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

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

by-

Isabel Grant, Crystal Choi and Debra Parkes*

A number of legal developments in recent years suggest that murder sentencing may be becoming increasingly punitive. This study examines two aspects of setting parole ineligibility. First, using cases from three two-year time periods spanning the past three decades, the authors explore whether judicial calculations of parole ineligibility for second degree murder have changed over time. Second, the authors examine changes enacted in 2011 to allow parole ineligibility to be imposed consecutively for those who commit more than one murder. The study finds a national trend towards reduced reliance on the minimum 10-year period of parole ineligibility, a slight increase in parole ineligibility periods over time, and evidence that increasingly harsh parole ineligibility in Ontario may be driving the national trends. With respect to consecutive periods of parole ineligibility, the cases suggest that courts are imposing consecutive parole ineligibility in just less than 45% of the eligible cases with that result being more likely where the victims include strangers. Courts in Ontario and Alberta have thus far shown the highest rates of consecutive parole ineligibility while British Columbia has resisted this trend. The authors conclude that some kind of review mechanism, like a faint hope clause, is necessary to temper the harshness of these increasingly long periods of parole ineligibility and that further study is warranted to explore the preliminary trends identified in this study.

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

Life sentences are remarkable because they result in a form of custodial and, for some, community supervision until the end of a person’s natural life, leaving little room for redemption, rehabilitation, or hope. For these reasons, some legal systems do not permit life sentences. Norway, for example, has abolished life sentences and in Portugal life sentences are unconstitutional. Common law jurisdictions such as the United Kingdom, the United States and Canada are generally harsher than their civil law European counterparts where determinate sentences are utilized even for serious offences such as murder. The United States leads the world in meting out life sentences, in many cases without any possibility for parole.

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3 *Ibid*, at 60.


5 van Zyl Smit & Appleton, *ibid*.

the availability of extreme prison sentences (life without parole or “virtual life” sentences of 50 years or more) has had an inflationary effect on sentencing generally due to the normalization of extreme penalties and a magnitude scaling effect whereby sentences that might otherwise been seen as unreasonably harsh become accepted.7

Canada has no formal sentence of life without parole; the possibility of conditional release has always been an essential feature of the sentencing regime for murder. Therefore, examining sentencing and parole decisions becomes key to understanding the impact of mandatory life sentences. What parameters do judges put on a life sentence and at what point in their sentence do lifers tend to get released? This paper zeroes in on the first set of decisions – namely judicial determination of the number of years a person sentenced to life for murder must serve in prison before being eligible to apply for parole, and leaves examination of parole board decision-making for a later paper. While life sentences and relatively long periods of ineligibility for parole have been normalized in Canadian law, there are also countervailing principles at stake such as human dignity, the salience of hope, and the possibility of rehabilitation, as well as the human and fiscal costs of an aging prison population, that suggest we should subject these sentences to close scrutiny.8

Since the abolition of the death penalty in 1976, Canada has relied on mandatory life sentences with long periods of parole ineligibility to punish persons convicted of murder. The prescribed periods of parole ineligibility have remained consistent since 1976, but a number of

related changes have been made to the legislative regime which have the potential to make the sentences for murder even harsher. In this study, we examine what is actually happening in our courts regarding sentencing for murder to determine whether the sentences imposed by judges have increased over time. In a subsequent paper, we will be examining how long those convicted of murder are incarcerated before being released on parole.\(^9\)

**B. Canada’s Murder Sentencing Regime**

The legal regime for murder sentencing has been detailed elsewhere and we will only briefly review it here.\(^10\) All murder is subject to a mandatory sentence of life imprisonment\(^11\) and the length of the parole ineligibility period attached to that sentence depends on whether the murder is classified as first or second degree. It is important to stress that these periods of parole ineligibility set the date at which an individual is eligible to apply for parole, not the date at which they will be paroled. For first degree murder,\(^12\) there is a mandatory period of 25 years before

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\(^9\) There is no recent publicly available data on this issue. According to the Correctional Service of Canada, in 1976 the average time in custody for capital and non-capital murder was 15.8 years and 14.6 years respectively. By 1999, the estimated average time that someone convicted of first-degree murder spent in prison was 28.4 years. These numbers were calculated using statistical survival analyses to produce an average length of incarceration from the start of the murder sentence to release or death. In other comparable jurisdictions, the number was much lower: 11 years in New Zealand, 14.4 in England and 14.8 in Australia. Mark Nafekh & Jillian Flight, “A Review and Estimate of Time Spent in Prison for Offenders Sentenced for Murder” (Ottawa: Correctional Service of Canada, November 2002) <http://www.csc-scc.gc.ca/005/008/092/b27-eng.pdf> accessed 11 September 2019.


\(^12\) First degree murder includes: planned and deliberate murders; murders for hire; the murders of police officers, prison guards and related officials; murders during the course of crimes such as hijacking, sexual assault, kidnapping and hostage taking; murders in the course of criminal harassment; murders while committing an act of terrorism; murders committed at the direction of a criminal organization; and murders in the course of intimidating a justice system participant (**Criminal Code**, ibid, s 231). The original s 214, enacted in 1976 by the **Criminal Law Amendment Act** (No 2), 1976 (SC 1974-76, c 105), only included only the first four categories and the remaining definitions have been added over time.
parole eligibility. For second degree murder, that period is set by the sentencing judge, after a recommendation from the jury where there is one, at somewhere between 10 and 25 years. If an individual has already been convicted of murder, they will be subjected to life imprisonment with 25 years of parole ineligibility regardless of whether the conviction is for first or second degree murder. Canada has special rules for persons who are sentenced as youth, and for those sentenced as adults who were under the age of 18 at the time of the offence.

In 1976, when this regime was introduced, it was widely considered a harsh but necessary compromise to win support for abolition of the death penalty. Part of the 1976 compromise was the provision, often referred to as “the faint hope clause”, that gave an individual sentenced to more than 15 years of parole ineligibility the right to apply to a court after 15 years to have that period of parole ineligibility reduced. Everyone convicted of first degree murder and all those

13 See Criminal Code, supra note 11, ss 235(1) and 745(a).
14 Second degree murder is defined in s 231(7) of the Criminal Code, supra note 11, as any murder that is not first degree murder. The Crown must prove beyond a reasonable doubt some form of subjective fault before a killing can be labelled as murder. Section 229 of the Criminal Code outlines when culpable homicide is murder. It includes intentional murder, a variant of reckless murder, transferred intent for either reckless or intentional murders where the wrong person is killed by mistake, and a form of unlawful object murder where the accused knows that death is likely to result from engaging in another form of criminal activity.
15 The jury is told that it may make a recommendation but is not required to do so. A jury is not given any instruction on how they should come to a recommendation. A jury recommendation need not be unanimous and multiple jurors can give different recommendations. See Criminal Code, supra note 11, s 745.2. A trial judge is not bound by the jury recommendation but must take it into account (see Rankin, supra note 10 at 533). Although murder is almost always tried by a judge and jury in Canada, there is no equivalent to the jury recommendation where a judge sits alone in exceptional circumstances or where the accused pleads guilty.
16 See Criminal Code, supra note 11, s 235(1) and s 745(c). The judge is instructed by the Criminal Code to consider "the character of the offender, the nature of the offence and the circumstances surrounding it commission," as well as the jury recommendation, if any (s 745.4).
17 Criminal Code, supra note 11, s 745(b).
18 For first degree murder, young persons are sentenced to a maximum of ten years, comprised of conditional supervision in the community following a maximum of six years in custody. For second degree murder, young persons are sentenced to a maximum of seven years, comprised of conditional supervision in the community following a maximum of four years in custody. See Youth Criminal Justice Act, SC 2002, c 1, s 42(2)(q).
19 See Criminal Code, supra note 11, s 745.1. A person who was under 16 will be sentenced to life with parole ineligibility between five and seven years. For a person who was 16 or 17 and sentenced as an adult, parole ineligibility will be 10 years for first degree murder and seven years for second-degree murder.
21 Criminal Code, RSC 1970, c C-35, s 672, as enacted by Criminal Law Amendment Act (No 2), 1976, supra note 12. This was later substantially amended by An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, SC 1996, c 34, and by An Act to amend the Criminal Code and another Act, SC 2011, c 2.
convicted of second degree murder with parole ineligibility greater than 15 years had access to the faint hope clause, which involved a hearing before a jury. Successful use of the faint hope clause did not inevitably lead to parole, but rather provided a mechanism for shortening the period before which an individual was eligible to apply for parole.

As of 2018, a total of 1,740 people serving life sentences were or had been eligible to apply for reconsideration under the faint hope clause. Of the 230 decisions\(^{22}\) made by juries since the first hearing in 1987,\(^{23}\) 174 (76 percent) resulted in a reduced parole ineligibility period. Of those 174 decisions,\(^{24}\) 162 (93 percent) resulted in the person’s release by the Parole Board at a subsequent hearing. This part of the 1976 compromise was important because the new regime required long periods of parole ineligibility and there was concern that the danger those individuals presented to themselves and to others would only increase if there was no incentive whatsoever for good behaviour.\(^{25}\) The compromise remained largely unchanged until the late 1990s at which

\(^{22}\) Corrections and Conditional Release Statistical Overview 2018, supra note 2, at 105. The document uses the somewhat ambiguous language of judicial review “court decisions” which we are assuming refers to decisions of a jury empaneled under subsection 745.61(5) of the Criminal Code to decide whether the parole ineligibility period should be reduced, and not to the screening decision of a single judge under s 746.61(1) as to whether there is a substantial likelihood that the application will succeed before a jury.

