will therefore refer to it only for the purposes of illustration.

[106] Germany, like France and Italy, has established that sentences of imprisonment for life without the possibility of release are unconstitutional (R. Hood and C. Hoyle, *The Death Penalty: A Worldwide Perspective* (5th ed. 2015), at p. 486). It was in 1977 that Germany's Federal Constitutional Court considered the constitutionality of the sentence of life imprisonment for murder (*Life Imprisonment Case* (1977), 45 BVerfGE 187, translated into English in D. P. Kommers and R. A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed. 2012), at pp. 363-68). The Constitutional Court held in that case that a sentence of life imprisonment is not in itself unconstitutional (p. 367). However, it found that imprisonment without any "concrete and realistically attainable" chance to regain freedom at some later point in time is contrary to human dignity (p. 366). The state must regard each individual within society as equal in worth and may not "turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect" (p. 365). The Constitutional Court maintained that rehabilitation is constitutionally required in any community that establishes human dignity as its centrepiece (p. 366). That decision has had a certain impact on the development of European law with respect to life sentences (*Vinter*, at §§ 69 and 113).

[107] In contrast, other countries similar to Canada that also respect the rule of law take a more restrictive approach to parole access. In the United States, for example, imprisonment for life without the possibility of parole is considered constitutional (*Harmelin v. Michigan*, 501 U.S. 957 (1991)) except in the case of juvenile offenders

(*Graham v. Florida*, 560 U.S. 48 (2010)), including those convicted of murder (*Miller v. Alabama*, 567 U.S. 460 (2012)). However, the American approach differs from the one that exists under Canadian law, since that country applies the death penalty and has a narrower interpretation of the concept of cruel and unusual punishment (*Kindler*, at p. 812). Some other countries also have legislative schemes recognizing the possibility of imposing a sentence of imprisonment without the possibility of parole. In New Zealand, the minimum parole ineligibility period for an offender convicted of murder is 10 years, or 17 years in certain specific circumstances, but there is no maximum ineligibility period (*Sentencing Act 2002* (N.Z.), ss. 103 and 104). In Australia, this type of sentence is also permitted in the various states and territories (J. L. Anderson, “The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence” (2012), 35 *U.N.S.W.L.J.* 747, at pp. 751-53 and 759-64). England and Wales, for their part, take a distinctive approach. A court has the power to order that any person given a life sentence for murder serve a parole ineligibility period with a starting point of 15 years, or 30 years in specific circumstances, or to completely exclude any possibility of release for the person (D. Ormerod and K. Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (16th ed. 2021), at pp. 536-37). However, it must be noted that courts in England and Wales, as well as the ECHR, take the view that there is an actual mechanism for reviewing life sentences in English law because of the existence of the Secretary of State’s release power under s. 30 of the *Crime (Sentences) Act 1997* (U.K.), 1997, c. 43 (*R. v. McLoughlin*, [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964, at paras. 31-35; *Hutchinson*, at §§ 70 and 72). I will come back to this point later.

[108] In summary, although s. 12, like any other *Charter* provision, must be interpreted primarily by reference to Canadian law and history (*9147-0732 Québec inc.*, at para. 20; see also *Kindler*, at p. 812), a parallel can be drawn between the approach taken in Canadian criminal law and the approaches taken in international law and in the law of various countries similar to Canada with respect to sentences of imprisonment for life without the possibility of parole, which are generally considered to be incompatible with human dignity.

(d) *Does the Judicial Discretion to Impose Consecutive Parole Ineligibility Periods Affect the Constitutionality of the Impugned Provision?*

[109] In support of its position that s. 745.51 *Cr. C.* is constitutional, the Crown stresses the discretionary nature of the power granted to courts by this provision (see to the same effect *R. v. Millard*, 2018 ONSC 1299; *R. v. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. v. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL) (S.C.J.), rev'd 2017 ONCA 607, 353 C.C.C. (3d) 317, but not on this point). According to this reasoning, the imposition of a disproportionate sentence results from an erroneous exercise of judicial discretion and can therefore be rectified by way of an appeal rather than a declaration of unconstitutionality.

[110] It is true that the imposition of consecutive parole ineligibility periods is not mandatory. Section 745.51 *Cr. C.* provides that a court *may* order that the parole ineligibility periods applicable for each murder conviction are to be served consecutively. In exercising its discretion, the court must take into consideration the

character of the offender, the nature of the offence and the circumstances surrounding its commission. In this regard, I note that the court's obligation to stack ineligibility periods in blocks of 25 years, if it chooses to exercise its discretion, is difficult to reconcile with the principles of proportionality and individualization in sentencing.

