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R. v. Mariani

2025 BCSC 129

COURT

Supreme Court of British Columbia

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2025 BCSC 129 R. v. Mariani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mariani,

2025 BCSC 129

Date: 20250127

Docket: 89371-2

Registry: Nanaimo

Rex

v.

Luciano Emilio Mariani

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment

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Place and Dates of Hearing:

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January 27, 2025

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Introduction

[1] On July 4, 2023, Luciano Mariani pled guilty to the first degree murder of Caroline Bernard.

[2] Pursuant to s. 745(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], the sentence for first degree murder is life imprisonment without eligibility for parole until Mr. Mariani has served 25 years of the sentence. Section 745(a) reads as follows:

Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

(a) in respect of a person who has been convicted of high treason or first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

[3] The imposition of Mr. Mariani's sentence has been delayed in order to decide on an application he has brought before the court. The application argues that several 2011 amendments to the Code, which, among other things, prohibit post-2011 offenders from applying for a reduction in their parole ineligibility period, have rendered the sentence required by s. 745(a) of the Code unconstitutional as contrary to both s. 12 and s. 7 of the Canadian Charter of Rights and Freedoms [Charter].

[4] The parties have placed a good deal of evidence before the court. Most of the evidence was introduced based on its relevance to the constitutional application.

[5] The court has had the benefit of reviewing a pre-sentence report, prepared by Nanaimo Community Corrections, and a risk assessment, prepared by Dr. Brianne Layden. In addition, the court heard viva voce evidence from Dr. Layden concerning her risk assessment of Mr. Mariani. The court has also heard from two experts tendered by the defence; Dr. Bruce Monkhouse, and Dr. Julian Roberts.

[6] Finally, the parties both introduced significant written material relating to various studies and academic commentaries that touched on the issues before the court. This evidence will be addressed as required.

[7] I begin with these critical circumstances.

- [8] Caroline Bernard resided in Bowser, British Columbia, a community near Nanaimo, B.C., on Vancouver Island. Ms. Bernard lived with her mother, Margarita, who lived in the upstairs portion of the home, while Ms. Bernard lived in the downstairs portion of the home with her four-year-old daughter A.B. At the time of the offence, Ms. Bernard, was separated from A.B.'s father.
- [9] Ms. Bernard and Mr. Mariani began a romantic relationship in approximately October 2020. Mr. Mariani moved into Ms. Bernard's home in March 2021. Ms. Bernard soon became pregnant with the child of Mr. Mariani. The relationship, however, also quickly deteriorated. The deterioration culminated in May 2021 when Mr. Mariani slapped A.B. and left the residence. There is some dispute as to whether he left voluntarily or was asked to leave by Ms. Bernard. In any event, Mr. Mariani moved back to Alberta, where some of his family resides.
- [10] Ms. Bernard terminated the pregnancy on June 3, 2021. Shortly thereafter she advised Mr. Mariani of her decision. Over the course of the next two to three months, Mr. Mariani resolved to kill Ms. Bernard.
- [11] In June, July, and August of 2021, Mr. Mariani sought the assistance of the internet. The evidence of his searches was discovered on Mr. Mariani's iPad. There were many searches and nothing subtle about the information he sought. Some examples of his searches are as follows.
- [12] Mr. Mariani searched for the term "domestic murders". He also searched "when you wanna kill your ex", "I can't believe you made me kill you", "time needed to kill someone with a baseball bat", "killing someone with a baseball bat", and "what to do if you believe an eye for an eye and your child was killed".
- [13] On August 23, 2021, Mr. Mariani borrowed his father's GMC Yukon truck and began driving from Calgary to Bowser. His goal was now plain. Purchase a bat; track down Ms. Bernard; beat her to death; and then kill himself.
- [14] Indeed, the next day, on August 24, 2021, Mr. Mariani purchased a baseball bat in Vancouver. He then travelled to Vancouver Island. At some point, he purchased hockey tape and wrapped the bat's handle with the tape.
- [15] In the early morning hours of August 31, 2021, Mr. Mariani surveilled Ms. Bernard's residence driving by the residence nine times in his vehicle. Mr. Mariani knew the location of Ms. Bernard's bedroom in the house, and it also appears he knew that A.B. habitually slept in her mother's bed.

- [16] At 4:10 a.m. Mr. Mariani broke through the glass sliding doors leading to Ms. Bernard's bedroom, proceeded to her bed, and bludgeoned her while she slept. Mr. Mariani fractured Ms. Bernard's skull, face, and jaw. The degree of force used by Mr. Mariani caused a complete transection of the skull into two halves. Ms. Bernard died on the way to the hospital.
- [17] When Mr. Mariani entered the residence, A.B. was asleep beside her mother. A.B. was not physically injured by the attack, although she was discovered soon thereafter covered with her mother's blood and organic matter.
- [18] Ms. Bernard's mother, who was sleeping upstairs, was awakened by what she thought was screaming. She came down to the lower level, discovered the ghastly scene, rescued A.B. from the bed, and called 911. Mr. Mariani had fled by this point.
- [19] After leaving the scene, Mr. Mariani drove to a nearby park and attempted to kill himself by cutting his arms. He quickly realized it was to no avail, and that he was not going to die. He then decided to walk away from the park and soon came upon a construction worker engaged in road construction nearby. He told the person he had, or may have, killed his girlfriend, and asked that he call the police. He was arrested shortly thereafter.

Circumstances of the Offender

- [20] The court has had the benefit of reviewing a violence risk assessment prepared by Dr. Layden, dated August 13, 2024; as well as a pre-sentence report.
- [21] The violence risk assessment evaluated Mr. Mariani with the goal of characterizing the risk that he will commit violence in the future. The report evaluated the nature, severity, and frequency of past violence, as well as the likelihood and imminency of future violence. The evaluation also discusses steps that could be taken to minimize the risk of future violence.
- [22] Dr. Layden has a Ph.D. in clinical forensic psychology. She is currently a contract forensic psychologist with the Provincial Health Services Authority and an adjunct professor at Simon Fraser University. Her report was prepared following this court referring Mr. Mariani to the Nanaimo Regional Forensic Clinic for assessment.
- [23] Mr. Mariani is 46 years of age. He is of Chilean heritage; although born and raised in Calgary, Alberta. He has no criminal record.
- [24] Mr. Mariani did not do particularly well in school. As an adult he was diagnosed with attention-deficit hyperactivity disorder ("ADHD"). He attended post-high school technical training in Alberta and obtained, over the course of some years, his welding and millwright certifications. His employment history was steady but with frequent stops and starts as he has found it difficult to maintain long-term employment at any one place.

- [25] His life throughout childhood and adulthood in Calgary was relatively unremarkable. He has maintained a group of several friends that he has known since childhood. He had one prior relationship when he was in his twenties that ended after several months.
- [26] He has experienced difficulties with alcohol and has also been described as having a "serious problem with drug use". He was a habitual user of marihuana in his twenties. In fact, around the age of 27, he was hospitalized for what was diagnosed as marihuana induced psychosis. He spent approximately a week at the Foothills Medical Centre in Calgary. During this time, he experienced suicidal thoughts and delusions. Following his discharge from the hospital he attended an Early Psychosis Intervention program for a period of time. Since this event in his twenties, he has not received any other psychological treatment for mental health difficulties.
- [27] That said, as part of Mr. Mariani's planning and deliberation, it is clear that he intended to kill himself after murdering Ms. Bernard. Indeed, he cut his arms following his flight from the murder scene. The records from the Vancouver Island Health Authority, relating to his treatment for the cuts, note that Mr. Mariani displayed no symptoms of psychosis. Following the murder, he was reported as being alert, oriented, calm, and in no acute distress.
- [28] Dr. Layden reported that in the weeks leading up to the murder, and on the day of the murder, Mr. Mariani did not appear to be suffering from psychotic symptoms although he did appear to be suffering from what is characterized as low mood and intense anger during that relevant timeframe.
- [29] Mr. Mariani offered his perspective to Dr. Layden concerning the events leading to the murder of Ms. Bernard. He stated he moved to Vancouver Island in 2019 from Calgary so he could surf. He found some employment, for instance, appliance installation, but moved to Vancouver in 2020 due to COVID. In Vancouver, he soon applied for employment insurance.
- [30] Shortly after, he moved back to Vancouver Island and struck up the relationship with Ms. Bernard. During that time, he continued to collect employment insurance. Following the separation from Ms. Bernard in May 2021, Mr. Mariani returned to Alberta where he spent a good deal of time with his sister and nephew. Shortly after being advised of the abortion he commenced ruminating about the abortion and planning the murder of Ms. Bernard.
- [31] Mr. Mariani told Dr. Layden that his actions and conduct were driven by the fact Ms. Bernard had made the decision concerning the abortion without his input. He stated that the resulting grief and frustration he felt drove him to do what he did. He stated "he wanted for her to end and himself". He stated he decided on the use of a bat to beat Ms. Bernard to death as a result of his inquiries on the internet.

- [32] Dr. Layden concluded that, absent successful special management strategies on the part of Mr. Mariani, the likelihood of him committing subsequent family violence upon release is moderate. Dr. Layden recommended a variety of treatments going forward and recommended that Mr. Mariani undergo another intimate partner and family violence risk assessment prior to being released into the community.
- [33] There were a number of letters submitted to the court in support of Mr. Mariani. These included letters from his mother, step-mother, sisters, aunts, and cousins; who are both here in Canada and in Chile. Some friends of Mr. Mariani have also stepped forward in support of him.
- [34] From the letters, it is clear Mr. Mariani has not spoken directly to his family and friends about the details of the offence.
- [35] In any event, there is a consistent theme throughout the letters of support. All express the greatest of sympathy for the family of Ms. Bernard. All are mystified as to how this could have happened and consistently described Mr. Mariani as a man of gentleness, care, and love for family and friends. Perhaps understandably, many expressed the view that the mental health of Mr. Mariani must have been a factor in his crime. All expressed their continued love and support regardless of what the future holds for Mr. Mariani.
- [36] The court as well received letters from those close to Ms. Bernard. These letters address the overwhelming raw grief they are experiencing in the wake of her passing.
- [37] The court heard from a close friend of Ms. Bernard. Their relationship was bonded through their children; their hopes for their children and the hopes for their own futures as new mothers. Her friend remains devastated. Her life has changed forever.
- [38] Ms. Bernard's mother, Ms. Margarita Bernard, also spoke to the court. Her grief was palpable. She will never recover.

The Constitutional Question

- [39] Given Mr. Mariani's guilty plea, this court would normally sentence Mr. Mariani to life in prison, without eligibility for parole until he has served 25 years. However, prior to sentencing, Mr. Mariani challenged the constitutionality of the sentence imposed by s. 745(a) of the Code.

The Relevant Statutory Provisions

- [40] In accordance with s. 745(a) of the Code, this court is required to impose a life sentence, with a 25-year parole ineligibility period, upon any adult offender who is convicted of first degree murder.

[41] The constitutionality of this sentence was considered by the Supreme Court of Canada in *R. v. Luxton*, [1990] 2 S.C.R. 711, 1990 CanLII 83 (S.C.C.). In *Luxton*, the accused was convicted of stabbing a taxicab driver to death. The murder was classified as first degree murder because the stabbing occurred while the victim was forcibly confined by the accused.

The accused argued, among other things, that the mandatory minimum sentence for first degree murder of life, without eligibility for parole for 25 years, was contrary to s. 7, s. 9, and s. 12 of the Charter. At the time, this sentence was contained in s. 669(a) of the Code, but it has since been renumbered to s. 745(a).

[42] The Supreme Court of Canada determined that the mandatory sentence did not violate s. 7, s. 9, or s. 12 of the Charter. In their finding of constitutional validity, the Supreme Court of Canada paid particular regard to the provisions of the Code which allowed offenders to seek early parole. The Court noted, at page 720, that:

It is of some note that even in cases of first degree murder, s. 672 of the Code provides that after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole having regard for the character of the applicant, his conduct while serving the sentence, the nature of the offence for which he was convicted and any other matters that are relevant in the circumstances. This 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.

[43] At the time of Mr. Luxton's offence, s. 672 of the Code read as follows:

(1) Where a person has served at least 15 years of his sentence

(a) in the case of a person who has been convicted of high treason or first-degree murder

he may apply to the appropriate Chief Justice for a reduction in his number of years of imprisonment without eligibility for parole.

(2) Upon receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to [enumerated factors].

[44] An offender's ability to apply for reduction in their parole ineligibility period is commonly referred to as "faint hope". The provisions contained in the former s. 672(1) are now contained in s. 745.6(1).

[45] Since the 1990 *Luxton* decision, the faint hope regime has been modified, and renumbered, several times. I will summarize only the most substantial modifications which are relevant to the applicant's claim.

- [46] In 1996, Parliament amended the faint hope regime by adding a judicial screening requirement. This amendment required a judge to find that the faint hope application had a "reasonable prospect of success" prior to the application being put to a jury.
- [47] The 1996 amendments also decided that, in order for an individual to have their parole ineligibility period reduced, the jury must unanimously support the reduction. At the time of Luxton, only two-thirds of the jury needed to vote in favour of a reduction.
- [48] Lastly, the 1996 amendments prohibited a person convicted of more than one murder from applying for a reduction in their parole ineligibility period via the faint hope regime.
- [49] In 2011, Bill S-6 made substantial changes to the faint hope regime. The applicant takes issue with the following three changes:
1. Sections 745.01(2) and 745.6(1)(a.1) of the Code, which prohibit individuals who commit an offence on or after December 2, 2011, from applying for faint hope. It is often stated that Bill S-6 repealed the faint hope clause, but this is not an entirely accurate statement. Pre-2011 offenders still have access to the faint hope regime; it is only post-2011 offenders that are precluded from bringing forward such an application.
 2. Sections 745.61 and 745.62 of the Code, which requires that a judge screen faint hope applications before they are put to a jury. The applicant takes issue with the entirety of this section, some of which predates 2011; however, the 2011 amendments increase the judicial screening threshold from "a reasonable prospect that the application will succeed" to "a substantial likelihood that the application will succeed".
 3. Sections 745.6(2.1) to (2.7) and the words "to (2.6)" in s. 745.6(1) of the Code, which instituted a procedural regime that eligible individuals must follow when applying for faint hope. Among other things, these clauses dictate that offenders may only commence a faint hope application during prescribed 90-day periods.
- [50] For simplicity I will refer to these three sections of the Code as the 2011 faint hope amendments, the judicial screening clauses, and the procedural regime, respectively. I will also refer to them collectively as the "2011 Amendments".
- [51] For ease of reference, the current version of the relevant Code provisions are appended to this decision and labelled as Appendix A.

