

A Macdonald-Laurier Institute Publication

# Punishing the Most Heinous Crimes

Analysis and recommendations related  
to Bill C-53 (*Life Means Life Act*)

BENJAMIN PERRIN



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# POLICE LINE DO NOT CROSS

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## Executive Summary

**L**ife in prison for a first-degree murder in Canada currently doesn't mean exactly that. The longest period of ineligibility for parole is 25 years, outside cases of multiple murders.

While all murders are of course deplorable, many would argue that some killings are so heinous, so offensive to the public and damaging to Canadian society, that the killers should be imprisoned for the rest of their natural lives. This would include violent predators who plan and deliberate about not only killing another human being, but do so while committing egregious crimes such as sexual assault, kidnapping, or terrorist activities. Or they involve the planned and deliberate killing of police officers or other officials tasked with keeping Canadians safe.

To address this issue, the federal government has introduced Bill C-53, the *Life Means Life Act*, which would make life imprisonment without parole a mandatory sentence for certain heinous murders and a discretionary sentence in other instances. These lifers could apply after 35 years to the federal Cabinet for "executive release".

There are legitimate reasons for adding life without parole to the *Criminal Code*, but there are also legitimate criticisms of Bill C-53. The legislation requires amendments if it is to achieve its stated goals without being struck down based on a challenge under the *Canadian Charter of Rights and Freedoms*.

The main arguments supporting Bill C-53 are that it: enhances proportionality in murder sentencing; reflects denunciation and retribution in sentencing heinous murders, which are very important sentencing principles for serious and violent crime; spares victims the ordeal of frequent and ongoing automatic parole board hearings for murderers after their parole ineligibility periods have expired; ensures the protection of victims and society; and potentially contributes to general deterrence.

On the other hand, the main concerns about Bill C-53 are that it: is unnecessary and will not increase public safety; denies a second chance to convicted murderers; increases pressure on the corrections system and risk to staff and fellow inmates; includes “executive release” as an illusory hope and it is unlikely to be used in practice; and infringes the *Charter*.

After canvassing these arguments, this paper concludes that life without parole would be appropriate and just in certain cases, but that Bill C-53 is vulnerable to being struck down for infringing the *Charter* as presently drafted. The following recommendations should be adopted:

- 1) Bill C-53 should be amended so that life without parole would be a discretionary – not a mandatory – sentencing option for heinous murders. The judge should also have the option of ordering a fixed-term parole ineligibility period of between 25 and 75 years. A jury recommendation, if it is a jury trial, should be sought in these cases.
- 2) The situations where Bill C-53 would currently provide for discretionary life without parole should not provide for that penalty but instead give the sentencing judge the option of ordering a fixed-term parole ineligibility period of between 25 and 75 years, with a jury recommendation where there is a jury.
- 3) All offenders serving life sentences with parole ineligibility periods greater than 35 years should be eligible to apply for executive release (not simply those sentenced to life without parole), up until the time that they become eligible for parole.
- 4) The Parole Board of Canada should provide an assessment to the Minister of Public Safety of all offenders serving a sentence of life imprisonment without parole when they apply for executive release at least 35 years after beginning to serve their sentence.
- 5) The purposes of Bill C-53 should be clearly articulated.

*Heinous murderers are not sentenced as severely as they should be in Canada and there is constitutional room to enhance their penalties.*

Heinous murderers are not sentenced as severely as they should be in Canada and there is constitutional room to enhance their penalties. However, Bill C-53 overreaches in this effort and thus risks failing to achieve needed reform.

## Sommaire

Une peine de prison à perpétuité pour un meurtre au premier degré au Canada n'est pas effectivement purgée pendant toute une vie. Le délai le plus long après lequel une personne peut demander sa libération conditionnelle est de vingt cinq ans, sauf si elle déclarée coupable de meurtres multiples.

À l'évidence, tous les meurtres sont déplorables, et nombreux sont ceux qui affirment que certains homicides sont tellement odieux et révoltants aux yeux de la population et si préjudiciables à la société canadienne, que leurs auteurs devraient être emprisonnés pour le reste de leur vie. Ces meurtriers sont les prédateurs violents qui non seulement commettent un meurtre avec préméditation et propos délibéré, mais qui le font en accomplissant des crimes graves comme des agressions sexuelles, des enlèvements ou des actes terroristes. Ces meurtriers sont aussi ceux qui assassinent des policiers ou d'autres agents chargés d'assurer la sécurité des Canadiens.

Pour lutter contre ce problème, le gouvernement fédéral a déposé le projet de loi C-53, la *Loi sur les peines de prison à vie purgées en entier*. L'emprisonnement à perpétuité sans possibilité de libération

conditionnelle deviendrait obligatoire pour certains meurtres horribles, mais discrétionnaire dans d'autres situations. Les condamnés à perpétuité pourraient présenter au Cabinet fédéral une « demande de libération sur décret » après avoir purgé trente cinq ans de leur peine.

Il y a des raisons légitimes d'ajouter au *Code criminel* une peine d'emprisonnement à perpétuité sans possibilité de libération conditionnelle, mais il y a aussi des critiques légitimes au projet de loi C-53. Pour atteindre les objectifs énoncés, la loi doit être modifiée au moyen d'amendements qui ne pourraient pas être invalidés en vertu d'une contestation fondée sur la *Charte canadienne des droits et libertés*.

Les principaux arguments à l'appui du projet de loi C-53 sont les suivants : l'application renforcée du principe de la proportionnalité dans la détermination des peines pour meurtre; l'exercice du pouvoir de sanction et de rétribution dans les cas de meurtres odieux, deux principes de détermination de la peine très importants pour les crimes graves et violents; la possibilité d'épargner aux victimes les souffrances subies lors des audiences répétées et fréquentes de la Commission des libérations conditionnelles, qui se tiennent automatiquement à partir du moment où les détenus deviennent admissibles à une libération conditionnelle; l'assurance que les victimes et la société sont protégées; et le potentiel d'effets généralement dissuasifs.

Les principales préoccupations à l'égard du projet de loi C-53 portent sur les questions suivantes : l'inefficacité du projet de loi à améliorer la sécurité publique; l'impossibilité d'accorder une deuxième chance aux condamnés pour meurtre; la pression additionnelle imposée sur le système correctionnel et les risques pour le personnel et l'ensemble des détenus; les espérances illusoire entraînées par des demandes de libération sur décret qui ne sont pas susceptibles d'être acceptées dans la pratique; les violations de la *Charte*.

Après avoir examiné ces arguments, on conclut dans cet article que l'emprisonnement à perpétuité sans possibilité de libération conditionnelle serait approprié et équitable dans certains cas, mais que le projet de loi C-53, tel qu'actuellement rédigé, est susceptible d'être invalidé en vertu de la *Charte*. Les recommandations suivantes devraient être adoptées :

- 1) Le projet de loi C-53 devrait être amendé afin que l'emprisonnement à perpétuité sans possibilité de libération conditionnelle pour les crimes horribles soit une peine discrétionnaire – et non obligatoire. Le juge devrait également avoir la possibilité d'imposer une période déterminée d'inadmissibilité à la libération conditionnelle allant de 25 à 75 ans. Dans ces situations, la recommandation d'un jury devrait être sollicitée s'il s'agit d'un procès avec jury.
- 2) Les situations prévues par le projet de loi C-53 pour l'application discrétionnaire de peines d'emprisonnement à perpétuité sans possibilité de libération conditionnelle ne devraient pas comporter ces peines, mais plutôt permettre au juge d'imposer une période déterminée d'inadmissibilité à la libération conditionnelle allant de 25 à 75 ans, sur recommandation d'un jury, lorsqu'un jury est sélectionné.
- 3) Tous les délinquants purgeant une peine d'emprisonnement à perpétuité sans possibilité de libération conditionnelle pendant plus de trente cinq ans devraient être admissibles à présenter une demande de libération sur décret (pas uniquement les condamnés sans possibilité de libération conditionnelle) jusqu'à ce qu'ils deviennent admissibles à une libération conditionnelle.
- 4) La Commission des libérations conditionnelles du Canada devrait fournir au ministre de la Sécurité publique une évaluation de tous les délinquants purgeant une peine d'emprisonnement sans possibilité de libération conditionnelle lorsqu'ils présentent une demande de libération sur décret au moins trente cinq ans après avoir commencé à purger leur peine.
- 5) Les objectifs du projet de loi C-53 devraient être clairement énoncés.