[111] In any event, I am of the view, as explained above, that the existence of a discretion cannot save a provision that authorizes the imposition of a punishment that is cruel and unusual by nature. No crime, no matter how appalling it might be, can justify imposing a punishment that is intrinsically incompatible with human dignity, like a sentence of imprisonment for life without a realistic possibility of parole. Since such a punishment must quite simply be excluded from the arsenal of punishments available to the state, the mere possibility that it may be imposed constitutes an infringement of s. 12 of the *Charter*. By way of analogy, a provision authorizing corporal punishment as a sentence for the commission of multiple murders — a sentence that would be imposed at a court's discretion and reserved for the vilest of criminals — could not, for obvious reasons, be held to be consistent with s. 12 of the *Charter*. The same conclusion must apply here.

(e) *Can the Royal Prerogative of Mercy Save the Impugned Provision?*

[112] Lastly, it is necessary to determine whether the impugned provision can be found to be constitutional based on the existence of the royal prerogative of mercy, since there is some debate over this question. In my view, the parole system is currently the only mechanism that offers a realistic possibility of release for individuals serving

a sentence of life imprisonment under Canadian law. The royal prerogative of mercy cannot be considered a true sentence review mechanism, because it is exercised only in exceptional circumstances.

[113] The royal prerogative of mercy gives Her Majesty the Queen an absolute discretion to grant a remission of sentence to any individual sentenced by a court, regardless of the nature or seriousness of the crime committed (ss. 748 and 749 *Cr. C.*). This prerogative arises from the former absolute power of British monarchs to pardon their subjects. Historically, the royal prerogative has had two strands and two objectives: “to show compassion by relieving an individual of the full weight of his or her sentence” and “to correct miscarriages of justice such as wrongful convictions” (*Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 28). Before the death penalty was abolished, the royal prerogative was often used to commute that sentence (C. Strange, “Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy” (2001), 64 *Sask. L. Rev.* 559, at p. 561).

[114] The power to exercise this prerogative has been conferred on the person holding office as Governor General of Canada by *Letters Patent (Letters Patent Constituting the Office of Governor General of Canada (1947), Canada Gazette, Part I, vol. 81, p. 3014, s. XII* (reproduced in R.S.C. 1985, App. II, No. 31)). The Governor General acts only on the advice of the Minister of Public Safety and Emergency Preparedness Canada, or that of at least one other minister (Parole Board of Canada, *Royal Prerogative of Mercy Ministerial Guidelines*, October 31, 2014 (online), at p. 2).

The Governor General may grant two types of pardons: a free pardon and a conditional pardon (s. 748(2) *Cr. C.*).

[115] The royal prerogative of mercy is exercised “only [in] rare cases in which consideration[s] of justice, humanity and compassion override the normal administration of justice” (*Ministerial Guidelines*, at pp. 4-5). For a pardon to be granted, there must be exceptional circumstances involving substantial injustice or undue hardship (pp. 3-5). The *Ministerial Guidelines* state that pardons are available only in “truly deserving cases” (p. 3). Although it is difficult to calculate how many applications for the exercise of the royal prerogative of mercy have been granted, it would seem that the number is very limited (as an illustration, from 2014-2015 to 2018-2019, 5 applications were granted, 3 were denied and 175 were discontinued (Parole Board of Canada, *Performance Monitoring Report 2018-2019*, at p. 170)).

[116] This Court has established that the royal prerogative of mercy is part of the array of mechanisms by which the principle of individualization in sentencing is given effect (*Luxton*, at p. 725). However, it has never found that this discretion on its own constitutes a true sentence review mechanism. On the contrary, in *Luxton*, to support its conclusion that the sentence of imprisonment for life without eligibility for parole for 25 years is constitutional, the Court simply stated that the royal prerogative, like escorted absences from custody for humanitarian purposes, demonstrates that “Parliament has been sensitive to the particular circumstances of each offender” (p. 725). In *R. v. Heywood*, [1994] 3 S.C.R. 761, which concerned the constitutionality

of a provision that limited, for life, the freedom of offenders convicted of sexual offences to be in various public places, on pain of imprisonment, this Court held that the royal prerogative of mercy does not constitute an “acceptable review process” because it is used only exceptionally (p. 798). The Court has instead found this discretion to be a mechanism of last resort in the case of unjust imprisonment (*R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 51; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at para. 89).

