Court File No. 39544

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

and

ATTORNEY GENERAL OF QUEBEC

APPELLANT

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

INTERVENERS

and

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 AND DEBORAH MAHAFFY (JOINTLY); OBSERVATORY ON NATIONAL SECURITY MEASURES; INDEPENDENT CRIMINAL DEFENSE 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

FACTUM OF THE INTERVENER
CANADIAN ASSOCIATION OF CHIEFS OF POLICE
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

CALGARY POLICE SERVICE
Legal Services Division
5050 – 40th Street NE
Calgary, Alberta T3J 3R2

Mathieu St-Germain
MSt-Germain@calgarypolice.ca
403.428.2944
780.421.2867 - fax

Counsel for the Intervener
Canadian Association of Chiefs of Police

MINISTÈRE de la JUSTICE du QUÉBEC
Direction du droit constitutionnel et autochtone
1200, route de l'Église, 4e étage
Québec, QC G1V 4M1

Sylvain Leboeuf
Julie Dassylva and Jean-François Paré
sylvain.leboeuf@justice.gouv.qc.ca
418.643.1477 x 31010
418.644.7030 – fax

Lawyers for the Appellant Attorney General of Quebec

HER MAJESTY THE QUEEN
Poursuites criminelles et pénales du Quebéc
Palais de la justice de Québec
300, boul. Jean-Lesage, bureau 255
Québec, QC G1K 8K6

Olivier Raymond
François Godin
olivier.raymond@dpcp.gouv.qc.ca
418.649.3500
418.646.4919 - fax

Lawyers for the Appellant Her Majesty the Queen

PERLEY-ROBERTSON, HILL & MCDOUGALL LLP
1400 – 340 Albert Street
Ottawa, ON K1R 0A5

Joël M. Dubois
jdudois@perlaw.ca
613.566.2815
613.238.8775 – fax

Lawyers for the Intervener Canadian Association of Chiefs of Police

NOËL et ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
p.landry@noelassocies.com
819.503.2178
819.771-5397 - fax

Gatineau agent for the Appellant Attorney General of Quebec

DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUEBÉC
17, rue Laurier, bureau 1.230
Gatineau, QC J8X 4C1

Isabelle Bouchard
isabelle.bouchard@dpcp.gouv.qc.ca
819.776.8111 x 60442
819.772.3986 - fax

Gatineau agent for the Appellant Her Majesty the Queen

BUREAU D'AIDE JURIDIQUE
400, boul. Jean-Lesage
Québec, QC G1K 8W1

Charles-Olivier Gosselin
Jean-Claude Gingras
charleso.gosselin@ccjq.qc.ca
418.643.4163
418.643.4712 – fax

Lawyers for the Respondent

CENTRE COMMUNAUTAIRE JURIDIQUE DE L'OUTAOUAIS
136, rue Wright
Gatineau, QC J8X 2G9

Catherine Barrière Gratton
cbarrieregratton@ccjo.qc.ca
819.772.3084
819.772-3105 – fax

Gatineau agent for the Respondent

UNIVERSITÉ DE MONTRÉAL
Faculté de droit
CP 6128 succ. centre-ville
Montréal, QC H3C 3J7

Anne-Marie Boisvert
Maude Pagé-Arpin
Walid Hijazi
anne-marie.boisvert@umontreal.ca
514.343.2356
514.3432199 - fax

Lawyers for Association des avocats de la défense de Montréal-Laval-Longueuil

MINISTÈRE DE LA JUSTICE
Complexe Guy-Favreau, Tour Est, 9e étage
200, boulevard René-Lévesque Ouest
Montréal, QC H2Z 1X4

Ian Demers
ian.demers@justice.gc.ca
514.496.9232
514.283.3103 – fax

Lawyers for the Attorney General of Canada

DEPARTMENT OF JUSTICE
500 - 50 O'Connor Street
Ottawa, ON K1A 0H8

Christopher Rupar
christopher.rupar@justice.gc.ca
613.670.6290
613.954.1920 – fax

Ottawa agent for the lawyers for the Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 10th floor
Toronto, ON M7A 2S9

Milan Rupic
Katie Doherty
milan.rupic@ontario.ca
416.326.4592
416.326.4656 – fax

Lawyers for the Attorney General of Ontario

ATTORNEY GENERAL OF ALBERTA
3rd Floor, Centrium Place
300 - 332 6 Avenue, S.W.
Calgary, AB T2P 0B2

Christine Rideout, Q.C.
christine.rideout@gov.ab.ca
403.297.6005
403.297.3453 – fax