Les meurtres horribles ne sont pas punis aussi sévèrement qu'ils devraient l'être au Canada et il n'y a pas de marge de manœuvre constitutionnelle permettant de renforcer les sanctions. Le projet de loi C-53 va donc trop loin et risque de compromettre une réforme qui est nécessaire.

# 1 Introduction

All murders are deplorable. They represent a life taken away that can never be given back. Some murders, however, are particularly heinous. They involve violent predators who plan and deliberate about not only killing another human being, but do so while committing egregious crimes such as sexual assault, kidnapping, or terrorist activities. They involve the planned and deliberate killing of police officers or other justice and corrections staff who are tasked with keeping Canadians safe. Yet the *Criminal Code* treats all first-degree murders equally for sentencing purposes – there is but one sentence: life imprisonment without eligibility for parole for 25 years.

Bill C-53 (*Life Means Life Act*) would change this by creating a more severe sentence of life imprisonment without parole. It has been called “the biggest change to the *Criminal Code* since the abolition of capital punishment in 1976” (Fine 2015a). While there have been other major criminal justice and sentencing reforms since that time, Bill C-53 takes the significant step of creating a penalty of life imprisonment without parole and makes it mandatory for heinous murders and a discretionary option for other murders.

Prime Minister Stephen Harper has said that this new legislation would “ensure that the most heinous criminals who commit the most horrific crimes face serious criminal penalties, and that a life sentence in Canada will mean exactly that: a sentence for life” (Prime Minister of Canada 2015). He added: “There are certain crimes so repulsive that only a life-long sentence adequately reflects their truly horrific nature” (quoted in Csanady 2015).

Peter MacKay, Minister of Justice and Attorney General of Canada, introduced Bill C-53 in the House of Commons on March 11, 2015. In announcing this proposed legislation, the Government stated that it “would ensure that Canada’s most heinous criminals will be subject to mandatory life imprisonment without the possibility of parole” (Department of Justice Canada 2015). Minister MacKay also referred to a commitment “to keeping our streets and communities safe for Canadians and their families while also ensuring that the rights of victims remain at the very heart of our criminal justice system” and “ensur[ing] that the most dangerous offenders in Canada cannot pose a risk to Canadians or their families” (Department of Justice Canada 2015).

Even prior to its formal introduction in the House of Commons, a number of groups and individuals were swift to denounce the idea of life without parole, while victims have applauded the proposal. Critics argue that there’s no need for Bill C-53 because the current parole system is working well and this new severe sentence will not enhance public safety. It has been argued that the federal government’s attempt to “*Charter*-proof” this proposed legislation by including provisions for executive release are inadequate. Others are concerned with the fiscal costs and pressures it will put on the corrections system and the risk that lifers without parole could pose to fellow inmates and prison guards since they would have “nothing to lose”. Notably, questions have been raised about whether Bill C-53 would survive a challenge under the *Canadian Charter of Rights and Freedoms* (*Charter*). The debate over this controversial proposed legislation is taking place in the shadow of the impending Fall 2015 federal election, making it all the more topical and pressing.

This paper begins by describing the current approach in the *Criminal Code* to murder classification and sentencing. Information and statistics related to convicted murderers who have been granted full parole are then discussed. The major proposed changes in Bill C-53 (*Life Means Life Act*) are set out, including mandatory life without parole, discretionary life without parole, and executive release. Arguments supporting and opposing Bill C-53 are then canvassed, after which there is a discussion and brief analysis of the anticipated challenge to this legislation under the *Charter*. Finally, this paper concludes by summarizing several proposed amendments to Bill C-53 that would enable it to contribute to more just sentences for heinous murders while enhancing its compliance with the *Charter*.

# 2 Current Approach to Sentencing Murder

## 2.1 Classification of Murder

Murder (*Criminal Code*, ss. 229-230) is classified as first-degree murder or second-degree murder (s. 231(1)). A first-degree murder is generally a murder that is “planned and deliberate” (s. 231(2)-(3)). However, the following types of murders are also classified as first-degree murder, even if they do not involve planning and deliberation:

› Where the murder victim is a:

- police officer, police constable, constable, sheriff, deputy sheriff, sheriff’s officer, or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
- warden, deputy warden, instructor, keeper, jailer, guard, or other officer, or a permanent employee of a prison, acting in the course of his duties; or
- person working in a prison with the permission of the prison authorities and acting in the course of his work (s. 231(4));

or

*“There are certain crimes so repulsive that only a life-long sentence adequately reflects their truly horrific nature.”*

–PRIME MINISTER STEPHEN HARPER

› when the death is caused while committing or attempting to commit any of the following offences:

- hijacking an aircraft (section 76);
- sexual assault (section 271);
- sexual assault with a weapon, threats to a third party, or causing bodily harm (section 272);
- aggravated sexual assault (section 273);
- kidnapping and forcible confinement (section 279);
- hostage taking (section 279.1);
- criminal harassment or “stalking” (section 264) and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered;
- an indictable offence under the *Criminal Code* or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity; or
- intimidation (section 423.1); (s. 231(5)-(6.01))

or

› the death is caused by that person for the benefit of, at the direction of, or in association with a criminal organization, or the death is caused by that person while committing or attempting to commit an indictable offence under the *Criminal Code* or any other Act of Parliament for the benefit of, at the direction of or in association with a criminal organization (s. 231(6.1)).



The *Criminal Code* classifies any murder that is not a first-degree murder as a second-degree murder (such as murders that are neither planned and deliberate nor deemed to be first-degree murders as set out above) (s. 231(7)).

In *R. v. Paré*, the Supreme Court of Canada interpreted what is now s. 231(5) of the *Criminal Code*, which classifies murders while committing hijacking an aircraft, sexual assault, sexual assault with a weapon, aggravated sexual assault, kidnapping and forcible confinement, or hostage taking as first-degree murders, regardless of whether there is any planning or deliberation by the accused. Justice Wilson, writing for a unanimous Court, stated that these “are all offences involving the unlawful domination of people by other people” and that “where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime” (para. 33).

## 2.2 Life Imprisonment and Parole Ineligibility Periods for Murder

The punishment for murder is a mandatory minimum sentence of “life imprisonment” (*Criminal Code*, s. 235). However, murderers are eligible to apply for parole after a certain period of time, depending on whether they were convicted of first or second-degree murder.

An offender convicted of first-degree murder is eligible to apply for parole after serving 25 years of their life sentence, whereas a person convicted of second-degree murder will have a parole ineligibility period of between 10 and 25 years, which is decided at the time they are sentenced and may involve a recommendation from the jury (ss. 745(a), (c), 745.2).<sup>1</sup> If an offender convicted of second-degree murder was previously convicted of murder under the *Criminal Code* or an intentional killing under the *Crimes Against Humanity and War Crimes Act*, their parole ineligibility period will be set at 25 years (ss. 745(b)-(b.1)).