The Applicant's Position

- [52] It must be stated at the outset that, through no fault of counsel, I found the application, entitled "Further Amended Charter Application" somewhat challenging to navigate in terms of determining the real focus of the applicant's constitutional argument. That said, the position of the applicant took a more comprehensible shape during the course of oral submissions.

[53] The applicant contends that, by virtue of the 2011 Amendments, s. 745(a) is no longer constitutional. The applicant does not take issue with the imposition of either the mandatory life sentence or the imposition of a 25-year parole ineligibility period. Instead, he argues that the post-Luxton amendments to the faint hope regime deprive offenders of any individualization, thus rendering the sentence imposed by s. 745(a) of the Code unconstitutional and contrary to both s. 12 and s. 7 of the Charter.

[54] The applicant has crystallized his position in written reply as follows:

The applicant is submitting that s. 745(a) is unconstitutional because it fails to provide for any "individualization" of the sentence by a Court at the time of sentencing or at any time and in particular after service of a further mandatory minimum period of 15 years of the sentence.

[55] The applicant submits that the sentence imposed pursuant to s. 745(a) of the Criminal Code: is in violation of the Canadian Charter of Rights and Freedoms because of the lack of any individualization and is incompatible with human dignity and thereby both "inherently grossly disproportionate" and "grossly disproportionate in fact" contrary to s. 12 of the Charter and further, is also contrary to s. 7 of the Charter.

[56] In addition, the applicant submits that in the event this court finds the sentence imposed pursuant to s. 745(a) of the Code to be in violation of s. 12 of the Charter as grossly disproportionate, "then it follows that it must also be 'inherently grossly disproportionate' under s. 7 of the Charter".

[57] The applicant also submits that the sentence required by s. 745(a) is arbitrary, contrary to s. 7 of the Charter. He argues that the sentence arbitrarily ignores one of the fundamental purposes of criminal law and of sentencing, namely, it "removes from the sentencing regime the significant purposes addressing reformation rehabilitation".

[58] In reply submissions, the applicant raised, for the first time, his reliance upon the principle of overbreadth. The applicant now submits that the sentence goes further than is necessary to achieve the legislative goal of the criminal law, namely, the goal of protecting the public. The applicant also argues that the sentence "is so broad in scope that it includes some conduct that bears no relation to its purpose" and that the sentence is therefore overbroad and contrary to s. 7 of the Charter.

[59] The applicant submits that in the event this court finds that either the 2011 faint hope amendments or the procedural regime have resulted in a sentence that violates either s. 12 or s. 7, and subject to a determination under s. 1 of the Charter, that the appropriate remedy is to declare the offending amendments of no force and effect, thus restoring the constitutional integrity of s. 745(a) as it was at the time of Luxton.

- [60] It should also be observed that the applicant originally sought to have the judicial screening clauses declared of no force and effect, but changed this position subsequent to developing an appreciation that striking the judicial screening clauses would create a non-functional faint hope regime.
- [61] The applicant now requests that should the judicial screening clauses result in the sentence imposed by s. 745(a) infringing upon either s. 12 or s. 7, that the clauses be suspended for a period of six months and remitted to Parliament to make amendments that are in compliance with the Charter. He submits that in order to be constitutionally compliant, an offender must be able to bring their faint hope application directly before a jury.

The Crown's Position

- [62] The Crown consistently observed that the submissions of the applicant were difficult to follow and that the focus was somewhat blurred.
- [63] In their written submissions, the Crown argued that while the applicant "purports to challenge the mandatory period of parole ineligibility imposed by s. 745(a), the respondent submits that the applicant's challenge is actually to s. 745.6(1)(a.1)".
- [64] During oral submissions, the Crown reiterated that it is unclear whether the applicant challenged the 2011 Amendments, namely s. 745.6(1)(a.1), directly, or whether the applicant is challenging the constitutionality of s. 745(a).
- [65] The Crown submits that, in its view, in order to find s. 745.6(1)(a.1) unconstitutional, this court would need to address the constitutionality of "the 25-year effectively mandatory minimum period of parole ineligibility" contained in s. 745(a).
- [66] On the issue of gross disproportionality, the Crown argues that this matter is distinguishable from other cases where mandatory minimum sentences have been found to be unconstitutional, as first degree murder does not encompass a broad range of activity. Instead, the Crown submits that there is no small murder, and that the current regime proportionately punishes serious crimes in a way that aligns with the sentencing principles of denunciation, deterrence, and rehabilitation.
- [67] The Crown also disputes the applicant's claim that a lack of individualization in sentencing necessarily leads to a sentence that is grossly disproportionate. The Crown submits that while individualization forms part of the proportionality assessment, it is not, in and of itself, a fundamental principle of justice protected by s. 7 of the Charter.
- [68] On the issues of arbitrariness and overbreadth, the Crown states that the purpose of the 2011 faint hope amendments is to ensure that offenders who commit first degree murder serve a minimum of 25 years before being eligible for parole and that the purpose of the mandatory sentence contained in s. 745(a) is to denounce and deter those who would deliberately take a life and to ensure the protection of the public. The Crown submits that the provisions effects are therefore clearly linked to their purpose and are therefore neither arbitrary nor

overbroad.

- [69] I observe that at certain points throughout the application, it was unclear whether the applicant was challenging the constitutionality of the 2011 Amendments, in isolation, whether the applicant's challenge was directed solely at s. 745(a) of the Code, or whether the challenge was directed at some combination of the two.
- [70] In the course of the proceedings, it became clear that the applicant is challenging the constitutionality of the mandatory minimum sentence that results from the combined application of the 2011 Amendments and s. 745(a) of the Code. Ultimately, the applicant submits that the current sentencing regime under s. 745(a) of the Code for first degree murder is, by virtue of the 2011 Amendments, contrary to s. 12 and s. 7 of the Charter.
- [71] The applicant therefore invites the court to address the validity of both the 2011 Amendments and s. 745(a) of the Charter. He argues that the interplay between these impugned sections results in a mandatory minimum sentence which is unconstitutional as contrary to both s. 12 and s. 7 of the Charter.
- [72] The Crown ultimately agreed that the constitutional challenge focussed on the constitutionality of s. 745(a) in light of the 2011 Amendments, and that arguments and submissions relating to both the 2011 Amendments and s. 745(a) of the Code are before the court and open to the court to consider.
- [73] I pause here to observe that, with the agreement of the parties, the application has been bifurcated and I have heard no submissions in relation to s. 1 of the Charter.
- [74] The Crown also raised two issues which ought to be addressed at the outset. Firstly, it took the position that the applicant's argument is premature, as the appropriate time to bring this application would be in 15 years, when, absent the 2011 faint hope amendments, the applicant would have been eligible to apply for a reduction in his parole ineligibility period.
- [75] The Crown also submits that this issue has already been decided against the applicant in Luxton; and, in addition, that I should adhere to the interpretation of Luxton as set out by this court in *R. v. Falkner*, 2004 BCSC 986. This argument raises the consideration of judicial comity as discussed in *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.), 1954 CanLII 253 (B.C.S.C.).
- [76] I will address these issues at the outset as it is apparent that if the application is premature, or if this court determines that it is bound, or ought to be bound, by previous decisions, the application ought to be dismissed.

The Evidence

- [77] As previously referenced, there has been a significant amount of evidence placed before the court. I will provide an overview of the evidence provided by Dr. Monkhouse and Dr. Roberts, although, unfortunately, I did not find their evidence particularly helpful.

The Evidence of Dr. Bruce Monkhouse

[78] Dr. Monkhouse obtained his Ph.D. in educational psychology from the University of Alberta in 1984. Dr. Monkhouse was tendered by the defence as an expert witness. He was tendered to provide opinion evidence in the areas of risk assessment and the effects that prisons have on persons sentenced to life imprisonment; including the treatment and rehabilitation that individuals receive while incarcerated.

[79] This evidence, it was suggested, would be of relevance in assessing the constitutional issues in this case.

[80] Following a short voir dire, Dr. Monkhouse was qualified in these areas with the agreement of the Crown. It must be observed that Dr. Monkhouse's curriculum vitae read as follows:

I have been accepted as an expert witness in the provinces of British Columbia, Alberta and Saskatchewan in the areas of Forensic assessment, Assessment of Violent offenders, Assessment of Sexual offenders and Treatment.

[81] It does not indicate he has previously been qualified as an expert concerning the impacts of a life sentence on an individual.

[82] In the course of providing his evidence, Dr. Monkhouse referenced and amplified a document he authored entitled "The Impact of a Life Sentence on an Individual". With the agreement of the Crown, this document was marked as an exhibit. It was referred to throughout the proceedings as "his report".

[83] It is my observation that the 'report' does not resemble the expert reports tendered in this court. It contained little narrative. Instead, it consists of propositions in point form; with references to various research purportedly in support of the proposition. It also contains a good deal of advocacy. It is undated and unsigned. Nevertheless, I will refer to the document as a report.

[84] I also find that, while the subject matter of his qualifications signalled the prospect of relevance, Dr. Monkhouse's evidence was not particularly helpful. Certainly, I found the evidence of little assistance in assessing the constitutional questions at play.

[85] Dr. Monkhouse began his career working with youth in Alberta and continued this work in B.C. after he moved to Victoria. In 1993, he became employed in Victoria by the Correctional Service of Canada ("CSC") with whom he was employed until recently. A good deal of his career was spent working at the William Head Institution in Victoria. For many years, William Head was a medium-security facility which incarcerated Federal inmates; however, for the last ten years or so it has been operating as a minimum-security institution.

- [86] At William Head, Dr. Monkhouse's work primarily entailed preparing inmates for the prospect of parole, including preparing risk assessments for these individuals. The risk assessments addressed the potential risks to the public of violent and sexual offenders. On occasion, Dr. Monkhouse would prepare risk assessments for inmates outside of William Head.
- [87] In relation to individuals serving life sentences, he testified that, on occasion, he counselled persons who expressed a desire to pursue a "faint hope" applicant; and, on occasion, prepared risk assessments for this purpose. Dr. Monkhouse stated that in his experience, most people do not go forward with the application. Dr. Monkhouse testified that only a handful of inmates serving a sentence for first degree murder found their way to William Head; less than ten out of 243 inmates.
- [88] The evidence of Dr. Monkhouse essentially consists of a variety of propositions supported by either his own antidotal opinion based upon personal experience and/or by various statistics and opinion from a variety of studies.
- [89] Dr. Monkhouse testified that his personal opinions are a result of his observations and experiences at William Head as well as his attendances at various courses and conferences over the years.
- [90] In my estimation, his evidence consisted of fairly generic information. He testified that persons convicted of first degree murder are generally housed in maximum security institutions; not at William Head. He also indicated that it is the inmates parole officer that will develop a correctional plan to facilitate rehabilitation.
- [91] While Dr. Monkhouse could speak to the programs available to inmates at William Head, and indeed did testify about his experiences at William Head, most inmates arriving at William Head were not convicted of first degree murder. In fact, most had little or no criminal record.
- [92] Dr. Monkhouse described that he understood the term "warehousing" to reference circumstances where inmates have completed their correctional plans; including the various programs required or recommended. As a result, the institution has no more to offer the individual while they complete their sentence.
- [93] Dr. Monkhouse was asked, generally, whether warehousing has a negative or positive impact on inmates. Dr. Monkhouse testified that it very much depends on the individual. As Dr. Monkhouse put it, some inmates need the time "to deal with stuff". While for others, the extra time does not make a difference; and for some, it can lead to increased anxiety and a state of discouragement.

- [94] In terms of "faint hope" applications, Dr. Monkhouse testified that preparation for a faint hope hearing is facilitated by the parole officer overseeing the inmate's correctional plan. Dr. Monkhouse, if asked to participate in the faint hope process, was asked to prepare psychological assessments.
- [95] Dr. Monkhouse opined about the impact of prison on inmates that have no hope of being released. Dr. Monkhouse clarified the proposition by stating that when he used the term "no hope of being released" he meant individuals who, for various practical considerations, are not likely to be released before they die in prison.
- [96] In any event, Dr. Monkhouse testified that the impact on inmates with no hope of being released "is complicated".
- [97] Finally, Dr. Monkhouse testified that he has participated in four faint hope assessments over the years but has never testified in a faint hope hearing.
- [98] The studies relied upon by Dr. Monkhouse were largely, if not exclusively, American studies, and, on their face, of dubious value in providing insight into the Canadian penal experience.
- [99] Dr. Monkhouse did not testify that the American research and study translated to his understanding of our Canadian institutions concerning persons serving life sentences. He also conceded he has no experience with the United States prison system; only what he has heard at various conferences. The fact is, I gave little weight to this evidence.
- [100] At one point in his report, Dr. Monkhouse cited a report from the Canadian Mental Health Association to support the statement that "mental health rates are four to seven times more common in prison than in the community". I take "mental health rates" to mean the rate of mental health problems, although this was not made clear.
- [101] In any event, Dr. Monkhouse conceded that the study he referenced in the report did not, in fact, cite statistics concerning mental health rates. He therefore believes he was in error, but he cannot say where the "rate" reference originated.
- [102] Finally, he clarified that the "mental health rates" statistic related to all inmates; in all Federal and Provincial institutions; for all offences. There was no particular view expressed in the study about the specific mental health impact of serving a life sentence; and he was unable to say whether the persons studied had mental health issues upon entering prison.
- [103] Dr. Monkhouse agreed that none of the studies he cited necessarily suggest that, in Canada, incarceration is associated with poor health. Generally, Dr. Monkhouse simply did not have a good day piecing together his views.
- [104] I will provide only a few examples, beginning with the following:
- Q And then under the heading, "Punishment versus rehabilitation," you say, in your opinion:

The physical, emotional and psychological prison environment faced by all Canadian federal inmates is determined by the prevailing belief and attitudes held by the criminal justice system and the general public concerning the appropriateness of certain types of punishment.

Can you explain to me what that means?

A More punishment is better. Longer sentences, longer periods of incarceration improves public safety.

Q And that opinion is based on what?

