# The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing

## Isabel Grant, Crystal Choi, and Debra Parkes

A NUMBER OF legal developments in recent years suggest that murder sentencing may be becoming increasingly punitive. This study examines two aspects of setting parole ineligibility for those convicted of murder. First, using cases from three two-year time periods spanning the past three decades, the authors explore whether judicial calculations of parole ineligibility for second degree murder have changed over time. Second, the authors examine changes enacted in 2011 to allow parole ineligibility to be imposed consecutively for those who are convicted of more than one murder.

The study finds a national trend towards reduced reliance on the minimum ten-year period of parole ineligibility, a slight increase in parole ineligibility periods over time, and evidence that increasingly harsh parole ineligibility in Ontario may be driving the national trends. With respect to consecutive periods of parole ineligibility, the cases suggest that courts are imposing consecutive parole ineligibility in just less than 45 percent of the eligible cases, with that result being more likely where the victims include strangers. Courts in Ontario and Alberta have thus far shown the highest rates of consecutive parole ineligibility, while British Columbia has largely resisted this trend. The authors conclude that some kind of review mechanism, like a faint hope clause, is necessary to temper the harshness of these increasingly long periods of parole ineligibility and that further study is

DE NOMBREUX AVANCEMENTS juridiques au cours des dernières années suggèrent que les peines pour meurtre deviendraient de plus en plus punitives. Cette étude examine deux aspects de la détermination de l'admissibilité à la libération conditionnelle des personnes reconnues coupables de meurtre. Premièrement, en se penchant sur des causes avancées au cours de trois périodes de deux ans, couvrant les trois dernières décennies, les auteures cherchent à savoir si les calculs judiciaires concernant l'admissibilité à la libération conditionnelle pour meurtre au second degré, ont changé au fil des années. Deuxièmement, les auteures font l'analyse de modifications adoptées en 2011 pour permettre l'imposition de périodes consécutives d'inadmissibilité à la libération conditionnelle pour les personnes ayant commis plus d'un meurtre.

L'étude révèle que la tendance nationale est de se fier de moins en moins à la mise en application de la période minimale d'inadmissibilité à la libération conditionnelle de 10 ans, une légère augmentation de cette période au fil du temps, et présente des preuves que la détermination de l'admissibilité à la libération conditionnelle étant de plus en plus sévère en Ontario pourrait être à l'origine des tendances nationales, à la hausse. En ce qui concerne les périodes consécutives d'inadmissibilité à la libération conditionnelle, les causes suggèrent que les tribunaux imposent des périodes consécutives d'inadmissibilité à

warranted to explore the preliminary trends identified in this study.

la libération conditionnelle dans un peu moins de 45 % des causes admissibles, ce résultat étant plus probable lorsque la personne coupable ne connaissait pas les victimes. Les tribunaux de l'Ontario et de l'Alberta ont jusqu'à présent affiché les taux les plus élevés de périodes consécutives d'inadmissibilité à la libération conditionnelle, tandis que la Colombie-Britannique a en grande partie résisté à cette tendance. Les auteures concluent qu'un processus de révision, comme la clause de la dernière chance, est nécessaire afin de tempérer la sévérité des périodes d'inadmissibilité à la libération conditionnelle de plus en plus longues et qu'une étude plus approfondie est justifiée pour explorer les tendances préliminaires identifiées dans cette étude.

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## I. INTRODUCTION

The implementation of life sentences as punishment for murder and other serious crimes is on the rise internationally, and Canada is not immune to this trend.[1] As of 2018, there were 5,619 people serving life or indeterminate sentences in Canada, representing approximately 24 percent of all individuals under federal correctional supervision in Canada.[2] The vast majority of these people—4,759 individuals—were serving a mandatory life sentence for murder.[3]

Life sentences are remarkable because they result in a form of custodial and, for some, community supervision until the end of a person's natural life, leaving little room for redemption, rehabilitation, or hope. For these reasons, some legal systems do not permit life sentences. Norwegian

[1]     Worldwide, there was an increase of almost 84 percent in the number of people serving life sentences from 2000 to 2014. See Penal Reform International, *Life Imprisonment: A Policy Briefing* (London, UK: Penal Reform International, 2018). See also Nadia Bernaz, "Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward" (2013) 35:2 Hum Rts Q 470.

[2]     See Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release: Statistical Overview 2018* (Ottawa: Public Safety Canada, August 2019) at 59–60, online (pdf): <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2018/ccrso-2018-en.pdf> [PSC Committee].

[3]     *Ibid* at 60.

law, for example, has no life sentences,[4] and in Portugal life sentences are unconstitutional.[5] Common law jurisdictions such as the United Kingdom, the United States, and Canada are generally harsher than their civil law European counterparts, where determinate sentences are utilized even for serious offences such as murder.[6] The United States leads the world in meting out life sentences, in many cases without any possibility for parole.[7] Research there has shown that the availability of extreme prison sentences (life without parole or "virtual life" sentences of 50 years or more) has had an inflationary effect on sentencing generally due to the normalization of extreme penalties and a magnitude scaling effect, whereby sentences that might otherwise be seen as unreasonably harsh become accepted.[8]

Canada has no formal sentence of life without parole; the possibility of conditional release has always been an essential feature of the post-1976 sentencing regime for murder. Therefore, examining sentencing and parole decisions becomes key to understanding the impact of mandatory life sentences. What parameters do judges put on a life sentence, and at what point in their sentence do lifers tend to get released? This paper zeroes in on the first set of decisions—namely judicial determination of the number of years a person sentenced to life for murder must serve in prison before being eligible to apply for parole—and leaves examination of parole board decision-making for a later paper. While life sentences and relatively long periods of ineligibility for parole have been normalized in Canadian law, there are also countervailing principles at stake, such as human dignity, the salience of hope, and the possibility of rehabilitation, as well as the

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4      See Hans-Jörg Albrecht, "Post-Adjudication Dispositions in Comparative Perspective" in Michael Tonry & Richard S Frase, eds, *Sentencing and Sanctions in Western Countries* (Oxford: Oxford University Press, 2001) 293 at 303.

5      See Dirk van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink?" (2010) 23:1 Federal Sentencing Reporter 39 at 40; Portugal Const (1976, amended 2005) art XXX §1; Dirk van Zyl Smit & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Cambridge, Mass: Harvard University Press, 2019) at 18.

6      van Zyl Smit & Appleton, *supra* note 5.

7      As of 2017, there were 206,268 people in the United States (US) serving life sentences or virtual life sentences of 50 years or more. From 1992 to 2016, the number of Americans serving life without parole increased by 328 percent to 53,290 individuals. See Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences* (Washington: Sentencing Project, 2017) at 7, 9, 24, online (pdf): <www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>.

8      See Melissa Hamilton, "Extreme Prison Sentences: Legal and Normative Consequences" (2016) 38:1 Cardozo L Rev 59 at 106–11.

human and fiscal costs of an aging prison population, which suggest we should subject these sentences to close scrutiny.[9]

Since the abolition of the death penalty in 1976, Canada has relied on mandatory life sentences with long periods of parole ineligibility to punish persons convicted of murder. The prescribed periods of parole ineligibility have remained consistent since 1976, but a number of related changes have been made to the legislative regime, which have the potential to make the sentences for murder even harsher. In this study, we examine what is actually happening in our courts regarding sentencing for murder to determine whether the sentences imposed by judges have increased over time. In a subsequent paper, we will be examining how long those convicted of murder are incarcerated before being released on parole.[10]

## II. CANADA'S MURDER SENTENCING REGIME

The legal regime for murder sentencing has been detailed elsewhere, and we will only briefly review it here.[11] All murder is subject to a mandatory sentence of life imprisonment, and the length of the parole ineligibility

9   See e.g. Derek Spencer, "Hope for Murderers? International Guidance on Interpreting the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act" (2017) 22:2 Can Crim L Rev 207; Margaret E Leigey & Doris Schartmueller, "The Fiscal and Human Costs of Life Without Parole" (2019) 99:2 Prison J 241; Ronald H Aday & Jennifer J Krabill, "Older and Geriatric Offenders: Critical Issues for the 21st Century" in Lior Gideon, ed, *Special Needs Offenders in Correctional Institutions* (Thousand Oaks: SAGE, 2013) 203.

10   There is no recent publicly available data on this issue. According to the Correctional Service of Canada, in 1976 the average time in custody for capital and non-capital murder was 15.8 years and 14.6 years, respectively. By 1999, the estimated average time that someone convicted of first degree murder spent in prison was 28.4 years. These numbers were calculated using statistical survival analyses to produce an average length of incarceration from the start of the murder sentence to release or death. In other comparable jurisdictions, the number was much lower: 11 years in New Zealand, 14.4 in England, and 14.8 in Australia. See Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill C-48*, by Robin MacKay, Publication No 40-3-C48-E, February 2011 revision (Ottawa: Library of Parliament, 24 November 2010) at 7, online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/40-3/c48-e.pdf>. See also Mark Nafekh & Jillian Flight, *A Review and Estimate of Time Spent in Prison for Offenders Sentenced for Murder* (Ottawa: Correctional Service of Canada, November 2002) at 1, 6, online (pdf): <www.csc-scc.gc.ca/005/008/092/b27-eng.pdf>.

11   See e.g. Julian V Roberts, "Determining Parole Eligibility Dates for Life Prisoners: Lessons from Jury Hearings in Canada" (2002) 4:1 Punishment & Society 103; Isabel Grant, "Rethinking the Sentencing Regime for Murder" (2001) 39:2/3 Osgoode Hall LJ 655; Micah B Rankin, "The Origins, Evolution and Puzzling Irrelevance of Jury Recommendations in Second-Degree Murder Sentencing" (2015) 40:2 Queen's LJ 531.

period attached to that sentence depends on whether the murder is classified as first or second degree.[12] It is important to stress that these periods of parole ineligibility set the date at which an individual is eligible to apply for parole, not the date at which they will be paroled. For first degree murder,[13] there is a mandatory period of 25 years before parole eligibility.[14] For second degree murder,[15] that period is set by the sentencing judge after a recommendation from the jury, where there is one,[16] at somewhere between ten and 25 years.[17] If an individual has already been convicted of murder, they will be subjected to life imprisonment with 25 years of parole ineligibility regardless of whether their new conviction is for first or second degree murder.[18] Canada has special rules for persons who are

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12   See *Criminal Code*, RSC 1985, c C-46, s 235.

13   First degree murder includes: planned and deliberate murders; murders for hire; murders of police officers, prison guards and related officials; murders during the course of crimes such as hijacking, sexual assault, kidnapping, and hostage taking; murders in the course of criminal harassment; murders while committing an act of terrorism; murders committed at the direction of a criminal organization; and murders in the course of intimidating a justice system participant. *Ibid*, s 231. The original section 214, enacted in 1976, included only the first four categories; the remaining definitions have been added over time. See *Criminal Law Amendment Act (No 2), 1976*, SC 1974-76, c 105 [*1976 Amendments*].

14   *Criminal Code*, *supra* note 12, ss 235(1), 745(a).

15   Second degree murder is defined in the *Criminal Code* as any murder that is not first degree murder. *Ibid*, s 231(7). Before a killing can be labelled as murder, the Crown must prove beyond a reasonable doubt some form of subjective fault. The *Criminal Code* outlines when culpable homicide is murder: it includes intentional murder, a variant of reckless murder, transferred intent for either intentional or reckless murders, where the wrong person is killed by mistake, and a form of unlawful object murder, where the accused knows that death is likely to result from engaging in another form of criminal activity. *Ibid*, s 229.

16   When present, the jury is told that it may make a recommendation but is not required to do so. The jury is not given any instruction on how it should come to a recommendation. A jury recommendation need not be unanimous, and multiple jurors can give different recommendations. *Ibid*, s 745.2. A trial judge is not bound by the jury recommendation but must take it into account. Rankin, *supra* note 11 at 533. Although murder is almost always tried by a judge and jury in Canada, there is no equivalent to the jury recommendation where a judge sits alone in exceptional circumstances or where the accused pleads guilty.

17   *Criminal Code*, *supra* note 12, ss 235(1), 745(c). The judge is instructed by the *Criminal Code* to consider "the character of the offender, the nature of the offence and the circumstances surrounding its commission," as well as the jury recommendation, if any. *Ibid*, s 745.4.

18   *Ibid*, s 745(b).

sentenced as youth[19] and for those sentenced as adults who were under the age of 18 at the time of the offence.[20]

In 1976, when this regime was introduced, it was widely considered a harsh but necessary compromise to win support for abolishing the death penalty.[21] Part of the 1976 compromise was the provision, often referred to as "the faint hope clause,"[22] that gave an individual sentenced to more than 15 years of parole ineligibility the right to apply to a court after serving 15 years to have that period of parole ineligibility reduced. Under the original provision, everyone convicted of first degree murder and all those convicted of second degree murder with parole ineligibility greater than 15 years had access to the faint hope clause, which involved a hearing before a jury.[23] Successful use of the faint hope clause did not inevitably lead to parole, but rather provided a mechanism for shortening the period before which an individual was eligible to apply for parole.