Since December 2, 2011, under Bill C-48 (*Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*), multiple murderers can be sentenced to serve their parole ineligibility period for each murder conviction consecutively (back-to-back, so they are added to each other) (s. 745.51). This provision has been invoked in a growing number of decisions to date, including the following high-profile cases:

“... where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime.”

—JUSTICE WILSON

- › In *R. v. Bourque*, Chief Justice of the New Brunswick Court of Queen’s Bench D.D. Smith sentenced Justin Bourque to life imprisonment with no parole eligibility for 75 years for three counts of first-degree murder and two counts of attempted murder using a firearm in relation to five RCMP officers on June 4, 2014 in Moncton, in what the judge described as “one of the most horrific crime sprees ever to occur in Canada” (paras. 2, 54).
- › In *R. v. Baumgartner*, Associate Chief Justice J.D. Rooke of the Alberta Court of Queen’s Bench sentenced Travis Baumgartner to life imprisonment with no parole eligibility for 40 years for one count of first-degree murder, two counts of second-degree murder, and one count of attempted murder in relation to four fellow armoured car security guards in Edmonton on June 15, 2012 (paras. 2-3, 180).
- › In *R. v. Vuozzo*, the accused was sentenced by the Prince Edward Island Supreme Court to life imprisonment without parole eligibility for 35 years for one count of first-degree murder and one count of second-degree murder.

- › In *R. v. Husbands*, Justice E. Ewaschuk of the Ontario Superior Court of Justice recently reportedly rejected a claim by the accused (the “Eaton Centre shooter”) that the imposition of a consecutive parole ineligibility period would violate section 12 (cruel and unusual punishment) of the *Charter* because judges retain discretion to craft a just sentence under Bill C-48. The accused was sentenced to life imprisonment without parole eligibility for 30 years (two consecutive life sentences with parole ineligibility periods of 15 years each) (Warnica 2015; Hasham 2015).

Prior to Bill C-48, persons who were convicted of more than one first-degree murder in a given trial would be sentenced to life imprisonment with a parole ineligibility period of 25 years – the same sentence as if they had only been convicted of one first-degree murder. For example, former Col.

*Being eligible to apply for parole does not mean that the offender is automatically granted parole.*

Russell Williams was sentenced to two terms of life imprisonment without parole eligibility for 25 years for the first-degree murders of Cpl. Marie-France Comeau and Jessica Lloyd, but is serving them concurrently (meaning that he is eligible to apply for parole after serving 25 – not 50 – years) (CBC News 2010).

The so-called “faint hope clause” allows offenders sentenced to life imprisonment with parole ineligibility periods greater than 15 years

to apply for early parole after serving 15 years of their sentence. However, it was abolished for offenders who committed their offences after December 2, 2011.<sup>2</sup>

If an offender sentenced to life imprisonment is granted parole, they remain subject to parole for the rest of their life as part of their “life” sentence.

### 3 Parole for Murderers

The Parole Board of Canada (PBC) decides whether someone who is eligible to apply for parole should be granted it. In other words, being eligible to apply for parole does not mean that the offender is automatically granted parole and a convicted murderer will remain in prison until the PBC decides to release them, pursuant to the *Corrections and Conditional Release Act*. As the PBC states: “Not all lifers will be granted parole. Some may never be released on parole because they continue to represent too great a risk to re-offend” (2015a).

Parole is described by the PBC as “a carefully constructed bridge between incarceration and return to the community” (2015b). An offender who is granted parole will be subject to various conditions. If they breach any of these conditions or commit a new offence, the PBC has the authority to revoke parole and the offender can be sent back to prison.

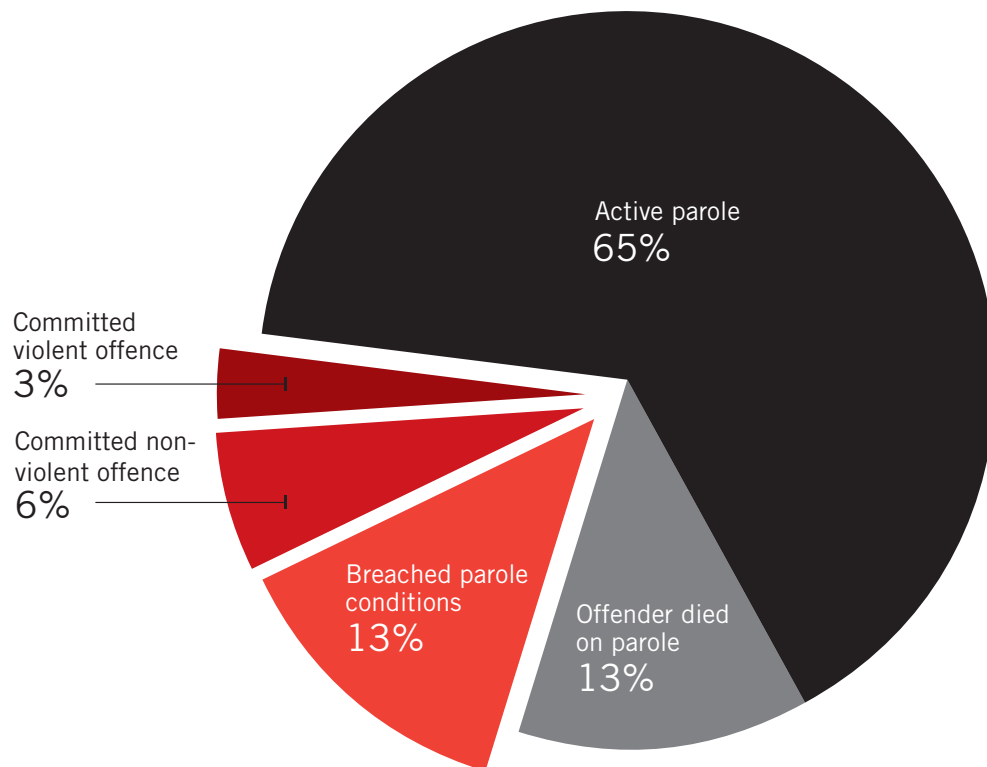
The homicide rate in Canada (which includes murders but also all deaths that were caused by another person) has been declining since a high in the mid-1970s (Statistics Canada 2014a). The number of police-reported homicides in 2013 was 505 (2014b). The proportion of federal inmates serving sentences for murder has grown over the last two decades. In 1994/95, murderers represented 14

percent of the federal prison population (Parole Board of Canada 2009a, 31) while in 2014 this figure had grown to 20 percent (which has been relatively stable for the last five years) (2014, 11).

According to the PBC (chart 1 below), long-term follow-up of 1886 convicted murderers who were granted full parole during a 14-year period (1994 to 2008) found that approximately 9 percent re-offended and had their parole revoked (comprised of 6 percent for non-violent offences and 3 percent for violent offences) (2008, 14). An additional 13 percent had their parole revoked for breaching their parole conditions. Unfortunately, more recent data do not appear in subsequent PBC reports. By comparison, in 2011/12, 5 percent of all federal paroles ended with a non-violent offence and 0.5 percent with a violent offence (Public Safety Canada 2012).

*9 percent of paroled murderers re-offend, while an additional 13 percent breach their parole conditions.*

**Chart 1 Outcomes of convicted murderers granted full parole (Parole Board of Canada data, 1994–2008)**



Source: Parole Board of Canada, 2008, “Performance Monitoring Report: 2007-2008”, 14.