\(^{23}\) Existing death sentences were automatically commuted to a life sentence with a parole ineligibility period of 25 years (Criminal Law Amendment Act (No 2), 1976, supra note 12, s 25(1)). For individuals who had their death sentences commuted, the time between their arrest and the date of the commutation counted towards their parole ineligibility period (s 21, enacting s 673(b) of the Criminal Code, supra note 11). This may explain the 1987 date of the first faint hope applications despite only 11 years having passed since the coming into force of the Criminal Law Amendment Act (No 2), 1976.

\(^{24}\) The rate of success of faint hope judicial review applications in Ontario was much lower than it was in the other provinces and territories. Again, we are assuming that “court decisions” refers to proceedings before a jury empaneled under s 745.61(5). In all jurisdictions reporting more than one or two cases, other than Ontario, a substantial majority of the applications resulted in the jury recommending a reduction. For example, in Quebec 88 applications were successful and only eight were unsuccessful, whereas in Ontario more than half of the applications were unsuccessful with 23 applications granted and 29 denied. In Manitoba 11 applications resulted in a reduction and only one did not. In Saskatchewan, 19 were successful and eight unsuccessful, and in British Columbia 23 were successful and six unsuccessful. Nova Scotia and New Brunswick only had two and one applications respectively. There were no applications in Prince Edward Island or the Territories. Corrections and Conditional Release Statistical Overview 2018, supra note 2, at 105. It would be an interesting avenue for future research to investigate what factors might account for this significant disparity.

time Parliament (under both Liberal and Conservative governments) began to slowly narrow the scope of the faint hope clause until its eventual repeal in 2011.26

The Supreme Court of Canada has taken a deferential approach to the constitutionality of murder sentencing. After the proclamation of the Canadian Charter of Rights and Freedoms27 in 1982, the Supreme Court used the Charter to limit the definition of murder. This was not a sentencing issue but rather a question of which killings could be labelled murder. The Court concluded that only killings with some degree of subjective fault with respect to causing death could be labelled murder.28 The Court justified this decision on two grounds: the stigma attached to murder was the primary factor, but the harsh mandatory penalties were also considered.29

However, when the Court was faced with challenges to the harsh sentence for first degree murder, the narrowed definition of murder was used to justify upholding the harsh penalty. If only the most blameworthy killing could be labelled as murder, Parliament was entitled to attach a correspondingly harsh penalty.30 The faint hope clause was relied upon to support the constitutionality of the murder sentencing regime. Twenty-five years of parole ineligibility was

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26 In 1997, An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, supra note 21, s 2 amended the faint hope provisions to require that an applicant satisfy a judge that there was a reasonable prospect that the application would succeed before a jury would be empaneled to review the case. This limit was aimed at preventing families from having to deal with a full hearing when there was almost no chance of success, such as in the case of Clifford Olsen who murdered 11 children in British Columbia and regularly applied for faint hope hearings (see Canada, Parliament, House of Commons Debates, 35th Parl, 2nd Sess, Vol 134, No 67 (16 September 1996) at 4217). These amendments also excluded multiple murders from the faint hope clause.


29 Vaillancourt, ibid at para 28.

30 R v Luxton, [1990] 2 SCR 711, [1990] SCJ 87 (SCC) [Luxton]. Challenges to second degree murder sentencing have also been unsuccessful. See R v Latimer, 2001 SCC 1, where Latimer, who had murdered his disabled daughter, unsuccessfully challenged the minimum sentence for second degree murder as cruel and unusual punishment in his circumstances. See also R v CAM, 1987 CanLII 128 (NS CA), and, more recently, R v Newborn, 2020 ABCA 120 upholding the mandatory minimum sentence for second degree murder.
less likely to be seen as cruel and unusual where there was a mechanism that could mitigate its harshness:

[The existence of the faint hope clause] indicates that even in the cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case when it comes to sentencing.31

The Alberta Court of Appeal went so far as to say that whether the mandatory parole ineligibility for the murder of a police officer was unconstitutional turned on whether 15 years of parole ineligibility was cruel and unusual punishment, rather than the full 25 years, demonstrating the importance of the faint hope clause to the constitutional analysis.32

Several notable changes have been made to this regime since the late 1990s. First, the definition of first degree murder has been expanded over time to include a wider range of murders, thus potentially shifting more people into the first degree category. For example, in 1997, Parliament added murders committed pursuant to criminal harassment to the list of first degree murders.33 The crime of criminal harassment had only been added to the Criminal Code in 1993 in response to the murders of two women within a week in Winnipeg by men on restraining orders to keep away from the victims.34 Murders in the course of terrorist activity were added in 2001, in response to increasing concerns about terrorism after the 9/11 terrorist attacks in the United States.35 Some of the new categories of first degree murder appear to have been enacted in reaction

31 Luxton, ibid at 720.
32 R v Bowen [R v Kay], 1990 ABCA 317 at para 24.
33 An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation), SC 1997, c 16, s 3.
35 Anti-Terrorism Act, SC 2001, c 41, s 9. See also Canada, Parliament, House of Commons Debates, 37th Parl, 1st Sess, Vol 137, No 95 (16 October 2001) at 6164. Murders committed while intimidating witnesses or journalists were added in 2001’s An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts, SC 2001, c 32. Murders committed by using explosives in association with
to particularly notorious events and we have only seen a small number of individuals convicted of first degree murder under the new provisions. In fact, some of the subsections have no reported cases in which a finding of first degree murder was made based on the provision.36

Second, Parliament began to narrow the faint hope clause in 1997 and ultimately prospectively repealed it in 2011.37 Where a murder is committed after December 2, 2011 a person will not have access to a review of parole ineligibility after 15 years. We have not yet begun to see the effect of the removal of the faint hope clause because the provision still applies to those serving a sentence for (single) murders committed before that date. Third, also in 2011, the Criminal Code was amended to allow those who are convicted of more than one murder to be given consecutive periods of parole ineligibility.38 We are now seeing sentences as high as life with 75 years before parole eligibility—a de facto sentence of life without parole.39 Consecutive parole ineligibility is more likely to be used for first degree murders or a combination of first and second degree murders. We have only found three cases where it was imposed for second degree murders only.40

36 See for example Criminal Code, supra note 11 at s 231(6.2). We found two cases: R v Cluney, 2008 SKQB 240, where the Crown failed to prove that Cluney intended to provoke fear in the victim which is required by this section, and R v Winmill, 2008 NBCA 88, where the trial judge’s flawed instructions prevented the jury from finding Winmill guilty of first degree murder, resulting in a retrial. We could find no cases of people sentenced under the terrorism provisions of s 231(6.01).

37 An Act to Amend the Criminal Code and another Act, supra note 21.

38 Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, SC 2011, c 5, s 2.

39 The first case involving a parole ineligibility period of 75 years for three first-degree murders was R v Bourque, 2014 NBQB 237 [Bourque]. Prior to Bourque, a 70-year parole ineligibility period was imposed in R v Baumgartner, 2013 ABQB 761 [Baumgartner], as the result of a joint submission by counsel. It could be said that some individuals sentenced for murder under the pre-2011 regime could have experienced de facto life without parole (due, for example, to their older age at sentencing or to the unlikelihood that that the Parole Board would release some people convicted of multiple murders). However, in our view, the new regime produced qualitatively different sentences by building in these extraordinarily long ineligibility periods, even for very young people.

40 R v Ostamas, 2016 MBQB 136 [Ostamas]; R v Husbands, 2015 CarswellOnt 7676, [2015] OJ No 2674 (ONSC) [Husbands]. Note that the verdict in Husbands was eventually overturned and Husbands was convicted of manslaughter at a subsequent trial (R v Husbands, 2017 ONCA 607; “Christopher Husbands Guilty of 2 Counts of Manslaughter in Eaton Centre Shooting”, CBC News (19 February 2019)
Consecutive parole ineligibility periods have thus far survived Charter scrutiny largely because a judge is never required to impose them; rather the decision is always discretionary. One judge has relied on the Charter to read in the flexibility to reduce the total period of consecutive parole ineligibility on the basis of the totality principle.  

From 2006-2015 the Conservative government charted a more overtly punitive course in criminal justice policy than had its recent Liberal and Conservative predecessors. The 2011 amendments to the Criminal Code making consecutive parole ineligibility periods possible and abolishing the faint hope clause were part of this “punishment agenda,” but the impact of those changes on sentencing outcomes is still largely unknown. Earlier legislative changes in 1996 that highlighted the seriousness of male intimate partner violence against women, and the decision of

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41 In R c Bissonnette, 2019 QCCS 354 [Bissonnette], Bissonnette had pleaded guilty to six counts of first degree murder and six counts of attempted murder. The Court rejected concurrent ineligibility periods but noted that consecutive ineligibility periods for first degree murder could only be imposed in 25-year intervals in light of ss 745(a) and 745.51 of the Criminal Code, such that his ineligibility period would be at least 50 years (at 768). The Court held that the lack of discretion in s 745.51 with regard to the duration of ineligibility violated ss 7 and 12 of the Charter and read in the ability to impose shorter consecutive sentences in accordance with the principles of “proportionality, totality, protection against any gross disproportionality in scope or consequences, and preservation of human dignity” (at 1192). The Court imposed a 40-year parole ineligibility period on this basis. An appeal is currently before the Quebec Court of Appeal (“Quebec Court of Appeal to Hear Alexander Bissonnette Appeal on Monday”, Global News (26 January 2020) <https://globalnews.ca/news/6464597/quebec-court-of-appeal-to-hear-alexandre-bissonnette-appeal/> accessed 8 March 2020). See discussion of Bissonnette in Derek Spencer, “How Multiple Murder Sentencing Provisions May Violate the Charter” (2019) 55 CR (7th) 165. See also R v Husbands, 2015 CarswellOnt 7677, [2015] OJ No 2673 (ONSC); R v Granados-Arana, 2017 ONSC 6785 and R v Millard, 2018 ONSC 1299, where consecutive parole ineligibility has survived Charter challenges.