Lawyers for the Attorney General of Alberta

NOVA SCOTIA PUBLIC PROSECUTION SERVICE
700 - 1625 Grafton Street
Halifax, NS B3J 0E8

Glenn Hubbard
Glenn.Hubbard@novascotia.ca
902.424.6794
902.424.8440 – fax

Lawyers for the Attorney General of Nova Scotia

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
lynne.watt@gowlingwlg.com
613.786.8695
613.788.3509 - fax

Ottawa agent for the lawyers of the Attorney General of Alberta

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
lynne.watt@gowlingwlg.com
613.786.8695
613.788.3509 - fax

Ottawa agent for the lawyers of the Attorney General of Nova Scotia

ATTORNEY GENERAL OF BRITISH COLUMBIA
Criminal Appeals and Special Prosecutions
3rd Floor, 940 Blanshard Street
Victoria, British Columbia
V8W 3E6

Micah B. Rankin
micah.rankin@gov.bc.ca
778.974.3344
250.216.0264 – fax

Lawyers for the Attorney General of British Columbia

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3

Matthew Estabrooks
matthew.estabrooks@gowlingwlg.com
613.786.0211
613.788.3573 - fax

Ottawa agent for the lawyers of the Attorney General of British Columbia

EMBRY DANN LLP
100 - 116 Simcoe Street
Toronto, ON M5H 4E2

Erin Dann
edann@edlaw.ca
416.868.1203
416.868.0269 – fax

Lawyers for Queen's Prison Law Clinic

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
mfmajor@supremeadvocacy.ca
613.695.8855 Ext: 102
613.695.8580 - fax

Ottawa agent for lawyers for Queen's Prison Law Clinic

DANSON RECHT LLP
1400 - 20 Toronto Street
Toronto, ON M5C 2B8

Timothy S.B. Danson
Marjan Delavar
danson@drlitigators.com
416.929.2200
416.929.2192 – fax

Lawyers for Toronto Police Association, Canadian Police Association

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
mfmajor@supremeadvocacy.ca
613.695.8855 Ext: 102
613.695.8580 - fax

Ottawa agent for lawyers for Toronto Police Association, Canadian Police Association

DANSON RECHT LLP
1400 - 20 Toronto Street
Toronto, ON M5C 2B8

Timothy S.B. Danson
Marjan Delavar
danson@drlitigators.com
416.929.2200
416.929.2192 – fax

Lawyers for 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 and Deborah Mahaffy

UNIVERSITÉ DE MONTRÉAL
Faculté de droit, Pavillon Maximilien-Caron
3101, chemin de la Tour, 7e étage
Montréal, QC H3C 3J7

Stéphane Beaulac
Miriam Cohen
Sarah-Michèle Vincent-Wright
stephane.beaulac@umontreal.ca
514.343.7211
514.343.2199 – fax

Lawyers for the Observatory on National Security Measures

MELVILLE LAW CHAMBERS
1200-1111 Melville Street
Vancouver, BC V6E 2V6

Eric Purtzki
Alix Tolliday
purtzki@gmail.com
604.662.8167
604.681.9797 – fax

Lawyers for Independent Criminal Defense Advocacy Society

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
mfmajor@supremeadvocacy.ca
613.695.8855 Ext: 102
613.695.8580 - fax

Ottawa agent for lawyers for 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 and Deborah Mahaffy

DENTONS CANADA s.e.n.c.r.l.
1420 - 99 Bank Street
Ottawa, ON K1P 1H4

David R. Elliott
david.elliott@dentons.com
613.783.9699
613.783.9686

Ottawa agent for lawyers for Observatory on National Security Measures

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8
msobkin@sympatico.ca
613.282.1712
613.288.2896

Ottawa agent for Lawyers for Independent Criminal Defense Advocacy Society

BORYS LAW
189 Ontario Street, 2nd Floor
Kingston, ON K7L 2Y7

Simon Borys
simon@boryslaw.ca
613.777.6262
613.777.6263 – fax

Lawyers for Canadian Prison Law Association

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
mfmajor@supremeadvocacy.ca
613.695.8855 Ext: 102
613.695.8580 - fax

Ottawa agent for lawyers for Canadian Prison Law Association

NATIONAL COUNCIL OF CANADIAN MUSLIMS
300 - 116 Albert Street
Ottawa, ON K1P 5G3

Sameha Omer
somer@nccm.ca
613.254.9704 Ext: 224
613.701.4062 – fax

Lawyers for National Council of Canadian Muslims

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
mfmajor@supremeadvocacy.ca
613.695.8855 Ext: 102
613.695.8580 - fax