While breaching bail or probation conditions constitute new criminal offences, breaching parole conditions does not constitute a new criminal offence. Instead, parole is revoked and the offender is returned to prison to continue serving their sentence.

Unfortunately, statistics on paroled murderers who commit murder again are difficult to locate. Neither Statistics Canada nor the Correctional Service of Canada publishes such data publicly nor could these agencies provide this information to the media (Fine 2015b). The most recent figures cited in media reports were that “[a]s of 2006, lifers on parole had killed 58 people. That category includes those such as Robert Bruce Moyes, sentenced to life as an armed bank robber, who, while on parole killed seven people in Abbotsford, B.C., in 1996” (Fine 2015c).

## 4 Proposed Changes in Bill C-53 (*Life Means Life Act*)

Bill C-53 is comprised of three main parts. First, it identifies situations when it would be *mandatory* for a sentencing judge to impose a sentence of life imprisonment without parole (referred to below as “heinous murders”). Second, it identifies situations when it would be at the *discretion* of the sentencing judge to decide whether to impose a sentence of life imprisonment without parole. Finally, for anyone sentenced to life imprisonment without parole (regardless of whether it was a mandatory or discretionary sentence), “executive release” from the Governor in Council (in other words, the federal Cabinet) can be sought after serving 35 years imprisonment. By virtue of section 11(i) of the *Charter*,<sup>3</sup> Bill C-53 would only apply to persons convicted after it comes into force.

### 4.1 Mandatory Life Imprisonment Without Parole

Bill C-53 (clause 6) would require a sentencing judge to impose a sentence of life imprisonment without parole where an accused has been found guilty of a planned and deliberate murder (first-degree murder):

› where the murder victim is a:

- police officer, police constable, constable, sheriff, deputy sheriff, sheriff’s officer, or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
- warden, deputy warden, instructor, keeper, jailer, guard, or other officer or a permanent employee of a prison, acting in the course of his duties; or
- person working in a prison with the permission of the prison authorities and acting in the course of his work;

or

› when the death is caused while committing or attempting to commit any of the following offences:

- hijacking an aircraft (section 76);
- sexual assault (section 271);
- sexual assault with a weapon, threats to a third party, or causing bodily harm (section 272);
- aggravated sexual assault (section 273);
- kidnapping and forcible confinement (section 279);
- hostage taking (section 279.1); or
- an indictable offence under the *Criminal Code* or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity;

or

› “in which the accused’s behaviour, associated with the offence, is of such a brutal nature as to compel the conclusion that the accused’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint” (referred to below as “brutal murders”) (clause 6).<sup>4</sup>

› High treason.

In many of these scenarios, Bill C-53 is elevating the penalty for what was deemed to be a first-degree

murder already with a sentence of life without parole eligibility for 25 years to life without parole, because there is also planning and deliberation (such as the planned and deliberate murder of a police officer). For this reason, these are referred to as heinous murders in discussing Bill C-53 – they are even more deplorable murders than what the law already considers to be first-degree murders because they are not only murders that involve planning and deliberation but combine this with illegal domination offences, terrorism, brutality, or the targeted killing of justice and corrections system participants. If the Crown prosecutor intends to seek a sentence of life imprisonment without parole, they must notify the accused prior to their entering a guilty plea (clause 6).

A sentence of life imprisonment without parole means that the offender cannot apply to the PBC for parole and they are not permitted any unescorted absences from imprisonment for any reason. Absences with an escort are not permitted for any reason other than medical reasons, to attend judicial proceedings or coroner's inquests, or for "administrative or compassionate reasons, community service, personal development for rehabilitative purposes or family contact, including parental responsibilities, on condition that the absence is approved by the Parole Board of Canada and that the offender has served 35 years of their sentence" (clause 14).

*Bill C-53 provides for a mandatory minimum sentence of life imprisonment without parole in select scenarios.*

## 4.2 Discretionary Life Imprisonment Without Parole

Bill C-53 would allow a sentencing judge, on application from the Crown prosecutor and with notice to the accused, to decide whether an accused found guilty of any of the following offences should be ordered to serve a life sentence without parole:

- › first-degree murder where a sentence of life imprisonment without parole is not mandatory; or
- › second-degree murder where the offender has previously been convicted of either a murder under the *Criminal Code* or an intentional killing under the *Crimes Against Humanity and War Crimes Act* (clause 7).

In exercising his or her discretion as to whether to order such an offender to serve life imprisonment without parole, the sentencing judge is to consider the accused's age and character, the nature of the offence, the circumstances surrounding its commission, and any jury recommendation (clause 11).

## 4.3 Executive Release

When an offender is sentenced to life imprisonment without parole, as the sentence suggests, the PBC would have no jurisdiction to grant them parole. However, after serving 35 years of imprisonment, under Bill C-53 such an offender could apply to the Minister of Public Safety for "exceptional release" (clause 17). The Minister *may* ask the PBC to assess the offender's case. If the PBC is asked to review a case, they are to assess whether:

- (a) the offender will, by reoffending, present an undue risk to society; and
- (b) the release of the offender will contribute to the protection of society by facilitating the successful reintegration of the offender into society as a law-abiding citizen (clause 17).

If such an assessment is directed, the offender is to be given a reasonable opportunity to make written representations and, with narrow exceptions, to know the information being considered in

the assessment. Once the assessment is complete, it is provided to the Minister, the offender, and corrections officials.

Whether the PBC is asked by the Minister to conduct such an assessment or not, the ultimate decision on whether to grant “executive release” is made by the Governor in Council, on the Minister’s recommendation. Bill C-53 sets out the requirements for the Minister in reviewing an application for executive release as follows:

- (3) In reviewing the application, the Minister shall assess whether the fundamental purpose and the objectives of sentencing have been met by the portion of the sentence that the offender has served, taking into account the following criteria:
  - (a) the character of the offender;
  - (b) the offender’s conduct while serving the sentence;
  - (c) whether the offender has accepted responsibility for the offence for which they have been convicted, including by acknowledging the harm done to victims and to the community;
  - (d) the nature of the offence for which the offender was convicted and the circumstances surrounding its commission; and
  - (e) any statement presented by the victim at the time of sentencing and any statements presented by the victim or a person referred to in subsection 156.12(3) to the Minister with respect to the application.
- (4) The Minister shall also assess if there are humanitarian or compassionate reasons for granting executive release, including the following reasons:
  - (a) the offender is terminally ill;
  - (b) the offender’s physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement; and
  - (c) the offender is one for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced. (clause 17)

The Minister is to provide a reasonable opportunity for written representations by the offender and the victim prior to making his or her recommendation. The Minister’s report is not provided to the offender, victim, or corrections officials.

The Governor in Council, on recommendation from the Minister, may grant or deny executive release. The order is to be given to the offender by the Minister. If executive release is denied, the offender can reapply after five years from the date of the order. If executive release is granted, conditions for release are set and the PBC can impose any conditions reasonable and necessary “to protect society and to facilitate the offender’s successful reintegration into society” (clause 17). The PBC has “exclusive jurisdiction and absolute discretion” to terminate or revoke an offender’s executive release and to cancel the termination or revocation of an offender’s executive release (clause 17). There are detailed provisions in Bill C-53 dealing with these eventualities. In other words, if an offender is granted executive release, the Governor in Council has no further role as the PBC takes over responsibility for the offender going forward.