A Well, I mean it's - sort of a review of the general - I mean it's my experience, going to conferences, going to forums, that - and politically, that, and listening to senior correctional people, I mean it's more of a feeling that I got when I've been to workshops, been to training, been to various things and opportunities to listen to the lay - lay people, that the belief that more punishment is better. Longer periods of incarceration will be - leads to a safer community. It's not - it's not coming from any specific research or any kind of - it's just mostly my - my -

Q It's your personal opinion. It's your personal opinion.

A It's a personal opinion. Yeah, that's a good way of putting it.

[Emphasis added.]

[105] And again:

Q You say [as read in]:

The Canadian research indicates 75 percent of individuals who have been incarcerated and have a mental illness also have substance abuse problems.

And you cite Drake for that.

A Yeah.

Q [As read in]:

And importantly the use of illicit drugs often makes the symptoms of mental illness, particularly psychosis, more pronounced.

And you also cite Drake. That's a U.S. based study, correct?

A Yes.

Q And it's not, in fact, about incarceration but about the coincidence of mental illness and substance abuse?

A Yes.

Q So that's something that occurs both within the correctional system but also within the general population?

A Yes.

Q And you also cite Skeem and Louden.

A Yes.

Q And they do say that of detainees with a mental illness, 75 percent have a co-occurring substance abuse disorder, and the study they cite for that was a study of female jailed detainees awaiting trial in Chicago?

A Yes.

Q So that would be a fairly small data set?

A Yes.

Q And that's 75 percent of the proportion who have a mental illness. So, it's not 75 percent of the inmates in the system?

A No.

[Emphasis added.]

[106] And finally, by way of example:

Q Moving on [as read in]:

From a trauma and deprivation perspective, prison can have severe detrimental effects on the inmate's mental health. Many studies report that trauma precipitates the development of mental illness. A number of studies have indicated that a disproportionate number of people convicted of criminal offences have significant mental health prior to imprisonment, which are only exacerbated during incarceration.

So I think what you're saying there is that people who already have significant mental health issues when they enter prison, that the prison environment exacerbates those?

A Correct.

Q And the author you cite, Armour, references factors, contributing factors such as overcrowding, violence, isolation, insecurities, poor health services and lack of privacy as contributing to mental illness in prison, and cites the World Health Organization as a source?

A Yes.

Q And this is primarily a review of other studies?

A Yes.

Q And it covers multiple jurisdictions. So, it's really not focused on Canada; is that fair to say?

A Yes.

Q Next you talk about trauma from experiencing and witnessing violence while incarcerated?

A Yes.

Q You say that incarceration can lead to post-incarceration syndrome?

A Yes.

Q And you included there a link to a blog post that seems, since the time that you gave us the report, seems to have disappeared from the internet. But my student saw it briefly before it disappeared, and I understand that this was a former inmate's - an opinion piece written by a former inmate?

A Yes.

Q And that was an inmate who had served 15 years for robbery in the United States?

A Yes.

[Emphasis added.]

[107] Dr. Monkhouse came to certain conclusions in his report. By way of example, one such conclusion is as follows:

Since the first judicial review hearing in 1987, only 173 prisoners have applied for a judicial review and received a completed hearing out of the 991 total prisoners eligible for a judicial review hearing.

[108] Dr. Monkhouse was pressed as to the origin of the data cited above. He originally testified it was from a study by Zang and Ha, but ultimately conceded the data was not contained in the Zang and Ha report. He thought he had perhaps gleaned the data from somewhere else, although he could not say from where.

[109] I conclude with this evidence:

Q At the top of page 10, you say [as read in]:

A review of the research literature indicates that those offenders serving life sentences generally have fewer risk factors than other incarcerated populations and, as such, are less likely to recidivate upon release than offenders being released on day parole, for parole and statutory release.

So we've talked about the research literature that you've cited, and very little of it relates to life sentences and very little of it relates to life sentences in Canada, if any of it. So what research are you referring to?

A Again, I mean review - I mean, like I said, I've reviewed a number of articles from CSC that CSC produces and that over the years, that's sort of what the conclusions they have come to. So CSC has a - produces its own kinds of documents. I forget what exactly it's called. And that's what I was referring to is the internal stuff that CSC uses and presents like at workshops and conferences and stuff. But you're right, I should have specifically mentioned that this is information that the Office of the Correctional Investigator or CSC would produce.

Q And then you say in your experience increasing terms of incarceration may actually increase the likelihood of recidivism?

A Yes.

Q And that's based on your personal experience?

A It is.

Q And is that specific to persons serving sentences for first degree murder?

A No.

[Emphasis added.]

[110] In the end, the testimony of Dr. Monkhouse demonstrated his opinions rested on empirical foundations that were often irrelevant, undeveloped, nonexistent, or a combination of the above. I can place little reliance on this evidence.

The Evidence of Dr. Julian Roberts

[111] The accused introduced Dr. Roberts as an expert in the field of sentencing policy and public opinion on matters of sentencing, including parole eligibility.

[112] Following a voir dire, Dr. Roberts was qualified to offer expert opinion evidence on sentencing policy generally, and in particular, on sentencing policies related to offenders convicted of murder.

[113] In addition, he was qualified to provide expert opinion evidence about the public opinions that exists in Canada concerning sentencing for murder. He was also qualified to provide expert opinion evidence concerning how to measure public opinion in relation to community attitudes toward sentencing, including how best to assess data concerning opinions relating to parole eligibility and faint hope reviews.

[114] The defence also tendered, what Dr. Roberts referred to as, a "memo" entitled "Public Opinion on Sentencing for Murder".

[115] The Crown's primary position concerning Dr. Robert's anticipated evidence; including his memo, was that while Dr. Roberts was qualified in the above areas, the Crown questioned the relevance of his evidence.

- [116] This was so because it was difficult to assess the relevance of the evidence before hearing from the defence as to how the evidence might be germane to the issues raised. In addition, the Crown submitted that parts of Dr. Robert's memo was really advocacy in aid of the accused. As a result of the Crown's objection, the memo was originally marked for identification only. The issue of admissibility was left to final argument, after Dr. Roberts' evidence was heard.
- [117] Dr. Roberts opined that the most appropriate means of determining the nature of public attitudes to parole eligibility arrangements for offenders convicted of murder is to examine the outcomes of jury decisions and hearings to date. Dr. Roberts is of the view that if the Canadian public opposed faint hope applications then it would be reasonable to expect a low success rate for faint hope applications, possibly zero, since juries ultimately get to determine if the faint hope applicant is successful.
- [118] Dr. Roberts stated that a low success rate would suggest that Canadians believe all offenders convicted of first degree murder should be detained for 25 years and that the public sees no need to distinguish between individual offenders convicted of this crime.
- [119] Dr. Roberts stated, however, that the outcomes of hearings to-date run counter to the above interpretation. He cited certain data, as follows:

An early study examined data from a Correctional Service Canada database containing comprehensive information for inmates convicted of first- and second-degree murder. Overall, 82% of 'Faint Hope' applicants have received positive outcomes from juries. The only peer-review publication to have analysed the outcome of 'faint hope' applications appeared the next year (in 2002). That research reported that approximately 80% of applicants had received some level of reduction in their parole ineligibility dates. In 2016, another study found a success rate of 82.6% to 2009.

- [120] His memo also cited more recent statistics, as follows:

The latest hearing statistics published by Public Safety Canada [in 2023] reflect court decisions to the end of the fiscal year 2020-2021. They reveal the following trends:

- To date, 243 s. 745 hearings have taken place, most of which (89%) involved convictions for first degree murder;
- Of all hearing since 1987, 184 applicants (representing 76% of applications) were granted a reduction of the period which must be served before parole eligibility.

- [121] Dr. Roberts advocated for the notion that it is important for the public to have confidence in the criminal justice system, including sentencing proceedings. It was suggested to Dr. Roberts that this was simply a matter of common sense. He disagreed. It was his view that the proposition was supported by empirical data.

- [122] Dr. Roberts voiced the view that the best source of public opinion concerning sentencing is the outcome of jury deliberations in first and second degree faint hope hearings. In his view, because a large number of the faint hope hearings result in a parole reduction for the accused, one can extrapolate that the public is in favour of faint hope hearings.
- [123] Dr. Roberts did not agree with the proposition that one could not extrapolate such a conclusion due to the fact that, for instance, jury members in faint hope hearings are not asked to voice their personal opinions on whether a faint hope process should or should not be available; nor their personal opinion on parole eligibility, generally. The Crown submitted to Dr. Roberts that the function of the jury is to follow the law, as instructed. Dr. Roberts did not agree with this proposition.
- [124] The Crown takes issue with aspects of Dr. Robert's memo on the basis that the memo really contains advocacy for the accused, masked as expert opinion evidence. I agree with the Crown. I find paragraphs 2, 3, 4, and 7 of the memo are inadmissible. I admit the balance of the memo, however, while I do not conclude the evidence wholly irrelevant, I do not find the evidence of Dr. Roberts particularly helpful in regards to the issues before me.

Issues

[125] In my view, the following questions are raised by this application:

1. Is this application premature?
2. Is this court bound by Luxton and/or Falkner's interpretation of Luxton?
3. Do s. 745.01(2) and s. 745.6(1)(a.1) of the Code, which eliminate the possibility of faint hope for post-2011 offenders, render the sentence imposed by s. 745(a) of the Code to be unconstitutional as contrary to either s. 12 or s. 7 of the Charter?
4. Do s. 745.61 and s. 745.62 of the Code, which require faint hope applications to go through judicial screening, render the sentence imposed by s. 745(a) of the Code to be unconstitutional as contrary to either s. 12 or s. 7 of the Charter?
5. Do ss. 745.6(2.1) to (2.7) and the words "to (2.6)" in s. 745.6(1) of the Code, which create a procedural regime surrounding faint hope applications, render the sentence imposed by s. 745(a) of the Code to be unconstitutional as contrary to either s. 12 or s. 7 of the Charter?

[126] For the reasons that follow, I answer questions one and two in the negative. I answer question three in the affirmative. I answer questions four and five in the negative.

Is This Application Premature?

- [127] In response to what appeared to be the applicant's initial position, the Crown submitted that the applicant was actually challenging s. 745.6(1)(a.1) of the Code, which prevents post-2011 offenders from applying to receive faint hope. The Crown took the position that such an application was premature for two reasons: (1) it would be seeking a remedy for a prospective breach; and, (2) the analysis would be conducted in a factual vacuum. Ultimately the court requested supplemental submissions from the parties on this point.
- [128] Prior to submitting these supplemental submissions, the applicant clarified that he was challenging the unconstitutionality of s. 745(a) in light of the 2011 Amendments. The Crown subsequently acknowledged that a challenge to s. 745(a) would not be premature as "that provision requires the imposition of a minimum period of parole eligibility and can be properly assessed under the s. 12 framework at the time of sentencing".
- [129] In my opinion, this acknowledgement resolves the issue of prematurity.
- [130] The question before me is not whether Mr. Mariani will be a good candidate for faint hope in 15 years. The question is whether the imposition of the sentence required by s. 745(a), in light of the 2011 Amendments, is an affront to the Charter. If it is, the violation of Mr. Mariani's rights will occur at the time the sentence is pronounced, and it is therefore appropriate to address the constitutionality of the sentence at this time.

The Issue of Stare Decisis

- [131] The applicant submits that the Supreme Court of Canada's decision in Luxton hinged upon offenders' ability to apply for a reduction in their parole ineligibility period, via the faint hope regime. By virtue of the 2011 Amendments, he therefore argues that this court can revisit the constitutionality of s. 745(a), as previously considered by the Supreme Court of Canada in Luxton, which upheld the constitutionality of the section.
- [132] The Crown submits that the reasoning in Luxton did not turn on the presence of the faint hope clause. The Crown submits that this interpretation is supported by Falkner. The Crown states this ought to end the matter.
- [133] It is of course well understood that as a matter of stare decisis, trial courts are bound to follow the decisions of higher courts; however, the Supreme Court of Canada has been clear that there are exceptions to this rule. Specifically, a trial court "may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate': Carter v. Canada (Attorney General), 2015 SCC 5 at para. 44, citing Canada (Attorney General) v. Bedford, 2013 SCC 72 at para. 42.
- [134] The Supreme Court of Canada has also clarified that "new legal issues are raised as a consequence of significant developments in the law": Bedford at para. 42; R. v. Comeau, 2018 SCC 15 at para. 29.

[135] The Code has changed significantly since Luxton was decided in 1990. These significant developments in the law raise a new legal issue in two ways.

[136] I find that if Luxton did hinge on an offender's ability to apply for faint hope, then the 2011 faint hope amendments, alone, raise a new legal issue vis-à-vis the constitutionality of the sentence imposed by s. 745(a) in the absence of a parole review mechanism.

[137] I also conclude that if Luxton did not hinge upon the existence of faint hope, that this court may nevertheless revisit the constitutionality of the sentence imposed by s. 745(a) as a new legal issue has been raised as a result of broader amendments to the Code which have significantly impacted the scope, and the functioning, of s. 745(a).

[138] The applicant argues that the faint hope regime was central to the finding of the constitutionality in Luxton. To reiterate, the applicant relies on the following remarks from Luxton to support the position that the finding of constitutionality hinged upon the existence of a 15-year parole review mechanism, in the form of a faint hope regime:

It is of some note that even in cases of first degree murder, s. 672 of the Code provides that after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole having regard for the character of the applicant, his conduct while serving the sentence, the nature of the offence for which he was convicted and any other matters that are relevant in the circumstances. This 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.

I reiterate that even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole

[139] That being said, interpretations of these comments are varied. As the Crown points out, in Falkner, the British Columbia Supreme Court concluded that the constitutional finding in Luxton did not hinge on the existence of faint hope.

[140] In Falkner, the accused was convicted of second degree murder. As this was the accused's second murder conviction, s. 745(b) of the Code required the court to impose a life sentence, with a parole ineligibility period of 25 years. The accused argued that this mandatory sentence resulted in an arbitrary period of imprisonment that contravened both s. 7 and s. 9 of the Charter. Justice Humphries concluded that the mandatory minimum conviction for second degree murder contained in s. 745(b) did not violate either s. 7 or s. 9.

