

Life Imprisonment in Canada: Is the “Hope” Lost?

Sébastien Lafrance*

Crown Counsel (Prosecutor), Public Prosecution Service of Canada

Abstract

Life imprisonment has divergent meanings in various countries. With a focus on the issues related to life imprisonment in Canada, more specifically regarding the issue of the ‘hope to be released’ for the individuals serving a life sentence, the author also sheds light on the most recent legislative and jurisprudential developments of life imprisonment in several countries.

Keywords: life imprisonment; life sentence; sentencing; Canada, Vietnam, Portugal, Brazil, Colombia, Mexico, United Kingdom, European Court of Human Rights.

Introduction

Life imprisonment “has divergent meanings in various countries. States impose life sentences for different ranges of offences; and States that release life-sentence prisoners do it in a variety of ways. ... Life imprisonment is of particular importance, as it is often the most severe penal sanction in countries where the death penalty does not apply.”¹ Capital punishment still exists in Vietnam for certain offences², but life imprisonment also exists as a sentence that may be imposed for specific crimes in Vietnam, to bribery for example.³ An author noted that “death penalty is always a controversial issue, [but] life imprisonment often

* Crown Counsel (Prosecutor) at the Public Prosecution Service of Canada in the Competition Law Section. Former part-time professor of law at University of Ottawa, Canada (2010-2013). LL.M. / Law Candidate (Laval University), LL.B. / Law (Université du Québec à Montréal) and B.Sc. / Political Science (University of Montreal). Former clerk for the Honorable Marie Deschamps of the Supreme Court of Canada (2010-2011) and also in-house counsel at the Law Branch of the Supreme Court of Canada (2011-2013). Former clerk for the Honorable Michel Robert, Chief Judge of the Quebec Court of Appeal (2008-2009). Public speaker since 2010 on various legal issues around the world in 20 countries so far, including many times in Vietnam. He published several book chapters and articles in Australia, Canada, France, India, Indonesia, United Kingdom and Vietnam. Hyperpolyglot, e.g. he studied Vietnamese and Chinese Mandarin (University of Toronto); Indonesian (General Consulate for Indonesia in Toronto); Russian (McGill University); Arabic (University of Montreal); German and Spanish (Collège de Maisonneuve), etc. *This work was prepared separately from this author’s employment responsibilities at the Public Prosecution Service of Canada. The views, opinions and conclusions expressed herein are personal to this author and should not be construed as those of the Public Prosecution Service of Canada or the Canadian federal Crown.*

¹ United Nations Office at Vienna Crime Prevention and Criminal Justice Branch, *Life Imprisonment*, United Nations, Vienna, 1994, paras 1 & 2.

² See, e.g., Sébastien Lafrance, ‘Death Penalty in Canada and Its Abolition: The Way to Go for Asian Countries’ in *Death Penalty in Asia: Law and Practice*, International Conference Proceedings, Social Science Publishing House, 2021, 44-54.

³ For example, Tuoi Tre News, ‘Nhận tiền hối lộ lớn ‘chưa từng có’, tuyên y án chung thân ông Nguyễn Bắc Sơn’ [Received an ‘unprecedented’ large bribe, sentenced Nguyen Bac Son to life] (April 27, 2020). Retrieved from: <https://tuoitre.vn/nhan-tien-hoi-lo-lon-chua-tung-co-tuyen-y-an-chung-than-ong-nguyen-bac-son-20200427162124954.htm> [translated from Vietnamese by Sébastien Lafrance].

remains unquestioned.”⁴ Perhaps it remains unquestioned because “[a] *common* response to the abolition of the death penalty is to substitute life imprisonment”⁵, so common, at least from a Canadian perspective and from the perspective of another “thirty-two countries [that] use a system similar to Canada where life imprisonment is imposed alongside a mechanism for release”⁶, that life imprisonment may not seem to offer, at first glance, much interest for the researchers. However, this paper, we hope, will prove this wrong since the issues it raises go well beyond the borders of Canada, and may occur in various jurisdictions because of their level of generality.