The federal government describes executive release as being included in Bill C-53 “[t]o address constitutional concerns” and describes petitions of this kind as “[c]onsistent with the traditional approach to granting clemency” (Department of Justice Canada 2015b). The reference to a traditional approach to granting clemency alludes to the period prior to the creation of the independent PBC in 1959 where the federal Cabinet, then simply the Minister of Justice, effectively made decisions on release since 1899 (Parole Board of Canada 2009b).

## 5 Arguments Supporting Bill C-53

The main arguments supporting Bill C-53, which are elaborated below, are that it:

- › enhances proportionality in murder sentencing;
- › reflects denunciation and retribution in sentencing heinous murders, which are very important sentencing principles for serious and violent crime;
- › spares victims the ordeal of frequent and ongoing automatic parole board hearings for murderers after their parole ineligibility periods have expired;
- › ensures the protection of victims and society; and
- › potentially contributes to general deterrence.

First, the existing sentencing structure in the *Criminal Code* does not provide for adequate penalties for heinous murders. The murder of a police officer or justice and corrections official is already deemed to be a first-degree murder punishable with life imprisonment without parole eligibility for 25 years. If such a murder involves planning and deliberation, the same sentence applies. Likewise, a murder while committing illegal domination offences is already deemed to be a first-degree murder punishable with life imprisonment without parole eligibility for 25 years. Again, the same sentence applies if such a murder involves planning and deliberation. In other words, there is a lack of proportionality in the current sentencing structure in the *Criminal Code*. Proportionality is a central concept in sentencing law, requiring that the sentence be proportionate to the gravity of the offence and degree of responsibility of the offender. Offenders who not only plan and deliberate about their murders but do so while committing or attempting to commit sexual offences, unlawful domination offences, or terrorism offences are particularly heinous and merit harsher punishment than first-degree murders that lack these significant aggravating elements.

*Executive release is included  
in Bill C-53 to address  
constitutional concerns.*

A sentence of life without parole would punish the most serious crimes in our law with the most serious penalty, consistent with the abolition of the death penalty. It is a proportionate sentence for the gravest crimes we have and consistent with the parity principle that like offenders committing like offences be treated similarly.<sup>5</sup>

Second, Bill C-53 is consistent with established principles of sentencing such as denunciation and retribution, which are very important when dealing with serious and violent crime. Denunciation is described by Chief Justice Lamer (for a unanimous Court) in a seminal sentencing decision of the Supreme Court of Canada in *R. v. M.(C.A.)* as follows:

The objective of denunciation mandates that a sentence should communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. (para. 81 [emphasis in original omitted])

Retribution is also endorsed and defined in *R. v. M. (C.A.)* as follows:

Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be “just and appropriate” under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. (para. 79)

A sentence of life without parole communicates society’s condemnation of the most heinous murders and recognizes that rehabilitation as a sentencing principle is largely spent for such offenders, with the exception of those who may exceptionally be granted executive release. The most heinous murders call for the most severe sanction to communicate society’s condemnation of their conduct and justly punish them for having the most significant moral blameworthiness recognized in our law.

Third, life without parole would spare victims the ordeal of regular parole board hearings after a murderer’s parole ineligibility period is up. Presently, if parole is denied, the *Corrections and Conditional Release Act* requires that further reviews occur every two years until such an offender

is released from prison – regardless of whether their prospects for parole have improved or not.<sup>6</sup> For the families of murder victims this means that once these offenders are eligible for parole, the victims will face a frequent and ongoing cycle of parole proceedings until the offender is released or dies in prison. Given the high proportion of murderers in federal prisons, it is not surprising that the family members of murder victims are the largest victim category making presentations at PBC hearings. For example, they represented

*There is a lack of proportionality in the current sentencing structure in the Criminal Code.*

45 percent of all victim presentations at such hearings in 2010/11 (Parole Board of Canada 2011, 29), 28 percent in 2009/10 (2010, 28), and 47 percent in 2008/09 (2009c, 19). Unfortunately, the PBC annual department performance reports stopped reporting this data for subsequent years.

A 2009 PBC report found that victims wanted “less frequent parole hearings for lifers” (2009a, 10).<sup>7</sup> Under Bill C-53, the possibility of the offender seeking executive release may only occur after 35 years and, if denied, every 5 years thereafter upon application. Thus, under Bill C-53, the possibility of release for heinous murderers would be delayed by 10 years (35 as opposed to 25 years), occur less frequently for reapplications (5 as opposed to 2 years), reapplications would not be automatic but on application by the offender, and release is exceptional as opposed to based on traditional parole grounds.<sup>8</sup>

Fourth, offenders sentenced to life imprisonment without parole will be separated from society and no longer able to pose a risk to victims or the community. The PBC statistics set out above demonstrate that 22 percent of convicted murderers granted full parole between 1994 to 2008 had their parole revoked for breaching conditions or committing more offences. While only a handful of these cases involved violent offences, breaching parole conditions is a very serious matter as they are set to ensure the offender abides by terms that will minimize the chances of their returning to violence or criminality. While Bill C-53 does not rely solely on a public safety rationale, this has featured prominently in the Government’s statements related to it.



Fifth, while life without parole may have a deterrent effect, this would remain to be seen. The general deterrent effect of more severe penalties has been undermined in the research and the Supreme Court of Canada has become increasingly skeptical of claims of general deterrence to justify criminal justice measures.<sup>9</sup> Further research and a long timeframe will be needed to determine the extent to which Bill C-53 contributes to general deterrence.

Some critics have argued that a sentence of life imprisonment without parole is akin to the “death penalty in slow motion” or “death by prison” because the sentence only ends with the death of the offender. This claim is an inflammatory hyperbole. A major difference between the death penalty and life without parole is that a death sentence that is carried out is irreversible whereas a sentence of life without parole can be altered in the case of wrongful conviction, up until the time of that person’s natural demise. Additionally, the state’s taking of an offender’s life by deliberate machinations is qualitatively and fundamentally different from the natural progression of death.

*Victims currently frequent an ongoing cycle of parole proceedings until the offender is released or dies in prison.*

## 6 Arguments Opposing Bill C-53

The main concerns about Bill C-53, which are elaborated below, are that it:

- › lacks a demonstrated need as the current system is working well and it will not increase public safety;
- › denies the possibility that even the worst offenders can change and that they deserve hope for a second chance;
- › increases the number of incarcerated offenders, financial costs, and resource pressures in the corrections system;
- › includes “executive release” as illusory and it is unlikely to be used in practice;
- › increases risks to fellow inmates and corrections staff since offenders sentenced to life without parole have “nothing to lose”; and
- › infringes section 12 (cruel and unusual punishment) and section 7 (principles of fundamental justice) of the *Charter*.

First, critics have argued that there is no demonstrated need for this proposed legislation. They say that the current sentencing approach that provides for a 25-year parole ineligibility period for the most serious murders is working well and that the most heinous murderers are unlikely to ever be granted parole, so this legislation is unnecessary. Critics argue that Bill C-53 will not make Canadians any safer.

Second, it has been argued that even the worst offenders have the capacity to change and rehabilitate, so they should be given the opportunity to be released.

Third, critics have said that this legislation will increase the number of offenders incarcerated in Canadian penitentiaries and that this will have financial costs and potentially result in over-crowding or a need for new prisons to be built. Some commentators have stated that 40 years in a maximum security prison would cost nearly \$6 million per offender (Fine 2015c). The federal government has said that Bill C-53 will apply to a “relatively small number of offenders” but has not released figures (Payton 2015).

*A death sentence that is carried out is irreversible whereas a sentence of life without parole can be altered in the case of wrongful conviction.*

Fourth, critics say executive release is illusory and unlikely to be exercised in practice. Some believe that executive release was only included in an attempt to render this proposed legislation less susceptible to being struck down for violating the *Charter*. The criticism is that substituting a political decision-maker for an independent quasi-judicial decision-maker is inherently flawed and without justification.