As of 2018, a total of 1,740 people serving life sentences were or had been eligible to apply for reconsideration under the faint hope clause.[24] Of the 230 decisions made by juries[25] since the first hearing in 1987,[26] 174

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19   For first degree murder, young persons are sentenced to a maximum of ten years, comprised of conditional supervision in the community following a maximum of six years in custody. For second degree murder, young persons are sentenced to a maximum of seven years, comprised of conditional supervision in the community following a maximum of four years in custody. See *Youth Criminal Justice Act*, SC 2002, c 1, s 42(2)(q).

20   *Criminal Code*, *supra* note 12, s 745.1 (a person who is under 16 will be sentenced to life with parole ineligibility for five to seven years; a person who is 16 or 17 and sentenced as an adult will have a parole ineligibility of ten years for first degree murder and seven years for second degree murder).

21   See Allan Manson, "The Easy Acceptance of Long Term Confinement in Canada" (1990) 79 CR (3rd) 265.

22   *Criminal Code*, RSC 1970, c C-34, s 672, as amended by *1976 Amendments*, *supra* note 13. This was later substantially amended by *An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act*, SC 1996, c 34 [*1996 Amendments*] and by *An Act to amend the Criminal Code and another Act*, SC 2011, c 2 [*2011 Amendments*].

23   *1976 Amendments*, *supra* note 13, s 21.

24   PSC Committee, *supra* note 2 at 105.

25   *Ibid*. The document uses the somewhat ambiguous language of judicial review "court decisions," which we are assuming refers to decisions of a jury empaneled under section 745.61(5) of the *Criminal Code*, *supra* note 12, to decide whether the parole ineligibility period should be reduced, and not to the screening decision of a single judge under section 745.61(1) as to whether there is a substantial likelihood that the application will succeed before a jury.

26   Existing death sentences were automatically commuted to a life sentence with a parole ineligibility period of 25 years. *1976 Amendments*, *supra* note 13, s 25(1). For individuals who had their death sentences commuted, the time between their arrest and the date of the commutation counted towards their parole ineligibility period. *Ibid*, s 21, enacting section 673(b) of the *Criminal Code*, *supra* note 12, as it appeared in July, 1978. This may explain

(76 percent) resulted in a reduced parole ineligibility period. Of those 174 decisions,[27] 162 (93 percent) resulted in the person's release by the parole board at a subsequent hearing. This part of the 1976 compromise was important because the new regime required long periods of parole ineligibility, and there was concern that the potential risk those individuals presented to themselves and to others would only increase if there was no incentive whatsoever for good behaviour.[28] The compromise remained largely unchanged until the late 1990s, at which time Parliament (under both Liberal and Conservative governments) began to slowly narrow the scope of the faint hope clause until its eventual repeal in 2011.[29]

The Supreme Court of Canada has taken a deferential approach to the constitutionality of murder sentencing. After the proclamation of the *Canadian Charter of Rights and Freedoms*[30] in 1982, the Supreme Court used the *Charter* to limit the definition of murder. This was not a sentencing issue but rather a question of which homicides could be labelled murder. The Court concluded that only homicides with some degree of subjective fault with respect to causing death could be labelled murder.[31] The

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the 1987 date of the first faint hope applications despite only 11 years having passed since the coming into force of the *1976 Amendments*.

27    PSC Committee, *supra* note 2 at 106. The rate of success of faint hope judicial review applications in Ontario was much lower than it was in the other provinces and territories. Again, we are assuming that "court decisions" refers to proceedings before a jury empaneled under section 745.61(5) of the *Criminal Code*, *supra* note 12. In all jurisdictions reporting more than one or two cases, other than Ontario, a substantial majority of the applications resulted in the jury recommending a reduction. For example, in Quebec, 88 applications were successful and only eight were unsuccessful, whereas in Ontario more than half of the applications were unsuccessful, with 23 applications granted and 29 denied. In Manitoba, 11 applications resulted in a reduction and only one did not. In Alberta, 19 were successful and eight unsuccessful, and in British Columbia 23 were successful and six unsuccessful. Nova Scotia and New Brunswick only had two and one applications, respectively. There were no applications in Prince Edward Island or the Territories. *Ibid*. It would be an interesting avenue for future research to investigate what factors might account for this significant disparity.

28    See *House of Commons Debates*, 30-1, vol 12 (3 May 1976) at 13091.

29    *1996 Amendments*, *supra* note 22, s 2. In 1996, this provision amended the faint hope provision to require that an applicant satisfy a judge that there was a reasonable prospect that the application would succeed before a jury would be empaneled to review the case. This limit was aimed at preventing families from having to deal with a full hearing when there was almost no chance of success, such as in the case of Clifford Olsen who murdered 11 children in British Columbia and regularly applied for faint hope hearings. See *House of Commons Debates*, 35-2, vol 134, No 67 (16 September 1996) at 4217. These amendments also excluded multiple murders from the faint hope clause.

30    Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

31    See *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399 [*Vaillancourt* cited to SCR]; *R v Martineau*, [1990] 2 SCR 633, 109 AR 321 [*Martineau* cited to SCR].

Court justified this decision on two grounds: the stigma attached to murder was the primary factor, but the harsh mandatory penalties were also considered.[32]

However, when the Court was faced with challenges to the harsh sentence for first degree murder, the narrowed definition of murder was used to justify upholding this penalty. If only the most blameworthy homicides could be labelled as murder, Parliament was entitled to attach a correspondingly severe penalty to it.[33] The faint hope clause was relied upon to support the constitutionality of the murder sentencing regime. Twenty-five years of parole ineligibility was less likely to be seen as cruel and unusual where there was a mechanism that could mitigate its harshness. As the Court noted in *R v Luxton*, "[the existence of the faint hope clause] indicates that even in the cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case when it comes to sentencing."[34] The Court of Appeal of Alberta went so far as to say that whether the mandatory parole ineligibility for the murder of a police officer was unconstitutional turned on whether 15 years of parole ineligibility was cruel and unusual punishment, rather than the full 25 years, demonstrating the importance of the faint hope clause to the constitutional analysis.[35]

Several notable changes have been made to this regime since the late 1990s. First, the definition of first degree murder has been expanded over time to include a wider range of murders, thus potentially shifting more people into the first degree category. For example, in 1997, Parliament added murders committed pursuant to criminal harassment to the list of first degree murders.[36] The crime of criminal harassment had only been added to the *Criminal Code* in 1993, in response to the murders of two women within a week in Winnipeg by men on restraining orders

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32   *Vaillancourt*, *supra* note 31 at 653–54.

33   See *R v Luxton*, [1990] 2 SCR 711, 111 AR 161 [*Luxton* cited to SCR]. Challenges to second degree murder sentencing have also been unsuccessful. See *R v Latimer*, 2001 SCC 1 (Latimer, who had murdered his disabled daughter, unsuccessfully challenged the minimum sentence for second degree murder as cruel and unusual punishment in his circumstances). See also *R v Mitchell* (1987), 81 NSR (2d) 57, 39 CCC (3d) 141 (CA); *R v Newborn*, 2020 ABCA 120, leave to appeal to SCC refused, 39319  (21 January 2021) (upholding the mandatory minimum sentence for second degree murder).

34   *Luxton*, *supra* note 33 at 720.

35   See *R v Bowen* (1990), 111 AR 146, (*sub nom R v Kay*) 59 CCC (3d) 515 (Alta CA).

36   See *An Act to amend the Criminal Code* (*child prostitution, child sex tourism, criminal harassment and female genital mutilation*), SC 1997, c 16, s 3.

pertaining to the victims.[37] Murders in the course of terrorist activity were added in 2001, in response to increasing concerns about terrorism after the 9/11 terrorist attacks in the United States.[38] Some of the new categories of first degree murder appear to have been enacted in reaction to particularly notorious events, and we have only seen a small number of individuals convicted of first degree murder under the new provisions. In fact, some of the subsections have no reported cases in which a finding of first degree murder was made based on the provision.[39]

Second, Parliament began to narrow the faint hope clause in 1997 and ultimately prospectively repealed it in 2011.[40] Where a murder is committed after December 2, 2011, a person will not have access to a review of parole ineligibility after 15 years. We have not yet begun to see the effect of the removal of the faint hope clause because the provision still applies to those serving a sentence for (single) murders committed before that date.

Third, also in 2011, the *Criminal Code* was amended to allow those convicted of more than one murder to be given consecutive periods of parole ineligibility.[41] We are now seeing sentences as high as life imprisonment with 75 years before parole eligibility—a *de facto* sentence of life without parole.[42] Consecutive parole ineligibility is more likely to be used for

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37    See Rosemary Cairns Way, "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism" (1994) 39:2 McGill LJ 379 at 388–89. See also Isabel Grant, Natasha Bone & Kathy Grant, "Canada's Criminal Harassment Provisions: A Review of the First Ten Years" (2003) 29:1 Queen's LJ 175.

38    See *Anti-Terrorism Act*, SC 2001, c 41, s 9. See also *House of Commons Debates*, 37-1, vol 137, No 95 (16 October 2001) at 6164. Murders committed while intimidating witnesses or journalists were added in 2001's *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, SC 2001, c 32. Murders committed by using explosives in association with a criminal organization were added in *An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence*, SC 1997, c 23. This was expanded in *An Act to amend the Criminal Code (organized crime and protection of justice system participants)*, SC 2009, c 22 to include all murders pursuant to gang activity, regardless of the means of killing.

39    See e.g. *Criminal Code*, *supra* note 12, s 231(6.2). We found two cases: *R v Cluney*, 2008 SKQB 240 (where the Crown failed to prove that Cluney intended to provoke fear in the victim, which is required by this section) and *R v Winmill*, 2008 NBCA 88 (where the trial judge's flawed instructions prevented the jury from finding Winmill guilty of first degree murder, resulting in a retrial). We could find no cases of people sentenced under the terrorism provisions of the *Criminal Code*, *supra* note 12, s 231(6.01).

40    *2011 Amendments*, *supra* note 22.

41    See *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5, s 2 [*Ending Sentence Discounts Act*].

42    The first case involving a parole ineligibility period of 75 years for three first degree murders was *R v Bourque*, 2014 NBQB 237 [*Bourque*]. Prior to *Bourque*, a 70-year parole

first degree murders or a combination of first and second degree murders. We have found only three cases where it was imposed for multiple second degree murders.[43] Consecutive parole ineligibility periods have, with one notable exception,[44] survived *Charter* scrutiny largely because a judge is never required to impose them; rather, the decision is always discretionary.[45]

From 2006 to 2015, the Conservative government charted a more overtly punitive course in criminal justice policy than had its recent Liberal and Conservative predecessors.[46] The 2011 amendments to the *Criminal Code* making consecutive parole ineligibility periods possible and abolishing the faint hope clause were part of this "punishment agenda,"[47] but the impact of those changes on sentencing outcomes is still largely unknown.

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ineligibility period was imposed in *R v Baumgartner*, 2013 ABQB 761 [*Baumgartner*] as the result of a joint submission by counsel. It could be said that some individuals sentenced for murder under the pre-2011 regime could have experienced *de facto* life without parole (due, for example, to their older age at sentencing or to the unlikelihood that the Parole Board would release some people convicted of multiple murders). However, in our view, the new regime produced qualitatively different sentences by building in these extraordinarily long ineligibility periods, even for very young people.

43   See *R v Ostamas*, 2016 MBQB 136 [*Ostamas*]; *R v Husbands*, [2015] OJ No 2674, 121 WCB (2d) 487 (Sup Ct) [*Husbands*]. Note that the verdict in *Husbands* was eventually overturned, and Husbands was convicted of manslaughter at a subsequent trial. See *R v Husbands*, 2017 ONCA 607; "Christopher Husbands Guilty of 2 Counts of Manslaughter in Eaton Centre Shooting", *CBC News* (19 February 2019), online: <www.cbc.ca/news/canada/toronto/christopher-husbands-verdict-1.5025385>. He received concurrent life sentences for his manslaughter convictions at his subsequent sentencing hearing. See *R v Husbands*, 2019 ONSC 6824. The third case, *R v Bailey*, was not reported. See "Alberta Man Who Killed 3 Near Edson Sentenced to Life Without Parole for 30 Years", *CBC News* (21 June 2018), online: <www.cbc.ca/news/canada/edmonton/mickell-bailey-murder-lyon-berube-miller-1.4717134> [*Bailey*].

44   In *Bissonnette c R*, 2020 QCCA 1585 [*Bissonnette* QCCA], the Court of Appeal of Quebec found section 745.51 of the *Criminal Code*, which provides for consecutive parole ineligibility, to be unconstitutional. The Crown has sought leave to appeal this decision to the Supreme Court of Canada. See Kalina Laframboise, "Quebec to Seek Leave to Appeal Mosque Shooter's Sentence at Supreme Court", *Global News* (15 January 2021), online: <globalnews.ca/news/7578576/quebec-alexandre-bissonnette-sentence-appeal-supreme-court>.