[141] Justice Humphries made the following finding:

- [161] The unavailability of review under s. 745.6 is more troubling, as its predecessor was used by the Supreme Court of Canada in *Luxton* to demonstrate a residual sensitivity on Parliament's part to individual circumstances, even for the most serious offenders. However, the constitutional analysis did not turn on it, and a reading of the entire decision clearly shows that the existence of the section was unnecessary to upholding the ultimate validity of the impugned sections.
- [142] I observe that the offender in *Falkner* was not eligible to apply for faint hope, as s. 745.6(2) of the Code prevents offenders who have been convicted of more than one murder from applying for a reduction in their parole ineligibility period. This application does not take issue with the prohibition; however, the prohibition was not present at the time *Luxton* was decided.
- [143] Conversely, in *R. v. Simmonds*, 2018 BCCA 205, the British Columbia Court of Appeal commented on *Luxton* in a way that can clearly be interpreted as supporting the proposition that the constitutional conclusions in *Luxton* rest, at least in part, on the presence of the faint hope review mechanism. Justice Dickson found:
- [19] ... Although the Court accepted the need for a proportionate gradation of punishments, it held the sentence for first degree murder conformed with s. 7 because it applied to a group of markedly blameworthy offenders and the faint hope review provided a sensitivity to individual circumstances. As to s. 12, Chief Justice Lamer described the penalty as "severe and deservedly so" and the minimum 25-year parole ineligibility period as punishment that is "not excessive and clearly does not outrage our standards of decency". He also referred to the ways in which the scheme accounted for individual circumstances, including the possibility of obtaining early parole via a faint hope application.
- [82] This conclusion finds support in the *Luxton* decision. As noted, in *Luxton* the Court upheld the minimum 25-year parole ineligibility period as constitutionally valid in part because the sentencing scheme for first degree murder accounts for individual circumstances by, among other things, incorporating the possibility of reduced parole ineligibility via a faint hope application.
- [Emphasis added.]
- [144] These conclusions certainly, at least, imply, that, in the view of the British Columbia Court of Appeal, the Supreme Court of Canada's decision in *Luxton* did, in part, hinge upon an offender's ability to apply for a reduction in their parole ineligibility period in accordance with the faint hope regime.
- [145] Similarly, in *Fortier-Grenier c. R.*, 2021 QCCS 1930, the Superior Court of Québec, citing *Simmonds*, found that the decision in *Luxton* hinged on the existence of the faint hope provision, as the Supreme Court of Canada had considered the existence of a 15-year parole review mechanism when coming to their conclusion of constitutionality.

- [146] The Crown, however, directs this court's attention to Fortier-Grenier for a different purpose, namely, to demonstrate that other courts have concluded that the 2011 Amendments do not render s. 745(a) unconstitutional.
- [147] In Fortier-Grenier, the accused argued that the repeal of faint hope prolonged the sentence of post-2011 offenders beyond what was necessary to obtain its sentencing objectives and deprived offenders of a review mechanism. He argued that, as a result, the sentence contained in s. 745(a) was unconstitutional as contrary to both s. 12 and s. 7 of the Charter. The Superior Court of Québec concluded that the repeal of faint hope did not render s. 745(a) unconstitutional contrary to either s. 12 or s. 7. The decision, in my view, was largely the result of the accused placing insufficient evidence before the court to ground a finding of unconstitutionality.
- [148] While Justice Champagne ultimately ruled against the applicant, he found that the constitutionality of s. 745(a), in the absence of the faint hope provisions, constituted a new legal issue that could be decided by the lower court. In coming to this conclusion, the justice stated:
- [28] Enfin, la constitutionnalité de l'article 745a) C.cr., quant à la période d'inadmissibilité à la libération conditionnelle de 25 ans, n'a jamais été tranchée dans le cas de figure qui nous occupe, soit en l'absence du mécanisme de révision.
- [29] Ainsi, le Tribunal conclut que la question de la validité constitutionnelle de la peine mandatoire pour meurtre au premier degré, en l'absence d'un mécanisme de révision, constitue une nouvelle question juridique qui doit être réexaminée.
- [149] This translates as follows:
- [28] Finally, the constitutional validity of s. 745(a) of the Criminal Code, regarding the 25 year parole ineligibility period, has never been decided in the legal context currently before us, namely in the absence of the [faint hope] review mechanism.
- [29] Thus, the Court concludes that the question of the constitutional validity of the mandatory sentence for first degree murder, in the absence of a [faint hope] review mechanism, constitutes a new legal question which must be re-examined.
- [150] My reading of Luxton tends to the views expressed in Simmonds and Fortier-Grenier. I conclude, as Justice Champagne did, that if the Supreme Court of Canada's finding in Luxton hinged on the existence of the faint hope regime then the 2011 faint hope amendments, which removed post-2011 offenders' ability to apply for faint hope, would, alone, create a new legal issue about the constitutionality of the sentence imposed by s. 745(a), in the absence of a 15-year parole review mechanism. I conclude that this new legal issue can be decided by this court.

- [151] I also find that whether or not the Supreme Court of Canada's reasoning hinged upon the existence of the faint hope provision is not solely determinative of whether a new legal issue has been raised. Based on my review of the legislative changes which have occurred since 1990, I conclude there have been significant developments in the law, beyond the removal of faint hope for post-2011 offenders, which raise new legal questions.
- [152] I find there have been two broad developments in the law relating to s. 745(a), since 1990. First, the faint hope regime has been substantially modified. Second, the scope of offences which result in the imposition of a sentence under s. 745(a) have expanded.
- [153] The changes to the faint hope regime have been referenced, above. In brief, aside from removing the availability of faint hope for post-2011 offenders, the applicant also challenges the existence of the judicial screening clauses and of the procedural regime. Neither of these were considered at the time of Luxton, and both would constitute significant developments in the law that require revisiting the constitutionality of the sentence imposed by s. 745(a) of the Code.
- [154] While not before me, faint hope has also been made unavailable for offenders who have been convicted of multiple murders. Additionally, applicants bringing forward a faint hope application now require a unanimous jury ruling to receive a reduction in their parole ineligibility period. These amendments may also justify reconsidering the constitutionality of the sentence imposed by s. 745(a).
- [155] I also note that the scope and reach of first degree murder has expanded since Luxton. At the time Luxton was decided, the provisions contained in the current s. 231(6.01) to (6.2), were not part of the Code. Therefore, death occurring in the course of terrorist activity, for the benefit of a criminal organization, or in the course of criminal harassment, would not have been considered first degree murder, unless, of course, there was also proof of planning and deliberation. All of these crimes now require the imposition of a s. 745(a) sentence.
- [156] In conclusion, I find that regardless of whether the decision in Luxton hinged upon the existence of the faint hope review mechanism, significant developments in the law since 1990 have made it such that new legal issues are being raised before this court. This court is therefore permitted to revisit the constitutionality of the sentence imposed by s. 745(a) of the Code.
- [157] In addition, the Crown submits that I ought to follow the reasoning of my former colleague in Falkner. This raises considerations discussed in Hansard Spruce Mills. The decision of Justice Wilson, in Hansard Spruce Mills, is well known, well regarded, and distinguished with only the greatest of care.
- [158] The comments of Justice Wilson are as follows:

Therefore, to epitomize what I have already written in the Cairney case, I say this: I will only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

[159] Falkner, of course, was rendered well prior to the Supreme Court of Canada's decisions in *R. v. Bissonnette*, 2022 SCC 23, *R. v. Hills*, 2023 SCC 2, and *R. v. Hilbach*, 2023 SCC 3. Therefore, Falkner (nor Fortier-Grenier) applied the most current version of the law which is binding on this court.

[160] I also find that Falkner is distinguishable from the matter before me. In addition to having been rendered prior to the 2011 Amendments and the subsequent guidance of the Supreme Court of Canada; Falkner also involves a different section of the Code and does not address s. 12 of the Charter. In addition, the finding in Falkner, relating to the role that faint hope played in the Luxton decision, does not seem to accord with the comments in Simmonds.

[161] In the circumstances, in my view, I am able to revisit this matter with proper regard to *Hansard Spruce Mills*.

Section 12: The Framework

Does the applicant challenge provisions that constitute either treatment or punishment?

[162] Section 12 of the Charter states that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment". This section protects the human dignity and the inherent worth of individuals. In order for s. 12 to apply, the impugned provision must constitute either "treatment" or "punishment".

[163] In my view, the applicant's submissions are fundamentally about whether the 2011 Amendments render the sentence enumerated in s. 745(a) of the Code to be unconstitutional. Section 745(a), which imposes a term of imprisonment, is clearly a punishment and is therefore captured within the scope of s. 12.

[164] While the focus is on the ultimate impact of s. 745(a), I also conclude that the 2011 faint hope amendments, the judicial screening clauses, and the procedural regime also, in my view, constitute punishments for the purpose of s. 12.

- [165] The 2011 faint hope amendments modify the period of parole ineligibility for offenders. Parole ineligibility is clearly punishment that is captured within the meaning of s. 12 of the Charter.
- [166] On their face, it is less clear whether the judicial screening clauses and the procedural regime constitute punishment; however, the British Columbia Court of Appeal in *Simmonds*, determined that such provisions do fall within the scope of punishment for the purposes of Charter analysis.
- [167] In *Simmonds*, the accused was convicted of first degree murder. At the time of the offence, the accused had the right to bring his faint hope application directly before a jury, but by the time of his sentencing, the judicial screening threshold had been introduced. The British Columbia Court of Appeal found that "the introduction of judicial screening into the faint hope regime increased the punishment for murder by reducing an offender's previously direct access to a jury to seek clemency via reduced parole ineligibility": *Simmonds* at para. 5. The British Columbia Court of Appeal found that the retrospective application of the judicial screening requirement violated s. 11(i) of the Charter but was saved by s. 1.
- [168] Section 11(i) of the Charter ensures that if a punishment for an offence is varied between the time of commission and the time of sentencing, the accused has the benefit of the lesser punishment.
- [169] In concluding that the judicial screening threshold constituted a punishment for the purposes of s. 11(i) of the Charter, the British Columbia Court of Appeal applied the following test, which was articulated by Justice Karakatsanis in *R. v. K.R.J.*, 2016 SCC 31:
- [41] Thus, I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests.
- [170] Applying this test, the British Columbia Court of Appeal found that while parole eligibility does not typically form part of the arsenal of sanctions imposed by the court, in the case of murder, "the parole ineligibility order and related faint hope provisions of the Code are nonetheless part of the original sentence imposed": *Simmonds* at para. 80; see also paras. 81–82.
- [171] In *R. v. Poulin*, 2019 SCC 47 at para. 38, the Supreme Court of Canada endorsed this determination, stating:

- [38] Numerous measures and sanctions have been assessed against the s. 11(i) concept of 'punishment'. The following measures have been found to qualify as punishment: The conditions governing the 'faint hope' regime (R. v. Simmonds, 2018 BCCA 205, 362 C.C.C. (3d) 215, at paras. 88-89)
- [172] In accordance with R. v. Boudreault, 2018 SCC 58 at para. 38, the meaning of punishment developed in the context of s. 11(i) also applies when interpreting s. 12 as "punishment should be defined consistently across ss. 11 and 12 of the Charter".
- [173] I conclude that the judicial screening clauses constitute punishment under s. 11(i) and can therefore be examined under the s. 12 framework. Applying the British Columbia Court of Appeal's logic, the procedural regime also constitutes "part of the original sentence imposed" and would constitute punishment within the meaning of s. 11(i). In the result, these sections can also be assessed under the s. 12 framework.

The Legal Test

- [174] The test for assessing whether there has been a violation of s. 12 is a two-pronged analysis, but in many cases only one analysis needs to be performed. In performing the s. 12 analysis, I am guided by the Supreme Court of Canada's recent decisions in Bissonnette, Hills, and Hilbach, where the Supreme Court of Canada clarified the s. 12 framework in the context of constitutional challenges to sentencing provisions.
- [175] The first prong asks whether the punishment is grossly disproportionate in a given case, concerning a specific set of facts. The applicant refers to this prong as the 'grossly disproportionate in fact' inquiry, while the Crown refers to this prong as the 'traditional approach'.
- [176] Regardless of how it is characterized, the first prong analysis has two stages. First, the court must determine what sentence is fit and proportionate for an individual accused. Second, the court must compare the fit sentence to the sentence imposed by the mandatory minimum sentencing regime.
- [177] As the first prong inquires as to whether a sentence is grossly disproportionate in the context of a specific factual situation, the court must first determine which factual situation will be assessed. The court may either assess the proportionality of the sentence in the context of the accused, or in the context of a reasonable hypothetical offender.
- [178] Once it has been determined which factual circumstances will be used to ground the analysis, the first stage of the s. 12 analysis asks what constitutes a "proportionate sentence for the offence having regard to the objectives and principles of sentencing in the Criminal Code": Hills at para. 60, citing R. v. Nur, 2015 SCC 15 at para. 46. In deciding on a proportionate sentence, the court should apply the same principles used in the context of a usual sentencing hearing.

- [179] Once the appropriate sentence has been determined, the court can proceed to the second stage of the analysis. At the second stage, the court must consider whether "the impugned provision requires it to impose a sentence that is grossly disproportionate to one that would be just and appropriate for the offender or for another offender in a reasonable hypothetical case": Bissonnette at para. 63.
- [180] This analysis involves comparing the differences between the appropriate sentence determined by stage one and the sentence required by the mandatory minimum. The question is whether the discrepancy between the appropriate sentence and the required sentence is grossly disproportionate. It is a high bar. A sentence which is merely unfit or excessive cannot result in the finding of gross disproportionality: Hills at para. 47.
- [181] Conversely, the second prong of the s. 12 analysis asks whether the nature of the punishment is intrinsically incompatible with human dignity. Or stated differently, whether the punishment is such that it could "never be imposed in a manner consonant with human dignity in the Canadian criminal context": Bissonnette at para. 67. The applicant refers to this prong as the 'inherently grossly disproportionate' analysis.
- [182] If the punishment is found to be either grossly disproportionate, under prong one, or intrinsically incompatible with human dignity, under prong two, the punishment violates s. 12 of the Charter. If a violation is found, the court must go on to assess if the legislative provision is justified under s. 1 of the Charter "if arguments or evidence to that effect are raised by the Crown": Hills at para. 42.
- [183] The applicant submits that the impugned provisions are both 'grossly disproportionate in fact' and 'inherently grossly disproportionate' and that both prongs of the s. 12 analysis should therefore apply.
- [184] According to Hills, mandatory minimum sentences should be analysed under the first prong of the s. 12 analysis, which deals exclusively with the gross disproportionality of the sentence vis-à-vis an individual accused. It is stated in Hills that a sentence is considered mandatory if "Parliament has not provided the safety valve of judicial discretion, exemptions, or escape clauses": at para. 37.
- [185] The applicant originally submitted, in his written submissions, that the second prong applies because he does not challenge the mandatory minimum itself, but instead challenges the "absence of any 'individualization' with respect to [among other things] the parole ineligibility date, which does not arise in the case of other mandatory minimum sentences".
- [186] This position evolved and was clarified during oral submissions. The 2011 Amendment cannot coherently be considered without assessing the impact the amendments have on the sentence contained in s. 745(a) of the Code.