Fifth, there have been concerns raised that offenders who have no real hope of ever being released from incarceration will have no incentive to act responsibly and will pose a risk to fellow inmates and corrections staff since they would have “nothing to lose” by committing other offences while incarcerated.

Finally, it has been argued that denying any chance of parole to an offender denies them hope and is a form of cruel and unusual punishment that likely infringes section 12 of the *Charter*. There is also a concern that “brutal” as used in Bill C-53 is unconstitutionally vague. These claims are examined in detail in the next section of this paper.

## 7 Charter Discussion

Both proponents and detractors of Bill C-53 have made claims about the constitutionality of this proposed legislation. There are two key provisions in the *Charter* that are likely to be central to any constitutional challenge to this legislation, if it is enacted: section 7, which requires that any deprivation of life, liberty, or security of the person be in accordance with the principles of fundamental justice, and section 12, which provides that no one is to be subjected to cruel and unusual punishment. If either of these rights were found to be infringed, then the government would have to argue that the infringement is reasonably justified in a free and democratic society under section 1 of the *Charter*. While a full *Charter* analysis of Bill C-53 is beyond the scope of this paper, a preliminary analysis suggests that while defensible, it is vulnerable to a *Charter* challenge.

### 7.1 Life Without Parole as a Penalty

A key question in this debate is whether a sentence of life imprisonment without parole infringes

the *Charter*. There are a number of authorities that shed light on how the Supreme Court of Canada could ultimately decide this issue.

In *R. v. Luxton*, the Supreme Court of Canada unanimously dismissed a challenge under sections 7 (principles of fundamental justice), 9 (arbitrary detention), and 12 (cruel and usual punishment) of the *Charter* to the penalty of life imprisonment with 25-year parole ineligibility for murder while committing a kidnapping. Chief Justice Lamer stated in the majority reasons:

In my view, it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat our most serious crime with an appropriate degree of certainty and severity. I reiterate that even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole. (para. 12, citations omitted)

Bill C-53 would treat the most heinous murders more severely than other murders. It would also preserve the “sensitivity” to the circumstances of individual offenders through both the executive release provisions as well as the escorted absences provisions in certain circumstances, as described above. As Professor Don Stuart (2010) has noted in relation to *R. v. Luxton* in *Charter Justice in Canadian Criminal Law*, “[u]nder the logic that it is constitutionally acceptable to impose the most severe punishment for the most serious offence, mandatory terms of 30, 40 or 50 years would survive” (485).<sup>10</sup>

*Critics say executive release is illusory and unlikely to be exercised in practice.*

A search of Supreme Court of Canada jurisprudence does not reveal any explicit consideration of whether life imprisonment without parole would offend section 12 of the *Charter*. However, a recent provincial appellate court decision and international court decision are relevant to this question.

Recently, in *United States of America v. Isa*, the Alberta Court of Appeal stated: “In our view, a sentence of life imprisonment without parole, while not a sentence available in Canada for the charges upon which the Minister has ordered the appellant’s surrender, would not sufficiently shock the conscience of Canadians such that his surrender to face those charges would be unjust or oppressive” (para. 71). Notably, leave to appeal this decision to the Supreme Court of Canada was denied last year (*Isa v. United States of America*).

The Supreme Court of Canada considers foreign legal decisions on international human rights issues and would undoubtedly consider a body of jurisprudence on life without parole from abroad. In *Case of Vinters and Others v. The United Kingdom*, the European Court of Human Rights found that “whole-life sentences” with a dedicated review mechanism may satisfy the requirements of article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>11</sup> The Court’s review of relevant practice found that such a review mechanism may be executive or judicial and should be available after no later than 25 years into the life sentence (paras. 119–121).

Recently, in the *Case of Hutchinson v. The United Kingdom*, the Fourth Chamber of the European Court of Human Rights considered a complaint by an offender who had been convicted of three counts of murder, rape, and aggravated burglary. After a series of proceedings, a whole-life sentence

was imposed and confirmed by the High Court. Under domestic law, the Secretary of State for Justice has the discretion to release an offender sentenced to a whole-life order in exceptional circumstances based on compassionate grounds and this was found to provide a compliant review mechanism.<sup>12</sup>

The authorities discussed above suggest that a sentence of life imprisonment without parole for the most heinous crimes is likely not *per se* unconstitutional, so long as there is a meaningful review mechanism to provide for exceptional release. The subsequent issue is whether the *Charter* would allow this sentence to be imposed on a mandatory basis or if sentencing judges must retain discretion to determine when it is appropriate in each case.

It is notable that, to date, judges have begun sentencing accused persons to greater than 25-year parole ineligibility periods under the Bill C-48 reforms, as mentioned above, and rejected arguments that longer parole ineligibility periods infringe section 12 of the *Charter*. Those cases that have considered this constitutional question squarely have upheld Bill C-48 because judges maintain the *discretion* to decide whether or not to order consecutive parole ineligibility periods – it is not a “one size fits all” approach. With Bill C-53, however, the mandatory situations where life without parole is required could be vulnerable because it could be argued that the decision of whether to impose such a severe penalty must involve an assessment of the particular offender and the particular offence to arrive at a just and proportionate sentence.

While the offences that are subject to Bill C-53 are the most serious offences with the highest levels of moral blameworthiness – and thus readily distinguishable from those offences at issue in the recent Supreme Court of Canada decision in *R. v. Nur* – it is still important to consider the majority’s strongly worded general concerns about mandatory minimum sentences:

*A sentence of life imprisonment without parole for the most heinous crimes is likely not per se unconstitutional, so long as there is a meaningful review mechanism to provide for exceptional release.*

Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability

to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing. (para. 44 per McLachlin C.J.)

Nevertheless, the majority in *Nur* also stated that it has “set a high bar” for finding a violation of section 12 of the *Charter* and that only those mandatory minimum penalties that are “grossly disproportionate” for the particular offender or in “reasonable hypothetical” scenarios will constitute cruel and unusual punishment (para. 39 per McLachlin C.J.). In earlier decisions, the Court has upheld mandatory life imprisonment with parole ineligibility of 25 years and indeterminate sentences for dangerous offenders (but it was significant that dangerous offenders may apply for parole after a time) (*R. v. Lyons*, paras. 48-49 per LaForest J. (majority)).

If a discretionary approach to life without parole were to be taken, it would reduce the *Charter* risk to Bill C-53. From the federal government’s perspective, the early decisions under Bill C-48 should

provide some comfort that Crown prosecutors and judges are finding it appropriate to go beyond the standard 25-year parole ineligibility period in egregious cases by imposing consecutive sentences for multiple murders. Indeed, as the majority suggested in *R. v. Nur*, the lack of a mandatory penalty “does not prevent judges from imposing exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances” (para. 5 per McLachlin C.J.).

With respect to the discretionary situations where Bill C-53 would allow a sentencing judge to impose a sentence of life without parole, it is odd that Bill C-53 would only provide for judges to either impose the standard 25-year parole ineligibility period or life without parole. Why would it not provide them with a range of 25 years up to life, meaning that fixed-year parole ineligibility periods greater than 25 years could be ordered? Because it does not do so, Bill C-53 is a blunt option that does not allow for a proportionate sentence to be crafted in these discretionary situations. It could have the unintended consequence that discretion will not be exercised to provide for life without parole although the sentencing judge may wish they could give a parole ineligibility period that is greater than 25 years (30 to even 50 years). Such situations would not serve the interests of justice.