The author submits that the evolution that Canada experienced with respect to release periods in the context of life imprisonment makes Canada, among other relevant things, an interesting case study for Vietnam, which has not abolished death penalty yet. Canada is not positioned in any of the extremes regarding this topic, i.e. it does not belong either to the category of countries that still punishes certain offences with death penalty or it is not in the category of countries that abolished both death penalty and life imprisonment, as some countries did. Having abolished death penalty in 1976 and replaced it with mandatory life sentences with specified minimum periods for parole eligibility for accused charged with murder⁷, Canada finds itself somewhat in the middle of these two categories, and it may then represent, as other such countries, an example of a balanced approach between these two categories that could perhaps, in turn, inspire potential legal reforms in Vietnam or, at least, be some food for thought among Vietnamese academics and legislative decision-makers about the topic of life imprisonment.

International Perspectives on Life Imprisonment

It must be noted, however, that the response to the abolition of death penalty, even though there is a ‘common response’ to it, as previously mentioned, is not always the same. For instance, some countries outlawed life imprisonment either in their constitution or it was

⁴ Matthew Derek Spencer, *Hope for Murderers? Lifelong Incarceration in Canada*, LLM thesis, University of Victoria (2016), 73.

⁵ *ibid.* (italics added); see also Hugh Adam Bedau, ‘Imprisonment vs. Death: Does Avoiding Schwarzschild’s Paradox Lead to Sheleff’s Dilemma’ (1989) 54 *Albany Law Review* 481, 481.

⁶ Spencer, *supra* note 4, 77; see also Dirk van Zyl Smit, ‘Life imprisonment: Recent issues in national and international law’ (2006) 29 *International Journal of Law and Psychiatry* 405, 410-411; United Nations Office at Vienna Crime Prevention and Criminal Justice Branch, *supra* note 1, para. 16: “[i]n practice, life imprisonment rarely exists without the eventual possibility of release.”

⁷ United Nations Office at Vienna Crime Prevention and Criminal Justice Branch, *ibid.*, para. 7: in those countries that have abolished capital punishment “a life sentence is imposed automatically for the crime of murder once a conviction has been reached.”

declared unconstitutional by the judiciary⁸, but there seems to be currently in some of these countries some movement towards the inclusion of life imprisonment in their criminal law when it did not exist already.

As examples of countries that outlawed life imprisonment in their constitution, let us have a brief look at Portugal and Brazil. **Portugal** outlawed life imprisonment in 1884, and constitutionalised its ban in Article 30(1) of its constitution.⁹ By way of historical background, the 1976 Portugal constitution was adopted after the end of the Salazar dictatorship following his death in 1970, and after the *Carnation Revolution (Revolução dos Cravos)*, which was a military coup held in Lisbon on April 25, 1974, that eventually resulted in a transition to democracy. **Brazil** also forbids life imprisonment under Article XLVII b) of its constitution¹⁰.

However, **Colombia** that forbade life imprisonment until recently life imprisonment had its Congress adopt a Bill on June 18, 2020 that allowed the amendment of Article 34 of the Colombian constitution in order to render possible life imprisonment for cases of sexual assaults and murders of children and adolescents. The relevant Act came into force recently, on July 6, 2021.¹¹ Other countries also contemplate the potential inclusion of life imprisonment in their criminal law, i.e. Argentina, Chile, Honduras, Mexico and Peru.¹²

That being said, **Mexico**, for instance, does not have the penalty of life imprisonment as such in its laws but “it is one of the few countries in the world that applies it *indirectly*” since “a person can be sentenced to 100 years in prison without any possibility of freedom and these sentences *only differ in terminology with life imprisonment*”.¹³ This seems to defeat the

⁸ For example, Mexico’s Supreme Court of Justice of the Nation, the highest court of the land, ruled that life imprisonment constitutes an ‘unusual and transcendental’ (*inusitada y trascendental*) penalty that is prohibited by the Mexican Constitution: see, e.g., Suprema Corte de Justicia de la Nación, ‘Improcedente la extradición a EU cuando se trate de cadena perpetua: SCJN’ (*Unfair extradition to the US when it comes to life imprisonment: SCJN*), México, D.F., September 2001, No. 135/2001.

⁹ Article 30(1) of the Constitution of the Portuguese Republic [Portugal], 25 April 1976: “Não pode haver penas nem medidas de segurança privativas ou restritivas da liberdade com carácter perpétuo ou de duração ilimitada ou indefinida.” (*There can be no penalties or security measures that deprive or restrict liberty with a perpetual or unlimited duration*) [translated from Portuguese by Sébastien Lafrance].

