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The Evolution of Life Sentences For Second-Degree Murder: Parole Ineligibility and Time Spent in Prison

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The Evolution of Life Sentences For Second-Degree Murder: Parole Ineligibility and Time Spent in Prison

Debra Parkes, Jane Sprott & Isabel Grant*

Abstract

Canada's murder sentencing regime has been in effect since 1976, and yet very little data has examined what these sentences actually mean for those convicted. This paper begins to fill this gap by examining the meaning of a life sentence for those convicted of second degree murder in Canada. Using data provided by the Correctional Investigator, we examine both the parole ineligibility periods imposed by sentencing judges, and how long people are serving before a grant of full parole over time from 1977 to 2020. We found statistically significant increases over time in both judicial parole ineligibility periods, and in how long people are serving beyond their first full parole eligibility date. We also found that Indigenous persons are more likely to serve longer periods of time past their parole ineligibility date. We conclude that, at every point in the process, sentencing for murder has become increasingly harsh over time with no obvious public safety rationale for this increase.

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1. Introduction

Life imprisonment accompanied by a long period of parole ineligibility is the harshest sentence known to Canadian law. Nearly 5,000 people are serving these sentences in Canada, the vast majority of them for murder.¹ Since the abolition of the death penalty for murder in 1976, a murder conviction has resulted in an automatic life sentence with 25 years of parole ineligibility for adults convicted of first degree murder, and somewhere between 10 and 25 years of parole ineligibility for those convicted of second degree.² Notably, parole ineligibility does not determine release date; rather it determines the first date at which a person is eligible to be considered for parole. A life sentence means just that. Even if an individual is released from prison on parole, they will be under supervision, and subject to re-incarceration for the remainder of their lives.³

These sentences have been made even more harsh in recent years, with the abolition of a mechanism for reconsideration of parole ineligibility after 15 years (the “faint hope clause”),⁴ and the potential for periods of parole ineligibility to be served consecutively where an individual

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¹ See Public Safety Canada, *Corrections and Conditional Release Statistical Overview 2019*, (Ottawa: Public Safety Canada, September 2020) at 66 (Table C14) <<https://www.publicsafety.gc.ca/cnt/rsrccs/pblctns/ccrso-2019/ccrso-2019-en.pdf>> [CCRSO 2019].

² See *Criminal Code*, RSC 1985, c C-46, s 745.

³ See Canada, National Parole Board, *Vision 2020 – Public Safety, Public Service*, (Ottawa: Minister of Public Works and Government Services Canada, February 2009) at 20 <<https://www.canada.ca/en/parole-board/corporate/publications-and-forms/vision-2020-public-safety-public-service-february-29.html>>.

⁴ See Bill S-6, *An Act to Amend the Criminal Code and another act*, 3rd Sess, 40th Parl, 2011 (assented to 23 March 2011). The Act abolished the “faint hope clause”, allowing those sentenced to murder with a parole ineligibility period greater than 15 years to apply for a shortening of the original parole ineligibility period.

has been convicted of more than one murder.⁵ Given the severity of these sentences, it is perhaps surprising how little research has been conducted to examine two key questions: first, what is the length of the parole ineligibility periods that are being imposed by judges for second degree murder; and second, how long are people sentenced to life actually serving in prison before being released on parole.

Grant, Choi and Parkes recently began to examine the first question with a sample of 296 cases, drawn from three time periods over the past 30 years.⁶ That study provides some preliminary data on how the parole ineligibility periods imposed by judges for second degree murder have changed over time. The authors found that the average parole ineligibility period increased slightly over time, but the increase was relatively small.⁷ Nevertheless, the study did find a dramatic *decrease* over time in the number of individuals being sentenced to the minimum period of 10 years of parole ineligibility, and a corresponding increase in higher periods of ineligibility.⁸ This means that the assumption the Supreme Court of Canada made in its 1995 decision in *R v Shropshire*,⁹ that 10 years of parole ineligibility would be the “general rule”¹⁰ in second degree murder sentencing, has not proven to be the case.¹¹ The authors found that in their sample, the floor for sentencing second degree murder appeared to have been raised across

⁵ See *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5, s 2; *Criminal Code*, *supra* note 2, s 745.51(1). Prior to 2011, those serving more than one life sentence for multiple murders served their parole ineligibility periods concurrently.