A sentencing structure that creates such a gap as Bill C-53 does for discretionary life without parole situations is vulnerable to concerns that it is arbitrary, contrary to section 7 of the *Charter*.

Finally, if a claimant were to establish that life imprisonment without parole under Bill C-53 infringes the *Charter*, it could nevertheless be saved under section 1 of the *Charter*, which provides: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set

out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The purpose of Bill C-53 would be quite important in this analysis and it would be more likely to survive such a challenge if it were not narrowly construed as solely about public safety. Rather, the more fulsome purpose of Bill C-53, as described above, encompasses the following aspects: enhancing proportionality and reflecting denunciation and retribution in sentencing heinous murders; sparing victims the ordeal of frequent and ongoing automatic parole board hearings for murderers, after their parole ineligibility periods have expired; ensuring the protection of victims and society; and potentially contributing to general deterrence. It is also interesting to note that the federal government has stated that Bill C-53 “would align Canada’s criminal justice approach with likeminded countries such as the United Kingdom, New Zealand, the United States, and Australia” (Department of Justice Canada 2015b) – suggesting that other free and democratic societies impose this sanction in certain situations.<sup>13</sup>

*“Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing.”*

—CHIEF JUSTICE MCLACHLIN

## 7.2 “Brutal” Murders

Some have argued that the word “brutal” in Bill C-53 may be unconstitutionally vague or overly broad and thus infringe section 7 of the *Charter*. Yet the word “brutal” is not used alone but is qualified in its context as follows: “the accused’s behaviour, associated with the offence, is of such a brutal nature as to compel the conclusion that the accused’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint” (clause 6). This language is very similar to that used in the dangerous offender provisions of the *Criminal Code*, which state: “any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint” (s. 753(1)(a)(iii)). There is a body of case law already

interpreting and applying the language in this provision in the dangerous offender context and a challenge that it was unconstitutionally vague and overly broad, contrary to section 7 of the *Charter*, has already been dismissed by the courts.<sup>14</sup> Accordingly, there is little reason to believe that strikingly similar language in Bill C-53 would be found to be unconstitutionally vague or overly broad.<sup>15</sup>

### 7.3 Executive Release

Without a meaningful review process in Bill C-53, a sentence of life without parole would likely infringe the *Charter*. Indeed, in speaking about why executive release was included in this proposed legislation, Prime Minister Stephen Harper stated that it was for constitutional reasons (Fine 2015a). The executive release process represents the hope of full release. In addition to the Royal Prerogative of Mercy and escorted absences, it would provide for “accommodating the circumstances of the individual offender”.<sup>16</sup>

With respect to executive release in Bill C-53, it is not inherently flawed, as some commentators have suggested, simply because it is an executive decision. Release by the executive rather than by an independent tribunal as a form of hope for release from a judicially imposed sentence of life imprisonment without parole is not in itself problematic, as other free and democratic societies provide for such an approach.<sup>17</sup> The key is how the executive release is structured. The lack of an oral hearing or reasons for an executive release decision will be part of an anticipated *Charter* challenge but may not be fatal.

The Supreme Court of Canada has recognized that the Royal Prerogative of Mercy and the availability of escorted absences from custody (both of which would be allowed under Bill C-53) can help reflect the particular circumstances of individual offenders serving life sentences (*R. v. Luxton*, para. 12). Indeed, executive clemency was also regularly used in Canada to commute death sentences prior to the abolition of the death penalty in Canada.<sup>18</sup> The actual practice of executive release under Bill C-53 will not be known for 35–40 years if Bill C-53 were to be adopted. Few, if any, current federal politicians would likely be in government at that time, so it is highly speculative to guess how it would be used in practice.

It is puzzling, however, that the Minister of Public Safety has the discretion to decide whether a given offender’s application should be first assessed by the PBC. To enhance transparency and fairness of this extraordinary release process, thereby enhancing compliance with the *Charter*, Bill C-53 should provide for a mandatory assessment by the PBC to inform the Minister’s recommendation to the Governor in Council on whether to grant executive release.

Another issue is that executive release application eligibility after 35 years under Bill C-53 for an offender sentenced to life without parole is arguably more advantageous for an offender than if a lengthy fixed-term parole ineligibility period were ordered (such as 50–75 years under Bill C-48) where there is no possibility of executive release. The life without parole sentence is supposed to be harsher, yet release is potentially available sooner. This risks the appearance of arbitrariness and is thus vulnerable under section 7 of the *Charter*. Bill C-53 should provide that any offender serving a life sentence with a parole ineligibility period that is greater than 35 years be eligible to apply for executive release. This would also enhance the constitutionality of Bill C-48, which has yet to be fully constitutionally tested, particularly with respect to parole ineligibility periods over 35 years.

## 8 Conclusion & Recommendations

While there are strong arguments supporting and opposing Bill C-53, on balance, our criminal justice system would benefit from enhancing the presently inadequate approach to sentencing murders. Heinous murders are not appropriately punished in the *Criminal Code* sentencing regime presently, as described in detail above. There is an inadequate consideration of proportionality, denunciation, retribution, respect for victims, and the need to protect society reflected in the current sentencing provisions in the *Criminal Code*.

Opponents of Bill C-53 have argued that the current system is working well, yet evidence shows that 22 percent of murderers granted parole have their parole revoked for breaching their conditions (13 percent) or re-offending (6 percent for non-violent offences and 3 percent for violent offences) (Parole Board of Canada 2008, 14). For example, police announced a Canada-wide arrest warrant on April 29, 2015 for Francis Patrick Clancy. He was serving a life

sentence for murder and had an extensive criminal record dating back to 1969. The judge described the 1983 murder as “brutal”. His victim was a member of a church group that was trying to support Clancy in the community. Clancy smashed his face repeatedly with the blunt end of an axe. Rather than remain in prison for life, the parole board granted his release despite noting he lived his life “in a manner consistent with entrenched criminal values”. Prior to being granted day parole in 2010, he had been assessed as a “moderate high risk for general and violent offending”. Clancy allegedly breached the conditions of his parole, and the public was warned that he is “violent” and not to approach him if they see him, but instead immediately call 911. Fortunately, Victoria police recently apprehended him. Even if the parole outcomes for convicted murderers were to improve, this still does not address the other primary purposes that Bill C-53 advances.

*On balance, our criminal justice system would benefit from enhancing the presently inadequate approach to sentencing murders.*

Unfortunately, publicly available statistics do not break down murder convictions in a way that would allow for estimates to be determined of how many offenders would be subjected to life without parole. Internal estimates would invariably be part of the federal government’s assessment of Bill C-53 and should be released publicly along with the anticipated costs of this proposed legislation (which in the short-term are nil). However, under the amendments proposed below, these figures would be reduced, perhaps substantially.

The empirical evidence from experience in the United States rejects the speculative concern that life without parole increases the risk to fellow inmates and corrections staff. Studies have shown that offenders serving life without parole “pose fewer disciplinary problems because they become the most institutionalized” (Appleton and Grøver 2007, 604) and are a “stabilizing rather than disruptive force in the prison environment” (Cunningham and Sorenson 2006).<sup>19</sup>

While Bill C-53 is a step in the right direction in terms of bringing greater accountability to the most heinous murderers, it could be improved if several amendments were adopted. These would enhance the effectiveness of this proposed legislation and its compliance with the *Charter*. As discussed above, while a sentence of life imprisonment without parole with a meaningful review process is constitutionally defensible, parts of Bill C-53 are vulnerable to being struck down, specifically the imposition of life without parole on a mandatory basis and aspects of the executive release regime.