44 See Criminal Code, supra note 11, s 718.2(a)(ii), as enacted by An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, SC 1995, c 22, s 6 which made the fact that a victim was one's spouse or common-law partner a mandatory aggravating factor.
the Supreme Court of Canada in *R v Shropshire* interpreting the 1976 second degree murder sentencing regime,\(^45\) may also have had an impact on murder sentencing.

**C. Our Study**

In this study, we examine the approach Canadian courts have taken to setting parole ineligibility periods for murder in this legislative regime. First, we examine whether these legislative changes have had any impact on parole ineligibility periods for second degree murder. Because the sentence for first degree murder is fixed at life without parole for 25 years for single murders, one of the few remaining areas of judicial discretion in sentencing for murder is in the setting of the parole ineligibility attached to second degree murder. We wanted to investigate whether the punitive changes made to murder sentencing law (allowing for longer, consecutive parole ineligibility periods and the removal of “faint hope” review) may have had an inflationary effect on the setting of parole ineligibility periods for murder more generally. Second, we consider how often judges are using the consecutive parole ineligibility option for those convicted of multiple murders—effectively meting out life without parole in some cases—and whether these sentences are more common for particular types of murder or in certain jurisdictions.

1. **Methodology**

In the first part of this study, we investigate what has happened since *Shropshire* and since the recent changes that have demonstrated an increasingly harsh approach to sentencing for murder. To examine changes over time, we compiled reported decisions for three two-year time periods over the last three decades. We confined our study to cases involving the sentencing of

adults for second degree murder, thereby excluding all young people including those sentenced as adults under the special provisions in s 745.1 of the Criminal Code. Our three time periods were approximately 15 years apart: 1987-88, 2002-03, and 2017-18. We wanted to have one period that was before the 1995 decision in Shropshire, one before consecutive sentences were introduced, and one after consecutive sentences were introduced, to investigate whether any of these changes were followed by changes in parole ineligibility determinations.

We conducted searches on QuickLaw, Westlaw and CanLII for all reported decisions where the sentence for second degree murder was indicated. We also went through sentencing digests for the selected years. These searches were supplemented by media searches to provide further details on some cases. We included reasons for sentence, appeals from sentence, and also appeals from conviction where the sentence imposed was mentioned on appeal. We recognize that this is an incomplete sample and only provides a snapshot in time of what our courts have been doing. It is possible that some cases did not have reasons for sentence, such as those involving joint recommendations, or that those reasons were not published, particularly in the early time periods. It is also likely that with the introduction of online databases, more cases will be available in the later time period than in the early time period. These time periods are not presented as rigid categories; we also included decisions outside of the time period where the sentence was ultimately changed on appeal during or after the years under study. Where a sentence was altered on appeal, it is that final sentence that is included as the sentence imposed.46

We had a handful of cases involving the sentencing of more than one person. Because sentencing is an individualized process, focusing on the circumstances and blameworthiness of the person before the court, and because

46 We included 22 cases where the murder conviction was ultimately overturned for reasons unrelated to sentence. Because of the limited amount of data available, these cases are nonetheless instructive as to how judges are imposing parole ineligibility.
co-accused often receive different sentences, we treat each person sentenced as a separate case for the purposes of our analysis. We excluded a small number of cases where we were unable to determine the parole ineligibility from the judgment.

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

It is important to note the approach to sentencing taken by courts generally in Canada. Although criminal law, and the sentences and principles prescribed by statute, are governed by federal law, sentencing has developed in a uniquely provincial manner. Appellate courts in each province or territory have determined whether that jurisdiction will, for example, use sentencing ranges or starting points, and how those ranges and starting points should be calculated. Sentencing courts predominantly rely on jurisprudence and direction from their own appellate courts rather than those from other provinces/territories. The Supreme Court of Canada hears only a small number of sentence appeals and, by and large, that Court has shown deference to trial

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48 See R v Friesen, 2020 SCC 9 at para 36 [Friesen].
judges and to the localized conditions in a community with respect to a particular crime. Andrew Reid and David MacAlister suggest that in countries such as Canada, where sentencing processes are largely unstructured and no sentencing guidelines or grids exist, interjurisdictional inconsistencies are more common. Given this framework, we thought it was important to examine provincial/territorial trends both when examining parole ineligibility periods and consecutive parole ineligibility.

In the first part of the paper examining parole ineligibility for second degree murder, we investigate whether there has been a decrease in reliance on the minimum period of parole ineligibility since the decision in Shropshire; whether there has been a corresponding increase at the upper end of the range; and whether the relationship of the person being sentenced to the victim has an impact on the parole ineligibility period. We also examine whether there are significant differences in the results among jurisdictions within Canada.

In the second part of the paper, we turn to the use of consecutive parole ineligibility for multiple murders. We examine whether consecutive parole ineligibility is becoming the norm for those convicted of multiple murders or whether it is only used in exceptional cases; whether consecutive sentences might be more likely to be imposed for particular types of murders; and whether there are differences among jurisdictions in the utilization of consecutive parole ineligibility. We recognize that consecutive parole ineligibility periods are only available for multiple murders that took place after December 2, 2011. Therefore, we simply do not have enough cases yet to talk about trends in any meaningful way. However, these early cases are particularly

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50 Lacasse, ibid at pars 87-104; M. (C.A.), ibid at para 92.
important and worthy of examination because they set the doctrinal foundation on which future sentencing judges will decide whether to impose consecutive parole ineligibility and determine whether or not it becomes the norm in sentencing multiple murders. What brings these two parts of the study together is an inquiry into whether courts have demonstrated an increasing punitiveness towards murder sentencing and an increased reliance on extraordinarily long periods of incarceration for people convicted of murder.

2. **Parole Ineligibility Periods for Second Degree Murder Sentencing**

   i) Background

   It took almost 20 years from the enactment of the 1976 amendments to the Supreme Court of Canada providing guidance on setting the parole ineligibility for second degree murder. Before the Court’s decision in *R v Shropshire*, many judges treated 10 years of parole ineligibility as the norm for sentencing second degree murder and required reasons for raising it above the minimum. A majority of the Court of Appeal for British Columbia Court in *Shropshire* had indicated that it required unusual circumstances to raise parole ineligibility over 10 years and that the deterrent value of the sentence could be fully realized by a 10 year period of parole ineligibility. The majority of the Court of Appeal noted that the purpose of the parole ineligibility period was to prevent the parole board from exercising the very function it was designed to exercise. However, in 1995 the Supreme Court of Canada in *Shropshire* instructed judges that

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52 *Shropshire, supra* note 45.
raising parole ineligibility over 10 years did not require exceptional circumstances. Speaking for a unanimous court, Iacobucci J said,

In my opinion, a more appropriate standard, which would better reflect the intentions of Parliament, can be stated in this manner: as a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744, the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may well be that, in the median number of cases, a period of 10 years might still be awarded.\(^{55}\)

The last sentence of this passage suggests that the Court considered a 10-year parole ineligibility period to be common; it was likely to be ordered “in the median of cases” although Justice Iacobucci’s use of the word median is somewhat ambiguous. However, *Shropshire* gave judges more latitude to lengthen the parole ineligibility period. The Court further held that appellate courts should be hesitant to interfere with decisions made by sentencing judges on parole ineligibility. Leading sentencing scholar Allan Manson raised the concern at the time that these two findings in combination would result in higher periods of parole ineligibility with less scrutiny from appellate courts.\(^{56}\)

ii) Canadian Parole Ineligibility Decisions Across Time

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

**Table 1: Case Sample by Time Period**

\(^{55}\) *Shropshire*, supra note 45 at para 27.

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<tr>
<td>Number of Cases</td>
<td>81 (27.36%)\textsuperscript{57}</td>
<td>85 (28.72%)</td>
<td>130 (43.92%)</td>
<td>296 (100%)</td>
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</tbody>
</table>

We suspect that the increased number of cases for the most recent time period is at least in part a function of improved case reporting and possibly an increased rate of publication of judicial reasons. The homicide rate between 1987-88 and 2017-18 declined overall, despite annual fluctuations.\textsuperscript{58} We note that these rates are for homicide generally and not for second degree murder specifically but there is no reason to believe that the number of second degree murders has increased more than those of other homicides, especially given the narrower definition of murder resulting from the Charter jurisprudence of the Supreme Court of Canada.\textsuperscript{59}

Table 2 presents the average parole ineligibility imposed for each time period under study. We present these numbers for cases involving one murder, cases involving multiple murders\textsuperscript{60} and all 296 cases respectively. Except where consecutive parole ineligibility periods are being imposed (for murders taking place after 2011), someone convicted of more than one murder is likely to be given one global period of parole ineligibility rather than separate periods for each murder to be served concurrently. In other words, the fact that there is more than one murder aggravates the parole ineligibility in a way that makes it impossible to disaggregate the sentence for each murder. We expected that the periods of parole ineligibility for multiple murders would be higher as a

\textsuperscript{57} This group of cases includes \textit{R v Nepoose}, 1988 ABCA 382, which was overturned in \textit{R v Nepoose}, 1992 ABCA 77. The case is now widely regarded as a wrongful conviction: see Malini Vijaykumar, “A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada,” (2018) 51:1 UBC LR 161.