¹⁰ “não haverá penas ... de caráter perpétuo” (*there will be no penalties ... of a perpetual character*) [translated from Portuguese by Sébastien Lafrance].

¹¹ See, e.g., Diego Camilo Carranza Jimenez (July 7, 2021) ‘Entra en vigor en Colombia la ley de cadena perpetua para violadores y asesinos de niños’ [*The law of life imprisonment for rapists and murders of children enters into force in Colombia*].

¹² BBC News Mundo, ‘Cadena perpetua en América Latina: Los países que la aplican (y por qué Nicaragua se quiere unir a la lista)’ [*Life imprisonment in Latin America: The countries that apply it (and why Nicaragua wants to join the list)*] (November 12, 2020). Retrieved from: <https://www.bbc.com/mundo/noticias-america-latina-54906804> [translated from Spanish by Sébastien Lafrance].

¹³ Andric Núñez Trejo (April 14, 2021) ‘¿Es necesario aplicar la cadena perpetua para terminar con la violencia hacia las niñas y los niños en México?’, Foro jurídico Retrieved from: <https://forojuridico.mx/es-necesario-aplicar-la-cadena-perpetua-para-terminar-con-la-violencia-hacia-las-ninas-y-los-ninos-en-mexico/> [translated from Spanish by Sébastien Lafrance] (*italics added*).

legal maxim *quando aliquid prohibetur ex director, prohibetur et per obliquum*¹⁴ since Mexico's Supreme Court of Justice of the Nation, the highest court of the land, ruled that life imprisonment is prohibited by the constitution.

Rabbat argued that “[t]here are generally two main motives for [outlawing life imprisonment]: First, life imprisonment is considered by these States as constituting a ‘cruel and unusual form of punishment’. Second, the imposition of a life sentence violates the right of the condemned individual to rehabilitation.”¹⁵

Interestingly, the United Nations reported that “[g]enerally, judicial systems establish a minimum period that a life-sentence prisoner must serve before being considered for release”¹⁶, and Canada was, in the past, one of the most severe countries in that regard in the Western world.¹⁷ It must also be noted that “[c]ommon 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.”¹⁸

Life Imprisonment in Canada

Sections 745 to 746.1 of the *Criminal Code* govern sentences of life imprisonment and the procedure for determining the consequent periods of parole ineligibility, but the issues raised in this paper mostly involve the following sections:

Sentence of life imprisonment

745 ... the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

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

(b) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

...

(c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years ...

¹⁴ What cannot be done directly, cannot be done indirectly.

¹⁵ P. Rabbat, ‘*Aut dedere aut judicare*: Constitutional Prohibitions on Extradition and the Statute of Rome’ (2002) 15(1) Quebec Journal of International Law, 195.

¹⁶ United Nations Office at Vienna Crime Prevention and Criminal Justice Branch, *supra* note 1, para. 11.

¹⁷ *R. v. Swietlinski*, [1994] 3 S.C.R. 481, 492.

¹⁸ Isabel Grant, Crystal Choi & Debra Parkes, ‘The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing’ (2020) 52(1) Ottawa L. Rev., 138.

Ineligibility for parole — multiple murders

745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may... decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.

Application for judicial review

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

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

(a.1) committed the murder or high treason before the day on which this paragraph comes into force;

(b) has been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of their sentence has been served; and

(c) has served at least fifteen years of their sentence.

Murder is the most serious crime set out in the *Criminal Code* in Canada¹⁹ to which life imprisonment is imposed as a sentence. However, the sentence that is imposed for such a crime has changed over time in Canada, then it is worth reviewing briefly the relevant four time periods that show this evolution. Between 1867, year that Canada became a country, and 1961, all individuals convicted of murder were sentenced to death. Between 1961 and 1976, murder was broken into designations of capital murder and non-capital murder. Death penalty was mandatory for capital murder, but was commuted to life imprisonment, and life imprisonment with no parole eligibility for a minimum of 10 years was imposed for non-capital murder. Let us note that “parole ineligibility is part of the ‘punishment’”²⁰, and when parole is granted, it merely changes the conditions of the sentence, which remains imprisonment in perpetuity.²¹ As I recalled in a different publication, “Canada abandoned the death penalty in 1976, abolishing the death penalty for all offences.”²² Several attempts were made in Canada to abolish death penalty before then, but they were all unsuccessful.²³ The abolition of death penalty in 1976 entailed the creation of the categories of first- and second-degree murders²⁴. Grant, Choi and Parkes recalled that “[s]ince the abolition of the death penalty in 1976, Canada has relied on mandatory life sentences with long periods of parole ineligibility to punish

¹⁹ *R. v. Martineau*, [1990] 2 S.C.R. 633.

