**SCC File No. 39544**

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

B E T W E E N:

**ATTORNEY GENERAL OF QUEBEC**

*Appellant*

– and –

**HER MAJESTY THE QUEEN**

*Appellant*

– and –

**ALEXANDRE BISSONNETTE**

*Respondent*

– and –

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*Interveners*

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# FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

**(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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November 25, 2021

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## PART I – OVERVIEW

**1.** Stacking consecutive parole ineligibility periods to incarcerate individuals for 50, 75, or 100 years, without hope of release, is cruel and grossly disproportionate. Section 745.51 of the *Criminal Code* creates a sentence previously unknown to Canadian criminal law. It allows judges to craft a sentence that will always lack the "fundamental moral value" of rehabilitation,[1] and necessarily results in a complete loss of hope for parole. Section 745.51 can be applied to individuals in the absence of any additional Crown burden and without any proof of heightened risk.[2] The disproportionality of this provision is evident by the fact that many sentences imposed under its authority will be impossible to carry out, as their length exceeds the natural human life span. By permitting the state to lock people up and throw away the key, s. 745.51 creates a vehicle for vengeance that is cruel and unusual.

**2.** In its assessment of constitutionality of the impugned provision, the BCCLA urges this Court to consider the entire s. 745 scheme against this Court's constitutional analysis in *Luxton* and the significant changes to the scheme since it was upheld in 1990. The legislative context of s. 745.51 and how it interacts with other statutory provisions in the *Criminal Code,* in particular s. 745, is essential to determine whether the impugned provision violates s. 12 of the *Charter*. Section 745.51 does not act in isolation. Rather, it builds on the foundation of the general period of ineligibility in s. 745. Although this Court in *Luxton* upheld the constitutionality of the first-degree murder sentencing regime, Parliament has since abolished the "faint hope clause," which was central to the reasoning of the Court as it provided an exit ramp from perpetual parole ineligibility.[3] In short, if the constitutional foundation of *one* 25-year period of parole ineligibility is uncertain, *consecutive* 25-year ineligibility periods should raise constitutional alarm bells. It is within this important context that the constitutionality of s. 745.51 must be assessed.

**3.** The BCCLA submits that the test developed by this Court in *Nur* to assess mandatory minimums under s. 12 is inappropriate when applied to punishments other than mandatory

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[1] *R. v. Lacasse*, 2015 SCC 64 at para. 4.

[2] By contrast, when an indeterminate prison sentence on a dangerous offender ("DO") is imposed under s. 753, the Crown has the burden to establish each statutory requirement of dangerousness. DOs are statutorily eligible for parole after 7 years in custody: s. 761 of the *Criminal Code*.

[3] *An Act to amend the Criminal Code*, S.C. 2011, c. 2.

minimum sentences. Instead, the BCCLA submits that this Court should return to *R. v. Smith* and adopt the 3-factor test set out by Justice McIntyre to determine whether a punishment is "cruel and unusual" and violates s. 12 of the *Charter*.[4] The BCCLA submits that particular emphasis should be placed on the second and third *Smith* factors: that punishment cannot go beyond what is necessary for the achievement of valid social aims and that the punishment cannot be arbitrarily imposed. Despite being fundamental to the assessment of gross disproportionality, these principles have thus far remained underdeveloped in the s. 12 jurisprudence.

**4.** Finally, the BCCLA argues that s. 745.51 of the *Criminal Code* necessarily constitutes cruel and unusual punishment under the proposed *Smith* framework, and therefore violates s. 12 of the *Charter*. Section 745.51 goes beyond what is necessary to safeguard the Canadian public and beyond what is needed to further the legitimate purposes of punishment. Indeed, it authorizes the imposition a sentence that is so grossly disproportionate that it is impossible to carry out.

## PART II –POSITION ON QUESTIONS IN ISSUE

**5.** The BCCLA submits that s. 745.51 of the *Criminal Code* constitutes cruel and unusual punishment and therefore violates s. 12 of the *Charter*.

## PART III – ARGUMENT

### I. Section 754.51 is unprecedented in Canadian sentencing law

**6.** Before 2011, the longest period of parole ineligibility in Canadian law was 25 years. After, and in stark contrast to the pre-2011 sentencing regime, the Crown could seek a parole ineligibility period 10 times that length (or more). Although life imprisonment without the possibility of parole does not exist in Canadian sentencing law, as of 2011 individuals could be sentenced to periods of imprisonment longer than a natural human lifespan.