[187] The application is, in essence, directed at the constitutionality of a mandatory minimum sentence. In keeping with the guidance in *Hills*, I therefore find that only the first prong of the s. 12 analysis should be undertaken.

[188] I do, however, wish to address the applicant's original argument that parole ineligibility periods have not been considered in challenges to other mandatory minimum sentences. Specifically, I consider this argument in view of the following remarks from *Hills*:

[103] The Crown argued that when assessing the disparity between a fit sentence and a mandatory minimum, a court should factor in the possibility of parole. This Court previously rejected this same argument in *Nur*, where it held that when comparing a mandatory minimum sentence to the fit sentence, the focus must be on the sentence itself. Accordingly, courts must not consider parole eligibility as a factor reducing the actual impact of the impugned sentence because the possibility of parole cannot cure a grossly disproportionate sentence (*Nur*, at para. 98).

[189] The Supreme Court of Canada states that courts should not consider the presence of parole eligibility when addressing the constitutionality of a mandatory minimum sentence. In my view, and upon a close reading of *Hills* at paras. 103–105, this guidance does not apply to the current circumstances. In the case at bar, the applicant asked the court to evaluate whether the absence of parole eligibility renders a mandatory minimum sentence unconstitutional. In my opinion, this distinguishing factor is of substance. In order to consider the constitutionality of the sentence before the court, the parole ineligibility must be considered.

[190] In oral submissions, the Crown also concedes that in the context of this constitutional challenge parole eligibility can be considered when assessing the constitutionality of the s. 745(a) mandatory minimum sentence.

Section 12: The Application of the First Prong

The Reasonable Hypothetical

[191] In accordance with the above, the first prong of the s. 12 analysis can either evaluate the circumstances of the accused and/or the circumstances of a reasonable hypothetical offender.

[192] It is the submission of counsel on behalf of the applicant that all of Mr. Mariani's circumstances indicate that, if he continues to work towards rehabilitation, he may well be a reasonable candidate for parole in 15 years.

[193] Counsel on behalf of Mr. Mariani submits that in Mr. Mariani's case it is clear this was a crime of passion, that was, in part, caused by a mental dysregulation. Counsel reminds the court that, at the age of 26, Mr. Mariani was hospitalized due to marijuana induced psychosis and was subsequently diagnosed with bipolar disorder and ADHD. Counsel states that after the dissolution of his relationship with Ms. Bernard, Mr. Mariani experienced

depression, suicidal ideation, and insomnia. This caused a resumption in his marihuana use. Counsel submits these circumstances are corroborated by the risk assessment presented to the court.

[194] It is also common ground that Mr. Mariani took steps to kill himself following the crime and certainly there is cogent evidence that he took additional steps to kill himself while incarcerated. Mr. Mariani openly admits that he deserves punishment for his crime. It is submitted on behalf of Mr. Mariani that he has no criminal record and has entered a guilty plea. While incarcerated, he has completed a number of rehabilitative programs and, in all of the circumstances, counsel, in their very able submissions, submits that in 15 years, if he continues to work towards rehabilitation, he may be a reasonable candidate for parole.

[195] Notwithstanding the above, counsel for Mr. Mariani also placed two hypothetical circumstances before the court to assist with the s. 12 analysis. The Crown submits that neither of the hypotheticals align with the characteristics of a reasonable hypothetical as discussed in *Hills*. The characteristics of a reasonable hypothetical are as follows:

- (i) the hypothetical must be reasonably foreseeable;
- (ii) reported cases may be considered in the analysis;
- (iii) the hypothetical must be reasonable in view of the range of conduct in the offence in question;
- (iv) personal characteristics may be considered as long as they are not tailored to create remote or far-fetched examples; and
- (v) reasonable hypotheticals are best tested through the adversarial process.

Hills at para. 77.

[196] Counsel for the applicant therefore amended the hypotheticals. In their final form, they were presented as follows:

1. A recently retired 55 year old King's counsel lawyer falls on hard times and becomes homeless. He becomes paranoid and starts to worry about the people who live in the [rooming house] with him. He decides he must kill his roommate who is in fact stealing from him. He goes and buys a knife and kills his roommate. Despite his mental disruption, he is fully aware that stabbing his roommate would kill him. At his age, he would have no realistic possibility of obtaining parole before dying in prison despite medical evidence that taking medication would mean he is no longer a risk to the public. His record of serving the community and the court, late onset mental illness, successful treatment and age are not to be considered by the sentencing judge. Further, this lawyer accepted responsibility early on in the proceedings, did not seek bail and pled guilty to first degree murder.

2. An 18 year old First Nations woman with grade 8 education, with a family history of residential school and generational violence, is in an abusive relationship with a much older man. He expects her to work the streets and bring home her earnings with their drug habit. She is depressed, isolated and estranged from any family. She would rather die than continue to live this way. She obtains some poison after getting the idea from a TV show as she plans to kill herself, but cannot go through with it. A few days later she pours the poison into his rum and coke. Guilt ridden, this young woman turns herself into the police and confesses. She pleads guilty to the charge of first-degree murder but not before demonstrating to the authorities while on bail that with psychological help and education that she was able to make tremendous strides in a short period of time, including obtaining her GED, working a full-time job and volunteering at a Native youth centre.
- [197] Following these amendments, the Crown again submitted that on their face, neither of the above hypotheticals clearly constituted first degree murder; that the scenarios 'stack' mitigating factors; and that the scenarios are not reasonably foreseeable.
- [198] I tend to agree with this submission.
- [199] The applicant also submitted a transcript of a faint hope hearing related to the case of R. v. R., 2010 BCSC 162. In this case, the accused was convicted of the first degree murder of his wife. After stabbing his wife, he attempted, but failed, to kill himself.
- [200] In response, the Crown submits that the applicant failed to explain why he produced this transcript or how the legal test applied to this hypothetical. Again, I agree with the Crown's submissions. The transcript is of little help and the applicant's submissions are somewhat vague and uncertain concerning the particulars of the circumstances.
- [201] I find that all three of these scenarios cannot reasonably form the basis of a s. 12 analysis.
- [202] In the result, the Crown submits that the court consider only the applicant's factual circumstances, given the applicant's failure to produce reasonable hypotheticals.
- [203] In this regard, the adjudication of the issues before the court will have a profound impact on both the accused and on the liberty interests of other incarcerated individuals. In my view, it is not appropriate to be held hostage to the failings of the hypotheticals. In my opinion, it would assist to examine two cases that could have relevance to the analysis. They are the cases of Terry Kennedy and Richard Sauvé.
- [204] It is important to appreciate, however, that the purpose of these cases is to illuminate the broad range of activities which are captured by first degree murder; as relevant to the first stage of the analysis. In considering the constitutionality of the current regime it is constructive for the court to consider how the impugned provisions impact a broad range of offenders. In my view, these cases serve that role. In one of these cases, the offender was denied faint hope. While in the other, the offender benefited from the pre-existing faint hope regime, but if convicted today would not have access to such relief.

Terry Kennedy

- [205] In 1992, a judge convicted Terry Kennedy of the first degree murder of Margaret Yvonne Rouleau. The decision is indexed as *R. v. Kennedy*, 17 W.C.B. (2d) 408, 1992 CarswellOnt 1913; affirmed in *R v. Kennedy*, 95 O.A.C. 321, 1996 CanLII 3040 (O.N.C.A.).
- [206] Mr. Kennedy, along with his friend and co-accused Richard Joyce, tortured and murdered Mrs. Rouleau in the course of a preplanned gas bar robbery. The gas bar, known as Nozzles, was owned by Mrs. Rouleau. For over a year, Mr. Kennedy had worked as an employee at Nozzles and was therefore familiar with the times and process by which money was placed in an on-site safe.
- [207] In the early morning of May 6, 1991, Mr. Kennedy and Mr. Joyce entered the gas bar. The forensic evidence suggests that Mrs. Rouleau was physically assaulted, bent over the gas bar's safe, and was then tortured while forcibly bent over. Either Mr. Kennedy or Mr. Joyce repeatedly struck and stabbed Mrs. Rouleau's head, neck, and upper shoulder area in an apparent attempt to force her to open the safe. Mrs. Rouleau was ultimately stabbed twice in the neck and died of blood loss. Mrs. Rouleau's sister found her body.
- [208] Prior to the robbery, Mr. Kennedy expressed his intention to rob the gas bar and slit Mrs. Rouleau's throat so that she would not be able to identify him as the perpetrator. He laughed when he made this statement. The court found that the murder was not a collateral accident which occurred accidentally in the course of a robbery. Mrs. Rouleau's murder was pre-planned.
- [209] In 2011, Mr. Kennedy applied for a reduction in his parole eligibility period via the faint hope provisions. During his faint-hope hearing, Mr. Kennedy confessed to wielding the serrated kitchen knife that slit Mrs. Rouleau's throat. A jury denied Mr. Kennedy's request for early parole.

Richard Sauvé

- [210] In 1979, at the age of 27, a jury convicted Richard Sauvé of the first degree murder of William Matiyek. Five other men were also convicted in relation to this murder; one was convicted of first degree murder and four were convicted of second degree murder.
- [211] Mr. Sauvé was convicted by a jury. There are no reasons for the jury's judgment. There are, however, reasons for judgment issued by the Provincial Court judge at the preliminary hearing indexed as *R. v. Sauve*, 55 C.C.C. (2d) 149, 1979 CanLII 2914 (O.N.C.J.). These reasons shed a certain light on the circumstances. I use the circumstances of Mr. Sauvé's offence to form the following hypothetical scenario, on which I will rely for the purposes of my analysis.

- [212] The murder arose from a dispute between biker gang members. The accused men -- who were all members of the Satan's Choice motorcycle gang -- entered a bar, began intimidating patrons, and refused to leave when asked. The men then surrounded Mr. Matiyek, who was a member of a rival motorcycle gang. One of the men shot Mr. Matiyek three times.
- [213] It is undisputed that Mr. Sauvé was involved with the Satan's Choice motorcycle gang at the time of the murder and that he was present at the scene of the crime. Nevertheless, Mr. Sauvé persistently maintained that he neither planned to kill Mr. Matiyek, nor did he fire the gun which killed Mr. Matiyek.
- [214] For the purpose of this reasonable hypothetical, it is assumed that Mr. Sauvé did not fire the gun that killed Mr. Matiyek. It is therefore assumed that Mr. Sauvé was convicted on the basis of either party liability as an aider or abetter under s. 21(1) of the Code; or, of common intention, under s. 21(2) of the Code; or, of conspiracy, which is now contained in s. 465(1) of the Code. I also assume that this liability would be sufficient to support a conviction under the standards of the present-day Code.
- [215] While the hypothetical does not contain the specific detail of the conduct which gave rise to the conviction. It is apparent, on the face of the circumstances, that there were significant aggravating factors.
- [216] The group, including Mr. Sauvé, intimidated patrons in a public place. The group, including Mr. Sauvé, refused to desist and refused to leave the premises. They also swarmed the victim. The circumstances of the killing clearly placed innocent members of the public in harms way.
- [217] In any event, in fact, Mr. Sauvé applied for a parole reduction via the faint hope regime. In accordance with the faint hope regime, a jury ruled that Mr. Sauvé's parole ineligibility period should be reduced.
- [218] After his release, Mr. Sauvé secured employment with the Lifeline Program at the St. Leonard's Society of Canada. He went on to work for St. Leonard's for over 20 years. Through his work, Mr. Sauvé supports inmates as they transition back into the community with the goal of encouraging the societal rehabilitation of accused people and reducing the rates of recidivism. Mr. Sauvé also developed a specialized program that supports gang disaffiliation.
- [219] On multiple occasions, Mr. Sauvé has also appeared before parliamentary and senate committees to discuss the experiences of inmates in Canadian prisons. In 2017, the Correctional Investigator of Canada presented Mr. Sauvé with the Ed McIsaac Human Rights in Corrections Award in recognition of his significant contribution towards advancing the human rights of correctional practices in Canada.

- [220] Mr. Sauvé would have served at least an additional 7.5 years before he would have become eligible for parole.
- [221] Crafting a reasonable hypothetical based on outlying, but actual cases is supported by the Supreme Court of Canada's remarks in *Hills* at paras. 79–81. Additionally, the Supreme Court of Canada said the following:
- [81] While marginal cases may be excluded (*Morrissey*), in *Nur*, the Court affirmed that reported cases can be used because they not only illustrate the range of real-life conduct captured by the offence, they actually "happened" (para. 72). Reported cases, while potentially helpful, should not be used as a licence or straitjacket and courts may modify the facts of a reported case to illustrate reasonably foreseeable scenarios (paras. 62 and 72).
- [222] In my view, these scenarios clearly respect the characteristics of a reasonable hypothetical as described by the Supreme Court of Canada. They are not merely situations which "may reasonably arise", they are circumstances which have already arisen and resulted in convictions of first degree murder. The scenarios, in my opinion, are therefore reasonably foreseeable, reasonable in view of the range of conduct captured by first degree murder, and are neither remote nor far-fetched.

Stage 1: What is a proportionate sentence?