²⁰ *R. v. Shropshire*, [1995] 4 S.C.R. 227, para. 23.

²¹ *Canada (Attorney General) v. Whaling*, [2014] 1 S.C.R. 392, para. 1.

²² See, e.g., Sébastien Lafrance, *supra* note 2, 51.

²³ Spencer, *supra* note 4, 33: “In Canada, M.P. Robert Bickerdike brought forward bills to abolish the death penalty annually from 1914-1917, all of which were defeated. Further bills to abolish the death penalty by William Irvine in 1924 and by Ross Thatcher in 1950, both of which were defeated.”

²⁴ Section 235(1) of the *Criminal Code*, RSC 1985, c. C-46 (hereinafter ‘*Criminal Code*’).

persons convicted of murder.”²⁵ During that period, “the Canadian criminal code provide[d] for a minimum penalty of 10 years of imprisonment for second-degree murder and a minimum of 25 years of imprisonment for first-degree murder before parole can be considered.”²⁶

Overview of Sentences Imposed for Murder Over Time²⁷

Years	Sentence
1867-1891	Death, commutable to life in prison. Those serving life in prison eligible for ticket of leave (1899-1959) and parole ²⁸ (1959-onwards).
1961-1976	Capital murder – death, commutable to life in prison with parole eligibility. Non-capital murder – Life, parole eligibility after 10–20 years.
1976-2011	First degree – Life, parole eligibility after 25 years. Second degree – Life, parole eligibility after 10–25 years. Eligible to apply for reduction after 15 years.
2011-onwards	First degree – Life, parole eligibility after 25 years. In case with multiple victims, up to 25 years per victim.

Faint Hope Clause in Canada

The faint hope clause, the proverbial name for section 745.6 of the *Criminal Code*²⁹, was enacted in 1976 when the death penalty was abolished. It “gave an individual sentenced to more than 15 years of parole ineligibility the right to apply to a court after serving 15 years to have that period of parole ineligibility reduced.”³⁰

²⁵ Grant, Choi & Parkes, *supra* note 18, 139-140.

²⁶ United Nations Office at Vienna Crime Prevention and Criminal Justice Branch, *Life Imprisonment*, United Nations, Vienna, 1994, para. 11; section 745 of the *Criminal Code*; Canada, Legal and Legislative Affairs Division, Legislative Summary of Bill C-36: An Act to amend the Criminal Code (Serious Time for the Most Serious Crime Act), (11 September 2009) (author: Robin MacKay), 2.

²⁷ Information for the table taken from Spencer, *supra* note 4, 25.

²⁸ In 1958, Parliament established a parole system through the *Parole Act*, R.S.C. 1958, c. 58. Parole is not a reduction of the sentence handed down by the court. Rather, it is a change in the conditions of the inmate’s incarceration.

²⁹ Spencer, *supra* note 4, 41.

³⁰ Grant, Choi & Parkes, *supra* note 18, 141.

Nevertheless, *An Act to Amend the Criminal Code and Another Act*³¹ repealed the faint hope clause in 2011 for all offenders who commit a murder on or after December 2nd, 2011. The loss of hope of release has not been recognized by Canadian courts so far to constitute an inhuman and degrading treatment within the meaning of section 12 of the *Canadian Charter of Rights and Freedoms* (hereinafter ‘*Charter*’)^{32,33}

With respect to multiple murders, the Quebec Court of Appeal recalled in *Bissonnette c. R.* that “[u]ntil 2011, the state of the law remained unchanged, and offenders convicted of multiple murders were sentenced to life imprisonment, coupled with periods of ineligibility, all served *concurrently*.”³⁴ This goes in line with the general rule that “all sentences shall be served concurrently unless a sentencing judge directs that a sentence is to be served consecutively or legislation requires that they are to be served consecutively.”³⁵

The murders committed by Alexandre Bissonnette not only very sadly took away the lives of too many innocent people, but it shocked the conscience of many Canadians because it targeted a specific group of people and was a hate crime.³⁶ Bissonnette was 27 years old at the time of the event in 2017. At the Great Mosque of Québec city, Bissonnette fired on the worshippers and killed several of them. He pleaded guilty to 12 counts, including six of first-degree murder. The law would have allowed the sentencing judge to impose a 150-year jail sentence, but he rather imposed a sentence of life imprisonment without the possibility of parole for 40 years, which was later reduced to 25 years on appeal. Of important note, the imprisonment for life without the possibility of parole does not exist in Canada.