\textsuperscript{59} Martineau, \textit{supra} note 28 at 644-646.

\textsuperscript{60} Multiple murders consisting of only one second degree murder conviction were counted as single murders (i.e. only multiple \textit{second degree} murders were counted as multiple murders).
reflection of the additional gravity of taking more than one life. We therefore calculated separate averages for single and multiple murders.

### Table 2: Average Parole Ineligibility in Years for Single and Multiple Murders

<table>
<thead>
<tr>
<th>Year</th>
<th>Single Murders</th>
<th>Multiple Murders</th>
<th>All Murder</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987-1988</td>
<td>13.25 (76)</td>
<td>15.00 (5)</td>
<td>13.36 (81)</td>
</tr>
<tr>
<td>2002-2003</td>
<td>13.76 (76)</td>
<td>15.56 (9)</td>
<td>13.95 (85)</td>
</tr>
<tr>
<td>2017-2018</td>
<td>14.07 (125)</td>
<td>19.60 (5)</td>
<td>14.28 (130)</td>
</tr>
<tr>
<td>All Years</td>
<td>13.76 (277)</td>
<td>16.47 (19)</td>
<td>13.94 (296)</td>
</tr>
</tbody>
</table>

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

We were also interested in the distribution of sentences across the 15-year range of 10 to 25 years parole ineligibility. These results are presented in Table 3.

### Table 3: Range of Parole Ineligibility Across Time Periods

<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Parole Ineligibility</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

61 Due to rounding, totals may be slightly more or less than 100 percent.
As at November 30, 2020 - Forthcoming in (2020) 52:1 Ottawa Law Review

<table>
<thead>
<tr>
<th></th>
<th>10-year minimum</th>
<th>11-15 years</th>
<th>16-20 years</th>
<th>21-25 years</th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>10-year minimum</strong></td>
<td>35.80% (29)</td>
<td>22.35% (19)</td>
<td>13.08% (17)</td>
<td>21.96% (65)</td>
<td>100.00% (81)</td>
</tr>
<tr>
<td><strong>11-15 years</strong></td>
<td>44.44% (36)</td>
<td>52.94% (45)</td>
<td>60.00% (78)</td>
<td>53.72% (159)</td>
<td>100.00% (85)</td>
</tr>
<tr>
<td><strong>16-20 years</strong></td>
<td>18.52% (15)</td>
<td>22.35% (19)</td>
<td>23.85% (31)</td>
<td>21.96% (65)</td>
<td>100.00% (130)</td>
</tr>
<tr>
<td><strong>21-25 years</strong></td>
<td>1.23% (1)</td>
<td>2.35% (2)</td>
<td>3.08% (4)</td>
<td>2.36% (7)</td>
<td>100.00% (296)</td>
</tr>
</tbody>
</table>

As we expected, the number of cases receiving the minimum parole ineligibility was highest in the first time period, before *Shropshire*. The percentage of cases imposing the minimum periods of parole ineligibility has gone down consistently over time from a high of approximately 36 percent in 1987-88 to a low of approximately 13 percent of cases in 2017-18.

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

**Figure 1: Range of Parole Ineligibility Across Time Periods**

![Figure 1: Range of Parole Ineligibility Across Time Periods](image-url)
We also broke down the parole ineligibility cases by their precise length of parole ineligibility and found that the most common period of parole ineligibility imposed in the first two time periods was 10 years, whereas in the later time period the most frequently imposed period was 15 years. These results are consistent with those of Craig Jones and Micah Rankin, who found that parole ineligibility periods set by the courts tend to cluster around even numbers and multiples of five without any obvious principled reason for such rounding.\textsuperscript{62} These findings are demonstrated in Figure 2.

\textbf{Figure 2: Frequency of Parole Ineligibility Periods Across Time Periods}

We also wanted to examine whether different types of murders were being sentenced differently by courts in terms of the relationship between the perpetrator and victim. We recognize that there is some arbitrariness in categorizing cases where the relationship does not neatly fit into

\textsuperscript{62} Jones & Rankin, \textit{supra} note 47.
one of our categories. Some categories, such as intimate partners or family members, were relatively easy to categorize, while the category of acquaintances had a wider range of relationships within it. The following table demonstrates that there were some differences among how murders involving different types of relationships were being sentenced.

<table>
<thead>
<tr>
<th></th>
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<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Relationship to Victim</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intimate Partners[^65]</td>
<td>11.92 years (15.79%)[^66]</td>
<td>12.63 years (21.05%)</td>
<td>14.53 years (27.20%)</td>
<td>13.53 years (22.74%) n = 62</td>
</tr>
<tr>
<td>Intimate Partners’ Family Members and New Partners</td>
<td>14.17 years (7.79%)</td>
<td>12.50 years (5.26%)</td>
<td>13.80 years (4.00%)</td>
<td>13.60 years (5.42%) n = 15</td>
</tr>
<tr>
<td>Other Family Members[^67]</td>
<td>15.20 years (6.58%)</td>
<td>14.50 years (7.89%)</td>
<td>13.21 years (15.20%)</td>
<td>13.80 years (10.83%) n = 30</td>
</tr>
<tr>
<td>Acquaintances[^68]</td>
<td>12.95 years (28.95%)</td>
<td>14.55 years (26.32%)</td>
<td>13.54 years (22.40%)</td>
<td>13.64 years (25.27%) n = 70</td>
</tr>
</tbody>
</table>

[^63] Where information was unclear in a judgment, we turned to media accounts to glean more information about some of the relationships in question. Where we were unable to clearly identify a relationship, the case was categorized as unknown relationship.

[^64] We excluded multiple murders from this table because it was impossible to disaggregate the parole ineligibility period received for each murder prior to the imposition of consecutive parole ineligibility periods. Nonetheless, of the 19 multiple murders, five involved the killing of intimate partners and their friends, families, or new partners; four involved the killing of family members; two involved the killing of acquaintances; two involved the killing of criminal associates; two involved the killing of strangers; and four were unknown.

[^65] Intimate partners included former intimate partners.

[^66] Percentages are of cases in each time period.

[^67] With two exceptions, this category only included family members of the person being sentenced. These exceptions are *R v CAM*, 1987 CanLII 128, 81 NSR (2d) 57 (NSCA), and *R v Monckton*, 2017 ONCA 450. Both of these cases involved men who killed their partner’s children to whom they were in a parenting role.

[^68] Acquaintances included friends, neighbours, roommates and others who had known the person being sentenced prior to the incident.
Looking first to the overall averages, the murder of a criminal associate and the murder of a stranger received the highest average periods of parole ineligibility of 15 years and 14 years respectively. After excluding unknown relationships, those who killed intimate partners (13.53 years), intimate partners’ family members or new partners (13.60 years), and acquaintances (13.64 years) received the lowest periods of parole ineligibility.

There are also some notable changes over time. For example, there was an increase in parole ineligibility for the murder of intimate partners over the three time periods. During the first two time periods the murder of an intimate partner on average received a parole ineligibility period below the average for that time period whereas during the most recent time period, the murder of an intimate partner received a parole ineligibility period higher than the average. Of the 62 intimate partner cases across all time periods 53, or approximately 85 percent, involved men killing women and an additional three involved men killing men (5 percent). There were five women who killed

<table>
<thead>
<tr>
<th></th>
<th>16.00 years (6.58%)</th>
<th>15.50 years (5.26%)</th>
<th>14.68 years (17.60%)</th>
<th>15.00 years (11.19%)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal Associates</strong>&lt;sup&gt;69&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>n = 31</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Strangers</strong></td>
<td>13.54 years (17.11%)</td>
<td>14.11 years (25.00%)</td>
<td>14.25 years (12.80%)</td>
<td>14.00 years (17.33%)</td>
</tr>
<tr>
<td></td>
<td>n = 48</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Relationship Unknown</strong>&lt;sup&gt;70&lt;/sup&gt;</td>
<td>12.46 years (17.11%)</td>
<td>12.29 years (9.21%)</td>
<td>15.00 years (0.80%)</td>
<td>12.52 years (7.22%)</td>
</tr>
<tr>
<td></td>
<td>n = 21</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>13.25 years (100.00%)</td>
<td>13.76 years (100.00%)</td>
<td>14.07 years (100.00%)</td>
<td>13.76 years (100.00%)</td>
</tr>
<tr>
<td></td>
<td>n = 76</td>
<td>n = 76</td>
<td>n = 125</td>
<td>n = 277</td>
</tr>
</tbody>
</table>

<sup>69</sup> Criminal associates included those who were connected through drug dealing (including as rivals), drug debts, as well as murders within a correctional facility.