- [223] A fit and proportionate sentence weighs the gravity of the offence with the moral blameworthiness of the offender, while adhering to the fundamental sentencing purposes as articulated in s. 718 of the Code.
- [224] The fundamental purposes of sentencing include denunciation, deterrence, and rehabilitation of offenders. These factors also acknowledge the need to separate offenders from society, when necessary, and promote a sense of responsibility in the offender to acknowledge and repair the harms that have been done.
- [225] The Crown submits that a fit and proportionate sentence for Mr. Kennedy, who committed a planned and deliberate murder is a life sentence, with a 25-year period of parole ineligibility. The Crown also states that a fit and proportionate sentence for Mr. Sauvé is a life sentence with a parole ineligibility period of between 22 and 25 years.
- [226] The assessment of a fit and proportionate sentence for the hypothetical offenders must begin with the irrefutable proposition that first degree murder requires a high level of denunciation and condemnation. The Code recognizes this. The offender is sentenced to life imprisonment. In addition, the offender cannot apply for release on parole until the expiration of 25 years of that life sentence.
- [227] A fundamental and important principle of sentencing is proportionality, such that a sentence for an offender should be similar to sentences imposed on similar offenders, for similar offences, committed in similar circumstances.

- [228] The Supreme Court of Canada in *Hills* makes clear that an assessment of a fit and proportionate sentence must consider both the general principles of sentencing and the principle of proportionality.
- [229] I will begin by considering the general principles of sentencing as laid out in s. 718 of the Code, in light of the aggravating and mitigating circumstances of the reasonable hypothetical offenders.
- [230] The circumstances of Mr. Kennedy's offence are significantly aggravating. The murder was premeditated and was committed in the course of a robbery. Mr. Kennedy also violated a relationship of trust by killing his former boss. The murder itself was violent and involved torturing the victim.
- [231] Similarly, Mr. Sauvé's offence, as previously referenced, occasioned a number of aggravating circumstances. Mr. Sauvé was a member of a gang, and the murder was committed in a public place. Mr. Sauvé was, however, a first-time offender and did not fire the weapon.
- [232] Setting aside the issue of parole ineligibility, a life sentence, is, in my opinion, a fit and proportionate sentence for both Mr. Kennedy and Mr. Sauvé. As explained by the Supreme Court of Canada, the mandatory life sentence was codified by Parliament upon the abolition of the death penalty to ensure that those who committed murder, while no longer being subjected to the death penalty, still receive a severe punishment: *Bissonnette* at paras. 31–32.
- [233] I find, that in accordance with the principles of denunciation and deterrence, it is appropriate for the crime of first degree murder to result in a serious life-long criminal sanction. Given the aggravated nature of the hypothetical offender's crime, it is fit and proportionate for them to receive a life sentence.
- [234] There remains a question, however, concerning what period of parole ineligibility is fit and proportionate for the hypothetical offenders. This is more difficult to answer. As submitted by the Crown, "first-degree murder has always [required] a set period of parole ineligibility for 25 years. Therefore, there is no jurisprudence that exists absent the mandatory sentence to draw comparisons from".
- [235] The Crown says that to determine an appropriate period of parole ineligibility, this court should consider the period of parole ineligibility imposed upon offenders convicted of second-degree murder. This period of parole ineligibility ranges from 10 to 25 years. While I tend to agree with the Crown's position that the lack of comparable jurisprudence presents challenges to assessing the fit and proportionate period of parole ineligibility for first degree murder, I do not find it particularly helpful to compare the offence of first degree murder with the offence of second-degree murder.

- [236] Instead, I turn to the principle of proportionality. In *Hills*, the Supreme Court of Canada described proportionality as "a 'central tenet' of Canada's sentencing regime": at para. 56. The Court went on to indicate that "the amount of punishment an offender receives must be proportionate to the gravity of the offence and the offender's moral blameworthiness": *Hills* at para. 57.
- [237] Of course, in *Bissonnette*, the Supreme Court of Canada considered the constitutionality and proportionality of parole ineligibility periods for first degree murder. In that case, the accused intentionally armed himself, entered a mosque, and killed six people while they prayed. He pled guilty to first degree murder. He was originally sentenced to life, and the trial judge stacked multiple parole ineligibility periods, resulting in a total parole ineligibility period of 40 years.
- [238] On appeal, the Supreme Court of Canada found that s. 745.51 of the Code, which allowed the court to sentence offenders convicted of multiple murders to serve parole ineligibility periods for each murder consecutively, was unconstitutional as contrary to s. 12 of the Charter.
- [239] In light of the decision, the sentence for Mr. Bissonnette was modified to life in prison without the possibility of parole for 25 years. In fact, Mr. Bissonnette is also not eligible to apply for a reduction in his parole ineligibility, via the faint hope regime, both by operation of s. 745.6(2) of the Code, which prohibits individuals convicted of more than one murder from applying to receive faint hope, and because his offence was committed after 2011. The result of *Bissonnette* is that individuals convicted of multiple murders will be sentenced to life without the possibility of parole for 25 years, without an ability to apply for a reduction of their parole ineligibility.
- [240] In my view, and I find, this presents a stark reality in the sentencing regime for first degree murder. There is a significant difference in the circumstances, the gravity of the offence, and the moral culpability of the reasonable hypothetical offenders who committed a single offence, as compared to a mass murderer who commit multiple murders at the same time, and/or serial murderers who commit murder on separate occasions.
- [241] I conclude the principle of proportionality demands that offenders that have victimized one person receive a different sentence than offenders that have victimized multiple people.
- [242] I find that the fit and proportionate sentence for the reasonable hypothetical offenders who each killed one person, is life, without the possibility of parole for 25 years, with the ability to apply for a reduction in their parole ineligibility period after 15 years. This sentence allows for a differentiation from the sentence pronounced upon offenders who murder multiple victims, and is also, in fact, the sentence that they both received. Offenders sentenced in this way will receive a reduction in their parole ineligibility period if, and only if, a reduction is approved by a jury.

- [243] The minimum amount of time an offender sentenced in this way would be incarcerated is 15 years. In my view, this 15 year minimum period of incarceration proportionately accounts for the moral blameworthiness of the accused, while also being a sufficient length to attain the sentencing objectives of denunciation and deterrence. I also find that this length of sentence appropriately balances the sentencing objectives of denunciation and deterrence with the objective of rehabilitation in accordance with s. 718 of the Code.
- [244] The Crown submits that Mr. Sauvé's contributions to society "are not relevant to the question of what a fit and proportionate sentence would have been at the time sentence was imposed as these would not have been known to the sentencing judge". I do not disagree.
- [245] It is of course true that the court does not know at the time of sentencing whether an offender will sincerely pursue rehabilitative efforts. The determination of rehabilitative potential is often a very difficult aspect of sentencing in trial courts. But it is for this very reason that the Supreme Court of Canada signalled in *Bissonnette* that to "ensure respect for the inherent dignity of every individual, s. 12 of the Charter requires that Parliament leave a door open for rehabilitation, even in cases where this objective is of secondary importance": at para. 9.
- [246] Mr. Sauvé's case illustrates the unpredictable human capacity for rehabilitation. At the time of his sentencing, Mr. Sauvé was a member of a violent motorcycle gang. After his incarceration, he committed to rehabilitating himself, and then worked towards assisting other offenders in leaving their gangs and peacefully reintegrating into society.
- [247] At the time of sentencing, neither a judge nor a jury could have predicted this turn of events. The re-evaluation of the parole ineligibility period afforded by the faint hope regime therefore permits a properly instructed jury to reassess whether the 25-year parole ineligibility remains appropriate in light of what has occurred in the intervening 15 years. It also encourages individuals to pursue rehabilitative efforts and rewards individuals who do sincerely rehabilitate themselves.
- [248] The difficulty of persuading a jury that an individual deserves earlier parole ensures that those who do not set themselves on a path of rehabilitation will serve the full duration of their parole ineligibility period.
- [249] The reasonable hypotheticals illustrate that, when operational, the faint hope regime was able to proportionately respond to offenders' rehabilitative efforts in a way that the mandatory 25-year parole ineligibility does not. Mr. Sauvé, who clearly demonstrated that he was rehabilitated was granted clemency by the jury, while Mr. Kennedy, who did not demonstrate the same level of rehabilitation, and who committed a more violent crime, was not.

[250] That being said, Mr. Sauvé was still incarcerated for 17.5 years, which I find is a sufficient time to attain the sentencing objectives of denunciation and deterrence while proportionately punishing the gravity of the offence.

[251] Given the current mandatory minimum sentencing regime contained in s. 745(a) of the Code, the sentencing objectives contained in s. 718 of the Code, and my finding that offenders who commit one murder have a lower moral culpability than those who commit mass murder, I find that a fit and proportionate sentence for the reasonable hypothetical offenders is life without the possibility of parole for 25 years, with the ability to apply for reduction in their parole ineligibility period after 15 years.

Stage 2: Is the mandatory minimum grossly disproportionate?

[252] Given this finding, if the offenders were sentenced today, s. 745(a) would require that the court impose a life sentence, without any possibility of parole for 25 years. This discrepancy creates, at a maximum, a 10 year difference between the fit and proportionate sentence and the sentence imposed by the current regime. In the case of Mr. Sauvé for instance, without the faint hope regime, he would have served an additional 7.5 years of incarceration.

[253] The assessment now requires a determination of whether this discrepancy is grossly disproportionate. Hills notes that three features must be assessed when considering whether a mandatory minimum sentence is grossly disproportionate: "(1) the scope and reach of the offence; (2) the effects of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives": Hills at para. 122.

[254] In some cases, one factor may alone lead to a finding of gross disproportionality, while in other cases a combination of the factors may lead to such a finding: Hilbach at para. 36.

[255] The applicant alleges that all three of the 2011 Amendments render the sentence imposed by s. 745(a) to be grossly disproportionate. I will begin by assessing the 2011 faint hope amendments.

The Impact of the 2011 Faint Hope Amendments on s. 745(a) of the Code

(i) The Scope and Reach of the Offence

[256] The applicant submits that the current sentencing regime for first degree murder imposes a "one-size-fits-all" sentence to a broad range of circumstances both in relation to the offence and the offender.

[257] This is a relevant consideration when assessing the scope and reach of the offence, as noted in Hills at para. 125:

- [125] The case law reveals that a mandatory minimum sentence is more exposed to challenge where it captures disparate conduct of widely varying gravity and degrees of offender culpability (Lloyd, at para. 24; Smith, at p. 1078). Indeed, mandatory minimum sentences for offences "that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable" (Lloyd, at para. 3; see also paras. 24, 27 and 35-36).
- [129] Thus, a court must assess to what extent the offence's mens rea and actus reus capture a range of conduct as well as the degree of variation in the offence's gravity and the offender's culpability.
- [258] The Crown submits that first degree murder applies only to a very narrow class of offenders and to a narrowly defined range of activity. In my view, while first degree murder captures a narrowly defined, and extremely serious harm, the scope and the reach of the offence encompasses a broad range of disparate circumstances, and by implication a broad scope of moral culpability.
- [259] While generally described as planned, deliberate, and committed with subjective foresight of death; first degree murder also encompasses a circumstance where an individual dies in the course of a hijacking, a sexual assault, kidnapping, criminal harassment, or terrorist activity; regardless of whether the death was planned and deliberate. It also includes any situation which results in the death of a peace officer, or a murder which is committed for the benefit of a criminal organization, again, whether the murder was planned and deliberate or not.
- [260] The fact is, the scope and reach of first degree murder has expanded since Luxton. At the time when Luxton was decided, s. 231(6.01) to (6.2) were not part of the Code. Therefore, death occurring in the course of a terrorist activity, for the benefit of a criminal organization, or in the course of criminal harassment would not have been considered first degree murder, unless there was also proof of planning and deliberation.
- [261] In addition to capturing a wide range of conduct, first degree murder captures a broad range of moral culpability. The hypothetical scenarios effectively illuminate this point. Mr. Sauvé was certainly involved in a motorcycle gang and was present when Mr. Matiyek was murdered; however, for the purpose of our reasonable hypothetical, he did not pull the trigger that killed Mr. Matiyek. He then went on to commit himself to rehabilitation. Conversely, Mr. Kennedy planned the murder of his former colleague for financial gain. He tortured Ms. Rouleau, slit her throat, and allowed her to bleed to death.

[262] Following the Supreme Court of Canada's decision in Bissonnette, these men would be subject to the same punishment as mass murderers. Alexander Bissonnette intentionally armed himself, entered a Mosque, and killed six people while they prayed. With respect, these are vastly different circumstances, that, on any reasonable assessment, involve very different levels of moral culpability. Nevertheless, the 2011 faint hope amendments require all three of these offenders to be subject to the same punishment.

[263] In my view, and I so find, that the scope and reach of the offence is wide.

(ii) The Effects of the Penalty on the Offender

[264] Turning to the impact the sentence would have on the offender, the Supreme Court of Canada has instructed that courts should identify the precise harm associated with the punishment, including any "additional period of imprisonment imposed by the mandatory minimum": Hills at para. 134.

[265] The sentence required by s. 745(a) of the Code, following the 2011 faint hope amendments, subjects offenders to up to 10 years of additional incarceration, regardless of the circumstances of the offence, the offenders level of moral culpability, and the rehabilitative steps taken by the accused following incarceration.

[266] Considering the hypothetical offenders, both Mr. Kennedy and Mr. Sauvé were eligible to apply for faint hope, and both did apply. Mr. Kennedy was denied a reduction in his parole ineligibility period, while Mr. Sauvé was permitted to apply for parole 7.5 years before he would have otherwise been eligible.

[267] If Mr. Sauvé had been sentenced after the 2011 faint hope amendments, he would have been required to serve an additional 7.5 years of incarceration. I find that serving this additional period of incarceration, after he had proven himself to be rehabilitated, would have a negative affect on Mr. Sauvé.

[268] I also find that such a sentence would have the negative corollary effect of disincentivizing incarcerated individuals from pursuing rehabilitative efforts. As was explained in Bissonnette at para. 33, the faint hope clause was "added to the Criminal Code in the hope of encouraging the rehabilitation of offenders serving long prison sentences and, as a result, of creating a safer prison environment".

[269] Considering the above, I find the effect of the impugned provision on Mr. Sauvé and broadly on the rehabilitative incentives of other offenders, is severe in this case.

(iii) The Penalty and its Objectives

[270] The third stage of the gross disproportionality assessment requires the court to consider "whether and to what extent the minimum sentence goes beyond what is necessary to achieve Parliament's sentencing objectives relevant to the offence": Hills at para. 138.

[271] The applicant submits that without the ability to apply for a reduction in parole ineligibility, the sentence for first degree murder negates the penal objective of rehabilitation in favour of punishing the accused, and that, as stated in Hills "no sentencing objective should be applied to the exclusion of all others": at para. 54.