Ottawa agent for lawyers for National Council of Canadian Muslims

RUBY SHILLER ENENAJOR DIGIUSEPPE
Barristers
101 - 171 John Street
Toronto, ON M5T 1X3

Stephanie DiGiuseppe
Karen Heath
sdigiuseppe@rubyshiller.com
416.964.9664
416.964.8305 – fax

Lawyers for Canadian Civil Liberties Association

GOLDBLATT PARTNERS LLP
500 - 30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
cbauman@goldblattpartners.com
613.482.2463
613.235.3041 – fax

Ottawa agent for lawyers for Canadian Civil Liberties Association

HENEIN HUTCHISON LLP
235 King Street East
First Floor
Toronto, ON M5A 1J9

Danielle Robitaille
Carly Peddle
drobitaille@hhllp.ca
416.368.5000
416.368.6640 – fax

Lawyers for British Columbia Civil Liberties Association

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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 AND DEBORAH MAHAFFY (JOINTLY); OBSERVATORY ON NATIONAL SECURITY MEASURES; INDEPENDENT CRIMINAL DEFENSE 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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Intervener the Canadian Association of Chiefs of Police ("CACP") will present the police perspective on the points in issue in this appeal, and argue that section 745.51 of the *Criminal Code*[1] is constitutionally sound. This provision was enacted in Parliament's pursuit of a legitimate legislative goal and is necessary to maintain public safety and trust in the justice system. It carries a clearly defined purpose in the sentencing regime and is properly attenuated by the exercise of judicial discretion. Judges are presumed to know the law; they are expected to apply this provision within its proper scope and in the appropriate cases.

2. The Respondent's mass killing – in its cruel, racist, and hateful nature – is the epitome of cases that exemplifies the need for section 745.51.

3. The CACP will argue against a blanket constitutional protection that purports to guarantee prospects of parole to every convicted murderer.

B. Statement of Facts

4. The CACP takes no position with respect to the facts of this case.

PART II - POINTS IN ISSUE

5. Having been provided with the opportunity to review the factum of the Appellant, the CACP would state the issues as follows:

1. Does section 745.51 of the *Criminal Code* violate sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to Question 1 is in the affirmative, can section 745.51 be reasonably justified as a reasonable limit on the rights and freedoms of Canadians that can be demonstrably justified in a free and democratic society?

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[1] L.R.C. 1985, ch. C–46

6. The CACP submits:

- Section 745.51 is a clear expression of governmental policy aimed at preserving public trust and safety in sentencing offenders convicted of multiple murders;
- This provision strikes the proper balance in addressing substantial and pressing societal concerns and properly attenuating its effects through judicial discretion and restraint.

PART III - STATEMENT OF ARGUMENT

A. General Deterrence and Public Safety

7. For victims of crime and their families, police officers are the face of the criminal justice system. They routinely witness the devastation caused by violent crimes in the communities they serve and can often be the target of such violence themselves. The policing community can speak to the erosion of public trust and the risks to public safety when such crimes are not proportionally deterred by the sentencing regime.

8. Alarming numbers of mass, serial and spree-type killings have plagued societies across the world and Canada is no exception. As we know, police officers in our country are not immune to falling at the hands of mass shooters as seen in the Mayerthope tragedy[2] or more recently, the Moncton shootings described as one of the worst crimes in Canadian history[3], as well as many others.

9. Nor are police officers impervious to the psychological harms of witnessing firsthand the havoc of mass murder; multiple lives lost, scarred families and communities shaken to their core. Officers are at the frontline of this trauma. The insidious effects of these experiences on their mental health and well-being is beyond question.

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[2] *R v Hennessey*, 2009 ABQB 60
[3] *R v Bourque*, 2014 NBQB 237, at para. 38

10. Indeed, Canada has seen its share of killers choosing not to stop at one victim, many of whom have been properly dealt with by way of consecutive periods of parole ineligibility pursuant to the impugned provisions of section 745.51[4].

11. From a systemic standpoint, the nature of these senseless tragedies in today's society is complex and multifaceted. This is precisely why the task of crafting a proper sentencing regime to address these societal concerns falls squarely under Parliament's purview. As this Honourable Court has recognized:

> "*Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do"*[5].

12. This Court has also acknowledged that parole ineligibility forms an integral part of the sentencing policy and informs the retributive and deterrent aspects of the sentence[6]. It forms part of the punishment.