[117] The royal prerogative of mercy in Canadian law can be distinguished from the power of the Secretary of State in English law to release prisoners on compassionate grounds under s. 30 of the *Crime (Sentences) Act 1997*. In 2014, a special constitution of the Court of Appeal of England and Wales held in *McLoughlin* that the law of England provides life prisoners with a realistic possibility of release (para. 35). The court found that the term “compassionate grounds” must be interpreted broadly, in a manner compatible with art. 3 of the *European Convention on Human Rights*, and that these grounds are not restricted to the ones listed in the “Lifer Manual” (*McLoughlin*, at paras. 31-33; United Kingdom, Ministry of Justice, National Offender Management Service, *PSO 4700 — The Indeterminate Sentence Manual* (2010), at ch. 12). In 2017, the ECHR held in *Hutchinson* that English law is consistent with art. 3 of the *European Convention on Human Rights* because it establishes a true review mechanism that makes whole life prison sentences reducible (§§ 57, 70 and 72). The ECHR found that the Secretary of State has a duty to release a whole life prisoner where “continued detention can no longer be justified on legitimate penological grounds” (*Hutchinson*,

at § 70). It would therefore seem that this discretion is broadly construed in English law. As a result, these principles are not relevant in interpreting the discretion conferred by the royal prerogative of mercy in Canadian law.

[118] In short, the royal prerogative of mercy, because of its exceptional nature, is at best a release mechanism based on compassion and on the existence of humanitarian grounds under Canadian law. Individuals suffering the normal consequences of a properly imposed sentence are in fact unlikely to obtain such a pardon. This is clear from the *Ministerial Guidelines*: “. . . an act of executive clemency will not be considered where the difficulties experienced by an individual applicant result from the normal consequences of the application of the law” (p. 4 (emphasis added); Sup. Ct. reasons, at paras. 963 and 967). The existence of the royal prerogative of mercy therefore creates no realistic possibility of parole for offenders serving a sentence of imprisonment for life for which there is no other review mechanism.

[119] Finally, in light of my conclusion concerning the infringement of s. 12 of the *Charter*, it will not be necessary to determine whether the impugned provision is also contrary to s. 7 (see *Lloyd*, at para. 38; *Nur*, at para. 110; *Boudreault*, at para. 95).

F. *Is the Infringement of Section 12 of the Charter Justified Under Section 1 of the Charter?*

[120] In order to justify an infringement of a *Charter* right under s. 1, the state is required to show that the impugned law addresses a pressing and substantial objective

and that the means chosen to achieve that objective are proportional to it (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 136-40; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 986). A law is proportionate when the following conditions are met: “(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law” (*Nur*, at para. 111; *Oakes*, at pp. 139-40).

[121] In this case, since the appellants have made no arguments concerning the justification for the impugned provision, they have not discharged the onus resting on them. In any event, it is hard to imagine how a punishment that is cruel and unusual by nature could be justified in a free and democratic society. I note that, in *Nur*, this Court stated that it would be difficult to show that a “grossly disproportionate” punishment under s. 12 could be “proportionate as between the deleterious and salutary effects of the law under s. 1” (para. 111).

#### G. *Appropriate Remedy*

[122] Having found that the impugned provision is contrary to the *Charter*, I would declare s. 745.51 *Cr. C.* to be of no force or effect immediately under s. 52(1) of the *Constitution Act, 1982*. The appellants have proposed no alternative remedy in this Court.

[123] Under s. 52 of the *Constitution Act, 1982*, any law that is inconsistent with the provisions of the Constitution can be declared to be of no force or effect to the extent of the inconsistency. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the leading case on constitutional remedies, Lamer C.J. stated that, depending on the circumstances, a court may strike down an inconsistent provision immediately, strike it down and temporarily suspend the declaration of invalidity, resort to the technique of reading in or that of reading down, or apply the doctrine of severance (see pp. 695-700). In exercising its discretion to determine an appropriate remedy, a court will consider not only the principle of constitutional supremacy in s. 52(1) but also the principles of the rule of law and the separation of powers (*R. v. Albashir*, 2021 SCC 48, at paras. 30 and 34; *R. v. Sullivan*, 2022 SCC 19, at para. 61).

