

# ***R v Bissonnette*: The Weight of Human Dignity**

## **An Overview of the Supreme Court’s Decision to Strike Down Section 745.51 of the *Criminal Code***

On May 27th, 2022, the Supreme Court of Canada (the “SCC” or the “Court”) rendered its judgement in *R v Bissonnette*. The case before the SCC centered on the validity of section 745.51 of the *Criminal Code*. This section allowed for a sentencing judge to stack periods of parole ineligibility for mass murders.<sup>[1]</sup> Under Canadian law, an adult convicted of first-degree murder receives an automatic life sentence with no chance of parole for 25 years.<sup>[2]</sup> When an accused committed multiple murders, the sentencing judge had the power under section 745.51 to impose consecutive periods of parole ineligibility for each murder (in 25-year increments). For instance, Alexandre Bissonnette — the claimant at issue here — murdered six people, so under section 745.51 the sentencing judge could have imposed a life sentence with no chance of parole for up to 150 years.

Mr Bissonnette challenged the constitutionality of this provision on the grounds that it unjustifiably violated his rights under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). The Court agreed unanimously and struck down section 745.51. The aim of this article is to explain how the Court arrived at this conclusion.

### **Section 745.51 Struck Down by Lower Courts**

In an Islamophobic attack on a mosque, Mr Bissonnette murdered six people in 2017. At trial, he pleaded guilty to multiple charges including six counts of first-degree murder.<sup>[3]</sup> The Crown asked the trial judge to apply section 745.51 and impose a life sentence with no chance of parole for 150 years, which would have guaranteed that Mr Bissonnette would die in prison. However, the trial judge found that section 745.51 was unconstitutional in that it violated section 7 (the right to life, liberty, and security of the person) and section 12 (the right to be free from cruel and unusual punishment) of the *Charter*.<sup>[4]</sup> To remedy these violations, the trial judge read the provision so as to give judges discretion in choosing the length of parole ineligibility above 25 years. As a result, the judge was able to impose a period of parole ineligibility of 40 years.<sup>[5]</sup>

On appeal, the Quebec Court of Appeal unanimously agreed with the trial judge that section 745.51 was unconstitutional. However, the Court of Appeal found that judges could not impose *any* excess periods of parole ineligibility.<sup>[6]</sup> As a result, Mr Bissonnette’s sentence became life in prison with no chance for parole for only 25 years. The Crown then appealed to the SCC.

## Section 745.51 Constitutes Cruel and Unusual Punishment

Section 12 of the *Charter* protects a person's right to be free from cruel and unusual treatment or punishment.<sup>[7]</sup> Since the law in question involved sentencing, the Court focused on the punishment aspect of the right. In considering whether this right had been violated, the first question the Court had to answer was accordingly whether consecutive periods of parole ineligibility constituted punishment. The SCC found that it did. Parole ineligibility, the Court said, is a consequence of conviction and impacts the liberty and security of the offender, making it a clear instance of punishment.<sup>[8]</sup>

The Court then stated the importance that the concept of human dignity plays in a section 12 analysis. While human dignity is not itself a constitutional right, the SCC noted that it is a "fundamental value" that guides *Charter* interpretation.<sup>[9]</sup> To reflect this, section 12 has been interpreted as prohibiting two dignity-offending types of punishment:

1. Punishment that is so excessive that it is incompatible with human dignity, i.e. punishment that is grossly disproportionate to what would be "just and appropriate."<sup>[10]</sup>
2. Punishment that is "intrinsically incompatible with human dignity."<sup>[11]</sup>

Such punishment, according to the Court, is cruel and unusual by nature (or "degrading and dehumanizing") and can never be imposed without offending human dignity. Corporal punishment is one such example.<sup>[12]</sup>

In this case, Chief Justice Wagner, writing for the Court, found that section 745.51 constituted the latter type of punishment. As the Court explained, section 745.51 allowed a judge to sentence a person convicted of multiple murders to a prison term that effectively denied them a chance at parole. In other words, a judge could sentence such a person to die in prison. The Court found that such a sentence was, by its very nature, incompatible with human dignity.<sup>[13]</sup> Stripping a person of their autonomy and degrading them by negating their chance to rehabilitate and reintegrate into society was described by the Court as "shak[ing] the very foundations of Canadian criminal law,"<sup>[14]</sup> including the principle of human dignity. "To ensure respect for human dignity," the Court wrote, "*Parliament must leave the door open for rehabilitation*, even in cases where this objective is of minimal importance."<sup>[15]</sup>