[272] The applicant placed evidence before the court tending to show that incarcerated individuals released pursuant to the faint hope regime had extremely low rates of recidivism, thus demonstrating, or at least tending to show, that the faint hope regime successfully encourages rehabilitation. The November 2, 2010, Standing Committee on Justice and Human Rights raises this point:

Marc Lemay: Of those 148 people as of April 25, 2010, has anyone re-offended?

John Giokas: According to the information I have, 13 people have re-offended

Marc Lemay: Thirteen have re-offended.

John Giokas: Nine of them have been granted parole, and two were on what we call day parole.

Marc Lemay: Did any of those individuals re-offend by committing first-degree murder?

John Giokas: No.

Marc Lemay: By committing second-degree murder?

John Giokas: No.

Marc Lemay: By committing manslaughter?

John Giokas: No.

Joe Comartin: Out of the 13, you had 11 that were basically parole violations, minor infractions of their attendance at work or abstinence from alcohol, those kinds of things.

John Giokas: That's my understanding. There were 11 for non-violent offences, breach of condition.

Joe Comartin: On the other two, I understood one was a violent offence involving a robbery and the other one was a theft of some sort.

John Giokas: No, it was an assault with a weapon. There were two violent offences: robbery, and the second one was assault with a weapon. As I said, I don't know what sentences they received for those separate offences. I just know their parole was revoked.

[273] The fact that individuals released by the faint hope regime are less likely to commit subsequent offences is also supported by the Canadian Department of Justice study entitled "An Analysis of the Use of the Faint Hope Clause", which arrived at the following conclusion:

While the number of offenders who breached with a new offence was quite low, the data indicates that five years post-release, the highest recidivism rates were for those who were either not eligible for faint hope, or were eligible but did not apply for faint hope (both at 7%). The lowest recidivism rate was for those offenders released early under the faint hope clause, at 4%.

Overall, the analysis indicates that the faint hope clause is not a free pass for individuals convicted of murder. Slightly more than a third of eligible murderers apply, and of these, only about half are successful. As well, the recidivism data shows that those granted reduced time under faint hope do better in the community than other offenders. Lower recidivism rates from faint hope offenders suggest that decisions to release early are based on fairly accurate assessments of an offenders' risk to reoffend.

[Emphasis added.]

[274] The Crown, in her very able submissions, submits that the penalty and the objectives of the sentence for first degree murder are aligned for serious offences; as Parliament is entitled to emphasize the objective of denunciation and deterrence over the goal of rehabilitation. The Crown also submits the sentence does not completely exclude the objective of rehabilitation, as offenders are still able to apply for parole after serving 25 years of their life sentence.

[275] In my assessment, based on the evidence that was placed before me, I find that allowing offenders to apply for a reduction in their parole ineligibility period after serving 15 years, does not undermine the sentencing objectives of denunciation and deterrence as the sentence pronounced upon the offenders is still sufficiently lengthy to express denunciation and severe condemnation of the conduct which led to a conviction of first degree murder.

[276] Specifically, the Department of Justice study determined that amongst offenders who were convicted of first degree murder, and were eligible to apply for faint hope, the average length of incarceration was 18.4 years. The discussions of the Standing Committee on Justice and Human Rights also indicates that this period is much longer than the period of incarceration in other countries. Specifically, the exchanges reveal that the average period of incarceration for first degree murder in Scotland is 11.2 years, and in Sweden it is 12 years.

[277] There is really little evidence to suggest that increasing the period of incarceration beyond the average of 18.4 years would more significantly deter or denounce first degree murder, which is notable given the remarks in Hills:

[137] In addition, this Court has repeatedly referred to longstanding doubts about whether mandatory minimum sentences, or incarceration writ large, are effective tools of deterrence (Nur, at paras. 113-14; Bissonnette, at para. 47; R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 107; see also Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (1987), at pp. 136-37). Though the certainty of criminal punishment

may produce certain deterrent effects, empirical evidence indicates that mandatory minimum sentences do not deter crime any more than a less harsh, proportionate sentence would (Nur, at para. 114).

[Emphasis added.]

[278] That said, it is also clear that Parliament has a broad discretion to legislate in the pursuit of the Code's sentencing objectives. As stated in Bissonnette:

[85] To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance. Offenders who are by chance able to rehabilitate themselves must have access to a sentence review mechanism after having served a period of incarceration that is sufficiently long to denounce the gravity of their offence. This last point is important, as Parliament has latitude to establish sentences whose severity expresses society's condemnation of the offence committed, and while such sentences may in some circumstances have the effect of dooming offenders to die behind bars, they are not necessarily contrary to s. 12 of the Charter.

[279] Therefore, while the mandatory sentence may go beyond what is necessary to deter and denunciate crime, and while the faint hope regime has proven to be a successful pathway to rehabilitate and reintegrate offenders into society, I find that given the severity of the crime it is within Parliament's discretion to focus on the principles of denunciation and deterrence.

[280] However, in conclusion, I find that the scope and reach of the offence is wide and results in a single sentence being pronounced upon individuals with vastly different levels of moral culpability. I also find that the effect of the 2011 faint hope amendments on the offender is high, as it imposes up to an additional 10 years of incarceration for offenders who have demonstrated real progress in rehabilitation and are deemed safe to return to the community.

[281] Therefore, while I find that the sentence is aimed at valid sentencing objectives, I find that, based on the wide scope of the offence and the high impact on the offender the 2011 faint hope amendments contained in s. 745.01(2) and 745.6(1)(a.1) of the Code result in the sentence required by s. 745(a) being grossly disproportionate for the reasonable hypothetical offenders.

[282] Section 745.01(2) and s. 745.6(1)(a.1) of the Code therefore render the sentence imposed by s. 745(a) of the Code grossly disproportionate in violation of s. 12 of the Charter. I therefore find that in their current form, s. 745.01(2), s. 745.6(1)(a.1), and s. 745(a) of the Code all violate s. 12 of the Charter.

The Impact of the Judicial Screening Clauses and the Procedural Regime on s. 745(a) of the Code

- [283] While counsel for the applicant has argued that both the judicial screening requirements and the procedural regime are grossly disproportionate, the evidentiary record in support of these submissions is insufficient to properly ground this claim.
- [284] The applicant bears the burden of proving that Charter rights have been violated. In my opinion, the applicant has failed to establish a s. 12 violation as it relates to the judicial screening clauses and the procedural regime.
- [285] In assessing whether these provisions are disproportionate, the court requires evidence as to whether the impugned provisions create a discrepancy between the fit and proportionate sentence and the sentence imposed by the current regime. While the 2011 faint hope amendments clearly lengthen the sentence for offenders; at face value, the judicial screening clauses and the procedural regime merely create a bureaucratic framework which must be followed by individuals applying for faint hope.
- [286] To create a discrepancy between the fit and proportionate sentence and the sentence imposed by the current mandatory minimum regime, the impugned provisions would likely need to create such a barrier to applying for faint hope that they practically deprive offenders of the ability to even apply; thereby, functionally, having the same impact on the offenders as the 2011 faint hope amendments.
- [287] In my view, the only cogent information put before the court that demonstrates that the judicial screening clause has increased the punishment for offenders simply emerges from the comments of the British Columbia Court of Appeal in the case of *Simmonds*. At para. 89, the court acknowledged that "the introduction of judicial screening increased the punishment for first degree murder albeit modestly and for good cause".
- [288] While the judicial screening threshold may have nominally increased the punishment, there is not a sufficient evidentiary basis to conclude that this outcome is grossly disproportionate as contrary to s. 12.
- [289] Similarly, there is no basis before the court which demonstrates the impact of the procedural regime on offenders; nor explains or develops why this impact is grossly disproportionate.
- [290] The applicant has failed to establish that either the procedural regime or the judicial screening requirements render the sentence imposed by s. 745(a) to be grossly disproportionate. There is simply not sufficient evidence before the court to conclude these provisions violate s. 12 of the Charter.

Section 7: The Framework

The Legal Test

- [291] Section 7 of the Charter states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".
- [292] Assessing whether there has been a breach of s. 7 requires a two-step analysis. The first step considers whether the impugned provisions interfere with the right to life, liberty, or security of the person. If a deprivation is found, the second step determines whether deprivation is contrary to a principle of fundamental justice: *R. v. Beare* [1988] 2 S.C.R. 387, 1988 CanLII 126 (S.C.C.) at para. 28.
- [293] It is uncontroversial that imprisonment interferes with an individual's liberty interest; therefore, I find that the impugned provisions, which form part of a broader mandatory minimum sentencing regime, interfere with the accused's liberty interests. To determine whether the deprivation is contrary to the principle of fundamental justice, the courts must first identify the relevant principle or principles of fundamental justice at play and then determine if the deprivation occurred in accordance with those principles.
- [294] The applicant argues that the 2011 faint hope amendments, the judicial screening clauses, and the procedural regime all violate s. 7 because they are arbitrary, overbroad, and have consequences that are grossly disproportionate. Arbitrariness, overbreadth, and gross disproportionality have long been recognized as principles of fundamental justice that can ground a s. 7 claim.
- [295] Arbitrariness is characterized by circumstances where there is no connection between the effect of the law and the law's purpose. Overbreadth is characterized by circumstances where the effect of the law goes beyond what is necessary to accomplish the law's purpose. Finally, gross disproportionality is characterized by circumstances where the effect of the law and the law's purpose are rationally connected, but the effect of the law is grossly disproportionate when compared to the law's purpose.
- [296] The distinction between these three fundamental principles were clarified by the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 where the court stated:
- [108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve -- the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

[109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

[297] In accordance with the above, to determine whether the impugned provisions are arbitrary, overbroad, or grossly disproportionate, the court first needs to identify the purpose of the impugned provisions so that the purpose can be compared to the law's effect.

What is the purpose of the impugned provisions?

[298] In *R. v. Sharma*, 2022 SCC 39, the Supreme Court of Canada provided guidance about how to correctly identify the purpose of legislation. It really creates a 'code' that I will set out, in part:

[88] The most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence, which can (subject to the caution we offer below) include Hansard, legislative history, government publications and the evolution of the impugned provisions (*Safarzadeh-Markhali*, at para. 31; *Moriarity*, at para. 31; Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 37).

[90] Warnings of imprecision aside, legislative history can be useful in determining legislative purpose (*Safarzadeh-Markhali*, at para. 36). Two stages in the legislative process are of particular assistance (and this is true both of Parliament and of provincial legislatures). Thus, the second reading speech by the Senator who introduces the legislation, as well as the explanations by departmental officials at committee hearings, can also be useful.

[299] The applicant appears to ground his submission on the proposition that the general purpose of the criminal law and of criminal sentencing are set out in the Code and The Corrections and Conditional Release Act, S.C. 1992, c. 20. Specifically, he suggests that these purposes include the principles of sentencing, as discussed above as well as the need to maintain a just, peaceful, and safe society.

[300] He argues that the current sentencing regime for first degree murder imposes a sentence which focuses on the principles of denunciation and deterrence, to the exclusion of the principle of rehabilitation and that the sentence is therefore inconsistent with the overall purpose of criminal law. He also submits that "while the general 'purpose' of s. 745(a) is the protection and safety of the public by the 'Criminal law', its specific relevant purposes here are clearly set out under 'Part XXIII- Sentencing' of the Criminal Code as contained in ss. 718, 718.1 and 718.2".

[301] With respect, these submissions do not really advance the issue.

- [302] The s. 7 analysis requires the court to identify the purpose of the impugned provisions, not the purposes of criminal law or sentencing broadly. When asked about the purpose of the 2011 Amendments, counsel for the applicant submitted that the purpose was the "protection of society".
- [303] Counsel on behalf of the Crown submits that the purpose of the sentence found in s. 745(a) is to "denunciate and deter those who would deliberately take a life and to protect the public". The Crown further submits that the purpose of s. 745.6(1)(a.1) "is to ensure that offenders who commit first degree murder serve a minimum 25 years in prison before they are eligible for parole".
- [304] These propositions, it is stated, are the result of a consideration of the text and context of the provisions, as well as certain statements made by the Minister of Justice during the debate concerning Bill S-6. These statements were as follows:
- The measures proposed in Bill S-6 are in direct response to these concerns and aim to accomplish three goals.
- First is to restore the truth in sentencing by ensuring the sentence pronounced on a convicted murderer in open court is the sentence that is served. Second is to keep those convicted of the most serious crimes in prison for lengthier periods of time commensurate with the gravity of their crimes. Third is to help ensure that the families and loved ones of murder victims are not themselves revictimized at the whim of a convicted murderer who decides to bring forward an application for early parole that forces them to relive the pain of their original loss.
- [305] In accordance with the guidance provided by Sharma, while it is appropriate to take into account these comments in considering the laws purpose, I find neither party has quite captured the characterization of the purpose of the 2011 Amendments.
- [306] Respectfully, the applicant's proposed purpose is somewhat vague and imprecise. It focuses on the purpose of the criminal law and of sentencing broadly, rather than the purpose of the impugned provisions. The Crown's position, in my view, does not entirely capture the context of the legislative enactment.
- [307] Unfortunately, Bill S-6 does not contain a statement of purpose. The guidance contained in Sharma invites a review of the second reading in the House and Senate as a helpful tool in this assessment of a law's purpose. Unfortunately, the parties did not place that material before the court. The court does, however, have the benefit of the Committee debates.
- [308] Considering the text of the legislation, the context of the legislation and the surrounding legislative record, I have identified that Bill S-6 had three purposes:

1. To ensure, by the repeal of faint hope, that persons who commit the most "serious crimes" serve the entirety of the sentence that is pronounced in court, that sentence being life without possibility of applying for parole for 25 years. The goals underlying this purpose are to denounce and deter crime, to protect society, and to ensure "truth in sentencing" that encourages confidence in the administration of justice. This, in my view, is the purpose identified by the Crown.
2. To make it more difficult for offenders who qualify for faint hope to apply for a reduction in their parole ineligibility period, both by modifying the application procedure and by increasing the judicial screening threshold.
3. To reduce the number of faint hope applications, thus minimizing the stress that faint hope applications cause the families and loved ones of the victims of crime. This is specifically accomplished by the procedural regime which instituted a 90-day time window within which an offender must apply and limited the number of applications an offender can make if their original application is rejected.

Section 7: The Application

[309] The applicant alleges that all three of the 2011 Amendments require s. 745(a) to impose a sentence as arbitrary, overbroad, and grossly disproportionate; contrary to s. 7 of the Charter. I begin by assessing the impact that the 2011 faint hope amendments have had on the mandatory minimum sentence required by s. 745(a) of the Code.