<sup>70</sup> The unknown category included cases where the relationship was not indicated in the case report and no further information about the relationship was found in media reports.
male intimate partners (8 percent) and one woman who killed a female partner (2 percent). Our findings are consistent with the suggestion that, historically, the murder of women by their male intimate partners has been treated as less serious than other murders but that this phenomenon may be changing over time.\(^{71}\) Section 718.2(a)(ii) of the *Criminal Code*, enacted in 1995,\(^{72}\) required judges to treat the fact that the victim was a spouse or common law partner (and, as of 2019, an intimate partner) as a mandatory aggravating factor in sentencing.\(^{73}\) We note also that our results are consistent with those of Myrna Dawson who found an intimacy discount in early cases involving intimate homicides but that this discount was not evident in more recent time periods after sentencing reform.\(^{74}\) In our study, the murder of strangers received parole ineligibility periods higher than the average during all three time periods.

We also examined whether sentencing patterns differed depending on the gender of the victim. Roughly 60 percent of all victims were male for both male and female perpetrators. We found no differences in parole ineligibility based on the gender of the victim for either male or female persons convicted of murder. In her review of femicides, Dawson found a “female victim effect.”\(^{75}\) Specifically, she found that cases where women were killed were treated more punitively than cases with male victims at various stages of the criminal process. Dawson also found that men who killed women with whom they shared closer relationships were subject to less punishment

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\(^{72}\) *An Act to amend the Criminal Code (sentencing) and another Act in consequence thereof, supra* note 44. This provision was proclaimed into force on September 3, 1996. Note that this provision was recently amended by Bill C-75 (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25) to apply to current and former intimate partners which are defined as including dating relationships, and has been extended to apply to “a member of the victim or the offender’s family” (ss 3, 293). This provision came into force on September 19, 2019, 90 days after royal assent on June 21, 2019: s 406.

\(^{73}\) Grant, *supra* note 71.


\(^{75}\) Myrna Dawson, “Punishing Femicide: Criminal Justice Responses to the Killing of Women Over Four Decades” (2016) 64:7 Current Sociology 996 at 1009.
than men who had more distant relationships with female victims, but that there had been changes over time in how the courts responded to femicide.\textsuperscript{76} Our results in the early time period, in particular, showed that men killing intimate partners were being sentenced less harshly than men killing other victims, and we saw an increase over time in parole ineligibility for intimate partner murders similar to what Dawson observed for all femicides. Overall, we also found that the murders of strangers were sentenced more harshly than those of intimate partners, family members and acquaintances.\textsuperscript{77}

Given the alarming number of Indigenous people serving life sentences – more than a quarter of all people in federal custody on a life or indeterminate sentence are Indigenous\textsuperscript{78} – we identified all cases during the years in question where the decision indicated that the person being sentenced was Indigenous. We found only 32 decisions out of 296 (11 percent) made explicit reference to the Indigeneity of the person sentenced. However, these numbers were heavily weighted towards the third time period. In 1987-1988, Indigeneity was mentioned in just two of 81 cases (2 percent); in 2002-2003, three of 85 cases (4 percent); and in 2017-2018, the number rose to 27 of 130 cases (21 percent). One possible explanation for this increase is that, in the earliest time period, before the enactment of s 718.2(e) of the \textit{Criminal Code}, Indigeneity was considered irrelevant to setting parole ineligibility. Even after \textit{R v Gladue},\textsuperscript{79} in the second time period, we suspect judges were not recognizing the applicability of \textit{Gladue} to parole ineligibility because murder is our most serious

\begin{itemize}
\item \textit{Ibid.}
\item We are not attempting to make direct comparisons to Dawson's work because she used very different sources and she included all homicides rather than just second degree murders. She also used much more sophisticated statistical tools than the simple analyses provided in this paper. We simply note that our findings are consistent with hers in a number of ways.
\item \textit{Corrections and Conditional Release Statistical Overview 2018, supra} note 2 at 57: "At the end of fiscal year 2017-18, there were a total of 3,672 offenders in custody with a life/indeterminate sentence. Of these… 972 (26.5\%) were Indigenous and 2,700 (73.5\%) were non-Indigenous."
\item \textit{[1999] 1 SCR 688}, 1999 CanLII 679 (SCC).
\end{itemize}
It was not until the decision in *R v Ipeelee*[^81] where the Supreme Court of Canada clarified that s 718.2(e) and *Gladue* apply to all offences, however serious, that judges began to regularly consider Indigeneity in setting parole ineligibility. However, because our numbers are so small, average parole ineligibility periods where the individual was identified as Indigenous (13.43 years in 1987-1988, 18 years in 2002-2003, and 14.33 years in 2017-2018) do not assist us in understanding trends or factors in the sentencing of Indigenous people for murder. Whatever the impact of *Gladue* and *Ipeelee*, we did not see a downward trend overall in setting parole ineligibility for Indigenous persons. In fact, the average parole ineligibility in the final time period was slightly higher for Indigenous persons (14.33 years) than for the overall sample in that time period (14.28 years).

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

**Table 5: Average Parole Ineligibility in Years by Province/Territory**

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>13.00 (5)</td>
<td>14.07 (15)</td>
<td>13.23 (26)</td>
<td>13.48 (46)</td>
</tr>
<tr>
<td>Alberta</td>
<td>13.00 (4)</td>
<td>18.33 (3)</td>
<td>14.00 (2)</td>
<td>15.00 (9)</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>-</td>
<td>10.00 (1)</td>
<td>14.25 (4)</td>
<td>13.40 (5)</td>
</tr>
<tr>
<td>Manitoba</td>
<td>14.40 (5)</td>
<td>10.00 (1)</td>
<td>16.50 (8)</td>
<td>15.29 (14)</td>
</tr>
<tr>
<td>Ontario</td>
<td>12.57 (47)</td>
<td>14.21 (34)</td>
<td>15.29 (51)</td>
<td>14.05 (132)</td>
</tr>
<tr>
<td>Quebec</td>
<td>13.60 (5)</td>
<td>13.25 (20)</td>
<td>12.95 (20)</td>
<td>13.16 (45)</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>17.33 (6)</td>
<td>12.40 (5)</td>
<td>12.83 (6)</td>
<td>13.50 (17)</td>
</tr>
</tbody>
</table>

[^80]: The first appellate decision to confirm that s 718.2(e) and the *Gladue* analysis applies to decisions about parole ineligibility was *R v Jensen*, [2005] OJ 1052, 74 OR (3d) 561 (ONCA).
[^81]: 2012 SCC 13
Nova Scotia | 17.75 (4) | 15.00 (1) | 13.71 (7) | 15.17 (12)
Prince Edward Island | 10.00 (1) | - | - | 10.00 (1)
Newfoundland and Labrador | 14.00 (1) | 17.00 (3) | - | 16.25 (4)
Yukon | 15.00 (1) | - | 11.50 (2) | 12.67 (3)
Northwest Territories | 10.00 (2) | 14.00 (1) | 16.00 (2) | 13.20 (5)
Nunavut | - | 10.00 (1) | 14.50 (2) | 13.00 (3)
Canada | 13.36 (81) | 13.95 (85) | 14.28 (130) | 13.94 (296)

Some jurisdictions had such small numbers that meaningful comparisons are impossible. However, 132 of the total 296 cases (45 percent) were decided in Ontario. Ontario was of particular interest to us because it began with an average parole ineligibility lower than the national average in 1987-88 but by 2017-18, had an average parole ineligibility higher than the national average. Manitoba, New Brunswick, Nova Scotia, and the Northwest Territories also showed considerable changes over time. New Brunswick and Nova Scotia both saw declines in parole ineligibility of over four years between 1987-88 and 2017-18, while the Northwest Territories showed an increase of six years from the first to the last time period and Manitoba saw an increase of just over two years. However, because these jurisdictions had a small number of cases, it is impossible to draw any conclusions about these changes. The finding of an increase in parole ineligibility in Ontario is more robust given the large number of cases. We thus decided to examine the Ontario data more carefully to determine whether Ontario might be an outlier from the rest of the country in setting the parole ineligibility period.

iii) Ontario Parole Ineligibility Decisions Across Time

We found that, unlike the rest of Canada, the average parole ineligibility period meted out in Ontario increased by 2.72 years, an increase of 22 percent, over the three time periods examined.
To explore this further, we sorted the Ontario cases into the ranges used above starting with the minimum parole ineligibility of 10 years and then examining five-year increments.

Table 6: Ranges of Parole Ineligibility Periods Across Time in Ontario

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Parole Ineligibility</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10-year minimum</td>
<td>40.43% (19)</td>
<td>17.65% (6)</td>
<td>3.92% (2)</td>
<td>20.45% (27)</td>
</tr>
<tr>
<td>11-15 years</td>
<td>48.94% (23)</td>
<td>55.88% (19)</td>
<td>52.94% (27)</td>
<td>52.27% (69)</td>
</tr>
<tr>
<td>16-20 years</td>
<td>10.64% (5)</td>
<td>20.59% (7)</td>
<td>39.22% (20)</td>
<td>24.24% (32)</td>
</tr>
<tr>
<td>21-25 years</td>
<td>0.00% (0)</td>
<td>5.88% (2)</td>
<td>3.92% (2)</td>
<td>3.03% (4)</td>
</tr>
<tr>
<td>Total Cases</td>
<td>100.00% (47)</td>
<td>100.00% (34)</td>
<td>100.00% (51)</td>
<td>100.00% (132)</td>
</tr>
</tbody>
</table>

These ranges can also be illustrated visually to demonstrate how striking the changes in Ontario were. In 1987-88, a larger percentage of persons received the 10-year minimum in Ontario (40 percent) than in Canada (35 percent). However, by 2017 only about 4 percent of people in Ontario received the minimum sentence compared to 13 percent nationally.