⁶ See Isabel Grant, Crystal Choi & Debra Parkes, “The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing” (2021) 52:1 *Ottawa L Rev* 133. The authors evaluated whether punitive changes made to murder sentencing laws have resulted in the lengthening of parole ineligibility periods, by examining the length of parole ineligibility periods set by Canadian courts during three time intervals: 1987-88, 2002-03 and 2017-18.

⁷ *Ibid* at 163.

⁸ *Ibid* at 164.

⁹ [1995] 4 SCR 227, 129 DLR (4th) 657.

¹⁰ *Ibid* at para 27.

¹¹ *Grant, Choi & Parkes, supra* note 6 at 174.

the country, with a particular increase in Ontario.¹² The authors recognized the limitations of their small sample, the need for further study to determine if these preliminary results could be replicated, and the need to explain what might be influencing decisions to set longer parole ineligibility periods.¹³

The answer to the second question of how long people sentenced to life are actually serving in prison, is even more elusive. And there is a related inquiry about the relationship between parole eligibility and actual release for those serving life sentences. While the Parole Board of Canada does not release statistics on the relationship between release dates and parole eligibility dates, the available data shows that most people serving determinate sentences (*i.e.*, not life sentences) are not released at their eligibility date.¹⁴ If, in fact, parole ineligibility periods for life sentences have been creeping up over time, it is particularly important to know what those sentences mean for the people serving them: is there a connection between the parole ineligibility set by a judge and how long the person actually spends in prison? Long-term

¹² *Ibid* at 158–63. From 1987-1988, Ontario’s average parole ineligibility period for second degree murder was 12.57 years, slightly lower than the national average at 13.36 years. However, by 2017-2018, Ontario’s average parole ineligibility period was *higher* than the national average at 15.29 years, compared to the mean of 14.28 years across Canada. Notably, “[i]n 1987-1988, a larger percentage of persons received the ten-year minimum in Ontario (40 percent) than in Canada as a whole (35 percent). However, by 2017 only about 4 percent of people in Ontario received the minimum sentence compared to 13 percent nationally” (*ibid* at 160).

¹³ *Ibid* at 174–76.

¹⁴ See Parole Board of Canada, *Performance Monitoring Report 2017-2018*, (Ottawa: Parole Board of Canada, January 2019) at 29 <<https://www.canada.ca/en/parole-board/corporate/transparency/reporting-to-canadians/performance-monitoring-report/2017-2018.html>> [*Performance Monitoring Report 2017-2018*]. Figure 19 demonstrates that, from 2013-2018, between 44% and 50% of people serving determinate sentences were released at their “statutory release” (presumptive release at 2/3 of the sentence), well past the time they were eligible for day parole or full parole (*ibid* at 29).

imprisonment is very costly, both in human¹⁵ and fiscal terms.¹⁶ Yet, there is currently a dearth of basic statistical information about the administration of life sentences to inform policy decisions, legislation, and judicial decisions.¹⁷

This study begins to fill that gap. We examine federal correctional data on the administration of life sentences for murder,¹⁸ going back to 1976 when the current murder sentencing regime came into force.¹⁹ These records provide a window into both parole ineligibility set by judges and the administration of the life sentence regime, at least in its broad strokes. This paper focuses on second degree murder because of its unique parole ineligibility scheme, and the unavailability of data on how this regime has been applied. It proceeds in four parts. First, we briefly locate this study in the context of the existing research on the mandatory life sentence for murder in Canada. Second, we describe the methods and the study data. Third, we move on to discuss our findings with respect to our key research questions, namely the length of parole ineligibility periods being set by sentencing judges, and the length of time spent in

¹⁵ See e.g. Susie Hulley, Ben Crewe & Serena Wright, “Re-examining the Problems of Long-term Imprisonment” (2016) 56:4 *Brit J Crim* 769 at 774, finding that “that the modes of adaptation developed by prisoners to cope with the demands of long-term confinement may alter them in fundamental ways, which may well be ‘maladaptive’ and counterproductive for life on release”.