**7.** Section 754.51 permits sentences that are contrary to the "fundamental principle" of sentencing in Canada: that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[5] Moreover, in cases where the parole ineligibility period exceeds natural human life, the sentence imposed *undermines* the purpose of rehabilitation (set out in s. 718(d) of the *Criminal Code*). In *Lacasse*, Wagner J. (as he then

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[4] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[5] *Criminal Code*, R.S.C. 1985, c. C-46, at s. 718.1.

was) emphasized that rehabilitation is one of the "fundamental moral values that distinguishes Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate."[6] Where rehabilitation plays no role in a sentence, Canadian sentencing law loses its ability to achieve this "main objective" of sentencing.[7]

**8.** The existence of s. 754.51 undermines or entirely removes the distinction drawn by Wagner J. regarding Canadian sentencing law and that of other developed nations. Indeed, the Netherlands, France, Denmark, Estonia, Lithuania, Austria, Spain, Croatia, Hungary, Sweden, Slovenia, Poland, Latvia, and Romania all have less stringent sentencing regimes for first-degree murder than Canada, ranging from no minimum sentence to 15 years.[8] England and Wales maintain the life sentence for murder but have no statutory minimum parole ineligibility periods. Australia likewise does not mandate minimum parole ineligibility periods. In New Zealand, a parole ineligibility period of 17 years can be imposed for the most serious murders, including multiple murders.[9] Other than the United States (which is an extreme outlier), Canada has one of the harshest sentencing regimes for murder amongst developed nations.

## II. Section 754.51 must be assessed in its legislative context

**9.** The constitutional vulnerability of the general 25-year parole ineligibility period should inform this Court's analysis of the constitutionality of s. 754.51. Nearly 32 years have passed since this Court considered the constitutionality of the mandatory life sentence and parole ineligibility periods for first-degree murder.[10] The sentencing regime, however, has undergone significant legislative changes, which leaves the 25-year parole ineligibility period for first-degree murder vulnerable to constitutional challenge. Constitutional concerns about s. 745 should inform this Court's assessment of the constitutionality of the impugned provision, as s. 745.51 simply builds on the foundation of s. 745.

**10.** The Attorney General of Quebec criticizes the court below for concluding that the 25-year parole ineligibility period is the longest period of ineligibility that remains *Charter*-

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[6] *Lacasse, supra* at para. 4.
[7] *Ibid*.
[8] European Union , European Commission, *Study on Minimum Sanctions in the EU Member States,* (Brussels, 2015) at p. 42.
[9] *Sentencing Act 2002* (New Zealand), No. 9, ss. 103–104.
[10] *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Luxton*, [1990] 2 S.C.R. 711.

compliant.[11] It argues that the Quebec Court of Appeal gave too much weight to the link between the constitutionally valid life sentence and 25-year parole ineligibility periods, and suggested that any longer period of ineligibility would be unconstitutional.[12] To the Attorney General, this approach would unduly restrict Parliament's legislative power by preventing it from adopting another measure imposing *more* than 25 years of parole ineligibility, such as the impugned provision in this case.[13]

**11.** The Court of Appeal's analysis, however, is flawed not because it paralyzes or unduly restricts Parliament but rather because the constitutionality of even a single 25-year period of parole ineligibility rests on a shaky foundation. This is so for three reasons: (1) the length of the 25-year parole ineligibility period was not designed to be *Charter*-compliant; (2) the constitutionality of the *length* of a 25-year parole ineligibility period has not been directly challenged before this Court; and (3) in *Luxton*, this Court explicitly relied on the existence of the now abolished faint hope clause in determining the 25-year mandatory minimum parole ineligibility period is constitutional. Consequently, when assessing the constitutionality of the impugned provision, this Court should not assume that the 25-year parole ineligibility period is immune from constitutional challenge when assessing whether stacking such periods is *Charter*-compliant.