Figure 3: Ranges of Parole Ineligibility Periods Across Time in Ontario
Ontario has seen a substantial decline in individuals being sentenced to the statutory minimum of 10 years of parole ineligibility. The opposite has happened with respect to sentences between 16 and 20 years of parole ineligibility, which have increased over time. In 1987-88, only 11 percent of cases of cases in Ontario were being sentenced to 16 to 20 years of parole ineligibility, compared to 39 percent of cases in 2017-18. This is different than the nationwide trend shown in Figure 2, above, where the smaller decrease in cases receiving 10 years corresponded with an increase in cases receiving the intermediate 11 to 15 years, rather than 16 to 20 years. The differences are more striking when we compare Ontario in Figure 3 to all Canadian jurisdictions except Ontario in Figure 4.

Figure 4: Ranges of Parole Ineligibility Periods Across Time in all Jurisdictions Except Ontario

In fact, as illustrated by Figure 4, the frequency of a 16 to 20-year parole ineligibility period actually declined in the rest of Canada while periods of 11 to 15 years increased. Given these findings, and the large number of cases in Ontario, it is likely that the Ontario cases are largely responsible for the small increase in the national average parole ineligibility over time as well as
the decline in the imposition of the minimum 10 years of parole ineligibility. There is no indication that any other Canadian jurisdictions are seeing a similar increase except with very small sample sizes.

In an attempt to understand the Ontario increase, we examined whether there was a difference in parole ineligibility based on the relationship between the person being sentenced and the victim. In other words, were particular murders being sentenced more harshly and occurring more often in Ontario? We found an increase in parole ineligibility for almost every relationship category examined over the three time periods.

Table 7: Average Parole Ineligibility Across Time Periods and Relationship between Victims and Person Sentenced in Ontario—Multiple Murders Excluded

<table>
<thead>
<tr>
<th></th>
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<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Intimate Partners</td>
<td>12.00 years (20.00%)</td>
<td>12.14 years (22.58%)</td>
<td>15.47 years (30.00%)</td>
<td>13.71 years (24.60%)</td>
<td></td>
</tr>
<tr>
<td>Intimate Partners’ Family Members and Partners</td>
<td>13.00 years (6.67%)</td>
<td>12.00 years (3.23%)</td>
<td>14.00 years (2.00%)</td>
<td>13.00 years (3.97%)</td>
<td></td>
</tr>
<tr>
<td>Other Family Members</td>
<td>13.33 years (6.67%)</td>
<td>16.33 years (9.68%)</td>
<td>15.00 years (12.00%)</td>
<td>14.92 years (9.52%)</td>
<td></td>
</tr>
<tr>
<td>Acquaintances</td>
<td>12.23 years (28.89%)</td>
<td>12.75 years (25.81%)</td>
<td>15.40 years (20.00%)</td>
<td>13.39 years (24.60%)</td>
<td></td>
</tr>
<tr>
<td>Criminal Associates</td>
<td>13.33 years (6.67%)</td>
<td>21.00 years (6.45%)</td>
<td>14.80 years (20.00%)</td>
<td>15.33 years (11.90%)</td>
<td></td>
</tr>
</tbody>
</table>

82 Six cases were excluded from this table because they had multiple victims, to avoid overcounting them. Two cases involved the murder of family members; one case involved the murder of criminal associates; one case involved the murder of strangers; one case involved the murder of an intimate partner and her son; and one case was unknown.
There was an increase in parole ineligibility for every category from 1987-88 to 2017-18. Excluding cases where the relationships were unknown, the largest increases were seen in the cases involving intimate partners, acquaintances, and strangers.

We have several observations about murders involving intimate partners in Ontario. In the first two time periods, the average parole ineligibility for the murder of an intimate partner was lower than the Ontario average overall. However, the intimate partner category showed the largest increase in parole ineligibility over time. The average parole ineligibility period for intimate partner murders increased by almost 3.5 years from 1987-88 to 2017-18, an increase of 29 percent. The average parole ineligibility for killing an intimate partner in Ontario in 2017-18 (15.47 years) is also higher than the national average for these murders during the same time period (14.53 years). This increase in parole ineligibility for intimate partner murders was larger in Ontario cases than in the Canada-wide sample. Of the 31 intimate partner murders over the three time periods in Ontario, 28 (90 percent) involved men killing their female partners while one (3 percent) involved a man killing a male partner. There was one case (3 percent) involving a woman killing a male partner and one (3 percent) involving a woman killing a female partner.

In 1999, the Ontario Court of Appeal set the range for such murders between 12 and 15 years in *R v McKnight*, but this range has drifted up to the point where it now appears to be 12-17 years.
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83 In Ontario, in 2017-18 there were no cases involving an intimate partner murder that received the minimum parole ineligibility of 10 years.

We also examined whether the gender of the victims had an impact on the length of parole ineligibility periods. In Ontario 55 percent of victims killed by men were male (compared to 58 percent for the Canada-wide sample). Overall men who killed women in Ontario received slightly longer parole ineligibility (14.63 years) than those who killed male victims (13.76 years) but the difference was less than one year.

iv) Understanding the Numbers

Looking at the national data, we have seen only small increases in average parole ineligibility periods over the three time periods under study. The most notable trend nationally is the decrease in the number of people receiving the minimum of 10 years and the increase in people receiving a sentence in the range of 11-15 years. The direction of the Supreme Court of Canada in Shropshire that “as a general rule, the period of parole ineligibility shall be for 10 years” does not describe what judges were doing in our sample of cases.

However, when examining Ontario specifically, we found more meaningful increases in parole ineligibility over the three time periods. Ontario courts in the early time period were more likely to impose the minimum parole ineligibility than were courts nationally, whereas Ontario courts in the later time period were less likely than the national average to impose 10 years of parole ineligibility. Thus, Ontario witnessed a dramatic decline of almost 37 percent in the share

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83 R v McKnight, 1999 CanLII 3717, 1999 CarswellOnt1079 (ONCA). In R v Wristen, 47 OR (3d) 66, [1999] OJ No 4589 (ONCA), the Ontario Court of Appeal refused to interfere with a 17-year ineligibility period for an intimate partner second degree murder. In R v Czibulka, 2011 ONCA 82, the Court noted that “[i]n the case before us, the trial judge took Wristen to reflect the upper end of the range, and I do not see how he can be faulted for doing so. At trial, both Crown and defence accepted a range of 12 to 17 years” (at 69). In R v French, 2017 ONCA 460, the Court stated that Wristen and Czibulka “allow a range up to 17 years in circumstances where there are no mitigating factors or remorse” (at 31).
of people receiving the minimum parole ineligibility over the three time periods and a corresponding increase of nearly 29 percent in the share of persons being sentenced to periods from 16 to 20 years. While there was a significant increase in parole ineligibility for intimate partner murders, this could not explain all of the increase in Ontario, because when we removed intimate partner murders we still saw an increase in parole ineligibility over time.

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

3. *Sentencing Multiple Murder Since the Introduction of Consecutive Parole Ineligibility*

The statutory sentencing regime for first degree murder remained the same between the 1976 changes and the 2011 introduction of consecutive parole ineligibility. Everyone sentenced for first degree murder was sentenced to life imprisonment with a mandatory 25 years of parole ineligibility. Until 1997, anyone convicted of first degree murder had access to the faint hope
clause but it was eliminated for multiple murders as of January 9, 1997.\footnote{An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, supra note 21. This was proclaimed into force on January 9, 1997.} In 2011, the Conservative government introduced consecutive periods of parole ineligibility such that someone sentenced for more than one murder, committed after that date, could be sentenced to serve periods of parole ineligibility consecutively.\footnote{Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, supra note 38.} The availability of consecutive parole ineligibility for multiple murders applies to both first and second degree murders although this option has been used more often for first degree murders and for a combination of first and second degree murders. Where there is a jury, the jury should be asked for a recommendation as to whether parole ineligibility should be served consecutively.\footnote{Criminal Code, supra note 11, s 745.21. Of the 38 reported multiple murder cases in our sample, jury recommendations were not available in 22 cases due to a guilty plea, a trial before a judge sitting alone, or a failure to instruct the jury on s 745.21. Of the remaining 16 cases, 12 had divided recommendations; two had unanimous recommendations for consecutive parole ineligibility period; one had a jury that unanimously declined to make a recommendation; and one did not mention a jury recommendation.} This change in the law opened up the possibility of parole ineligibility extending significantly beyond the natural life of the person sentenced.