[124] The trial judge found that the technique of reading in was appropriate in the circumstances. He therefore interpreted the provision as authorizing courts to impose consecutive ineligibility periods whose length is discretionary, [TRANSLATION] “notwithstanding the requirements of section 745 for any additional murder” (para. 1211 (emphasis deleted)). Because that interpretation allowed him to opt for an additional period of less than 25 years, he ordered that the respondent serve a total ineligibility period of 40 years before applying for parole.

[125] In this regard, I agree with the Court of Appeal that the trial judge erred in applying the technique of reading in as a remedy (para. 154).

[126] The technique of reading in allows a court to extend the reach of a statute so that it includes what was wrongly excluded from it (*Schachter*, at p. 698; *Ontario (Attorney General) v. G*, 2020 SCC 38, at para. 113). For example, where a statute unconstitutionally excludes a group of individuals, a court may find that the statute includes the group rather than striking it down (*Schachter*, at pp. 699-700; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143). Under the second technique, reading down, a court limits the reach of a statute by declaring it to be of no force or effect to a precisely defined extent (*G*, at para. 113). Severance, in turn, allows a court to declare something “improperly included in the statute which can be severed and struck down” to be of no force or effect (*Schachter*, at p. 698; *G*, at para. 113).

[127] A court may apply these techniques only “in the clearest of cases”, and to do so, it must be able to define the offending portion of the statute in a limited manner (*Schachter*, at p. 725; see also p. 697). In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, McLachlin C.J. stated that these alternatives to striking down are appropriate when a court is confronted with a “law that is substantially constitutional and peripherally problematic” (para. 111). It follows that it is frequently not appropriate to use any of these techniques (*G*, at para. 114).

[128] These interpretive techniques must be applied in a manner that respects Parliament’s role and is in keeping with the purpose of the statute in question. In *Schachter*, Lamer C.J. stated that “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” (p. 697). This note of caution also applies to reading in (*Schachter*, at p. 725). In every case, the court must ensure that the interpretation it proposes is as faithful as possible to the scheme enacted by Parliament, within the requirements of the Constitution (*Schachter*, at p. 700). As this Court stated in *Ferguson*, when a court opts for one of these techniques, “it does so on the assumption that had Parliament been aware of the provision’s constitutional defect, it would likely have passed it with the alterations now being made by the court” (para. 51). Therefore, “[i]f it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere” (*Ferguson*, at para. 51 (emphasis in original); *G*, at para. 114). In such a context, striking down the unconstitutional provision is the least intrusive alternative (*Ferguson*, at paras. 51 and 65).

[129] In this case, the trial judge found that because the inconsistency of s. 745.51 *Cr. C.* with the Constitution [TRANSLATION] “does not in any way affect the core of this provision” (para. 1187), reading in was an appropriate way to remedy its unconstitutionality. In his view, reading into the impugned provision would advance Parliament’s objectives, namely [TRANSLATION] “to promote proportionality, ensure that multiple murderers get their ‘just deserts’ for their crimes, reinforce the objective of denunciation and protect society” (para. 1172).

[130] I agree with the Court of Appeal that the trial judge overstepped the limits of his judicial functions. The impugned provision could not be saved through the technique of reading in. By broadening the discretion conferred on the courts, the trial judge undermined Parliament's objective. He failed to consider the fact that the imposition of consecutive 25-year ineligibility periods is directly related to Parliament's objective in enacting s. 745.51 *Cr. C.* In this regard, the words of the provision and the parliamentary debate are indicators that can shed light on the provision's purpose (see *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 81).

[131] First of all, the words of s. 745.51 *Cr. C.* are clear as regards the length of the ineligibility periods that a court may make consecutive: "At the time of the sentencing under section 745 . . . the judge who presided at the trial . . . may . . . by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively". For first degree murder, these periods must be 25 years under s. 745(a) *Cr. C.*

[132] Second, the parliamentary debate, which is very instructive in this case, clearly shows that Parliament's intention was to authorize courts to make the ineligibility periods set out in s. 745 *Cr. C.* consecutive. For an offender convicted of more than one first degree murder, a court has no choice but to impose consecutive ineligibility periods in blocks of 25 years (*House of Commons Debates*, vol. 145, No. 96, 3rd Sess., 40th Parl., November 15, 2010, at p. 5931; *House of Commons*

*Debates*, vol. 145, No. 121, 3rd Sess., 40th Parl., February 1, 2011, at p. 7510). The interpretation urged by the trial judge was in fact specifically rejected by Parliament. An amendment to the bill had been proposed to give courts a discretion to determine the total length of the additional parole ineligibility period (*House of Commons Debates*, February 1, 2011, at p. 7515; see also House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 42, 3rd Sess., 40th Parl., December 9, 2010, at pp. 10-11). Despite that proposal, Parliament opted for ineligibility periods with a fixed length of 25 years each, leaving no room for tailoring by a court (Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 22, 3rd Sess., 40th Parl., March 2, 2011, at pp. 10-11 and 23-24).