**12.** First, the 25-year parole ineligibility period was not designed to address penological objectives in a *Charter*-compliant fashion. When Parliament abolished the death penalty in 1976, the 25-year parole ineligibility period was borne out of a compromise between legislators seeking to abolish the death penalty and those seeking to maintain it.[14] At this time, proponents of the death penalty argued that imprisonment for life without the possibility of parole for 25 years was the only palatable sentence other than death.[15] Proponents of capital punishment did not demand the imposition of multiple 25-year periods of parole ineligibility. The choice of 25 years was not intended to address valid penological objectives in a *Charter*-compliant fashion:

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[11] Factum of the Appellant, Attorney General of Quebec, at paras. 12, 27, 29–53.
[12] *Ibid* at paras. 29, 36.
[13] *Ibid* at paras. 12, 27, 29–53.
[14] *R. v. Bissonnette*, 2020 QCCA 1585 at para. 58, citing *R. v. Swietlinski*, [1994] 3 S.C.R. 481 at p. 492.
[15] *Bissonnette, supra* at para. 58, citing Allan Manson, *The Easy Acceptance of Long Term Confinement in Canada*, (1990) 79 C.R. (3d) 265.

the *Charter* did not yet exist. Rather, 25 years was a period of continual incarceration that offended even the standards of decency at the time. That was precisely the point. In a political showdown, only a grossly disproportionate and excessive sentence could adequately substitute for punishment by death. As a result, there is no constitutional magic in the number 25. The concern at the time was finding a politically agreeable and expedient substitute for the death penalty. The concern was not designing a sentencing regime to ensure compliance with a norm prohibiting grossly disproportionate punishment.

**13.** Second, although the first-degree murder sentencing regime has been constitutionally challenged,[16] this Court has not directly considered the question of whether a 25-year parole ineligibility period constitutes cruel and unusual treatment. Instead, these constitutional challenges focused on whether the first-degree murder classification scheme was *Charter*-compliant:

a. In *Arkell*, the appellant argued that the *Code* provision that classified a murder as first-degree if caused while the accused was committing certain designated offences violated ss. 7 and 11(d) of the *Charter*.[17] The appellant did not challenge the provision under s. 12. The Court dismissed the appeal.
b. In *Luxton*, the appellant argued that s. 231(5) of the *Criminal Code*, in combination with the mandatory parole ineligibility, violated ss. 7, 9, and 12 of the *Charter* as it offended the principle that a just sentencing system has a gradation of punishment differentiated by the seriousness of the offence and the circumstances of the individual.[18] This Court upheld the constitutionality of the regime.

This Court has not squarely addressed whether a 25-year parole ineligibility period is grossly disproportionate since *Arkell* and *Luxton*.

**14.** Since *Luxton*, the Canadian legal landscape has undergone significant changes which, consequently, may undermine the constitutionality validity of the 25-year parole ineligibility period. These changes are important considerations when assessing whether s. 754.51 violates s. 12. Since *Luxton*, the crisis of over-incarceration of Indigenous peoples has been carefully documented in Canada. Section 718.2(e) was enacted in 1996, and in 1999, nearly a decade after *Luxton*, this Court held in *Gladue* that courts must consider an Indigenous person's background in determining the appropriate sentence.[19] In 2012, this Court held that judges

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[16] *Arkell, supra*; *Luxton, supra*. See also *R. v. Kay*, 1990 ABCA 317, *R. v. Cairns* (1989), 51 C.C.C. (3d) 90 (BCCA).
[17] *Arkell*, *supra*.
[18] *Luxton*, *supra* at p. 720.
[19] *R. v. Gladue*, [1999] 1 S.C.R. 688.

must consider *Gladue* in all cases involving Indigenous people and that a failure to do so would "result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality."[20] These considerations were not before the Court in *Luxton*.

**15.** Moreover, Parliament abolished the "faint hope clause" in 2011, which allowed a review of parole ineligibility. The faint hope clause figured prominently in this Court's reasoning in *Luxton*, as it was seen to attenuate the otherwise harsh sentencing regime based on an individualized assessment. Chief Justice Lamer explicitly relied on the existence of the faint hope clause in upholding the regime.[21] He noted that even for the "most serious offenders" the faint hope clause allowed for a reduction in the number of years of parole ineligibility based on individual circumstances.[22] Courts of Appeal have likewise relied on the faint hope clause in finding the sentencing regime for murder constitutional. In *R. v. Kay*, for example, the Alberta Court of Appeal specifically noted that the faint hope clause was not illusory, [23] and the appellant's "effective sentence" of incarceration was therefore 15 years (despite being sentenced to 25 years of parole ineligibility), a clear reference to the faint hope clause.[24]

**16.** The faint hope clause, however, was repealed with the passage of the Senate Bill S-6, which came into force in 2011.[25] The same year, s. 745.51 was enacted.[26] As a result, Parliament removed an essential "exit ramp" from perpetual parole ineligibility while also subjecting individuals to exponentially longer terms of imprisonment. Before Bill S-6 came into force, the period of ineligibility could not be longer than 25 years, even in the case of multiple murders. As a result of these changes, no matter if the court ordered a 50-year, 100-year, or 200-year ineligibility period, as of 2011, individuals had no ability to review their ineligibility for parole, regardless of whether officials believed their further incarceration was inappropriate or unnecessary.