45   See *R v Husbands*, [2015] OJ No 2673, 122 WCB (2d) 21 (Sup Ct); *R v Granados-Arana*, 2017 ONSC 6785; *R v Millard*, 2018 ONSC 1299. See also Derek Spencer, "How Multiple Murder Sentencing Provisions May Violate the Charter" (2019) 55 CR (7th) 165.

46   See Cheryl Marie Webster & Anthony N Doob, "US Punitiveness 'Canadian Style'? Cultural Values and Canadian Punishment Policy" (2015) 17:3 Punishment & Society 299; Anthony N Doob & Cheryl Marie Webster, "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century" (2016) 45 Crime & Justice 359.

47   See Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67 SCLR (2d) 589.

Earlier legislative changes in 1996 that highlighted the seriousness of male intimate partner violence against women,[48] and the decision of the Supreme Court of Canada in *R v Shropshire* interpreting the 1976 second degree murder sentencing regime,[49] may also have had an impact on murder sentencing.

## III. OUR STUDY

In this study, we examine the approach Canadian courts have taken to setting parole ineligibility periods for murder under this legislative regime. Because the sentence for first degree murder is fixed at life without parole for 25 years for single murders, one of the few remaining areas of judicial discretion in sentencing for murder is in the setting of the parole ineligibility attached to second degree murder. We wanted to investigate whether the punitive changes made to murder sentencing law (allowing for longer parole ineligibility, consecutive parole ineligibility periods, and the removal of "faint hope" review) may have had an inflationary effect on the setting of parole ineligibility periods for murder more generally.

### A. Methodology

In the first part of this study, we investigate what has happened since *Shropshire* and since the recent changes that have demonstrated an increasingly harsh approach to sentencing for murder. To examine changes over time, we compiled reported decisions for three two-year time periods over the last three decades. We confined our study to cases involving the sentencing of adults for second degree murder, thereby excluding all young people, including those sentenced as adults under the special provisions in section 745.1 of the *Criminal Code*. Our three time periods were approximately 15 years apart: 1987–1988, 2002–2003, and 2017–2018. We

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48    See *Criminal Code*, *supra* note 12, s 718.2(a)(ii), as amended by *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22, s 6 [*Act to amend sentencing*] (which made the fact that a victim was one's spouse or common-law partner a mandatory aggravating factor).

49    [1995] 4 SCR 227, 129 DLR (4th) 657 [*Shropshire* cited to SCR]. See also Isabel Grant, "Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners" (2010) 47:3 Alta L Rev 779 [Grant, "Intimate Femicide"] (for a discussion of the impact of *Shropshire* and section 718.2(a)(ii) on sentencing for intimate femicide).

wanted to have one period that was before the 1995 decision in *Shropshire*, one before consecutive sentences were introduced, and one after consecutive sentences were introduced, to investigate whether any of these changes were followed by changes in parole ineligibility determinations.

We conducted searches on Quicklaw, Westlaw, and CanLII for all reported decisions where the sentence for second degree murder was indicated. We also went through sentencing digests for the selected years. These searches were supplemented by media searches to provide further details on some cases. We included reasons for sentence, appeals from sentence, and appeals from conviction where the sentence imposed was mentioned on appeal. We recognize that this is an incomplete sample and only provides a snapshot in time of what our courts have been doing. It is possible that some cases did not have reasons for sentence, such as those involving joint recommendations, or that those reasons were not published, particularly in the early time periods. It is also likely that with the introduction of online databases, more cases will be available in the later time period than in the early time periods. These time periods are not presented as rigid categories; we also included decisions outside of the time period where the sentence was ultimately changed on appeal after the years under study. Where a sentence was altered on appeal, it is that final sentence that is included as the sentence imposed.[50] We had a handful of cases involving the sentencing of more than one person. Because sentencing is an individualized process focusing on the circumstances and blameworthiness of each person before the court, and because co-accused often receive different sentences, we treat each person sentenced as a separate case for the purposes of our analysis.

We recognize that studying reported judgments can never paint a complete picture of what is happening in the courts. However, we believe it is a useful exercise to lay the groundwork for future research by providing a snapshot of trends that may be emerging. We note also that this methodology has been used by other scholars.[51] Thus, while we present our results

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50   We included 22 cases where the murder conviction was ultimately overturned for reasons unrelated to sentence. Because of the limited amount of data available, these cases are nonetheless instructive as to how judges are imposing parole ineligibility.

51   In the context of murder sentencing specifically, see Craig E Jones & Micah E Rankin, "Justice as Rounding Error? Evidence of Subconscious Bias in Second Degree Murder Sentences in Canada" (2014) 52:1 Osgoode Hall LJ 109. Another example of this methodology can be seen in Isabel Grant & Janine Benedet, "The 'Statutory Rape' Myth: A Case Law Study of Sexual Assaults Against Adolescent Girls" (2019) 31:2 CJWL 266 (where the authors examined roughly 600 reported cases involving sexual assault against teenage girls);

with some caution, we hope that the trends identified in this paper can be the subject of more exhaustive future research.

It is important to briefly explain the approach to sentencing generally taken by courts in Canada. Although the statutory rules and principles governing sentencing are found in federal law, sentencing has developed in a uniquely provincial manner. Appellate courts in each province or territory have determined whether that jurisdiction will, for example, use sentencing ranges or starting points to guide judicial discretion,[52] and how those ranges and starting points should be calculated. Lower courts predominantly rely on jurisprudence and direction from their own appellate court in sentencing, rather than those from other provinces/territories. The Supreme Court of Canada hears only a small number of sentence appeals, and that Court has generally shown deference to trial judges[53] and to the localized conditions in a community with respect to a particular crime.[54] Scholars have suggested that in countries such as Canada, where sentencing processes are largely unstructured and no sentencing guidelines or grids exist, interjurisdictional inconsistencies are more common.[55] Given this framework, we thought it was important to examine provincial/territorial trends both when examining parole ineligibility periods and consecutive parole ineligibility.

In the first part of the paper examining parole ineligibility for second degree murder, we investigate whether there has been a decrease in reliance on the minimum period of parole ineligibility since the Supreme Court of Canada provided guidance on this issue in *Shropshire*; whether there has been a corresponding increase at the upper end of the range; and whether the relationship of the person being sentenced to the victim has

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Helene Love, Fiona Kelly & Israel Doron, "Age and Ageism in Sentencing Practices: Outcomes from a Case Law Review" (2013) 17:2 Can Crim L Rev 253 (where the authors examined 212 sentencing decisions of individuals aged 60 or older between 1981 and 2011). See also Richard Jochelson, Debao Huang & Melanie J Murchison, "Empiricizing Exclusionary Remedies—A Cross Canada Study of Exclusion of Evidence Under s 24(2) of the *Charter*, Five Years After *Grant*" (2016) 63:1/2 Crim LQ 206; Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018" (2019) 67:1/2 Crim LQ 95.

52   See *R v Friesen*, 2020 SCC 9 at para 36.

53   *Ibid* at paras 37–38. See also *R v Lacasse*, 2015 SCC 64 at paras 39–41 [*Lacasse*]; *R v M (CA)*, [1996] 1 SCR 500, 105 CCC (3d) 327 [*M (CA)*]; *R v LM*, 2008 SCC 31; *R v Proulx*, 2000 SCC 5; *Shropshire*, *supra* note 49.

54   *Lacasse*, *supra* note 53 at paras 87–104; *M (CA)*, *supra* note 53 at para 92.

55   Andrew A Reid & David MacAlister, "Extending a Geographical Perspective to the Study of Jurisdictional Consistency in Sentencing Outcomes" (2018) 58:5 Brit J Crim 1147 at 1165.

an impact on the parole ineligibility period. We also examine whether there are significant differences in the results among jurisdictions within Canada.

In the second part of the paper, we turn to the use of consecutive parole ineligibility for multiple murders. We examine whether consecutive parole ineligibility is becoming the norm for those convicted of multiple murders or whether it is only used in exceptional cases; whether consecutive sentences might be more likely to be imposed for particular types of murders; and whether there are differences among jurisdictions in the utilization of consecutive parole ineligibility. Consecutive parole ineligibility periods are only available for multiple murders that took place after December 2, 2011. Therefore, we simply do not have enough cases yet to talk about trends in any meaningful way. However, these early cases are particularly important and worthy of examination because they set the doctrinal foundation on which future sentencing judges will decide whether to impose consecutive parole ineligibility and determine whether or not it becomes the norm in sentencing multiple murders. What brings these two parts of the study together is an inquiry into whether, in sentencing for murder, courts have become increasingly punitive and reliant on extraordinarily long periods of parole ineligibility.

## B. Parole Ineligibility Periods for Second Degree Murder Sentencing

### 1. Background

It took almost 20 years from the enactment of the 1976 amendments for the Supreme Court of Canada to provide guidance on setting the parole ineligibility for second degree murder. Before the Court's decision in *Shropshire*,[56] many judges treated ten years of parole ineligibility as the norm for sentencing second degree murder and required reasons for raising it above the minimum.[57] A majority of the Court of Appeal for British Columbia in *Shropshire* had indicated that it required unusual circumstances to raise parole ineligibility over ten years and that the deterrent value of the sentence could be fully realized by a ten-year period of parole ineligibility.[58] The majority of the Court of Appeal noted that the purpose

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56   *Supra* note 49.

57   See e.g. *R v O'Connor*, 1988 CarswellOnt 37305, WCB 2(d) 374 (Ont CA); *R v Leahy*, 1978 CarswellOnt 1225, 44 CCC (2d) 479 at 480 (Ont CA); *R v Brown* (1993), 83 CCC (3d) 394 at 402, 20 WCB (2d) 266 (BCCA).

58   *R v Shropshire* (1994), 90 CCC (3d) 234 at 239, 24 WCB (2d) 39 (BCCA).

of the parole ineligibility period was to prevent the parole board from exercising the very function it was designed to exercise. However, in 1995, the Supreme Court of Canada in *Shropshire* instructed judges that raising parole ineligibility over ten years did not require exceptional circumstances. Speaking for a unanimous court, Justice Iacobucci said:

> In my opinion, a more appropriate standard, which would better reflect the intentions of Parliament, can be stated in this manner: as a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744, the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may well be that, in the median number of cases, a period of 10 years might still be awarded.[59]

The last sentence of this passage suggests that the Court considered a ten-year parole ineligibility period to be common; it was likely to be ordered "in the median number of cases" although Justice Iacobucci's use of the word "median" is somewhat ambiguous. *Shropshire* gave judges more latitude to lengthen the parole ineligibility period. The Court further held that appellate courts should be hesitant to interfere with decisions made by sentencing judges on parole ineligibility. Leading sentencing scholar Allan Manson raised the concern at the time that these two findings in combination would result in higher periods of parole ineligibility with less scrutiny from appellate courts.[60]

### 2. *Canadian Parole Ineligibility Decisions Across Time*

We examined a total of 296 cases across our three time periods, with each case representing one person sentenced for second degree murder. Table 1 shows the distribution of cases over each of the three time periods. It is important to stress that these cases in no way reflect the incidence of second degree murder at a particular point in time. Rather, we use these cases to shed light on what courts were doing over time when sentencing second degree murder.

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59   *Shropshire*, *supra* note 49 at para 27, Iacobucci J.

60   See Allan Manson, "The Supreme Court Intervenes in Sentencing" (1996) 43 CR (4th) 306.

TABLE 1: CASE SAMPLE BY TIME PERIOD

| | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **Number of Cases** | 81 (27.36%)[61] | 85 (28.72%) | 130 (43.92%) | 296 (100%) |

We suspect that the increased number of cases for the most recent time period is at least in part a function of improved case reporting and possibly an increased rate of publication of judicial reasons. The homicide rate between 1987–1988 and 2017–2018 declined overall, despite annual fluctuations.[62] We note that these rates are for homicide generally and not for second degree murder specifically, but there is no reason to believe that the number of second degree murders has increased more than those of other homicides, especially given the narrower definition of murder resulting from the *Charter* jurisprudence of the Supreme Court of Canada.[63]

Table 2 presents the average parole ineligibility imposed for each time period under study. We present these numbers for cases involving one murder, cases involving multiple murders,[64] and all 296 cases respectively. Except where consecutive parole ineligibility periods are being imposed (for murders occurring after 2011), someone convicted of more than one murder is given one global period of parole ineligibility, rather than separate periods for each murder. In other words, the fact that there is more than one murder aggravates the parole ineligibility in a way that makes it impossible to disaggregate the sentence for each murder. We expected that the periods of parole ineligibility for multiple murders would be higher as a reflection of the additional moral blameworthiness of taking more than one life. We therefore calculated separate averages for single and multiple murders.