13. In introducing section 745.51, Parliament provided sentencing courts with the statutory tool to ensure that deterrence could be adequately addressed by imposing consecutive periods of parole ineligibility. By doing so, Parliament drew a clear nexus between the general deterrence of the sentence and public safety, as articulated by Campbell J. in *R v Granados-Arana* when assessing the legislator's intent behind this provision*:*

> *"…to better protect the public against offenders who have proven to be especially dangerous by virtue of their murder of two or more victims, by the imposition of sentences that provide a greater degree of denunciation and deterrence."*[7]

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[4] *R v Baumgartner*, 2013 ABQB 761; *R v Bourque*, 2014 NBQB 237; *R v Clorina*, 2015 ABQB 252; *R v Vuozzo*, 2015 PESC 14; *R v Husbands*, [2015] OJ No 2674 (SCJ), rev'd 2017 ONCA 607 (convictions set aside on appeal for reasons unrelated to section 745.51CC); *R v Ostamas*, 2016 MBQB 136; *R v Garland*, 2017 ABQB 198; *R v Saretzky*, 2017 ABQB 496; *R v Borutski*, 2017 ONSC 7762; *R v Hudon-Barbeau*, 2018 QCCS 895 (CanLII); *R v Millard*, 2018 ONSC 1299; *R v Millard*, 2018 ONSC 7578; *R v Granados-Arana*, 2018 ONSC 1756; *R v Zekarias*, [2018] O.J. No. 6827 (Ont Sup Ct J); *R v Brass*, 2018 MBQB 182; *R v Downey*, 2019 ABQB 365; *R v Forman*, 2019 BCSC 2165

[5] *R v Malmo-Levine*, 2003 SCC 74, at para. 133

[6] *R v Shropshire*, 1995 CanLII 47 (SCC), at para. 23-25; *Whaling v. Canada (Attorney General)*, 2014 SCC 20, at para. 61; *R v Zinck*, 2003 SCC 6, at para. 24

[7] *R v Granados-Arana*, 2017 ONSC 6785, at para. 22

14. From assassins who err on the side of eliminating witnesses to a murder, to terrorist attacks, organized crime killings and mass shootings; the inability for courts to cumulate periods of parole ineligibility undermines the objective of general deterrence and as such, jeopardizes public safety.

B. Quantum and Life Expectancy

a) Constitutionalizing the hope of release

15. Both the Sentencing Judge[8] and the Quebec Court of Appeal[9] seem to have rested their constitutional analysis on the overarching premise that a period of parole ineligibility that surpasses 25 years and risks exceeding the offender's natural life is grossly disproportionate and loses its penological objectives. The result of this type of reasoning is to create a constitutional protection of every offender's "hope of release" as a blanket principle. A proposition that any life sentence without a real prospect of parole is inherently ("*par nature*") disproportionate.

16. Respectfully, such a premise is flawed both from a legal and public policy standpoint. It purports to guarantee a prospect of parole to every offender regardless of the facts surrounding the crime and as such, it is inconsistent with the individualized process of sentencing in Canadian law[10]. It places an undue focus on the rehabilitative aspects of the sentence to the detriment of the *primary* sentencing objectives of denunciation, deterrence and protection of the public.

17. In fact, imposing a 25-year "cap" on parole ineligibility, as the Court of Appeal purported to do in this matter, will inevitably create disproportionate results; sentencing mass murderers as though they had committed a single homicide. A blanket 25-year rule is untenable; it shocks the conscience of the public and adds insult to injury to the families of the victims.

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[8] Sentencing Ruling, at paras. 853-859, 1046
[9] Court of Appeal Decision, at paras. 93, 96, 109, 113, 143
[10] *R v Nasogaluak*, 2010 SCC 6, at para. 43

b) Opening constitutional floodgates

18. The proposition that consecutive periods of parole ineligibility cannot – constitutionally – exceed an offender's natural life invites this Honourable Court to create a precedent that will carry ripple effects onto many other provisions of the sentencing regime.

19. For instance, pursuant to the minimum 25-year parole ineligibility period mandated by section 745(a) of the *Criminal Code*, a 70-year-old offender convicted of a single first-degree murder would see their parole eligibility only become available well beyond their life expectancy. By this rationale, section 745(a) would be equally problematic as it can create the same de facto result as consecutive periods of parole ineligibility; even more so, as that section is deprived – contrary to section 745.51 – of any judicial discretion to temper its effect.