Perhaps the possibility of imposing a sentence, for example, of 150 years or, said otherwise, beyond the life expectancy of any human beings could make Canada similar to Mexico, which does *not* have the penalty of life imprisonment as such in its laws, and where, as we previously mentioned, “a person can be sentenced to 100 years in prison without any possibility of freedom and these sentences *only differ in terminology with life imprisonment*”.³⁷

³¹ 2011 S.C. c. 2.

³² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982 c. 11.

³³ *Bissonnette c. R.*, 2020 QCCA 1585, para. 101.

³⁴ *Ibid.*, para. 61 (italics added).

³⁵ Robin MacKay, *supra* note 26, 4.

³⁶ Another example of such atrocities brings us back to December 6, 1989 with the École Polytechnique massacre that was a misogynist terrorist mass shooting in Montreal, Canada, at an engineering school.

³⁷ Andric Núñez Trejo (April 14, 2021). ‘¿Es necesario aplicar la cadena perpetua para terminar con la violencia hacia las niñas y los niños en México?’, Foro jurídico Retrieved from: <https://forojuridico.mx/es-necesario-aplicar-la-cadena-perpetua-para-terminar-con-la-violencia-hacia-las-ninas-y-los-ninos-en-mexico/> [translated from Spanish by Sébastien Lafrance] (italics added).

The *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*³⁸ came into force in 2011 and amended section 745.51 of the *Criminal Code*, which now gives a sentencing judge the discretion to decide that an offender who commit multiple murders receive *consecutive*³⁹ parole ineligibility periods rather than concurrent^{40, 41}. An author remarked that “[a]n offender convicted of ten counts of murder theoretically could receive a sentence of life with no parole eligibility for 250 years”!⁴² because section 745.51 of the *Criminal Code* “does not set a maximum duration for the total mandatory imprisonment that can thus be ordered.”⁴³ Section 745.51 was declared unconstitutional by the Quebec Superior Court in the *Bissonnette* decision. This outcome was confirmed on appeal and the hearing of this matter is currently pending at the Supreme Court of Canada⁴⁴, the highest court of the land.

The Quebec Court of Appeal in *Bissonnette c. R.* identified one of the issues about that as “whether, in and of itself, a sentence of imprisonment for life, without the possibility of parole before a period of 50, 75, 100 or 125 years, or even longer, represents, by its very nature or because it is grossly disproportionate, a degrading and dehumanizing treatment that is intrinsically cruel and unusual within the meaning of section 12 of the *Charter*”.⁴⁵ In 1972, the Ontario Court of Appeal commented about life imprisonment in a different context that “Parliament cannot have contemplated both a physical impossibility and a logical absurdity which tends to bring the law into disrepute”⁴⁶, but it seems as if this is precisely what the Parliament just did there with the possible length of imprisonment for life... that may go well beyond anybody’s lifetime.

This whole idea of no maximum duration for a period of imprisonment was inexistent in Canadian criminal law until 2011.⁴⁷ An author even opined that “[w]hile Canada was in line with the international community in abolishing capital punishment and took the international perspective into account creating the new sentencing structure in 1976, the harsher, more retributive sentences introduced in 2011 now put Canada out of step with the global trend on sentencing.”⁴⁸

³⁸ 2011 S.C. c. 5

³⁹ Consecutive sentences are served one after the other.

⁴⁰ A concurrent sentence means multiple sentences will be served at the same time.

⁴¹ Section 745.51 of the *Criminal Code*.

⁴² Spencer, *supra* note 4, 49.

⁴³ *Bissonnette c. R.*, *supra* note 33, para. 63.