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61   This group of cases includes *R v Nepoose* (1988), 93 AR 32, 46 CCC (3d) 421 (Alta CA), which was overturned in *R v Nepoose* (1992), 125 AR 28, 71 CCC (3d) 419 (Alta CA). This case is now widely regarded as a wrongful conviction. See Malini Vijaykumar, "A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada" (2018) 51:1 UBC L Rev 161.

62   See Statistics Canada, "Number, Rate, and Percentage Changes in Rates of Homicide Victims" (last modified 25 October 2020), online: *Government of Canada* <www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3510006801>.

63   *Martineau*, *supra* note 31 at 644–46.

64   Multiple murders consisting of only one second degree murder conviction were counted as single murders (*i.e.* only multiple *second degree* murders were counted as multiple murders).

TABLE 2: AVERAGE PAROLE INELIGIBILITY IN YEARS BY NUMBER OF
VICTIMS, ACROSS TIME PERIODS

|  | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **Single Murders** | 13.25 (76) | 13.76 (76) | 14.07 (125) | 13.76 (277) |
| **Multiple Murders** | 15.00 (5) | 15.56 (9) | 19.60 (5) | 16.47 (19) |
| **All Murders** | 13.36 (81) | 13.95 (85) | 14.28 (130) | 13.94 (296) |

As one would expect, these averages were lower where only single mur-
ders were included. For single murders, we saw only a very small increase
in parole ineligibility over the three time periods. The increase in par-
ole ineligibility for multiple murders is based on such a small number of
cases that it is difficult to draw conclusions about the increase in parole
ineligibility over time. Because the number of multiple murders is small,
and because none of these cases involved consecutive parole ineligibility—
but rather were cases where the number of victims was just one factor in
setting parole ineligibility—we have included sentences for both multiple
murders and single murders in our results below, except where we were
investigating the impact on parole ineligibility of the relationship between
the perpetrator and the victim (Tables 4 and 7). For those tables, we have
excluded multiple murders because including them risked overcounting
certain types of victim relationships.

We were also interested in the distribution of sentences across the
15-year range of ten to 25 years parole ineligibility. These results are pre-
sented in Table 3.

TABLE 3: DISTRIBUTION OF PAROLE INELIGIBILITY ACROSS TIME
PERIODS (IN FIVE-YEAR INCREMENTS)[65]

|  | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **10-year minimum** | 35.80% (29) | 22.35% (19) | 13.08% (17) | 21.96% (65) |
| **11–15 years** | 44.44% (36) | 52.94% (45) | 60.00% (78) | 53.72% (159) |
| **16–20 years** | 18.52% (15) | 22.35% (19) | 23.85% (31) | 21.96% (65) |
| **21–25 years** | 1.23% (1) | 2.35% (2) | 3.08% (4) | 2.36% (7) |
| **Total Cases** | 100.00% (81) | 100.00% (85) | 100.00% (130) | 100.00% (296) |

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65    Due to rounding, totals may be slightly more or less than 100 percent.

As we expected, the number of cases receiving the minimum parole ineligibility was highest in the first time period, before *Shropshire*. The percentage of cases imposing the minimum periods of parole ineligibility has gone down consistently over time from a high of approximately 36 percent in 1987–1988 to a low of approximately 13 percent of cases in 2017–2018.

In all time periods, the largest group of cases fell between 11 and 15 years, inclusive, of parole ineligibility, but there has been a steady increase (of just over 15 percent) in the percentage of cases in this range over the three time periods. The following graph demonstrates these findings in a more visual way.

FIGURE 1: DISTRIBUTION OF PAROLE INELIGIBILITY ACROSS
TIME PERIODS (IN FIVE-YEAR INCREMENTS)

**Parole Ineligibility: All Murders, Canada**
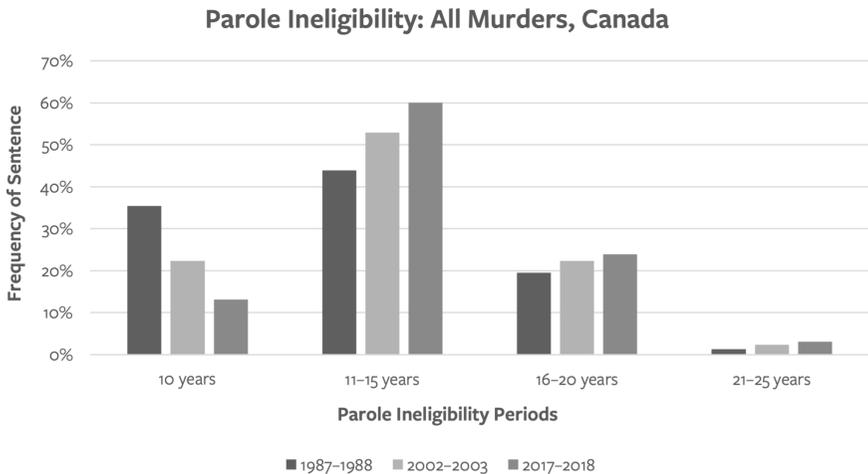


We also broke down the parole ineligibility cases by their precise length of parole ineligibility and found that the most common period of parole ineligibility imposed in the first two time periods was ten years, whereas in the later time period the most frequently imposed period was 15 years. These results are consistent with those of Craig Jones and Micah Rankin, who found that parole ineligibility periods set by the courts tend to cluster around even numbers and multiples of five, without any obvious principled reason for such rounding.[66] Our findings are demonstrated in Figure 2.

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66   *Jones & Rankin, supra* note 51.

FIGURE 2: DISTRIBUTION OF PAROLE INELIGIBILITY PERIODS
ACROSS TIME PERIODS

**Parole Ineligibility: All Murders, Canada**
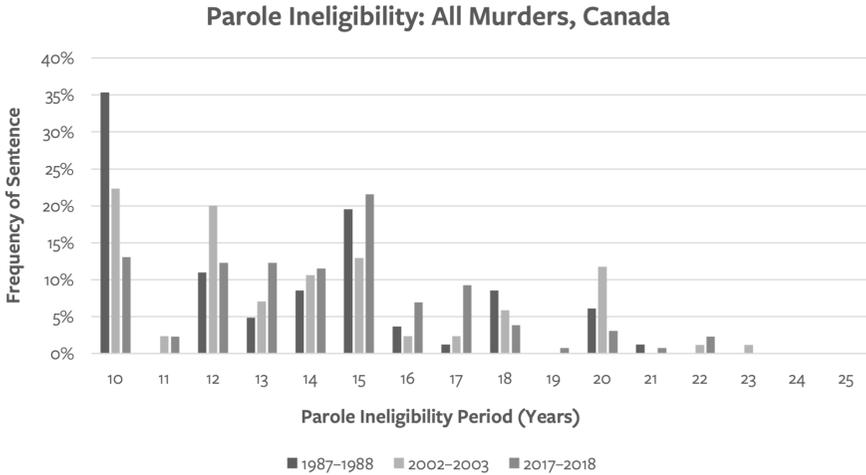


We also wanted to examine whether different types of murders were being sentenced differently by courts in terms of the relationship between the perpetrator and victim. We recognize that there is some arbitrariness in categorizing cases where the relationship does not fit neatly into one of our categories.[67] Some categories, such as intimate partners or family members, were relatively easy to categorize, while the category of acquaintances had a wider range of relationships within it. The following table demonstrates that there were some differences in how murders involving different types of relationships were being sentenced.

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67    Where information was unclear in a judgment, we turned to media accounts to glean more information about some of the relationships in question. Where we were unable to clearly identify a relationship, the case was categorized as an unknown relationship.

TABLE 4: AVERAGE PAROLE INELIGIBILITY ACROSS TIME PERIODS
AND RELATIONSHIP BETWEEN VICTIM AND PERPETRATOR,
CANADA — MULTIPLE MURDERS EXCLUDED[68]

| | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **Intimate Partners**[69] | 11.92 years (15.79%)[70] | 12.63 years (21.05%) | 14.53 years (27.20%) | 13.53 years (22.74%) n = 62 |
| **Intimate Partners' Family Members and New Partners** | 14.17 years (7.79%) | 12.50 years (5.26%) | 13.80 years (4.00%) | 13.60 years (5.42%) n = 15 |
| **Other Family Members**[71] | 15.20 years (6.58%) | 14.50 years (7.89%) | 13.21 years (15.20%) | 13.80 years (10.83%) n = 30 |
| **Acquaintances**[72] | 12.95 years (28.95%) | 14.55 years (26.32%) | 13.54 years (22.40%) | 13.64 years (25.27%) n = 70 |
| **Criminal Associates**[73] | 16.00 years (6.58%) | 15.50 years (5.26%) | 14.68 years (17.60%) | 15.00 years (11.19%) n = 31 |
| **Strangers** | 13.54 years (17.11%) | 14.11 years (25.00%) | 14.25 years (12.80%) | 14.00 years (17.33%) n = 48 |
| **Relationship Unknown**[74] | 12.46 years (17.11%) | 12.29 years (9.21%) | 15.00 years (0.80%) | 12.52 years (7.22%) n = 21 |
| **Total** | 13.25 years (100.00%) n = 76 | 13.76 years (100.00%) n = 76 | 14.07 years (100.00%) n = 125 | 13.76 years (100.00%) n = 277 |

Looking first to the overall averages, murders of criminal associates and strangers received the highest average periods of parole ineligibility of

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68  We excluded multiple murders from this table because it was impossible to disaggregate the parole ineligibility period received for each murder prior to the imposition of consecutive parole ineligibility periods. Nonetheless, of the 19 multiple murders, five involved the killing of intimate partners and their friends, families, or new partners; four involved the killing of family members; two involved the killing of acquaintances; two involved the killing of criminal associates; two involved the killing of strangers; and four were unknown.

69  Intimate partners included former intimate partners.

70  Percentages are of cases in each time period.

71  With two exceptions, this category only included family members of the person being sentenced. These exceptions were *R v CAM* (1987), 39 CCC (3d) 141, 81 NSR (2d) 57 (CA); *R v Monckton*, 2017 ONCA 450. Both of these cases involved men who killed their partner's children to whom they were in a parenting role.

72  Acquaintances included friends, neighbours, roommates, and others who had known the person being sentenced prior to the incident.

73  Criminal associates included those who were connected through drug dealing (including as rivals), drug debts, as well as murders within a correctional facility.

74  The unknown category included cases where the relationship was not indicated in the case report, and no further information about the relationship was found in media reports.

15 years and 14 years, respectively. After excluding unknown relationships, those who killed intimate partners (13.53 years), intimate partners' family members or new partners (13.60 years), and acquaintances (13.64 years) received the lowest periods of parole ineligibility.

There are also some notable changes over time. For example, there was an increase in parole ineligibility for the murder of intimate partners over the three time periods. During the first two time periods, murders of intimate partners generally, received shorter than average parole ineligibility periods. In contrast, during the most recent time period, the murder of an intimate partner received longer than average parole ineligibility. Of the 62 intimate partner cases across all time periods, 53 — or approximately 85 percent — involved men killing women and an additional three involved men killing men (five percent). There were five women who killed male intimate partners (eight percent) and one woman who killed a female partner (two percent).

Our findings are consistent with the suggestion that, historically, the murder of women by their male intimate partners has been treated as less serious than other murders but that this phenomenon may be changing over time.[75] Since 1995, section 718.2(a)(ii) of the *Criminal Code*[76] has required judges to treat a victim's status as a spouse or common law partner (and, as of 2019, an intimate partner) of a perpetrator as an aggravating factor in sentencing.[77] Our results are consistent with those of Myrna Dawson, who found an "intimacy discount" in early cases involving intimate homicides but not in more recent time periods after sentencing reform.[78] We also found that murders of strangers consistently received parole ineligibility periods higher than the average during all three time periods.

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75  Grant, "Intimate Femicide", *supra* note 49 at 798, 804. See also Isabel Grant, "The Role of Section 718.2(a)(ii) in Sentencing for Male Intimate Partner Violence Against Women" (2018) 96:1 Can Bar Rev 158 at 161–63 [Grant, "Intimate Partner Violence"].

76  *Act to amend sentencing*, *supra* note 48. This provision was proclaimed into force on 3 September 1996. Note that this provision was recently amended by Bill C-75 to apply to current and former intimate partners, which are defined as including dating relationships, and has been extended to apply to "a member of the victim or the offender's family." Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 25, s 293. The amended provision came into force on 19 September 2019, 90 days after royal assent. *Ibid*, s 406.

77  Grant, "Intimate Partner Violence", *supra* note 75 at 160.

78  See Myrna Dawson, "Intimacy, Homicide, and Punishment: Examining Court Outcomes Over Three Decades" (2012) 45:3 Austl & NZ J Crim 400 at 408.