The Court did note, however, that rehabilitation did not take precedence over other objectives of sentencing like deterrence and denunciation. Instead, the Chief Justice found that those other objectives were already satisfied with the automatic sentence for first degree murder — life in prison without parole for 25 years.<sup>[16]</sup> Compared to many other democratic states, this is actually a relatively harsh sentence. In Denmark and Finland, for example, the comparable ineligibility period is only 12 years, and in Germany and Switzerland it is 15.<sup>[17]</sup>

## **The Provision Is Not Saved by Judicial Discretion or the Royal Prerogative of Mercy**

Despite section 745.51's detrimental impact on human dignity, the Crown argued that the provision could be saved on the grounds that it gave a sentencing judge discretion on whether to impose consecutive parole ineligibility periods (and since such a decision could be reviewed on appeal). However, the Court found that discretion could not save a law that was, by its nature, cruel and unusual; such punishments must not exist even as a possibility.[\[18\]](#)

The Crown also argued that the Royal Prerogative of Mercy could save the provision since it provided another avenue a prisoner could use to seek release outside of parole. This argument, however, was also rejected by the Court. While the Governor General possesses the power to release an inmate under the prerogative on the advice of cabinet,[\[19\]](#) this power is only used in exceptional cases where there is "substantial injustice or undue hardship."[\[20\]](#) For this reason, the Court found that the prerogative does not count as an "acceptable review process"[\[21\]](#) for most inmates. It does not allow for a realistic chance at parole, the Court said, for an inmate serving a life sentence who would be ineligible for any other parole under section 745.51.[\[22\]](#)

### **Section 1 Not Argued**

When a court has determined that a law infringes upon the *Charter* rights of an individual, the state may be able to justify that infringement under section 1 of the *Charter*, which permits "reasonable" limits on *Charter* rights if they can be "demonstrably justified in a free and democratic society."[\[23\]](#) In this case, though, the Crown chose not to try to justify the impugned provision.[\[24\]](#)

As a result, Chief Justice Wagner, finding that section 745.51 breached section 12 of the *Charter*, struck down the provision effective immediately.[\[25\]](#) This declaration of invalidity was retroactive to the date the impugned provision was enacted, which meant that any inmate who may have been "doomed to die" in prison under section 745.51 is now eligible for parole 25 years after the start of their sentence.[\[26\]](#)

### **Conclusion: No Guarantee of Parole**

As soon as it was handed down, the Supreme Court faced a high degree backlash for this decision, with some federal politicians (including prime ministerial hopefuls) advocating for the use of the notwithstanding clause to revive section 745.51.[\[27\]](#) However, the Court has made it clear that striking down section 745.51 does not mean the murderers it applied to will be walking the streets in 25 years. It simply means that after 25 years they will be eligible for parole, and it will then be up to the parole board to determine if an offender has been rehabilitated to the extent that they can safely reintegrate into society.[\[28\]](#) Even after *Bissonnette*, a murderer who never reaches that stage of rehabilitation will still spend the rest of their lives in a prison cell.

- [1] *Criminal Code*, RSC 1985, c C-46, s 745.51.
- [2] *Ibid*, s 745.
- [3] *R v Bissonnette*, 2022 SCC 23, paras 10-12 [*Bissonnette*].
- [4] *Ibid* at paras 15-17. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].
- [5] *Bissonnette*, *supra* note 3 at paras 18-19.
- [6] *Ibid* at para 20.
- [7] *Charter*, *supra* note 4 at s 12.
- [8] *Bissonnette*, *supra* note 3 at para 58.
- [9] *Ibid* at para 59.
- [10] *Ibid* at paras 60-62.
- [11] *Ibid* at para 60.
- [12] *Ibid* at paras 66-67.
- [13] *Ibid* at para 81.
- [14] *Ibid* at para 84.
- [15] *Ibid* at para 85 [emphasis added].
- [16] *Ibid* at para 89.
- [17] *Ibid* at para 91.
- [18] *Ibid* at para 111.
- [19] *Ibid* at paras 113-114.
- [20] *Ibid* at para 115.
- [21] *Ibid* at para 116.
- [22] *Ibid* at para 118.
- [23] *Charter*, *supra* note 4 at s 1.
- [24] *Bissonnette*, *supra* note 3 at para 121.

[25] *Ibid* at para 122.

[26] *Ibid* at para 137.

[27] Madeleine Cummings, “Alberta murder victim's parents, MP criticize top court's decision on parole ineligibility”, CBC News, June 28, 2022; Aaron Wherry, “The case for making the notwithstanding clause politically awkward again”, CBC News, June 1, 2022.

[28] *Bissonnette*, *supra* note 3 at para 41.