[133] Accordingly, because it is impossible to conclude that Parliament would likely have passed the impugned provision with the modifications proposed by the trial judge, reading in was inappropriate. Parliament deliberately chose to exclude the approach adopted by the trial judge. By opting for reading in as a remedy, the trial judge thus made an inappropriate intrusion on Parliament's powers. In the circumstances, this Court has no choice but to declare s. 745.51 *Cr. C.* invalid.

[134] With regard to the temporal scope of the declaration of invalidity, the declaration must have immediate effect given the seriousness of the infringement of the right of every individual not to be subjected to cruel and unusual punishment. To stop the continuing infringement of s. 12 of the *Charter*, this declaration with

immediate effect must strike down the impugned provision retroactively to the date it was enacted in 2011.

[135] When unconstitutional legislation is declared to be of no force or effect immediately pursuant to s. 52(1), it can no longer be enforced. Such a declaration is *generally* retroactive and renders the legislation invalid from the date it was enacted (*Albashir*, at paras. 38-39 and 43; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at paras. 82-83; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28). Retroactivity operates in favour of the parties by reaching back in time to annul the effects of legislation found to be unconstitutional (*Hislop*, at para. 82; see also *Boudreault*, at para. 103). It also benefits individuals who are still “within the judicial system” by allowing them to appeal on constitutional grounds (*Boudreault*, at para. 103; *R. v. Thomas*, [1990] 1 S.C.R. 713, at p. 716).

[136] However, the doctrine of *res judicata* tempers the application of the principle that remedies granted under s. 52(1) are retroactive (*Albashir*, at para. 61). *Res judicata* precludes “the re-opening of cases decided by the courts on the basis of invalid laws” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 757). In the context of criminal convictions, it is generally recognized that cases that are no longer in the system cannot be reopened, even if the provisions under which the accused persons were convicted are later declared unconstitutional (*R. v. Wigman*, [1987] 1 S.C.R. 246, at p. 257; *Thomas*, at p. 716; *Sarson*, at paras. 25-27). However,

“a ‘continuing current violation’ of a *Charter*-protected interest could give rise to a successful application for a *Charter* remedy, even where the violation began with a valid order that is legally unassailable” (*Boudreault*, at para. 107, quoting *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 630).

[137] In *Boudreault*, this Court held that the rule of law, of which the principle of *res judicata* is one pillar, will not permit “the continued infliction of cruel and unusual punishment that cannot be justified in a free and democratic society” (paras. 105-6). This is especially so where the punishment is cruel and unusual by nature, as it is in the instant case, which concerns the imposition of consecutive 25-year ineligibility periods under s. 745.51 *Cr. C.* on offenders convicted of multiple first degree murders. Under this unconstitutional provision, offenders have been sentenced to imprisonment for life without eligibility for parole for 50 or even 75 years. Such a sentence is degrading in nature and thus incompatible with human dignity, as it eliminates any possibility of reintegration into society. Any offender who has been ordered under s. 745.51 *Cr. C.* to serve a parole ineligibility period of 50 years or more for multiple murders — whether the murders are first degree, second degree or a combination of the two — must be able to apply for a remedy. While some of these offenders are no longer in the judicial system, the infringement of their right guaranteed by s. 12 of the *Charter* is a continuing one, since they remain completely without access to parole. *Res judicata* cannot prevent them from bringing applications to stop this continuing infringement of s. 12 of the *Charter*. These individuals may therefore seek relief in the courts, including under s. 24(1) of the *Charter* (*Boudreault*, at para. 109;

*Gamble*, at p. 649). Lastly, given that this Court has confined its analysis to the imposition of ineligibility periods of 50 years or more, nothing prevents offenders upon whom consecutive ineligibility periods totalling less than 50 years have been imposed under the provision being struck down from alleging a continuing infringement of their constitutional right, provided that the infringement is proved in each case.