We also examined whether sentencing patterns differed depending on the gender of the victim, given Dawson's findings of a "female victim effect" in her review of femicides in Canada.[79] Specifically, Dawson found that the killing of women was treated more punitively throughout the criminal legal process than that of men. However, Dawson also found an "intimacy discount," such that men who killed women with whom they shared more intimate relationships were subject to less punishment than those who had more distant relationships with their victims, but that this had changed over time in how the courts responded to femicide.[80]

In contrast, in our study, we found no difference in parole ineligibility based on the gender of the victim—60 percent of whom were men, regardless of the gender of the perpetrator. While we did not see a difference based on victim gender or a "female victim effect," we did find an "intimacy discount" with men's murders of intimate partners sentenced less harshly than their murders of other victims in the first two time periods. We also found that, over time, parole ineligibility periods for intimate partner murders increased, paralleling what Dawson observed for all femicides. Finally, like Dawson, we also found that the murders of strangers were sentenced more harshly than those of intimate partners, family members, and acquaintances.[81]

Given the alarming number of Indigenous people serving life sentences—more than a quarter of all people in federal custody on a life or indeterminate sentence are Indigenous[82]—we identified all cases during the years in question where the decision indicated that the person being sentenced was Indigenous. We found only 32 decisions out of 296 (11 percent) that made explicit reference to the Indigeneity of the person sentenced. However, these numbers were heavily weighted towards the third time period. In 1987–1988, Indigeneity was mentioned in just two of 81

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79  Myrna Dawson, "Punishing Femicide: Criminal Justice Responses to the Killing of Women Over Four Decades" (2016) 64:7 Current Sociology 996 at 1009 [Dawson, "Punishing Femicide"].

80  *Ibid*.

81  We are not attempting to make direct comparisons to Dawson's work because she used very different sources and included all homicides rather than just second degree murders. She also used much more sophisticated statistical tools than the simple analyses provided in this paper. We simply note that our findings are consistent with hers in a number of ways.

82  PSC Committee, *supra* note 2 ("[a]t the end of fiscal year 2017-18, there were a total of 3,672 offenders in custody with a life/indeterminate sentence. Of these…972 (26.5%) were Indigenous and 2,700 (73.5%) were non-Indigenous" at 57).

cases (two percent); in 2002–2003, three of 85 cases (four percent); and in 2017–2018, the number rose to 27 of 130 cases (21 percent).

One possible explanation for this increase is that, in the earliest time period, before the enactment of section 718.2(e) of the *Criminal Code*, Indigeneity was considered irrelevant to setting parole ineligibility. Even after *R v Gladue*,[83] in the second time period, we suspect judges were not recognizing the applicability of *Gladue* to parole ineligibility because murder is our most serious crime.[84] It was not until the decision in *R v Ipeelee*,[85] where the Supreme Court of Canada clarified that section 718.2(e) and *Gladue* apply to all offences, however serious, that judges began to regularly consider Indigeneity in setting parole ineligibility. However, it is difficult to draw any conclusions about parole ineligibility for Indigenous persons convicted of murder because of our small sample size in the first two time periods. Whatever the impact of *Gladue* and *Ipeelee*, we did not see Indigenous persons being sentenced to shorter periods of parole ineligibility than others. In fact, the average parole ineligibility in the final time period was slightly higher for Indigenous persons (14.33 years) than for non-Indigenous persons in that time period (14.27 years).

As discussed above, sentencing in Canada is distinctly provincial/territorial in focus. We therefore wanted to compare whether there were any differences among provinces and territories in setting parole ineligibility.

TABLE 5: AVERAGE PAROLE INELIGIBILITY IN YEARS BY
PROVINCE/TERRITORY, ACROSS TIME PERIODS

|  | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **British Columbia** | 13.00 (5) | 14.07 (15) | 13.23 (26) | 13.48 (46) |
| **Alberta** | 13.00 (4) | 18.33 (3) | 14.00 (2) | 15.00 (9) |
| **Saskatchewan** | - | 10.00 (1) | 14.25 (4) | 13.40 (5) |
| **Manitoba** | 14.40 (5) | 10.00 (1) | 16.50 (8) | 15.29 (14) |
| **Ontario** | 12.57 (47) | 14.21 (34) | 15.29 (51) | 14.05 (132) |
| **Quebec** | 13.60 (5) | 13.25 (20) | 12.95 (20) | 13.16 (45) |
| **New Brunswick** | 17.33 (6) | 12.40 (5) | 12.83 (6) | 13.50 (17) |
| **Nova Scotia** | 17.75 (4) | 15.00 (1) | 13.71 (7) | 15.17 (12) |

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83    [1999] 1 SCR 688, 171 DLR (4th) 385.

84    The first appellate decision to confirm that section 718.2(e) and the *Gladue* analysis apply to decisions about parole ineligibility was *R v Jensen*, [2005] 74 OR (3d) 561 at 28, 195 CCC (3d) 14 (Ont CA).

85    2012 SCC 13 at paras 84, 87.

|  | **1987–1988** | **2002–2003** | **2017–2018** | **All Years** |
|---|---|---|---|---|
| **Prince Edward Island** | 10.00 (1) | - | - | 10.00 (1) |
| **Newfoundland and Labrador** | 14.00 (1) | 17.00 (3) | - | 16.25 (4) |
| **Yukon** | 15.00 (1) | - | 11.50 (2) | 12.67 (3) |
| **Northwest Territories** | 10.00 (2) | 14.00 (1) | 16.00 (2) | 13.20 (5) |
| **Nunavut** | - | 10.00 (1) | 14.50 (2) | 13.00 (3) |
| **Canada** | 13.36 (81) | 13.95 (85) | 14.28 (130) | 13.94 (296) |

Manitoba, New Brunswick, Nova Scotia, and the Northwest Territories showed considerable changes over time. New Brunswick and Nova Scotia both saw declines in parole ineligibility of over four years between 1987–1988 and 2017–2018, while the Northwest Territories showed an increase of six years from the first to the last time period, and Manitoba saw an increase of just over two years. Because these jurisdictions had a small number of cases, it is impossible to draw any conclusions about these changes.

However, 132 of the total 296 cases (45 percent) were decided in Ontario. Ontario was of particular interest to us because in 1987–1988, it began with a lower average parole ineligibility than the national average, but by 2017–2018, had a higher average parole ineligibility than the national average. The finding of an increase in parole ineligibility in Ontario is more robust than in other provinces given the large number of cases. We thus decided to examine the Ontario data more carefully to determine whether Ontario might be an outlier from the rest of the country in setting the parole ineligibility period.

### 3. *Ontario Parole Ineligibility Decisions Across Time*

We found that, unlike the rest of Canada, the average parole ineligibility period meted out in Ontario increased by 2.72 years—an increase of 22 percent—over the three time periods examined. To explore this further, we sorted the Ontario cases into the ranges used above, starting with the minimum parole ineligibility of ten years, and then examined the data in five-year increments.

TABLE 6: DISTRIBUTION OF PAROLE INELIGIBILITY IN ONTARIO
ACROSS TIME PERIODS (IN FIVE-YEAR INCREMENTS)

|  | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **10-year minimum** | 40.43% (19) | 17.65% (6) | 3.92% (2) | 20.45% (27) |
| **11–15 years** | 48.94% (23) | 55.88% (19) | 52.94% (27) | 52.27% (69) |
| **16–20 years** | 10.64% (5) | 20.59% (7) | 39.22% (20) | 24.24% (32) |
| **21–25 years** | 0.00% (0) | 5.88% (2) | 3.92% (2) | 3.03% (4) |
| **Total Cases** | 100.00% (47) | 100.00% (34) | 100.00% (51) | 100.00% (132) |

These ranges can also be illustrated visually to demonstrate how striking the changes in Ontario were. In 1987–1988, a larger percentage of persons received the ten-year minimum in Ontario (40 percent) than in Canada as a whole (35 percent). However, by 2017 only about four percent of people in Ontario received the minimum sentence compared to 13 percent nationally.
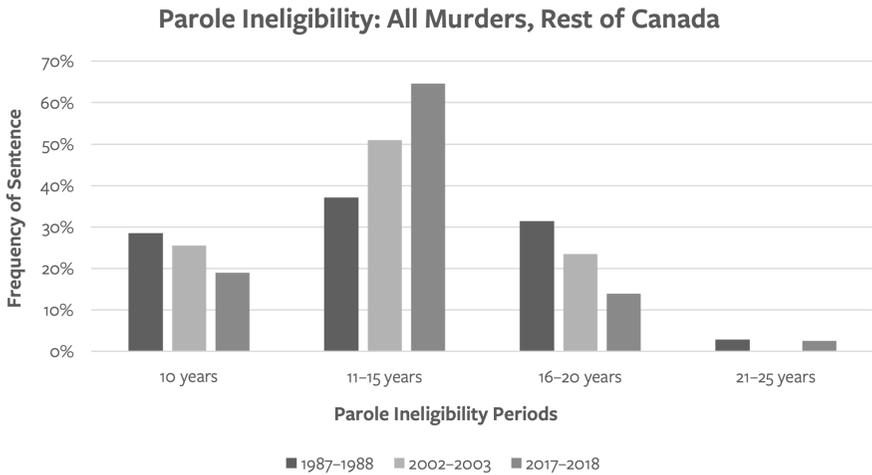
FIGURE 3: RANGES OF PAROLE INELIGIBILITY PERIODS
ACROSS TIME IN ONTARIO



**Parole Ineligibility: All Murders, Ontario**
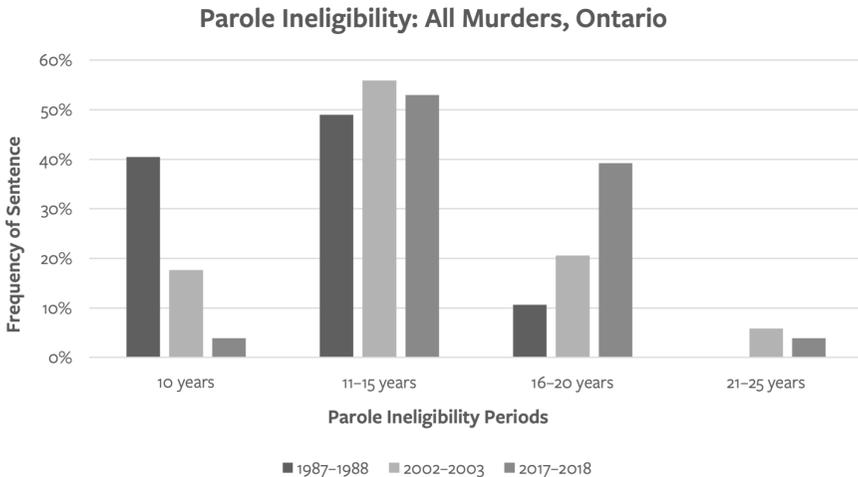
Ontario has seen a substantial decline in individuals being sentenced to the statutory minimum of ten years of parole ineligibility. The opposite has happened with respect to sentences between 16 and 20 years of parole ineligibility, which have increased over time. In 1987–1988, only 11 percent of cases in Ontario were being sentenced to 16 to 20 years of parole ineligibility, compared to 39 percent of cases in 2017–2018. This is

different from the nation-wide trend shown in Figure 2 above, where the smaller decrease in cases receiving ten years of parole ineligibility corresponded with an increase in cases receiving the intermediate 11 to 15 years, rather than 16 to 20 years. The differences are more striking when we compare Ontario in Figure 3 to all Canadian jurisdictions except Ontario in Figure 4.

FIGURE 4: RANGES OF PAROLE INELIGIBILITY PERIODS
ACROSS TIME IN ALL JURISDICTIONS EXCEPT ONTARIO

**Parole Ineligibility: All Murders, Rest of Canada**



As illustrated by Figure 4, in contrast to Ontario, parole ineligibility periods of 16 to 20 years actually declined over time in the rest of Canada, while periods of 11 to 15 years increased. Given these findings and the large number of cases in Ontario, it is likely that the Ontario cases are largely responsible for the small increase in the national average parole ineligibility over time as well as the decline in the imposition of the minimum ten years of parole ineligibility. There is no indication that any other Canadian jurisdictions are seeing a similar increase except with very small sample sizes.

In an attempt to understand the increasing parole ineligibility seen in Ontario over time, we examined whether there was a difference in parole ineligibility based on the relationship between the person being sentenced and the victim. In other words, were particular murders being sentenced more harshly and occurring more often in Ontario in the later time periods? Table 7 presents parole ineligibility based on the relationship between the victim and the perpetrator.