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[20] *R. v. Ipeelee*, 2012 SCC 13 at para 87.
[21] *Luxton*, *supra* at p. 720.
[22] *Ibid*.
[23] Indeed, about one-quarter of eligible offenders applied for a reduction in their parole ineligibility: *R. v. Simmonds*, 2018 BCCA 205 at para. 20.
[24] *Kay*, *supra* at para. 24.
[25] *An Act to amend the Criminal Code*, S.C. 2011, c. 2
[26] *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, S.C. 2011, c.5.

**17.** This context must inform the constitutional analysis of s. 745.51. Given the repeal of the faint hope clause, it cannot be said that the foundation of the sentencing regime for first-degree murder has been tested and found to be constitutionally sound. To stack parole ineligibility periods in 25-year increments aggravates a sentencing regime that may already be constitutionally suspect. When assessing whether s. 745.51 is grossly disproportionate, it is important to consider the interaction between the impugned provision and the sentencing regime for first-degree murder more generally.

## III. The 3-factor *Smith* test should be used to assess whether a punishment other than a mandatory minimum sentence is "cruel and unusual"

**18.** This Court has not yet articulated a precise analytical framework to assess whether punishments (other than mandatory minimum sentences) are cruel and unusual under s. 12 of the *Charter*. The BCCLA urges this Court to develop a framework that refocuses the analysis on whether the punishment goes beyond what is necessary to achieve a valid social aim, and whether the punishment is arbitrary. The BCCLA submits that the 3-step test outlined by Justice McIntyre in *Smith*, in dissent, provides the appropriate framework to assess compliance with s. 12.

**19.** While this Court in *Nur*[27] developed a two-step test to assess whether mandatory minimum sentences are "cruel and unusual", this test is ill-suited to assess constitutional compliance with other kinds of punishment. As the judge is not obliged to impose consecutive periods, much of the exercise described in *Nur* is irrelevant. In *R. v. Boudreault*, in assessing a non-mandatory minimum sentence, Justice Martin focused her analysis on the central question identified by this Court in *Smith*,[28] that of gross disproportionality, rather than proceeding through the two-step test in *Nur*.[29] In doing so, Martin J. outlined the various considerations identified by this Court prior to *Nur* when assessing s. 12 *Charter*-compliance: whether the punishment is necessary to achieve a valid penal purpose, the effect of the punishment on the actual or reasonable hypothetical offender, whether the punishment is founded on recognized

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[27] *R. v. Nur*, 2015 SCC 15.
[28] *Smith, supra*.
[29] *R. v. Boudreault*, 2012 SCC 56.

sentencing principles, and whether there are valid alternatives to the punishment.[30] Martin J. made clear that these considerations do not constitute a rigid test.

**20.** While the BCCLA agrees that a rigid test is not necessary, it submits that an assessment based on such considerations is insufficiently precise to assess whether a punishment is cruel and unusual. In particular, the BCCLA submits any assessment under s. 12 should include considerations of arbitrariness, and whether the punishment goes beyond what is necessary to achieve valid penological objectives, in other words: to consider the principle of restraint.[31]

**21.** The BCCLA submits that this Court should endorse the three-factor test identified by Justice McIntyre, dissenting, in *Smith* to determine whether a punishment other than a mandatory minimum sentence is cruel and unusual.[32] In *Smith*, Justice McIntyre concluded that a punishment will be "cruel and unusual" and will violate s. 12 of the *Charter* if it has one or more of the following factors:

> (1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
> (2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
> (3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.[33]

**22.** The BCCLA submits that the second and third factors from the *Smith* test are crucial for assessing what constitutes "cruel and unusual" within the meaning of s. 12. This Court should ensure that the first factor from *Smith*, whether the punishment would "outrage the public conscience", does not overwhelm the analysis or become a basis for a determination of proportionality, under the proposed test or any other test this Court develops under s. 12. In circumstances where the crime is one of great brutality (like multiple murders); is motivated by hate or targets the vulnerable; or where a certain *class* of offender becomes stigmatized and villainized, there may indeed be no punishment that would shock the public conscience. Indeed, the submissions of the Appellant Her Majesty the Queen, that aggravating factors must