⁴⁴ *Attorney General of Quebec, et al. v. Alexandre Bissonnette*, application for leave to appeal from the judgment of the Court of Appeal of Quebec (Québec), dated November 26, 2020 is granted.

⁴⁵ *Ibid.*, para. 53; see also para. 89.

⁴⁶ *R. v. Sinclair*, 1972 CanLII 1297 (ONCA), 524.

⁴⁷ Spencer, *supra* note 4, 50.

⁴⁸ *Ibid.*, 50.

Delaying parole eligibility could “extinguish any hope of early freedom”⁴⁹, then “Parliament ha[d] provided [with the existence of the faint hope clause before it was repealed in 2011] for some sensitivity to the individual circumstances of each case when it comes to sentencing.”⁵⁰ Hope, wrote Berger, “gives flavour, character, and existential texture to the experience of punishment.”⁵¹ Justice Huot of the Quebec Superior Court even wrote in *R. c. Bissonnette* that “[i]ncarceration without hope of parole is an expression of the law of retaliation (‘an eye for an eye’) and seeks only vengeance. It is tantamount to a death sentence by incarceration.”⁵² Johnson and McGunigall-Smith wrote about death by incarceration:⁵³

Offenders sentenced to death by incarceration suffer a “civil death.” Their freedom - the essential feature of our civil society - has come to a permanent end. These prisoners are physically alive, of course, but they live only in prison. It might be better to say they “exist” in prison, as prison life is but a pale shadow of life in the free world. Their lives are steeped in suffering. The prison is their cemetery, a cell their tomb.

As recalled by the Quebec Court of Appeal in the same matter on appeal, “vengeance has no role to play in a civilized system of sentencing.”⁵⁴

International Decisions on Life Imprisonment and the Hope for Release

As observed by Grant, Choi and Parkes, sentences of life imprisonment “raise serious human rights issues that [also] 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”.⁵⁵

For instance, Lord Justice Laws of the United Kingdom High Court of Justice wrote: “[A] prisoner’s incarceration without hope of release is in many respects in like case to a sentence of death.”⁵⁶

However, on appeal of that decision, the United Kingdom House of Lords disagreed with the lower court’s view:⁵⁷

It is not the case that the abolition of the death penalty *must* have been founded upon the premise that the life of every person has such inalienable value that its forfeiture

⁴⁹ *R. v. Zinck*, [2003] 1 S.C.R. 41, para. 24.

⁵⁰ *R. v. Luxton*, [1990] 2 S.C.R. 711.

⁵¹ Benjamin Berger, ‘Sentencing and the Salience of Pain and Hope’ in Dwight Newman & Malcolm Thorburn, eds, *The Dignity of Law – The Legacy of Justice Louis Lebel* (Markham: LexisNexis Canada, 2015) 337, 353.

⁵² *R. c. Bissonnette*, 2019 QCCS 354, para. 295.

⁵³ Robert Johnson & Sandra McGunigall-Smith, ‘Life Without Parole, America’s Other Death Penalty Notes on Life Under Sentence of Death by Incarceration’ (2008) 88:2 *Prison Journal* 328, 329.

⁵⁴ *Bissonnette c. R.*, *supra* note 33, para. 94; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, para. 80.

⁵⁵ Grant, Choi & Parkes, *supra* note 18, 165-166.

⁵⁶ *R. (Wellington) v. Secretary of State for the Home Department* [2007] EWHC 1109 (Admin), para. 39(iv).

⁵⁷ *R. (Wellington) v. Secretary of State for the Home Department* [2009] EWKC 1109 (Admin), para. 7 (italics added).

cannot be justified on the ground of retributive punishment. ... Opposition to the death penalty may be based upon the more pragmatic grounds that it is irreversible when justice has miscarried, that there is little evidence that its deterrent effect is greater than that of other forms of punishment and that the ghastly ceremony of execution is degrading to the participants and the society on whose behalf it is performed. *For people who hold such views, who must include many opposed to the death penalty, the parallels between the death penalty and life imprisonment without parole, to which Laws LJ draws attention, are the very reasons why they think that in some cases the latter sentence is appropriate.* The preservation of a whole life sentence for the extreme cases which would previously have attracted the death penalty is for such people part of the price of agreeing to its abolition.