## TABLE 7: AVERAGE PAROLE INELIGIBILITY ACROSS TIME PERIODS AND RELATIONSHIP BETWEEN VICTIM AND PERPETRATOR IN ONTARIO — MULTIPLE MURDERS EXCLUDED[86]

|  | 1987–1988 | 2002–2003 | 2017–2018 | All Years |
|---|---|---|---|---|
| **Intimate Partners** | 12.00 years (20.00%) | 12.14 years (22.58%) | 15.47 years (30.00%) | 13.71 years (24.60%) n = 31 |
| **Intimate Partners' Family Members and Partners** | 13.00 years (6.67%) | 12.00 years (3.23%) | 14.00 years (2.00%) | 13.00 years (3.97%) n = 5 |
| **Other Family Members** | 13.33 years (6.67%) | 16.33 years (9.68%) | 15.00 years (12.00%) | 14.92 years (9.52%) n = 12 |
| **Acquaintances** | 12.23 years (28.89%) | 12.75 years (25.81%) | 15.40 years (20.00%) | 13.39 years (24.60%) n = 31 |
| **Criminal Associates** | 13.33 years (6.67%) | 21.00 years (6.45%) | 14.80 years (20.00%) | 15.33 years (11.90%) n = 15 |
| **Strangers** | 13.17 years (13.33%) | 15.14 years (22.58%) | 15.29 years (14.00%) | 14.60 years (15.87%) n = 20 |
| **Unknown** | 12.00 years (17.78%) | 13.33 years (9.68%) | 15.00 years (2.00%) | 12.58 years (9.52%) n = 12 |
| **All Cases** | 12.47 years (100.00%) n = 45 | 14.06 years (100.00%) n = 31 | 15.20 years (100.00%) n = 50 | 13.94 years (100.00%) n = 126 |

There was an increase in parole ineligibility for every relationship category from 1987–1988 to 2017–2018. Excluding cases where the relationships were unknown, the largest increases were seen in the cases involving intimate partners, acquaintances, and strangers.

We have several observations about murders involving intimate partners in Ontario. In the first two time periods, the average parole ineligibility for the murder of an intimate partner was lower than the Ontario

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86   Six cases were excluded from this table because they had multiple victims, to avoid overcounting them. Two of these cases involved the murder of family members; one case involved the murder of criminal associates; one case involved the murder of strangers; one case involved the murder of an intimate partner and her son; and in one case the relationship was unknown.

average overall. However, the intimate partner category showed the largest increase in parole ineligibility over time. The average parole ineligibility period for intimate partner murders increased by almost 3.5 years from 1987–1988 to 2017–2018—an increase of 29 percent. The average parole ineligibility for killing an intimate partner in Ontario in 2017–2018 (15.47 years) was also higher than the national average for these types of murders during the same time period (14.53 years). This increase in parole ineligibility for intimate partner murders was larger in Ontario cases than in the Canada-wide sample. Of the 31 intimate partner murders over the three time periods in Ontario, 28 (90 percent) involved men killing their female partners, while one (three percent) involved a man killing a male partner. There was one case (three percent) involving a woman killing a male partner and one (three percent) involving a woman killing a female partner.

In 1999, the Court of Appeal for Ontario set the range for such murders between 12 and 15 years in *R v McKnight*,[87] but this range has drifted up to the point where it now appears to be 12–17 years of parole ineligibility.[88] In 2017–2018 in Ontario, there were no cases involving an intimate partner murder that received the minimum parole ineligibility of ten years.

We also examined whether the gender of the victims had an impact on the length of parole ineligibility periods. We focused on murders committed by men because of the small number of cases involving women as perpetrators. In Ontario, 55 percent of victims killed by men were male (compared to 58 percent for the Canada-wide sample). Overall, men who killed women or girls in Ontario on average received a slightly longer parole ineligibility (14.63 years) than those who killed other men or boys (13.76 years), but the difference was less than one year.

### 4. Understanding the Numbers

Looking at the national data, we have seen only small increases in average parole ineligibility periods over the three time periods under study. The

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87  [1999] 44 OR (3d) 263 at para 54, 135 CCC (3d).

88  See *R v Wristen*, [1999] 47 OR (3d) 66 at para 78, 141 CCC (3d) 1 (Ont CA) (where the Court of Appeal for Ontario refused to interfere with a 17-year ineligibility period for an intimate partner second degree murder); *R v Czibulka*, 2011 ONCA 82 (the Court noted that "[i]n the case before us, the trial judge took *Wristen* to reflect the upper end of the range, and I do not see how he can be faulted for doing so. At trial, both Crown and defence accepted a range of 12 to 17 years" at para 69); *R v French*, 2017 ONCA 460 (where the Court stated that *Wristen* and *Czibulka* "allow a range up to 17 years in circumstances where there are no mitigating factors or remorse" at para 31).

most notable trend nationally is the decrease in the number of people receiving the minimum of ten years and the increase in people receiving a sentence in the range of 11–15 years. The direction of the Supreme Court of Canada in *Shropshire* that "as a general rule, the period of parole ineligibility shall be for 10 years"[89] does not describe what judges were doing in our sample of cases.

However, when examining Ontario specifically, we found more meaningful increases in parole ineligibility over the three time periods. Ontario courts in the early time period were more likely to impose the minimum parole ineligibility than were courts nationally, whereas Ontario courts in the later time period were less likely than the national average to impose ten years of parole ineligibility. Thus, Ontario witnessed a dramatic decline of almost 37 percent in the share of people receiving the minimum parole ineligibility over the three time periods and a corresponding increase of nearly 29 percent in the number of persons being sentenced to periods from 16 to 20 years. While there was a significant increase in parole ineligibility for intimate partner murders, this could not explain the entire increase in Ontario because when we removed intimate partner murders, we still saw an increase in parole ineligibility over time.

We recognize that it is possible that some of this difference could be a function of some unidentified reporting biases in Ontario. In other words, it is possible that cases involving the minimum period of parole ineligibility were less likely to be published or reported in Ontario in the latter period. It might be possible, for example, that minimum periods of parole ineligibility are more likely to be the result of a joint recommendation, which in turn might be less likely to lead to published reasons. However, there is no reason to believe that Ontario has different reporting biases than other jurisdictions, and we do not believe that this possibility can explain the striking differences we found in Ontario compared to the rest of the country. Further research, with a more comprehensive sample, is warranted to explore these differences and to determine whether Ontario has in fact taken an increasingly punitive approach to murder sentencing.

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89    *Shropshire*, *supra* note 49 at para 27.

## C. Sentencing Multiple Murders Since the Introduction of Consecutive Parole Ineligibility

The statutory sentencing regime for first degree murder remained the same between the 1976 changes and the 2011 introduction of consecutive parole ineligibility. Everyone sentenced for first degree murder was sentenced to life imprisonment with a mandatory 25 years of parole ineligibility. Until 1997, anyone convicted of first degree murder had access to the faint hope clause, but it was eliminated for multiple murders as of January 9, 1997.[90] In 2011, the Conservative government introduced consecutive periods of parole ineligibility such that someone sentenced for more than one murder, committed after that date, could be sentenced to serve periods of parole ineligibility consecutively.[91] The availability of consecutive parole ineligibility for multiple murders applies to both first and second degree murders, but consecutive parole ineligibility has been imposed most often for first degree murders and for a combination of first and second degree murders. Where there is a jury, the jury should be asked for a recommendation as to whether parole ineligibility should be served consecutively.[92] This change in the law opened up the possibility of parole ineligibility extending significantly beyond the natural life of the person sentenced.

Under these new provisions, a number of Canadians are now serving effective "whole life" sentences or *de facto* life without parole, including a 24-year-old man who was sentenced to 75 years of parole ineligibility for the murder of three police officers.[93] These sentences raise serious human

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90  *1996 Amendments*, *supra* note 22, s 745.6, proclaimed into force 9 January 1997, SI/97-12, (1997) C Gaz II, 535.

91  *Ending Sentence Discounts Act*, *supra* note 41, s 5, proclaimed into force 2 December 2011, SI/2011-107, (2011) C Gaz II, 2849.

92  *Criminal Code*, *supra* note 12, s 745.21. Of the 38 reported multiple murder cases in our sample, jury recommendations were not available in 22 cases due to a guilty plea, a trial before a judge sitting alone, or a failure to instruct the jury on section 745.21. Of the remaining 16 cases, 12 had divided recommendations, two had unanimous recommendations for consecutive parole ineligibility periods, one had a jury that unanimously declined to make a recommendation, and one did not mention a jury recommendation.

93  *Bourque*, *supra* note 42 at paras 2, 5, 54. See also *R v Basil Borutski*, 2017 ONSC 7762 at 4, 10 [*Borutski*] (Borutski received a 70-year ineligibility period at the age of 60); *R v Downey*, 2019 ABQB 365 at paras 5, 13, 66 [*Downey*] (Downey received a 50-year ineligibility period at the age of 49); *Ostamas*, *supra* note 43 at para 46 (Ostamas received a 75-year ineligibility period at the age of 40); *R v Millard*, 2018 ONSC 1299 at paras 17, 21; and *R v Millard*, 2018 ONSC 7578 at paras 30, 35 [*Millard*] (one of the people being sentenced received a 75-year ineligibility period at the age of 33 and the other received a 50-year ineligibility period at the age of 30); *R v Saretzky*, 2017 ABQB 496 at paras 42, 62 [*Saretzky*] (Saretzky received a

rights issues that have been addressed in a body of international decisions focused on the fundamental requirement that a life sentence include some form of meaningful hope for release.[94] Even in the United States—where more than 200,000 people are serving life sentences, many without any prospect of release—there are growing calls to abolish these sentences.[95]

## D. Consecutive or Concurrent Parole Ineligibility? The Early Cases

For this part of the study, we compiled a database of all persons for whom consecutive parole ineligibility was available for first or second degree murder, or some combination thereof. Where more than one person was sentenced for the same multiple murders, we treated these as separate cases.

We found a total of 39 reported cases from December 2, 2011 to August 31, 2020 across Canada.[96] We found an additional 15 cases that appeared only in the news media which clearly stated the length of parole ineligibility imposed.[97] Of the cases reported in official case reporters, consecutive

75-year ineligibility period at the age of 24; *R v Zekarias*, 2018 CarswellOnt 22170, [2018] OJ No 6827 (Ont Sup Ct) [*Zekarias*] (Zekarias received a 45-year ineligibility period at the age of 46); *R v Garland*, 2017 ABQB 198 at paras 5, 43 [*Garland* 2017] (Garland received a 75-year ineligibility period at the age of 57). Garland's appeal from conviction was heard and dismissed in *R v Garland*, 2019 ABCA 479. A majority of the Court of Appeal for Alberta dismissed his appeal from sentence, finding that it was not demonstrably unfit. See *R v Garland*, 2021 ABCA 46.

94  See e.g. *Vinter and Others v The United Kingdom* [GC], No 66069/09, [2013] III ECHR 317, 63 EHRR 1 [*Vinter and Others*].

95  See Marc Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (New York: The New Press, 2018) at 13.

96  The data in this section, including in the tables, reflects cases that were decided as of August 31, 2020. As this article was going to press, the Court of Appeal of Quebec released its decision in *Bissonnette* QCCA, *supra* note 44, on the constitutionality of the consecutive parole ineligibility regime. We briefly discuss the implications of this case in section III. E. but we have not updated the statistics or tables to reflect that decision or any other cases decided after August 31, 2020.

97  The 15 cases reported only in the media were: *Bailey*, *supra* note 43; *R v Bear and Bear* (2014, Saskatchewan), as reported in "2 Plead Guilty in Double Murder on Standing Buffalo First Nation", *CBC News* (3 November 2014), online: <www.cbc.ca/news/canada/saskatchewan/ 2-plead-guilty-in-double-murder-on-standing-buffalo-first-nation-1.2822051> [*Bear and Bear*]; *R v Eichler* (2016, Saskatchewan), as reported in Kevin O'Connor, "No Chance of Parole for 20 Years for Sask. Man Who Murdered Kelly Goforth, Richele Bear", *CBC News* (20 September 2016), online: <www.cbc.ca/news/canada/saskatchewan/clayton-eichler-sentenced-for-murders-of-goforth-bear-1.3770181> [*Eichler*]; *R v Hay* (2018, Ontario), as reported in Nick Boivert, "Moka Cafe Shooter Jason Hay Handed Consecutive Life Sentences", *CBC News* (4 July 2018), online: <www.cbc.ca/news/canada/toronto/moka-cafe-sentencing-1.4733537> [*Hay*]; *R v Kahsai* (2018, Alberta), as reported in Meghan Grant,

parole ineligibility was imposed in 18 cases (46 percent)[98] and concurrent parole ineligibility was imposed in the other 21 cases (54 percent).[99] In the