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[30] *Ibid* at para. 48.
[31] See e.g. *Smith, supra* at paras. 114-5, per Wilson J., dissenting on this point, concurring in result; *R. v. Johnson*, 2003 SCC 46 at para. 28.
[32] *Smith, supra* at pp. 1097–8, per McIntyre J, dissenting.
[33] *Ibid*.

dominate the analysis,[34] and that of the Intervener Toronto Police Association, that the previous regime "devalued and marginalized the lives of murder victims" and failed to focus on the "horrors" of such actions, articulate precisely BCCLA's concern.[35] This Court should not endorse the highly emotional and often vindictive public reactions to crime when assessing a punishment for compliance with s. 12.

**23.** What must restrain state action and the human impulse to meet shockingly brutal crimes with state brutality of similar magnitude must be the principles that (1) punishment cannot go beyond what is necessary for the achievement of valid social aims, and (2) that the punishment cannot be arbitrarily imposed. These are vital aspects of "gross disproportionality" that remain analytically underdeveloped in the s. 12 jurisprudence of this Court. The BCCLA submits these principles should be fundamentally intertwined in any framework developed by this Court for assessing s. 12 *Charter* claims.

## IV. Stacking parole ineligibility periods in 25-year increments will always be cruel and unusual under the proposed test

**24.** Under the proposed framework, stacking parole ineligibility periods in 25-year increments will always violate the second and third factors of the *Smith* test. First, s. 745.51 is arbitrary: it is not imposed in accordance with standards or principles that are rationally connected to the purposes of the legislation.[36] Although the parole ineligibility period is statutorily authorized, the class of individuals that s. 745.51 applies to is broad. The legislation does not prescribe the conditions under which a further 25-year period of ineligibility will be imposed. Therefore, unlike the classification for first degree murder, s. 745.51 presents a particular risk of arbitrary application because it does not prescribe conditions which must be met before it can be imposed. For the court to make an order under s. 745.51, the Crown does not need to prove anything further or adduce any further evidence. The lack of prescriptive conditions also creates greater risk that the provision is applied unevenly, which would mean that some individuals convicted of multiple murders will be subject to a significantly lengthier period of incarceration than others, with no way to review it.

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[34] Factum of the Respondent, Her Majesty the Queen, at paras. 16, 20.
[35] Factum of the Intervener, Toronto Police Association, et al, at paras. 2, 13.
[36] *Smith*, *supra* at para. 101–102.

**25.** Second, s. 745.51 goes far beyond what is necessary to achieve a valid social aim. It is unnecessary to impose additional periods of parole ineligibility when all parole assessments are done on an individual basis. Being eligible for parole does not mean that parole will be granted. If the parole board is of the view that an inmate should not be granted parole after 25 years, 50 years, or more, that is within their authority. Most crucially, however, imposing parole ineligibility periods beyond the natural human life span is both absurd and dehumanizing. It deprives individuals of all realistic hope of being released, which even if wrongly placed, is essential for prisoners' wellbeing, particularly because of the abolishment of the faint hope clause.[37] Having no hope for release also provides no motivation to engage in rehabilitation and reintegration, potentially making prison itself more dangerous to inmates.[38]

**26.** While imposing lengthy parole ineligibility periods may satisfy a vindictive spirit, doing so fails to achieve any valid penological goals. As Chief Justice Lamer emphasized in *M. (C.A.)*, after a certain point, the "utilitarian and normative goals of sentencing will eventually begin to exhaust themselves" as the sentence approaches the individual's natural lifespan.[39] In such circumstances, "the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value."[40] Stacking consecutive 25-year periods of parole ineligibility fails to achieve any valid objective of sentencing and should be found grossly disproportionate.

## PART IV – SUBMISSIONS ON COSTS

**27.** The BCCLA does not seek costs and asks that no costs be awarded against it.

## PART V – ORDERS SOUGHT

**28.** The BCCLA makes no submissions on the ultimate order to be made.

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

**Danielle Robitaille**
**Carly Peddle**

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[37] See *R. v. Johnson*, 2012 ONCA 339 at para. 20.
[38] See *Bissonnette*, *supra* at para. 98.
[39] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 74
[40] *Ibid*.

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