20. This Honourable Court is essentially being invited, albeit indirectly, to reconsider its own jurisprudence that has previously upheld the constitutionality of provisions such as s. 745(a) [then s. 669(a)]:

> *"This is a crime that carries with it the most serious level of moral blameworthiness, namely, subjective foresight of death. The penalty is severe and deservedly so. The minimum 25 years to be served before eligibility for parole reflects society's condemnation of a person who has exploited a position of power and dominance to the gravest extent possibly by murdering the person that he or she is forcibly confining. The punishment is not excessive and clearly does not outrage our standards of decency. In my view, it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat out most serious crime with a appropriate degree of certainty and severity."*[11]
>
> [Emphasis added]

21. This proposition would also bring into question the constitutionality of many other provisions of the *Criminal Code* that carry the mere potential, depending on an offender's given age, of removing any realistic prospect of parole.

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[11] *R v Luxton*, 1990 CanLII 83 (SCC)

c) Attempting to correlate parole eligibility and life expectancy

22. Much of the discussion in these proceedings has been focused on attempting to quantify the life expectancy of offenders and correlate these numbers with the quantum of parole eligibility, ultimately making the age of the offender a determinant factor in that respect. This is an exercise that the Honourable sentencing Judge undertook by reading-down section 745.51 and crafting a parole ineligibility period that would give the Respondent *some* hope of one day obtaining release based on his age.

23. This exercise, in our respectful view, is flawed. It essentially leaves two avenues for sentencing judges. The first, by relying on the average life expectancy (i.e. national averages, standard retirement age, etc.), thereby discounting offender-specific factors such as demographics, incarceration, and pre-existing health conditions, to name but a few. The other option is for the courts to conduct the actuarial exercise of estimating the offender's specific life expectancy based on countless individualized factors, an equally unworkable exercise.

24. Courts in the U.S. have grappled with this issue in attempts to determine the life expectancy of young offenders under Eighth Amendment analysis[12]. These discussions expose the problem between a "one-size-fits-all" life expectancy framework and an offender-specific assessment based on demographics, health, socioeconomics and other individualized factors. The former creating unfair outcomes for those with a reduced life expectancy, the latter also problematic in effectively imposing longer sentences for anyone with a higher life expectancy.

C. CONCLUSION

25. Section 745.51 gives the ability to the Courts to provide an escalation in punishment for offenders convicted of multiple murders. But for this provision, convicted murderers would all be placed in the same footing of parole eligibility regardless of the number of murders they've committed, as illustrated in this case.

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[12] COMMENT: Categorically Redeeming Graham v Florida and Miller v Alabama: Why the Eighth Amendment Guarantees All Juvenile Defendants a Constitutional Right to a Parole Hearing, 86 U. Chi. L. Rev. 1439

26. As a result, the individual lives of the victims are discounted in the sentence, the public's trust in our system is eroded and, as previously articulated, the sentence is deprived of any general deterrence for multiplying victims. These are the very harms Parliament intended to address by enacting this provision.

27. As leaders in the policing community, the CACP recognizes that the fundamental role of police in Canada is to uphold the law and maintain public safety. Striking down this section will serve to benefit society's most irredeemable offenders and fail to deter others from committing such atrocities.

28. The CACP implores this Honourable Court to uphold the constitutionality of this provision and afford proper deference to Parliament's clear expression of sentencing policy.

29. In the alternative, should the Court arrive to a different conclusion, we join the other interveners[13] in respectfully requesting that other remedies be considered such as "reading down" or "reading-in" this provision into constitutional compliance, or suspending any declaration of invalidity to allow Parliament to rectify any constitutional defect.

PART IV – SUBMISSIONS CONCERNING COSTS

30. The CACP makes no submissions as to costs.

PART V – NATURE OF ORDER SOUGHT

31. Pursuant to Rule 42(3) of the *Rules of the Supreme Court of Canada,* the CACP takes no position on the outcome of this appeal as between the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, ON NOVEMBER 19, 2021.

Mathieu St-Germain
Counsel for the Intervener
Canadian Association of Chiefs of Police

[13] 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 and Deborah Mahaffy

PART VII – AUTHORITIES RELIED UPON

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2.	*R v Borutski*, 2017 ONSC 7762	10
3.	*R v Bourque*, 2014 NBQB 237	8, 10
4.	*R v Brass*, 2018 MBQB 182	10
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18.	*R v Ostamas*, 2016 MBQB 136	10
19.	*R v Saretzky*, 2017 ABQB 496	10
20.	*R v Shropshire*, 1995 CanLII 47	12
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