"No Parole for 50 Years for Double Murderer Emanuel Kahsai Whose 'Torture' of Mother Began a Decade Ago", *CBC News* (5 April 2018), online: <www.cbc.ca/news/canada/calgary/emanuel-kahsai-selma-alem-julie-tran-murder-sentencing-1.4606722> [*Kahsai*]; *R v MacPhail* (2020, British Columbia), as reported in Michele Brunoro, "Man Sentenced to Life in Prison for Killing 2 People During Drug Deal Gone Wrong", *CTV News* (23 June 2020), online: <bc.ctvnews.ca/man-sentenced-to-life-in-prison-for-killing-2-people-during-rug-deal-gone-wrong-1.4997140#:>; *R v O'Hagan and Another* (2015, Alberta), as reported in Meaghan Craig, "Convicted Killer Randy O'Hagan Pleads Guilty to 2nd-Degree Murder", *Global News* (2 December 2015), online: <globalnews.ca/news/2375392/convicted-killer-randy-ohagan-pleads-guilty-to-2nd-degree-murder/> [*O'Hagan and Another*]; *R v Pasieka* (2017, Alberta), as reported in Janice Johnston, "Man Who Killed Co-Workers in Edmonton Warehouse Rampage Sentenced to Life in Prison", *CBC News* (31 March 2017), online: <www.cbc.ca/news/canada/edmonton/jayme-pasieka-murder-sentencing-edmonton-warehouse-stabbings-1.4049262> [*Pasieka*]; *R v Rogers* (2018, Ontario), as reported in "Cameron Rogers Pleads Guilty to Killing Parents", *CBC News* (19 December 2018), online: <www.cbc.ca/news/canada/ottawa/cameron-rogers-parent-murder-1.4952085> [*Rogers*]; *R v Ryan* (2017, Ontario), as reported in "Brett Ryan Pleads Guilty to Crossbow Deaths of Mother, 2 Brothers", *CBC News* (29 July 2017), online: <www.cbc.ca/news/canada/toronto/brett-ryan-pleads-guilty-1.4227608> [*Ryan*]; *R v Steinhauer* (2019, Alberta), as reported in "Crown Appeals Concurrent Life Terms for Mac's Killer Colton Steinhauer", *CBC News* (4 October 2019), online: <www.cbc.ca/news/canada/edmonton/crown-appeals-concurrent-life-terms-for-mac-s-killer-colton-steinhauer-1.5308980> [*Steinhauer*]; *R v Vielle* (2018, Alberta), as reported in Meghan Grant, "'Crimes of Such Horrendous Violence Diminish Us All,' Says Judge in Sentencing Triple Murderer", *CBC News* (9 January 2018), online: <www.cbc.ca/news/canada/calgary/triple-murder-lethbridge-austin-vielle-english-devine-sentence-1.4479198> [*Vielle*]; *R v Wettlaufer* (2017, Ontario), as reported in Kate Dubinski, "Ex-Nurse Who Killed 8 Seniors in Her Care Sentenced to 8 Concurrent Life Terms", *CBC News* (23 June 2017), online: <www.cbc.ca/news/canada/london/killer-nurse-wettlaufer-sentencing-1.4175164> [*Wettlaufer*]. In another case, *R v Mitchell* (2019, Saskatchewan), the description of parole ineligibility was unclear in the article. This case has therefore been excluded. See Kendall Latimer, "Man Pleads Guilty to Second-Degree Murder for Regina Homicide", *CBC News* (21 January 2019), online: <www.cbc.ca/news/canada/saskatchewan/malcolm-miles-mitchell-guilty-plea-daniel-richard-dipaolo-1.4987328>.

98 *Baumgartner*, *supra* note 42; *R c Bissonnette*, 2019 QCCS 354 [*Bissonnette* QCCS]; *Borutski*, *supra* note 93; *Bourque*, *supra* note 42; *R v Brass*, 2018 MBQB 182 [*Brass*]; *R v Clorina*, 2015 ABQB 252 [*Clorina*]; *Downey*, *supra* note 93; *R v Forman*, 2019 BCSC 2165 [*Forman*]; *Garland 2017*, *supra* note 93; *R v Granados-Arana*, 2018 ONSC 1756 [*Granados-Arana* 2018]; *R c Hudon-Barbeau*, 2018 QCCS 895 [*Hudon-Barbeau*]; *Husbands*, *supra* note 43; *Millard*, *supra* note 93 (his co-accused, Smich, also received consecutive parole ineligibility periods); *Ostamas*, *supra* note 43; *Saretzky*, *supra* note 93; *R v Vuozzo*, 2015 PESC 14 [*Vuozzo*]; *Zekarias*, *supra* note 93.

99 See *R v Addison*, 2016 BCSC 2352 [*Addison*]; *R v Bains*, 2015 BCSC 2145 [*Bains*]; *R v Berry*, 2019 BCSC 2362; *R v Delorme*, 2019 ABQB 2; *R v Guimond*, 2020 MBQB 63; *R v Howe*, 2018 ONSC 3357 [*Howe*]; *R v Kionke*, 2018 MBQB 71 [*Kionke*]; *R v Klaus*, 2018 ABQB 97 (his co-accused, Frank, also received concurrent parole ineligibility periods; the Crown has appealed their sentences); *R v Kam*, 2020 BCSC 1369; *R v Koopmans*, 2015 BCSC 2120;

15 media-reported cases, there were five cases of consecutive parole ineligibility (33 percent), and ten cases of concurrent parole ineligibility (67 percent).[100] Thus, out of a total of 54 persons eligible for consecutive parole ineligibility, 23 (43 percent) clearly received consecutive parole ineligibility and 31 (57 percent) did not. Of the 23 cases receiving consecutive parole ineligibility, three involved charges of second degree murder only,[101] nine involved charges of first degree murder only,[102] and 11 involved a combination of both.[103]

We examined the positions of the parties in these cases to determine whether Crown counsel across Canada have consistently sought consecutive parole eligibility or have only done so in certain cases. We assumed that consecutive parole ineligibility is unlikely to be imposed unless the Crown was requesting it. We also expected that defence counsel would generally oppose consecutive parole ineligibility. In presenting the position of the parties, we limited our consideration to officially-reported cases because sentencing positions were often unclear in the media-reported cases.

TABLE 8: POSITION OF PARTIES IN CASES WHERE CONSECUTIVE
PAROLE INELIGIBILITY WAS IMPOSED

| Position Taken on Consecutive Parole Ineligibility | Number of Cases (%) |
|---|---|
| **Parties agreed to consecutive parole ineligibility** | 5 (27.78%) |
| **Defence opposed consecutive parole ineligibility** | 13 (72.22%) |
| **Total** | 18 (100%) |

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*R v Marki*, 2018 ONSC 5106; *R v McArthur*, 2019 ONSC 963 [*McArthur*]; *R v McLeod*, 2018 MBQB 73 [*McLeod*]; *R c Ramsurrun*, 2017 QCCS 5791; *R v Rushton*, 2016 NSSC 313 [*Rushton*]; *R v Salehi*, 2019 BCSC 698 [*Salehi*]; *R v Sharpe*, 2017 MBQB 6; *R v Simard*, 2019 BCSC 741 [*Simard*]; *R v Sparks MacKinnon*, 2019 ONSC 3436; *R v Zerbinos*, 2019 BCSC 584 [*Zerbinos*].

100 Consecutive parole ineligibility was imposed in: *Bailey*, *supra* note 43; *Hay*, *supra* note 97; *Kahsai*, *supra* note 97; and *O'Hagan and Another*, *supra* note 97. Concurrent parole ineligibility was imposed in: *Bear and Bear*, *supra* note 97; *Eichler*, *supra* note 97; *MacPhail*, *supra* note 97; *Pasieka*, *supra* note 97; *Rogers*, *supra* note 97; *Ryan*, *supra* note 97; *Steinhauer*, *supra* note 97; *Vielle*, *supra* note 97; and *Wettlaufer*, *supra* note 97.

101 *Bailey*, *supra* note 43; *Husbands*, *supra* note 43; *Ostamas*, *supra* note 43.

102 *Bissonnette*, *supra* note 98; *Bourque*, *supra* note 42; *Downey*, *supra* note 93; *Garland* 2017, *supra* note 93; *Hay*, *supra* note 97; *Kahsai*, *supra* note 97; *Millard*, *supra* note 93 (along with his co-accused, Smich); *Saretzky*, *supra* note 93.

103 *Baumgartner*, *supra* note 42; *Borutski*, *supra* note 93; *Brass*, *supra* note 98; *Clorina*, *supra* note 98; *Forman*, *supra* note 98; *Granados-Arana* 2018, *supra* note 98; *Hudon-Barbeau*, *supra* note 98; *O'Hagan and Another*, *supra* note 97; *Vuozzo*, *supra* note 98; *Zekarias*, *supra* note 93.

We were surprised to see that in five cases, the defence did not contest the imposition of consecutive parole ineligibility.[104] Most notably, this was the case in *R v Bourque* and *R v Ostamas*, both of which involved parole ineligibility periods of 75 years. With respect to cases where consecutive parole ineligibility was *not* imposed, in half of the cases the Crown had sought consecutive parole ineligibility, but the judge declined to impose it.

TABLE 9: POSITION OF PARTIES IN CASES WHERE CONCURRENT PAROLE INELIGIBILITY WAS IMPOSED

| Position Taken on Consecutive Parole Ineligibility | Number of Cases (%) |
| --- | --- |
| Crown sought consecutive parole ineligibility | 11 (52.38%) |
| Parties agreed to concurrent parole ineligibility | 8 (38.10%) |
| Unknown | 2 (9.52%)[105] |
| Total | 21 (100%) |

Thus, of the 37 reported cases where we know the position taken by the parties, the Crown sought consecutive parole ineligibility in 29 cases (78 percent). In other words, there were only eight cases (22 percent) where the Crown did not seek consecutive parole ineligibility.[106] Thus, these cases suggest that the trend is towards Crown counsel seeking consecutive parole ineligibility in multiple murder cases, and that seeking this extreme option is not limited to exceptional cases.

We also examined whether consecutive parole ineligibility was more likely to be imposed for particular kinds of murders. It is difficult to draw direct connections between consecutive parole ineligibility and the relationship to the victim because many of the multiple murders involved victims in different relationships with the perpetrator. For example, a person

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104  *Baumgartner*, *supra* note 42, *Clorina*, *supra* note 98, and *Ostamas*, *supra* note 43, were all the result of joint submissions. The defence in *Bourque*, *supra* note 42, conceded 50 years would be an appropriate parole ineligibility length but did not concede the 75 years ultimately imposed. The accused refused representation in *Borutski*, *supra* note 93, and made no submissions regarding the length of his sentence.

105  In *Addison*, *supra* note 99, after being laid off when the mill he worked at closed, Addison murdered two co-workers and attempted to murder two others. The judge made no mention of consecutive parole ineligibility, although he did state that life sentences could not be made consecutive to each other. There was no mention of the Crown submission nor jury recommendation, if any, with respect to consecutive sentences. In *Howe*, supra note 99, Howe murdered two women with whom he had been in intimate relationships. He pleaded guilty, and no mention was made of consecutive parole ineligibility.

106  *Bains*, *supra* note 99; *Kionke*, *supra* note 99; *McLeod*, *supra* note 99; *Rushton*, *supra* note 99; *Salehi*, *supra* note 99; *Simard*, *supra* note 99.

might murder an intimate partner and a stranger. However, we can say that 66 percent of murders where victims included strangers resulted in consecutive parole ineligibility periods, whereas only 36 percent of murders where victims included intimate partners or those connected to intimate partners (such as a family member or a new partner of a former intimate partner) received consecutive parole ineligibility. While these numbers are too small to form the basis for anything more than exploratory findings, they are consistent with Dawson's concept of an "intimacy discount,"[107] as discussed above.

All but three of the multiple murders in this study were committed by men.[108] We therefore examined whether gender of the victim had any impact on whether consecutive parole ineligibility was imposed. The same challenge arose here because some cases involved victims of different genders. We found that murders of men were slightly more likely to result in consecutive parole ineligibility than those of women. However, the difference was small and could be a function of the high number of consecutive sentences given for the murder of strangers, of whom approximately 80 percent were men, and the lower number of consecutive sentences given for the murder of intimate partners and those connected to them, of whom 70 percent were women.

Because of the small number of multiple murder decisions across the country, it is difficult to compare the rates of imposing consecutive parole ineligibility across provinces. Nonetheless, it would appear that some preliminary trends can be identified, particularly by comparing provinces with the most reported multiple murder decisions: British Columbia, Alberta, and Ontario. Table 10 includes both cases that were officially reported and those that were only reported in the media, and only includes jurisdictions from which multiple murder cases are available.

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107  Dawson, "Punishing Femicide", *supra* note 79 at 1010.

108  There was one reported case, *Zerbinos*, *supra* note 99, in which the issue of consecutive parole ineligibility arose in the context of a woman being sentenced. Zerbinos killed two women (her mother and, while she awaited trial for her mother's murder, another incarcerated person) for which she received concurrent ineligibility periods. Media-reported cases involving women being sentenced included *Wettlaufer*, *supra* note 97, and *Bear and Bear*, *supra* note 97 (which involved one woman and one man being sentenced).