[138] With regard to the respondent, given that s. 745.51 *Cr. C.* is being declared invalid immediately and that the declaration of invalidity is retroactive to the date this provision was enacted, the applicable law is the law that existed prior to that date. The 25-year parole ineligibility periods imposed on the respondent for each of the 6 counts of first degree murder must therefore be served concurrently. As a result, the respondent may not apply for parole until he has served a total ineligibility period of 25 years, in accordance with s. 745(a) *Cr. C.* The Board remains the ultimate arbiter of whether the respondent can be released on parole at the end of the ineligibility period.

## V. Conclusion

[139] In summary, by stipulating that a court may impose consecutive 25-year parole ineligibility periods, the impugned provision authorizes the infliction of a degrading punishment that is incompatible with human dignity. Under this provision, a court has the power to sentence an offender to imprisonment for life without a realistic possibility of parole for 50, 75 or even 150 years. In other words, in the context of multiple first degree murders, all offenders to whom this provision applies are doomed

to spend the rest of their lives behind bars, and the sentences of some offenders may even exceed human life expectancy.

[140] Not only do such punishments bring the administration of justice into disrepute, but they are cruel and unusual by nature and thus contrary to s. 12 of the *Charter*. They are intrinsically incompatible with human dignity because of their degrading nature, as they deny offenders any moral autonomy by depriving them, in advance and definitively, of any possibility of reintegration into society. Sentences of imprisonment for life without a realistic possibility of parole may also have devastating effects on offenders, who are left with no incentive to rehabilitate themselves and whose incarceration will end only upon their death.

[141] Parliament may not prescribe a sentence that negates the objective of rehabilitation in advance, and irreversibly, for all offenders. This penological objective is intimately linked to human dignity in that it reflects the conviction that every individual has the capacity to reform and re-enter society. For the objective of rehabilitation to be meaningful, every inmate must have a realistic possibility of applying for parole, at the very least earlier than the expiration of the minimum ineligibility period of 50 years stipulated in the impugned provision for cases involving first degree murders. What is at stake is our commitment, as a society, to respect human dignity and the inherent worth of every individual, however appalling the individual's crimes may be.

[142] Let me be very clear. The conclusion that imposing consecutive 25-year parole ineligibility periods is unconstitutional must not be seen as devaluing the life of each innocent victim. Everyone would agree that multiple murders are inherently despicable acts and are the most serious of crimes, with consequences that last forever. This appeal is not about the value of each human life, but rather about the limits on the state's power to punish offenders, which, in a society founded on the rule of law, must be exercised in a manner consistent with the Constitution.

[143] In the circumstances, this Court has no choice but to declare s. 745.51 *Cr. C.* invalid immediately. This declaration strikes down the provision retroactively to its enactment in 2011. The applicable law is therefore the law that existed prior to that date. This means that the respondent must receive a sentence of imprisonment for life without eligibility for parole for a total period of 25 years.

[144] The respondent committed horrendous crimes that damaged the very fabric of our society. Fueled by hatred, he took the lives of six innocent victims and caused serious, even permanent, physical and psychological injuries to the survivors of the killings. He left not only families devastated but a whole community — the Muslim community in Québec and throughout Canada — in a state of anguish and pain, with many of its members still fearful for their safety today. And he left Canadians at large feeling deeply saddened and outraged in the wake of his heinous crimes that undermined the very foundations on which our society rests.

[145] Sadly, this case is but one example of the crimes committed by multiple murderers that shock our collective conscience. Other examples include murders committed by sexual predators who place no value on the lives of their victims and who leave entire communities in a state of fear and terror until they are apprehended. So, too, is the case of terrorists who seek to destroy Canada's political order without regard to the devastation and loss of life that may result from their crimes.

[146] The horror of the crimes, however, does not negate the basic proposition that all human beings carry within them a capacity for rehabilitation and that, accordingly, punishments which fail to account for this human quality will offend the principles that underlie s. 12 of the *Charter*.

[147] All multiple murderers receive a minimum sentence of life in prison. In the current state of the law, they are eligible for parole after 25 years in the case of first degree murders. Eligibility for parole is not a right to parole. Experience has shown that the Board generally proceeds with care and caution before making a decision as important as releasing multiple murderers back into society. The protection of the public is the paramount consideration in the Board's decision-making process, but the Board also takes into account other factors such as the gravity of the offence and its impact on victims. It, perhaps, provides a measure of solace to know that compelling evidence of rehabilitation will be demanded before the perpetrators of such crimes will be released on parole.

[148] For all these reasons, the appeal is dismissed.

*Appeal dismissed.*

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