A number of Canadians are now serving effective “whole life” sentences or \textit{de facto} life without parole under these new provisions, including a 24-year-old man who was sentenced to 75 years of parole ineligibility for the murder of three police officers.\footnote{Bourque, supra note 39. In \textit{R v Borutski}, 2017 ONSC 7762 [\textit{Borutski}], Borutski received a 70-year ineligibility period at the age of 60. In \textit{R v Downey}, 2019 ABQB 365 [\textit{Downey}], Downey received a 50-year ineligibility period at the age of 39. In \textit{R v Garland}, 2017 ABQB 198 [\textit{Garland}], Garland received a 75-year ineligibility period at the age of 57. His appeal from conviction was heard and dismissed in \textit{R v Garland}, 2019 ABCA 479. His sentence is currently under appeal. In \textit{Ostamas, supra note 40, Ostamas received a 75-year ineligibility period at the age of 40. In \textit{R v Millard}, 2018 ONSC 1299, 2018 ONSC 7578 [\textit{Millard}], one of the people being sentenced received a 75-year ineligibility period at the age of 33 and the other received a 50-year ineligibility period at the age of 30. In \textit{R v Saretzky}, 2017 ABQB 496 [\textit{Saretzky}], Saretzky received a 75-year ineligibility period at the age of 24. In \textit{R v Zekarias}, 2018 CarswellOnt 22170, [2018] OJ No 6827 (ONSC) [\textit{Zekarias}], Zekarias received a 45-year ineligibility period at the age of 46.} These sentences raise serious human rights issues that have been addressed in a body of international decisions focused on the fundamental requirement that a life sentence include some form of meaningful hope for release.\footnote{E.g., \textit{Vinter and Others v United Kingdom}, [2013] ECHR 786 [\textit{Vinter and Others}].}
Even in the United States, where more than 200,000 people are serving life sentences, many without any prospect of release, there are growing calls to abolish these sentences.\(^8\(^9\)\)

4. Consecutive or Concurrent Parole Ineligibility? The Early Cases

For this part of the study we compiled a database of all persons for whom consecutive parole ineligibility was available for first or second degree murder or some combination thereof.\(^9\)\(^0\) Where more than one person is sentenced for the same multiple murders, we treat these as separate cases.

We found a total of 38 reported cases from December 2, 2011 to August 31, 2020 across Canada, with each case representing one person being sentenced for multiple murders. We also found an additional 16 cases in 14 media reports which clearly stated the length of parole ineligibility imposed.\(^9\)\(^1\) Of the reported cases, consecutive parole ineligibility was imposed in 18 (47 percent) cases\(^9\)\(^2\) and concurrent parole ineligibility in the other 20 (53 percent) cases.\(^9\)\(^3\) In the

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\(^9\)\(^0\) There were nine cases involving consecutive sentences where at least one of the murders was second degree and at least one of the murders was first degree. There were three cases involving consecutive parole ineligibility where the murders were second degree only: *Husbands*, supra note 40; *Ostamas*, supra note 40; *Bailey*, supra note 40.


media reported cases there were five cases of consecutive parole ineligibility (31 percent) and 11 cases of concurrent parole ineligibility (69 percent). Thus out of a total of 54 persons eligible for consecutive parole ineligibility, 23 (43 percent) received consecutive parole ineligibility and 31 (57 percent) did not. Of the 23 cases receiving consecutive parole ineligibility, three involved charges of second degree murder only, nine involved charges of first degree murder only, and eleven involved a combination of both.

We examined the positions of the parties in these cases to determine whether Crown counsel across Canada have consistently sought consecutive parole eligibility or have only done so in certain cases. We assumed that consecutive parole ineligibility would probably not be imposed unless the Crown was requesting it. We had also expected that defence counsel would generally oppose consecutive parole ineligibility. In presenting the position of the parties, we limited our consideration to reported cases because sentencing positions were often unclear in the media reported cases.

**Table 8: Position of Parties in Cases where Consecutive Parole Ineligibility Imposed**

<table>
<thead>
<tr>
<th>Position Taken on Consecutive Parole Ineligibility</th>
<th>Number of Cases (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties agreed to consecutive parole ineligibility</td>
<td>5 (27.78%)</td>
</tr>
<tr>
<td>Defence opposed consecutive parole ineligibility</td>
<td>13 (72.22%)</td>
</tr>
<tr>
<td>Total</td>
<td>18 (100%)</td>
</tr>
</tbody>
</table>

94 Consecutive parole ineligibility was imposed in Bailey, supra note 40; Hay, supra note 91; Kahsai, supra note 91; and O’Hagan and Another, supra note 91. Concurrent parole ineligibility was imposed in Bear and Bear, supra note 91; Eichler, supra note 91; Pasieka, supra note 91; Rogers, supra note 91; Ryan, supra note 91; Steinhauser, supra note 91; Vielle, supra note 91; and Wettlaufer supra note 91.

95 Bailey, supra note 40; Husbands, supra note 40; Ostamas, supra note 40.

96 Bissonnette, supra note 41; Bourque, supra note 39; Downey, supra note 87; Garland, supra note 87; Hay, supra note 91; Kahsai, supra note 91; Millard, supra note 87 (along with his co-accused, Smich); Saretzky, supra note 87.

97 Baumgartner, supra note 39; Borutski, supra note 87; Brass, supra note 92; Clorina, supra note 92; Forman, supra note 92; Granados-Arna, supra note 92; Hudon-Barbeau, supra note 92; O’Hagan and Another, supra note 91; Vuozzo, supra note 92; Zekarias, supra note 87.
We were surprised to see that in four cases defence counsel conceded consecutive parole ineligibility.\(^98\) Most notably, this was the case in *Bourque* and *Ostamas*, both of which involved parole ineligibility periods of 75 years. With respect to cases where consecutive parole ineligibility was not imposed, in half of the cases the Crown had sought consecutive parole ineligibility but the judge declined to impose it.

### Table 9: Position of Parties in Cases Where Concurrent Parole Ineligibility Imposed

<table>
<thead>
<tr>
<th>Position Taken on Consecutive Parole Ineligibility</th>
<th>Number of Cases (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crown sought consecutive parole ineligibility</td>
<td>10 (50%)</td>
</tr>
<tr>
<td>Parties agreed to concurrent parole ineligibility</td>
<td>8 (40%)</td>
</tr>
<tr>
<td>Unknown</td>
<td>2 (10%)(^99)</td>
</tr>
<tr>
<td>Total</td>
<td>20 (100%)</td>
</tr>
</tbody>
</table>

Thus, of the 36 reported cases where we know the position taken by the parties, the Crown sought consecutive parole ineligibility in 28 cases (78 percent). In other words, there were only eight cases (22 percent) where the Crown did not seek consecutive parole ineligibility.\(^100\) Thus these cases suggest the trend is towards Crown counsel seeking consecutive parole ineligibility in multiple murder cases and that seeking this extreme option is not limited to exceptional cases.

\(^{98}\) *Baumgartner*, supra note 39, *Clorina*, supra note 92 and *Ostamas*, supra note 40 were all the result of joint submissions. The defence in *Bourque*, supra note 39 conceded 50 years would be an appropriate parole ineligibility length but did not concede the 75 years ultimately imposed. In *Hay*, supra note 91, a media case, the defence did not contest the consecutive sentence.

\(^{99}\) In *Addison*, supra note 93, after being laid off when the mill he worked at closed, Addison murdered two co-workers and attempted to murder two others. The judge made no mention of consecutive parole ineligibility although he did state that life sentences could not be made consecutive to each other. There was no mention of the Crown submission nor jury recommendation, if any, with respect to consecutive sentences. In *Howe*, supra note 93, Howe murdered two women with whom he had been in intimate relationships. He pleaded guilty and no mention was made of consecutive parole ineligibility.

\(^{100}\) *Bains*, supra note 93; *Kionke*, supra note 93; *McLeod*, supra note 93; *Rushton*, supra note 93; *Salehi*, supra note 93; *R v Simard*, supra note 93.

36
We also examined whether consecutive parole ineligibility was more likely to be imposed for particular kinds of murders. It is difficult to draw direct connections between consecutive parole ineligibility and the relationship to the victim because many of the multiple murders involved victims in different relationships with the perpetrator. For example, a person might murder an intimate partner and a stranger. However, we can say that 66 percent of murders where victims included strangers resulted in consecutive parole ineligibility periods, whereas only 36 percent of murders where victims included intimate partners or those connected to intimate partners (such as a family member or a new partner of a former intimate partner) received consecutive parole ineligibility. While these numbers are too small to form the basis for anything more than exploratory findings, they are consistent with Dawson’s concept of an “intimacy discount.”

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

101 Dawson, supra note 75 at 1010.
102 There was one reported case in which the issue of consecutive parole ineligibility arose in the context of a woman being sentenced (Zerbinos, supra note 93). Zerbinos killed two women (her mother and another incarcerated person while she was awaiting trial for the murder of her mother) and she received concurrent ineligibility periods. Media-reported cases involving women being sentenced included Wettlaufer, supra note 91, and Bear and Bear, supra note 91, which involved one woman and one man being sentenced.
Because of the small number of multiple murder decisions across the country, it is difficult to compare the rates of imposing consecutive parole ineligibility across provinces. Nonetheless it would appear that some preliminary trends can be identified, particularly by comparing provinces with the most reported multiple murder decisions, British Columbia Alberta, and Ontario. Table 10 only includes jurisdictions from which multiple murder cases are available.