TABLE 10: IMPOSITION OF CONSECUTIVE PAROLE INELIGIBILITY
PERIODS BY JURISDICTION

| | Number of Multiple Murder Cases | Number of Cases Imposing Consecutive Parole Ineligibility |
|---|---|---|
| **British Columbia** | 10 | 1 (10.00%) |
| **Alberta** | 13 | 7 (53.85%) |
| **Saskatchewan** | 5 | 2 (40.00%) |
| **Manitoba** | 6 | 2 (33.33%) |
| **Ontario** | 14 | 7 (50.00%)[109] |
| **Quebec** | 3 | 2 (66.67%) |
| **New Brunswick** | 1 | 1 (100%) |
| **Nova Scotia** | 1 | 0 (0.00%) |
| **PEI** | 1 | 1 (100%) |
| **Canada Total** | 54 | 23 (42.59%) |

British Columbia provides an interesting contrast to Ontario and Alberta. Judges in British Columbia have only imposed consecutive parole ineligibility once in ten eligible cases, although the trial judge in that case avoided a whole-life sentence by combining consecutive with concurrent sentences and imposing 35 years of parole ineligibility.[110] By contrast, in Ontario and Alberta, at least half of those convicted of multiple murders received consecutive parole ineligibility.

## E.  Reconsidering Consecutive Parole Ineligibility

The early case law on consecutive parole ineligibility suggests that, nationally, judges are using this option in approximately 43 percent of the cases

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109   One of these cases was *Husbands*, *supra* note 43. Husbands shot multiple people in Toronto's Eaton Centre. After an acquittal, he was convicted of two counts of manslaughter in 2019 and received a life sentence. However, he has been included in this sample since the acquittal did not involve an error in sentencing.

110   *Forman*, *supra* note 98. Forman was convicted of the first degree murders of his two daughters and the second degree murder of his wife. The parole ineligibility for the murders of his daughters was ordered to be served concurrently, but consecutively to the minimum ten years of parole ineligibility imposed for the murder of his wife. Had all of the parole ineligibility been consecutive, the 35-year-old would have been required to serve 60 years before being eligible for parole. Since this paper went to press, an additional case has been reported in British Columbia. In *R v Brittain*, 2020 BCSC 1821, the accused pled guilty to four counts of first degree murder and was sentenced to 25 years of parole ineligibility, thus continuing British Columbia's trend of rejecting consecutive parole ineligibility.

eligible for such sentences with notable differences across jurisdictions. British Columbia judges have imposed consecutive parole ineligibility in only one of ten multiple murders, whereas Quebec, Ontario, and Alberta judges did so in at least half of the cases where consecutive sentences were available. While the numbers are small, murders related to male intimate partner violence against women were less likely to receive consecutive sentences than those involving the murder of strangers.

Consecutive parole ineligibility will result in people serving many more years in prison in the future, with the resulting human and fiscal costs. It is difficult to justify these much longer periods of parole ineligibility—*de facto* life without parole—on the basis of public safety, as there is no evidence that people convicted of murder have been released on parole to reoffend in any significant numbers.[111] Decision-making by the Parole Board of Canada is fundamentally risk-averse.[112] A number of high-profile prisoners will never be released.

The financial costs of long parole ineligibility periods amounting to life without parole are obvious, particularly as these prisoners age in prison.[113] However, there are also very substantial human costs of incarcerating people—mostly men—with no realistic hope of ever being released regardless of whether or not they attempt to turn their lives around while incarcerated.[114] Life sentences with little or no opportunity for parole have been described in the prison effects literature as a "new and distinctive kind of 'prison pain'."[115] People serving life-long sentences devoid of hope tend to find the deprivations associated with their removal from society to be more painful than the deprivations inherent within the prisons.[116]

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111  This was recognized by some parliamentarians during the debates pertaining to the *Ending Sentence Discounts Act*, *supra* note 41. See "Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act", 2nd reading, *House of Commons Debates*, 40-3, No 96 (15 November 2010) at 5959 (André Bellavance).

112  See Ivan Zinger, "Conditional Release and Human Rights in Canada: A Commentary" (2012) 54:1 Can J Corr 117; Anthony N Doob, Cheryl Marie Webster & Allan Manson, "Zombie Parole: The Withering of Conditional Release in Canada" (2014) 61:3 Crim LQ 301.

113  See Catherine Appleton & Bent Grøver, "The Pros and Cons of Life Without Parole" (2007) 47:4 Brit J Crim 597 at 611. See also Spencer, *supra* note 9 at 211–12. See generally, Adelina Iftene, *Punished for Aging: Vulnerability, Age, and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press, 2019).

114  Leigey & Schartmueller, *supra* note 9.

115  See Alison Liebling, "Moral Performance, Inhuman and Degrading Treatment and Prison Pain" (2011) 13:5 Punishment & Society 530 at 536.

116  van Zyl Smit & Appleton, *supra* note 5, ch 7.

Before the Court of Appeal of Quebec decision in *Bissonnette*, rendered late in 2020,[117] the *Charter* challenges to consecutive parole ineligibility had not engaged fully with the harms resulting from a sentence that precludes any possibility of hope for release. Lisa Kerr and Benjamin Berger have argued that there are two different types of analysis required under the cruel and unusual punishment provision of section 12 of the *Charter*, depending on whether the case is one challenging the method of the punishment or its severity. Conducting a gross disproportionality analysis as a severity inquiry, in their view, is destined to fail for consecutive parole ineligibility because someone who kills more than one person will always be found to be more morally blameworthy and deserving of a harsher punishment than someone who kills one person. The authors argue, instead, that consecutive parole ineligibility should be examined from a methods perspective: "Whether such sentences are proportional or not, the gravamen of the s 12 concern about [consecutive parole ineligibility] is that there is something intrinsically abhorrent about consigning a person to die in prison, stripping them of any hope of future liberty."[118]

In *Bissonnette*, the Court of Appeal of Quebec considered the nature of the punishment itself, finding that a life sentence with a parole ineligibility period that runs longer than the reasonable life expectancy of the person serving it, and that leaves no room for rehabilitation or hope of release, is "degrading because of its absurdity."[119] Imposing consecutive parole ineligibility also enlists the judiciary in a project of vengeance, a goal that the Supreme Court of Canada has made clear "has no role to play in a civilized system of sentencing."[120]

The Court in *Bissonnette* held that the sentences created by section 745.51 are inconsistent with Canada's international human rights obligations, which require a meaningful opportunity to seek release during a life sentence.[121] The European Court of Human Rights, among others, has recognized that the salience of hope is more than a practical consideration that may alleviate some harms of long-term imprisonment. That Court held that it is a violation of fundamental human dignity to incarcerate

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117  *Bissonnette* QCCA, *supra* note 44.

118  See Lisa Kerr & Benjamin Berger, "Methods and Severity: The Two Tracks of Section 12" (2020) 94 SCLR (2d) 235 at para 22 (QL). Kerr and Berger attribute the "seeds of the idea" of two tracks to the section 12 jurisprudence to Lamer J (as he then was) in *R v Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435.

119  *Bissonnette* QCCA, *supra* note 44 at para 93.

120  *Ibid* at para 94, citing *M (CA)*, *supra* note 53 at para 80.

121  *Bissonnette* QCCA, *supra* note 44 at paras 105–06.

someone without any chance of release.[122] As in *Bissonnette*, this principle gives rise to a right to *hope for release*, not a right to release itself.

In our view, given that all those convicted of murder are subject to a mandatory life sentence already, there is no public safety or deterrent justification for consecutive parole ineligibility, which removes all hope for release—in some cases, for life. Rather, it is a policy that prioritizes punitiveness for punitiveness' sake, thus authorizing sentences that are cruel and unusual. We hope that the Supreme Court of Canada, if it grants leave to appeal in *Bissonnette*,[123] will recognize that consecutive parole ineligibility does not serve the interests of public safety and will confirm that vengeance has no place in Canadian sentencing practice, even for our most serious crimes.

## IV. CONCLUSION AND DIRECTIONS FOR FURTHER RESEARCH

Our study has identified a number of sentencing patterns for murder that warrant further research with respect to both the parole ineligibility periods attached to second degree murder and consecutive parole ineligibility for multiple murders. First, nationally, the average parole ineligibility period for second degree murder increased slightly over time, but the increase was small. Nevertheless, we did find a dramatic decrease over time in the number of individuals being sentenced to ten years of parole ineligibility. The minimum parole ineligibility period of ten years, which was expected by the *Shropshire* court to be the norm, has been largely abandoned by sentencing judges in favour of longer periods, especially in Ontario. At least in our sample of cases, the floor for sentencing murder appears to have been raised across the country, and especially in Ontario.

Second, the increase in parole ineligibility periods in Ontario may account for the small change seen nationally. Ontario's trajectory has been one of increasing punitiveness, with increasing periods of parole ineligibility over time across all types of cases. Some—but not all—of this finding may be a result of an increasing recognition in the Ontario decisions that the murder of women by their male partners should not be discounted in sentencing. We believe these findings warrant further study of parole ineligibility in Ontario to determine whether these results can be replicated over a larger sample.

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122   *Vinter and Others*, *supra* note 94.

123   Laframboise, *supra* note 44.

Finally, while our numbers are small, the option of consecutive parole ineligibility has been taken up by a number of judges, particularly those in Ontario and Alberta, while British Columbia courts have so far largely resisted this option. We worry that once a pattern is established of imposing consecutive parole ineligibility in a particular jurisdiction, it will become difficult for judges to return to concurrent parole ineligibility as a baseline that already made Canada's murder sentencing regime one of the harshest when compared to those of other liberal democratic states.[124] Given that judges in certain jurisdictions have shown more willingness to utilize consecutive parole ineligibility, we suspect that we will see the disparity among jurisdictions increase as judges start to rely on these early cases as setting the baseline for concerns about parity.[125] Parity becomes very challenging when one person convicted of murdering three people receives 75 years of parole ineligibility and another is sentenced to 25 years. In jurisdictions like Ontario and Alberta, where consecutive parole ineligibility has been used at a higher rate, it may become increasingly difficult for a judge to impose concurrent parole ineligibility for multiple murders without creating a perception that the lives of some of the victims are being devalued, except perhaps where the age of the person being sentenced renders consecutive parole ineligibility effectively meaningless.[126]

The extent to which these whole life sentences have become a part of Canadian law, with relatively little examination of their purported justifications, is troubling, and we hope that this preliminary study will prompt further investigation and reflection on the impact of these sentences on an individual and societal level. In the meantime, we urge judges to use these sentences sparingly, with an eye to the dangers of normalizing such extreme punishments where individuals are denied even the hope of release.

The upward trend in parole ineligibility, particularly in Ontario, and the introduction of consecutive parole ineligibility makes some sort of review mechanism, like the faint hope clause, all the more important. At the time the faint hope clause was amended to exclude multiple murders in 1997, multiple murders were being sentenced with the same maximum parole

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124  See Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill S-6*, by Robin MacKay, Publication No 40-3-S6-E, April 2011 revision (Ottawa: Library of Parliament, 30 April 2010) at 7–8, online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/40-3/40-3-s6-e.pdf>.

125  See Daniel M Isaacs, "Baseline Framing in Sentencing" (2011) 121:2 Yale LJ 426.

126  In *McArthur*, *supra* note 99, McArthur was convicted of murdering eight men. The trial judge imposed concurrent parole ineligibility largely because McArthur was 66 years of age when his sentence began and will be 91 after 25 years of parole ineligibility.

ineligibility as single murders. There was some justification for arguing that multiple murders should be sentenced more severely than single murders. Now that there is no maximum parole ineligibility for multiple murders, which means extraordinarily long periods of parole ineligibility for some individuals, we believe it is important to bring back some mechanism to reassess these cases after a number of years. We strongly support bringing back some sort of "faint hope" mechanism that would be available to all persons convicted of murder, including those convicted of multiple murders.[127] If it is necessary to distinguish multiple murders, the time required to be served before accessing such a mechanism could be higher for multiple murders than for single murders.

We also believe that our study demonstrates the need for judges to provide written and published reasons in cases involving sentencing for second degree murder, and for all multiple murder cases, especially those where consecutive parole ineligibility is sought. These cases not only provide valuable precedents for future judges but are also necessary tools for researchers to track and understand sentencing for our most serious crime.

At the end of the day, judicial decisions setting parole ineligibility only tell part of the story of the impact of Canada's murder sentencing regime. The question of how long individuals sentenced to life are actually serving in prison before being released on parole, on average, can only be answered by examining corrections and parole data, some of which is not currently in the public realm. We know, for example, that the rate of withdrawing, postponing, or waiving rights to apply for parole are quite high, particularly for Indigenous people,[128] and that parole decision-making is highly dependent on whether the applicant has the support of correctional authorities for release.[129] Further study should be undertaken to identify the impact of a variety of institutional actors and actions on how long people sentenced to life are incarcerated before conditional release. It is only with such data that we can gain a better understanding of the meaning of life in Canada.

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127 Similarly, in their recent call to abolish life sentences in the United States, Mauer and Nellis recommend that some form of "second look" procedure be instituted in the meantime for those sentenced to life without parole or other long periods of parole ineligibility. See Mauer & Nellis, *supra* note 95 at 165.

128 See e.g. Office of the Auditor General of Canada, *Report 3 — Preparing Indigenous Offenders for Release — Correctional Service Canada* (Ottawa: OAG, 29 November 2016), online (pdf): <www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_ 41832.html>.

129 Zinger, *supra* note 112.