To improve Bill C-53, the following amendments are proposed that would allow it to best achieve its important objectives:

- 1) Life without parole should be a *discretionary* sentence – not a mandatory one. Specifically, in the situations where Bill C-53 would impose a mandatory sentence of life imprisonment without parole, it should instead allow for that penalty at the discretion of the sentencing judge, on recommendation from a jury. The judge should also have the option of ordering a fixed-term parole ineligibility period of between 25 and 75 years, again on recommendation from a jury. The situations where Bill C-53 would currently provide for discretionary life without parole should not provide for that penalty but instead give the sentencing judge the option of ordering a fixed-term parole ineligibility period of between 25 and 75 years.

*Life without parole should be a discretionary sentence – not a mandatory one.*

- 2) All offenders serving life sentences with parole ineligibility periods greater than 35 years should be eligible to apply for executive release (not simply those sentenced to life without parole), up until the time that they become eligible for parole.
- 3) The Parole Board of Canada should provide an assessment to the Minister of *all* offenders serving a sentence of life imprisonment without parole when they apply for executive release at least 35 years after beginning to serve their sentence.
- 4) The purposes of Bill C-53 should be clearly articulated through a preamble to this proposed legislation or in Ministerial statements in Hansard (the official record of Parliamentary proceedings), namely, that it seeks to:
  - enhance proportionality in sentencing heinous murders – the punishment should fit the crime;
  - reflect denunciation and retribution in sentencing heinous murders, which are very important sentencing principles for serious and violent crime;
  - spare victims the ordeal of frequent and ongoing automatic parole board hearings for murderers after their parole ineligibility periods have expired;
  - ensure the protection of victims and society; and
  - potentially contribute to general deterrence.

Heinous murderers are not presently sentenced as severely as they should be in Canada and there is constitutional room to enhance their penalties. However, Bill C-53 overreaches in this effort and thus risks failing to achieve needed reform. By adopting the proposed amendments above, sentencing of heinous murders could become more reflective of their severity and gravity and serve the other important purposes that have been identified, while having a much greater chance of surviving an anticipated *Charter* challenge.



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# Endnotes

- 1 The punishment for treason is the same as for first-degree murder: life imprisonment without eligibility to apply for parole for 25 years.
- 2 *Criminal Code*, R.S.C., 1985, c. C-46, s. 745.6. See Bill S-6 (*Serious Time for the Most Serious Crime Act*), 40<sup>th</sup> Parl., 3<sup>rd</sup> Sess. (Royal Assent March 23, 2011).
- 3 “11. Any person charged with an offence has the right [...] if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.”
- 4 The judge determines this issue of brutality so there is some degree of judicial discretion at this stage, despite its inclusion in the list of “mandatory” life without parole situations.
- 5 See *R. v. Luxton*, [1990] 2 S.C.R. 711, paras. 10-11.
- 6 See *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 123(5).
- 7 The same report stated “the public remained opposed to parole for violent offenders, particularly offenders serving life for murder.”
- 8 Another approach to address the concerns of victims (rather than the way taken by Bill C-53) could be to allow the PBC to decide when to allow new parole claims by murderers after a failed bid for parole (i.e., by extending the date that they are eligible to next apply for parole beyond the current two-year mandatory review period).
- 9 See *R. v. Nur*, 2015 SCC 15, para. 114 per McLachlin C.J.
- 10 It should be noted that Professor Stuart appears to question the persuasiveness of the reasoning in *R. v. Luxton*.
- 11 This provision is analogous to section 12 of the *Charter*.
- 12 For additional international cases, see Joanna Harrington, August 14, 2014, “Guest Post: Professor Joanna Harrington on Canadian Legal Values, Extradition, and Life Imprisonment Without Parole.”
- 13 Life without parole is particularly widespread in the US: see Catherine Appleton and Bent Grøver, 2007, “The Pros and Cons of Life without Parole”; and Ashley Nellis, 2010, “Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States”.
- 14 See e.g., *R. v. Langevin*, [1984] O.J. No. 3159, 45 O.R. (2d) 705 (Ont. C.A.), paras. 33-34; *R. v. Teskey*, [2005] A.J. No. 493, 2005 ABPC 33, paras. 134-136; *R. v. Campbell*, [2004] O.J. No. 2151 (Ont. S.C.J.).
- 15 The word “brutal” is also used in the new High Risk Mentally Disordered Accused designation: *Criminal Code*, s. 672.64(1)(b).
- 16 Quotations refer to analogous case of *R. v. Lyons*, [1987] 2 S.C.R. 309, paras. 47-48 per LaForest J. (majority).

- 17 See Catherine Appleton and Bent Grøver, 2007, “The Pros and Cons of Life without Parole” at 601; *Case of Vinters and Others v. The United Kingdom*, Judgment, (Merits and Just Satisfaction), European Court of Human Rights (Grand Chamber), 9 July 2013, Applications nos. 66069/09, 130/10 and 3896/10), paras. 119-121.
- 18 See Globe Editorial, February 4, 2015, “The Conservatives’ Temptation to Politicize the Parole System”, *The Globe and Mail*.
- 19 See also Julian H. Wright Jr., 1990, “Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?”

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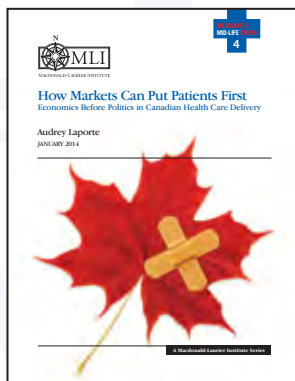
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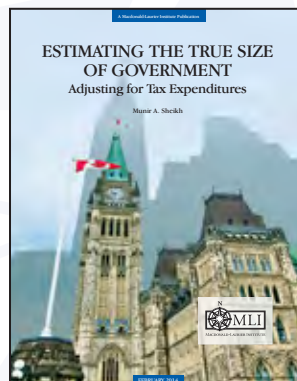
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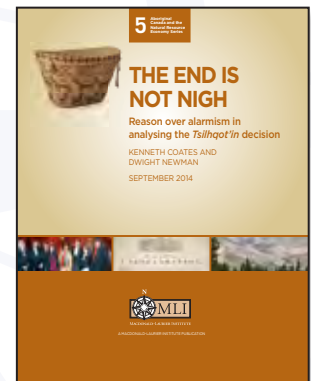
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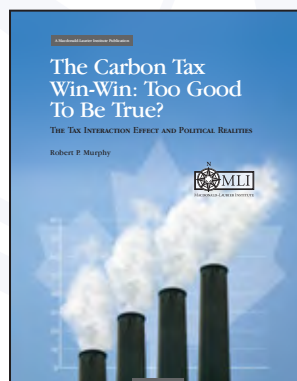
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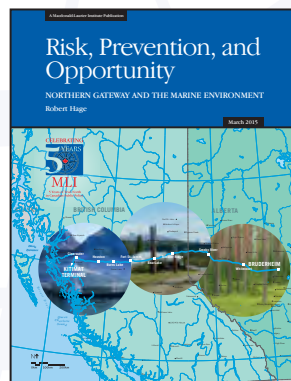
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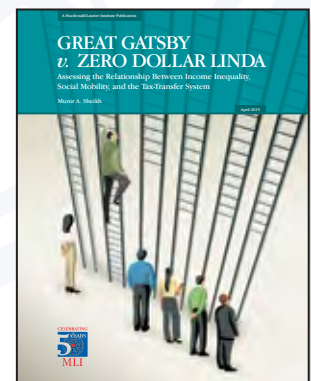
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