With respect to the jurisprudence of the European Court of Human Rights (hereinafter ‘ECHR’), the decision in *Vinter* rendered in 2013 recognized that “the salience of hope is more than a practical consideration that may alleviate some harms of long-term imprisonment. That Court held that it is a violation of fundamental human dignity to incarcerate someone without any chance of release”⁵⁸ contravening Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter ‘*European Convention on Human Rights*’), which reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁵⁹ The ECHR found that there is “clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved”⁶⁰ In *Trabelsi v. Belgium*⁶¹, the ECHR confirmed the principles set out in *Vinter*.

Although Article 3 of that European Convention is very close to the wording and meaning of section 12 of the *Charter*⁶², which reads: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”, one must be cautious before considering the two provisions as perfect equivalents in terms of their jurisprudential interpretation and scope of application in Canada, for example.

⁵⁸ Grant, Choi & Parkes, *supra* note 18, 173-174; *Case of Vinter and Others v. The United Kingdom*, (2013) Applications nos 66069/09, 130/10, 3896/10, European Court of Human Rights (Grand Chamber) (hereinafter ‘*Vinter*’).

⁵⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (Council of Europe). Corrections and Conditional Release Act, RSC 1992, c. 20.

⁶⁰ *Vinter*, *supra* note 56, para. 114.

⁶¹ *Trabelsi v. Belgium*, [GC] No. 140/10 [2014] ECHR.

⁶² *R. v. Goltz*, [1991] 3 S.C.R. 485 at para. 34: “The test for determining whether a sentence is disproportionately long is very properly stringent and demanding.”; *R. v. Nur*, [2015] 1 S.C.R. 773, para. 39: “This Court has set a high bar for what constitutes “cruel and unusual ... punishment” under s. 12 of the Charter.” Section 12 of the *Charter* protects against any cruel and unusual punishment, namely, a sentence that is “so excessive as to outrage standards of decency” and “abhorrent or intolerable” to society”: *R. v. Boudreault*, [2018] 3 S.C.R. 599, para. 45, citing *R. v. Lloyd*, [2016] 1 S.C.R. 130, para. 24; see also *R. v. Morrisey*, [2000] 2 SCR 90, para. 26.

In *Quebec (Attorney General) v. 9147-0732 Québec inc.*, the majority of the Court stated that it “has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been to *support* or *confirm* an interpretation”.⁶³ It also stated that “[t]hile this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a *limited* role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are *not bound* by the content of international norms.”⁶⁴

In *Hutchinson*⁶⁵, the ECHR reversed its position in *Vinter* and declared that the life sentencing regime does not violate the *European Convention on Human Rights*.⁶⁶ To reach that conclusion, it did not depart from the principles enunciated in *Vinter*, i.e. life imprisonment without possibility of parole constitutes inhumane or degrading treatment.

Conclusion

Some authors expressed the wish regarding the forthcoming decision of the Supreme Court of Canada in *Bissonnette* that the Court “recognize that *consecutive* parole ineligibility does not serve the interests of public safety”.⁶⁷ Since nobody may predict the future with a crystal ball, it is hard if not impossible to know in advance what would or could be the decision of the Court. No one is against virtue, including the judges of the Court, then it would be too simplistic to narrow down the argument to the possibility that the Court will confirm the decision of the lower courts on the constitutionality of section 745.51 of the *Criminal Code* *only* because it is, in somebody’s opinion, *immoral* to impose a sentence on someone beyond anybody’s possible life expectancy. As we have seen with the examples of the United Kingdom and European Court of Human Rights, supporters and opponents of such a possible too-lengthy sentence all use *legal* arguments. It would be missing the point to do otherwise, whichever way it goes. It will be interesting not only for Canadians, but also for anybody interested in the issues related to life imprisonment to know what the Court will decide in that matter, and mostly, for the researchers, what will be the supporting reasoning to justify that decision.

⁶³ 2020 SCC 32, para. 28 (italics added).

⁶⁴ *Ibid.*, para. 22 (italics added).

⁶⁵ *Case of Hutchinson v The United Kingdom*, Application no. 57592/08, European Court of Human Rights (Forth Section) (January 2017).

⁶⁶ This important reversal was left unnoticed by some Canadian authors who recently wrote on these issues: see Grant, Choi & Parkes, *supra* note 18.

⁶⁷ Grant, Choi & Parkes, *supra* note 18, 174 (italics added).

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