**Table 10: Imposition of Consecutive Parole Ineligibility Periods by Jurisdiction**

<table>
<thead>
<tr>
<th>Province</th>
<th>Number of Multiple Murder Cases</th>
<th>Number of Cases Imposing Consecutive Parole Ineligibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>10</td>
<td>1 (10.00%)</td>
</tr>
<tr>
<td>Alberta</td>
<td>13</td>
<td>7 (53.85%)</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>5</td>
<td>2 (40.00%)</td>
</tr>
<tr>
<td>Manitoba</td>
<td>6</td>
<td>2 (33.33%)</td>
</tr>
<tr>
<td>Ontario</td>
<td>14</td>
<td>7 (50.00%)</td>
</tr>
<tr>
<td>Quebec</td>
<td>3</td>
<td>2 (66.67%)</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>1</td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>1</td>
<td>0 (0.00%)</td>
</tr>
<tr>
<td>PEI</td>
<td>1</td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Canada Total</td>
<td>54</td>
<td>23 (42.59%)</td>
</tr>
</tbody>
</table>

British Columbia provides an interesting contrast to Ontario and Alberta. Judges in British Columbia have only imposed consecutive parole ineligibility once in 10 eligible cases, although the trial judge in that case avoided a whole-life sentence by combining consecutive with concurrent

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103 One of these cases was *Husbands*, supra note 40. Husbands shot multiple people in Eaton Centre. After an acquittal, he was convicted of two counts of manslaughter in 2019 and received a life sentence. However, he has been included in this sample since the acquittal did not involve an error in sentencing.
sentences and imposing 35 years of parole ineligibility. By contrast, in Ontario and Alberta, at least half of those convicted of multiple murders received consecutive parole ineligibility.

5. Reconsidering Consecutive Parole Ineligibility

The early case law on consecutive parole ineligibility suggests that, nationally, judges are using this option in approximately 43 percent of the cases eligible for such sentences with notable differences across jurisdictions. British Columbia judges have imposed consecutive parole ineligibility in only one of ten multiple murders, whereas Quebec, Ontario and Alberta judges did so in at least half of the cases where consecutive sentences were available. While the numbers are small, murders related to male intimate partner violence against women were less likely to receive consecutive sentences than those involving the murder of strangers.

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

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104 Forman, supra note 92. Forman was convicted of two first degree murders of his daughters and the second degree murder of his wife. The parole ineligibility for the murders of his daughters were ordered to be served concurrently but consecutive to the minimum 10 years of parole ineligibility imposed for the murder of his wife. Had all of the parole ineligibility been consecutive, the 35-year-old would have been required to serve 60 years before being eligible for parole.

105 This was recognized by some parliamentarians during the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, supra note 38 debates. See Canada, Parliament, House of Commons Debates, 40th Parl, 3rd Sess, Vol 145, No 96 (15 November 2010) at 5959.

The financial costs of long parole ineligibility periods amounting to life without parole are obvious, particularly as those detained age.\textsuperscript{107} However, there are also very substantial human costs of incarcerating people, mostly men, with no realistic hope of ever being released regardless of whether or not they attempt to turn their lives around while incarcerated.\textsuperscript{108} Life sentences with little or no opportunity for parole have been described in the prison effects literature as a “new and distinctive kind of ‘prison pain’.”\textsuperscript{109} People serving lifelong sentences devoid of hope tend to find the deprivations associated with their removal from society to be more painful than the deprivations inherent within the prison.\textsuperscript{110}

The \textit{Charter} challenges to consecutive parole ineligibility to date have failed to engage fully with the harms resulting from a sentence that precludes any possibility of hope for release. Lisa Kerr and Benjamin Berger have argued that there are two different types of analyses required under the cruel and unusual punishment provision of s 12 of the \textit{Charter} depending on whether the case is one challenging the method of the punishment or its severity. Conducting a gross disproportionality analysis as a severity inquiry, in their view, is destined to fail for consecutive parole ineligibility because someone who kills more than one person will always be found to be more morally blameworthy and deserving of a harsher punishment than someone who kills one person. The authors argue, instead, that consecutive parole ineligibility should be examined from a methods perspective:

\textsuperscript{107} Catherine Appleton & Brent Grover, "The Pros and Cons of Life Without Parole" (2007) 47:4 Brit J Crim 597 at 611. See also Spencer, \textit{supra} note 8 at 211-12 and see generally, Adelina Ifene, \textit{Punished for Aging: Vulnerability, Age, and Access to Justice in Canadian Penitentiaries} (Toronto: University of Toronto Press, 2019).

\textsuperscript{108} Leigey & Schartmueller, \textit{supra} note 8.

\textsuperscript{109} Alison Liebling, “Moral Performance, Inhuman and Degrading Treatment and Prison Pain” (2011) 13:5 Punishment & Society 530 at 536.

\textsuperscript{110} See generally, van Zyl Smit & Appleton, \textit{supra} note 4 at Ch 7 “Doing Life”. 

40
Whether such sentences are proportional or not, the gravamen of the s 12 concern about [consecutive parole ineligibility] is that there is something intrinsically abhorrent about consigning a person to die in prison, stripping them of any hope of future liberty.\textsuperscript{111}

Justice Rooke, who imposed the first sentence of consecutive parole ineligibility in Canada, recognized the importance of a ray of hope: “Some prospect for freedom in the future will help to ensure that he does not commit crimes against prison guards or other inmates.”\textsuperscript{112} However, as the European Court of Human Rights, among others, has recognized, the salience of hope is more than a practical consideration that may alleviate some harms of long term imprisonment. That Court held that it is a violation of fundamental human dignity to incarcerate someone without any chance of release.\textsuperscript{113} This principle gives rise to a right to hope for release, not a right to release itself.

In our view, given that all those convicted of murder are subject to a life sentence, there is no public safety or deterrent justification for consecutive parole ineligibility, which removes all hope for release, in some cases for life. Rather, it is a policy that prioritizes punitiveness for punitiveness’ sake.

D. Conclusion and Directions for Further Research

Our study has identified a number of sentencing patterns for murder that warrant further research, both with respect to the parole ineligibility periods attached to second degree murder and consecutive parole ineligibility for multiple murders. First, nationally the average parole ineligibility period increased slightly over time but the increase was small. Nevertheless, we did find a dramatic decrease over time in the number of individuals being sentenced to 10 years of parole ineligibility. The minimum parole ineligibility period of 10 years, which was expected by

\textsuperscript{111} Lisa Kerr & Benjamin Berger “Methods and Severity: the Two Tracks of Section 12” (2020) 94 SCLR (2d) 235 at 246.
\textsuperscript{112} Baumgartner, supra note 39 at para 84.
\textsuperscript{113} Vinter and Others, supra note 88.
the *Shropshire* court to be the norm, has been largely abandoned by sentencing judges in favour of longer periods, especially in Ontario. At least in our sample of cases, the floor for sentencing murder appears to have been raised across the country and especially in Ontario.

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

Finally, while our numbers are small, the option of consecutive parole ineligibility has been taken up by a number of judges, particularly those in Ontario and Alberta, while British Columbia courts have so far largely resisted this option. We worry that once a pattern is established of imposing consecutive parole ineligibility in a particular jurisdiction, it will become difficult for judges to return to concurrent parole ineligibility as a baseline, a starting point that already made Canada’s murder sentencing regime one of the harshest when compared to those of other liberal democratic states. Given that judges in certain jurisdictions have shown more willingness to utilize consecutive parole ineligibility, we suspect that we will see the disparity among jurisdictions increase as judges start to rely on those cases as setting the baseline for concerns about parity. Parity becomes very challenging when one person convicted of murdering three people receives 75 years of parole ineligibility and another is sentenced to 25  

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years. In jurisdictions like Ontario and Alberta where consecutive parole ineligibility has been used at a higher rate, it may become increasingly difficult for a judge to impose concurrent parole ineligibility for multiple murders without creating a perception that the life of some of the victims is being devalued, except perhaps where the age of the person being sentenced renders consecutive parole ineligibility effectively meaningless.\(^\text{116}\)

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

The trending up of parole ineligibility, particularly in Ontario, and the introduction of consecutive parole ineligibility makes some sort of review mechanism, like the faint hope clause, all the more important. At the time the faint hope clause was amended to exclude multiple murders in 1997, multiple murders were being sentenced with the same maximum parole ineligibility as single murders. There was some justification for arguing that multiple murders should be sentenced more severely than single murders. Now that there is no maximum parole ineligibility for multiple murders, which means extraordinarily long periods of parole ineligibility for some individuals, we believe it is important to bring back some mechanism to reassess these cases after a number of years. We strongly support bringing back some sort of “faint hope” mechanism that would be available to all persons convicted of murder including those convicted of multiple

\(^{116}\) In *McArthur*, supra note 93, McArthur was convicted of murdering eight men. The trial judge imposed concurrent parole ineligibility because McArthur was 66 years of age when his sentence began and will be 91 after 25 years of parole ineligibility.
murders.\textsuperscript{117} If it is necessary to distinguish multiple murders, the time required to be served before accessing such a mechanism could be higher for multiple murders than for single murders.

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

At the end of the day, judicial decisions setting parole ineligibility only tell part of the story of the impact of Canada’s murder sentencing regime. The question of how long life-sentenced individuals are actually serving in prison before being released on parole, on average, can only be answered by examining corrections and parole data, some of which is not currently in the public realm. We know, for example, that the rate of withdrawing, postponing, or waiving rights to apply for parole are quite high, particularly for Indigenous people,\textsuperscript{118} and that parole decision-making is highly dependent on whether the applicant has the support of correctional authorities for release.\textsuperscript{119} Further study should be undertaken to identify the impact of a variety of institutional actors and actions on how long people sentenced to life are incarcerated before conditional release. It is only with such data that we can gain a better understanding of the meaning of life in Canada.

\textsuperscript{117} Similarly, in their recent call to abolish life sentences in the United States, Mauer and Nellis recommend that some form of “second look” procedure be instituted in the meantime for those sentenced to life without parole or other long periods of parole ineligibility (Mauer and Nellis, \textit{supra} note 89 at 165).


\textsuperscript{119} Zinger, \textit{supra} note 109.