The Impact of the 2011 Faint Hope Amendments on s. 745(a) of the Code

- [310] The applicant submits that "if the Court accepts that the sentence in issue is 'inherently grossly disproportionate' under s. 12 then it follows that it must also be 'inherently grossly disproportionate' under s. 7 of the Charter as well where the same test applies when punishment is under consideration".
- [311] In support of this proposition the applicant relies on R. v. Malmo-Levine, 2003 SCC 74. With respect, I do not agree that Malmo-Levine supports this proposition. The following comments of the Supreme Court of Canada provide context to the portions of the judgment cited by the applicant:
- [160] Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the Charter by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

- [161] Accordingly, even if we were persuaded by our colleague Arbour J. that punishment should be considered under s. 7 instead of s. 12, the result would remain the same. In both cases, the constitutional standard is gross disproportionality. In neither case is the standard met.
- [312] In my view, the Supreme Court of Canada does not conclude that where a sentence is found to violate s. 12 of the Charter, the court must automatically find that a violation also exists under s. 7. The Supreme Court of Canada states that where a sentence is not found to violate s. 12, as was the case in *Malmo-Levine*, that it would be somewhat disjointed to then conclude that the same sentence is grossly disproportionate and in violation of s. 7.
- [313] In addition, the Supreme Court of Canada in *Malmo-Levine* disagreed as to whether the sentences of imprisonment could properly be assessed under s. 7 of the Charter. The majority concludes, at para. 158, that "we believe that the issue of punishment should be approached in light of s. 12 of the Charter (which protects against "cruel and unusual treatment or punishment"), and, in that regard, the constitutional standard is one of gross disproportionality".
- [314] The applicant's argument is closer to the position of Justice Arbour, who wrote, in dissent, that:
- [260] The argument of the majority that the availability of imprisonment as a fit sentence in this case is more appropriately approached under s. 12 than under s. 7 is unconvincing. Section 12 of the Charter protects against "cruel and unusual treatment or punishment". Although imprisonment is undoubtedly very serious, it is not inherently "cruel and unusual". Section 7 provides the proper scope for considering whether the availability of imprisonment for an offence and the consequent engagement of the liberty interest in s. 7 are in accordance with the principles of fundamental justice.

It is inappropriate to restrict the consideration of the constitutionality of a person's liberty interest to s. 12. Such a stance is counter to the notion that ss. 8 to 14 of the Charter are specific illustrations of the principles of fundamental justice in s. 7

- [315] That said, while the Supreme Court of Canada concludes that the appropriate approach in considering the constitutionality of criminal sentences is within the framework of s. 12, the Court has not foreclosed the possibility of approaching these issues in the context of s. 7. As the Supreme Court of Canada states in *Nur* at para. 110, they "do not rule out the possibility that despite the detailed sentencing jurisprudence that has developed under s. 12 of the Charter, situations may arise requiring recourse to s. 7 of the Charter".
- [316] In recent years, the Supreme Court of Canada has also declined to consider the constitutionality of sentences under s. 7, where they have already concluded that the sentence violates s. 12 of the Charter: *Nur* at para. 110; *Bissonnette* at para. 26.

[317] Therefore, following the guidance of the Supreme Court of Canada, and given my conclusion that the sentence created by the combined application of s. 745(a) and the 2011 faint hope amendments violate s. 12 of the Charter, I decline to consider whether the 2011 faint hope amendments also violate s. 7 of the Charter.

The Impact of the Judicial Screening Clauses and the Procedural Regime on s. 745(a) of the Code

[318] The applicant argues that the sentence which results in combining s. 745(a) of the Code with either the judicial screening clauses or the procedural regime is arbitrary, overbroad, and grossly disproportionate.

[319] I have found that the evidentiary basis in this matter does not allow for a constructive assessment of whether the judicial screening clauses or the procedural regime violate s. 12 of the Charter.

[320] Against this finding, I must consider whether the judicial screening clauses and the procedural regime have rendered the sentence imposed by s. 745(a) to be unconstitutional as contrary to s. 7 of the Charter.

[321] To analyse the alleged arbitrariness, overbreadth, and gross disproportionality of the criminal sentence, this court is required to consider the purpose of the law when compared to the effects of the law. In my view, the applicant has not put sufficient evidence before the court to allow for a determination of the effects of the impugned provisions.

[322] Without an adequate evidentiary foundation, the court is unable to determine the effect that the judicial screening clauses or the procedural regime have on the offender's liberty interest. Because the court is unable to determine the effect of the law, the court is also unable to compare the effect of the law with the purpose of the law and, accordingly, it cannot determine whether the sentence required by s. 745(a) is arbitrary, overbroad, or grossly disproportionate as contrary to s. 7 of the Charter.

[323] Given the insufficiency of the evidentiary record, this aspect of the application is dismissed.

In Summary

[324] Given the above:

1. I conclude that s. 745.01(2), s. 745.6(1)(a.1), and s. 745(a) of the Code, which eliminate the possibility of seeking early parole eligibility, violate s. 12 of the Charter. This aspect of the application is granted.
2. I decline to decide whether s. 745.01(2), s. 745.6(1)(a.1), and s. 745(a) of the Code violate s. 7 of the Charter. This aspect of the application is dismissed.

3. I find the record before the court does not support a conclusion that s. 745.61 and s. 745.62 of the Code, which requires faint hope applications to be facilitated through judicial screening, render the sentence imposed by s. 745(a) of the Code to be unconstitutional as contrary to either s. 12 or s. 7 of the Charter. This aspect of the application is dismissed.
4. I find the record before the court does not support a conclusion that s. 745.6(2.1) to (2.7) and the words "to (2.6)" in s. 745.6(1) of the Code, which create a procedural regime surrounding faint hope applications, render the sentence imposed by s. 745(a) of the Code to be unconstitutional as contrary to either s. 12 or s. 7 of the Charter. This aspect of the application is dismissed.

[325] I will hear from the Crown, as and when so advised, on whether the Crown will be pursuing reliance on s. 1 of the Charter. The matter of remedy must await a determination in this regard.

"Crossin J."

Appendix A

Sentence of life imprisonment

745 Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

- (a) in respect of a person who has been convicted of high treason or first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
- (b) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
- (b.1) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of an offence under section 4 or 6 of the Crimes Against Humanity and War Crimes Act that had as its basis an intentional killing, whether or not it was planned and deliberate, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
- (c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4; and
- (d) in respect of a person who has been convicted of any other offence, that the person be sentenced to imprisonment for life with normal eligibility for parole.

Information in respect of parole

745.01 (1) Except where subsection 745.6(2) applies, at the time of sentencing under paragraph 745(a), (b) or (c), the judge who presided at the trial of the offender shall state the following, for the record:

The offender has been found guilty of (state offence) and sentenced to imprisonment for life. The offender is not eligible for parole until (state date). However, after serving at least 15 years of the sentence, the offender may apply under section 745.6 of the Criminal Code for a reduction in the number of years of imprisonment without eligibility for parole. If the jury hearing the application reduces the period of parole ineligibility, the offender may then make an application for parole under the Corrections and Conditional Release Act at the end of that reduced period.

Exception

- (2) Subsection (1) does not apply if the offender is convicted of an offence committed on or after the day on which this subsection comes into force.

Persons under eighteen

745.1 The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served

- (a) such period between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;
- (b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and
- (c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

Recommendation by jury

745.2 Subject to section 745.3, where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I

should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.

Recommendation by jury -- multiple murders

745.21 (1) Where a jury finds an accused guilty of murder and that accused has previously been convicted of murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of murder. The law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period without eligibility for parole to be served for this murder consecutively to the period without eligibility for parole imposed for the previous murder? You are not required to make any recommendation, but if you do, your recommendation will be considered by me when I make my determination.

Application

- (2) Subsection (1) applies to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the National Defence Act or the Crimes Against Humanity and War Crimes Act.

Persons under sixteen

745.3 Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.

Ineligibility for parole

745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to

the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

Idem

745.5 At the time of the sentencing under section 745.1 of an offender who is convicted of first degree murder or second degree murder and who was under the age of sixteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court, may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.3, by order, decide the period of imprisonment the offender is to serve that is between five years and seven years without eligibility for parole, as the judge deems fit in the circumstances.

Ineligibility for parole -- multiple murders

745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made pursuant to section 745.21, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.

Reasons

- (2) The judge shall give, either orally or in writing, reasons for the decision to make or not to make an order under subsection (1).

Application

- (3) Subsections (1) and (2) apply to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the National Defence Act or the Crimes Against Humanity and War Crimes Act.

Application for judicial review

745.6 (1) Subject to subsections (2) to (2.6), a person may apply, in writing, to the appropriate Chief Justice in the province in which their conviction took place for a reduction in the number of years of imprisonment without eligibility for parole if the person

- (a) has been convicted of murder or high treason;

- (a.1) committed the murder or high treason before the day on which this paragraph comes into force;
- (b) has been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of their sentence has been served; and
- (c) has served at least fifteen years of their sentence.

Exception -- multiple murderers

- (2) A person who has been convicted of more than one murder may not make an application under subsection (1), whether or not proceedings were commenced in respect of any of the murders before another murder was committed.

Less than 15 years of sentence served

(2.1) A person who is convicted of murder or high treason and who has served less than 15 years of their sentence on the day on which this subsection comes into force may, within 90 days after the day on which they have served 15 years of their sentence, make an application under subsection (1).

At least 15 years of sentence served

(2.2) A person who is convicted of murder or high treason and who has served at least 15 years of their sentence on the day on which this subsection comes into force may make an application under subsection (1) within 90 days after

- (a) the end of five years after the day on which the person was the subject of a determination made under subsection 745.61(4) or a determination or conclusion to which subsection 745.63(8) applies; or
- (b) the day on which this subsection comes into force, if the person has not made an application under subsection (1).

Non-application of subsection (2.2)

(2.3) Subsection (2.2) has no effect on a determination or decision made under subsection 745.61(3) or (5) or 745.63(3), (5) or (6) as it read immediately before the day on which this subsection comes into force. A person in respect of whom a time is set under paragraph 745.61(3)(a) or 745.63(6)(a) as it read immediately before that day may make an application under subsection (1) within 90 days after the end of that time.

Further five-year period if no application made

(2.4) If the person does not make an application in accordance with subsection (2.1), (2.2) or (2.3), as the case may be, they may make an application within 90 days after the day on which they have served a further five years of their sentence following the 90-day period referred to in that subsection, as the case may be.

Subsequent applications

(2.5) A person who makes an application in accordance with subsection (2.1), (2.2) or (2.3), as the case may be, may make another application under subsection (1) within 90 days after

- (a) the end of the time set under paragraph 745.61(3)(a) or 745.63(6)(a), if a time is set under that paragraph; or
- (b) the end of five years after the day on which the person is the subject of a determination made under subsection 745.61(4) or a determination or conclusion to which subsection 745.63(8) applies, if the person is the subject of such a determination or conclusion.

Subsequent applications

(2.6) A person who had made an application under subsection (1) as it read immediately before the day on which this subsection comes into force, whose application was finally disposed of on or after that day and who has then made a subsequent application may make a further application in accordance with subsection (2.5), if either paragraph (2.5)(a) or (b) is applicable.

(2.7) The 90-day time limits for the making of any application referred to in subsections (2.1) to (2.5) may be extended by the appropriate Chief Justice, or his or her designate, to a maximum of 180 days if the person, due to circumstances beyond their control, is unable to make an application within the 90-day time limit.

(2.8) If a person convicted of murder does not make an application under subsection (1) within the maximum time period allowed by this section, the Commissioner of Correctional Service Canada, or his or her designate, shall immediately notify in writing a parent, child, spouse or common-law partner of the victim that the convicted person did not make an application. If it is not possible to notify one of the aforementioned relatives, then the notification shall be given to another relative of the victim. The notification shall specify the next date on which the convicted person will be eligible to make an application under subsection (1).

Definition of appropriate Chief Justice

- (3) For the purposes of this section and sections 745.61 to 745.64, the appropriate Chief Justice is
 - (a) in relation to the Province of Ontario, the Chief Justice of the Ontario Court;
 - (b) in relation to the Province of Quebec, the Chief Justice of the Superior Court;

- (c) in relation to the Province of Newfoundland and Labrador, the Chief Justice of the Supreme Court, Trial Division;
- (d) in relation to the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen's Bench;
- (e) in relation to the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Chief Justice of the Supreme Court; and
- (f) in relation to Yukon, the Northwest Territories and Nunavut, the Chief Justice of the Court of Appeal.

Judicial screening

745.61 (1) On receipt of an application under subsection 745.6(1), the appropriate Chief Justice shall determine, or shall designate a judge of the superior court of criminal jurisdiction to determine, on the basis of the following written material, whether the applicant has shown, on a balance of probabilities, that there is a substantial likelihood that the application will succeed:

- (a) the application;
- (b) any report provided by the Correctional Service of Canada or other correctional authorities; and
- (c) any other written evidence presented to the Chief Justice or judge by the applicant or the Attorney General.

Criteria

- (2) In determining whether the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge shall consider the criteria set out in paragraphs 745.63(1)(a) to (e), with any modifications that the circumstances require.

Decision re new application

- (3) If the Chief Justice or judge determines that the applicant has not shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge may
 - (a) set a time, no earlier than five years after the date of the determination, at or after which the applicant may make another application under subsection 745.6(1); or
 - (b) decide that the applicant may not make another application under that subsection.

If no decision re new application

- (4) If the Chief Justice or judge determines that the applicant has not shown that there is a substantial likelihood that the application will succeed but does not set a time for another application or decide that such an application may not be made, the applicant may make another application no earlier than five years after the date of the determination.

Designation of judge to empanel jury

- (5) If the Chief Justice or judge determines that the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application.

Appeal

745.62 (1) The applicant or the Attorney General may appeal to the Court of Appeal from a determination or a decision made under section 745.61 on any question of law or fact or mixed law and fact.

Documents to be considered

- (2) The appeal shall be determined on the basis of the documents presented to the Chief Justice or judge who made the determination or decision, any reasons for the determination or decision and any other documents that the Court of Appeal requires.

Sections to apply

- (3) Sections 673 to 696 apply, with such modifications as the circumstances require.

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