¹⁶ See Canada, Office of the Parliamentary Budget Officer, *Update on Costs of Incarceration*, by Ben Segel-Brown (Ottawa: Parliamentary Budget Officer, March 2018) at 1 <https://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2018/Update%20Incarceration%20Costs/Update%20on%20Costs%20of%20Incarceration_EN.pdf>. In 2016-2017, the Parliamentary Budget Officer assessed the average cost of incarcerating one person in federal prison at \$114,587 per year. The number is an astonishing \$463,045 per year for those in segregation (solitary confinement) (*ibid* at 1).

¹⁷ See e.g. Ben Crewe, Susie Hulley & Serena Wright, “Swimming with the Tide: Adapting to Long-Term Imprisonment” (2017) 34:3 *Justice Q* 517 at 517. Crewe, Hulley & Wright acknowledge that the most comprehensive studies about life-sentenced and long-term prisoners in North America and Europe were conducted “several decades ago” (*ibid* at 517).

¹⁸ The data was obtained through a research collaboration with the Office of the Correctional Investigator, as further discussed in section 2, below.

¹⁹ See Isabel Grant, “Sentencing for Murder in Canada” (1997) 9:5 *Federal Sentencing Reporter* 266 at 266. In 1976, the death penalty was replaced by the mandatory life sentence for murder, carrying a minimum parole ineligibility period of 25 years for first degree murder, and between 10 and 25 years for second degree murder (*ibid* at 266).

prison before parole for those sentenced. Notably, we found a marked increase over time in both the length of parole ineligibility periods set by judges. and the amount of time people sentenced to life were spending in prison beyond their parole eligibility dates. In short, people sentenced for second degree murder are receiving longer periods of parole ineligibility from judges, and are spending longer in prison beyond that which could be accounted for by the increased parole ineligibility. Finally, we conclude with some thoughts on the implications of our findings, including the need for further research and for policy makers to reckon with the increased punitiveness of Canada’s murder sentencing and parole regimes.

2. Life sentences for murder: what we know and don’t know

The number of people serving life sentences in Canada has grown substantially in recent decades.²⁰ Over 24% of all people under federal correctional supervision are serving a life or indeterminate sentence.²¹ The vast majority of those individuals—4,841 or 20.6% of the total number of people under federal sentences—are serving life for murder.²² That number has risen consistently from 11.7% of population of people under federal sentence in 1983,²³ 12.1% in

²⁰ See Canada, Office of the Correctional Investigator, *Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody*, (Ottawa: Office of the Correctional Investigator, February 2019) <<https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20190228-eng.aspx>>. “Today, there are more than 3,600 individuals (or 26.4%) in federal custody with a life sentence. Though the number of new admissions to federal custody with a life/indeterminate sentence has remained relatively stable over the past decade, the accumulation of ‘lifers’ over time creates a stacking effect.”

²¹ *CCRSO 2019*, *supra* note 1 at 66.

²² *Ibid.*

²³ See Solicitor General Canada, *Long Term Imprisonment in Canada: Working Paper No. 1. An Overview of the Long Term Prisoner Population and Suggested Directions for Further Research*, Ministry Committee on Long Term Imprisonment (Ottawa: Ministry of the Solicitor General, April 1984) at 10 <<https://www.publicsafety.gc.ca/lbrr/archives/hv%208708%2016%201984-eng.pdf>>. 1.8% of the total prison population were serving a life sentence for first degree murder; 5.7% were serving a life sentence for second degree murder; and 3.9% were serving a life sentence for non-capital murder and 0.3% were serving a commuted life sentence.

1990,²⁴ 18% in 1996,²⁵ and 19% in 2009.²⁶ All of this has happened while the homicide rate has generally been declining.²⁷ Canada's homicide rate reached its highest point in 1975,²⁸ the year before the death penalty was abolished and the new murder sentencing regime was enacted. Since 1975, the homicide rate in Canada has generally been decreasing, such that in 2016 the rate of homicides was 44% lower than the rate recorded in 1975.²⁹ As of 2018, that rate sits at 1.76 homicides per 100,000 people.³⁰

Of the 4,841 people serving life sentences for murder, 2,934 or 61% are incarcerated, while the remaining 1,907 or 39% are in the community on some form of supervision.³¹ The government's own research shows that people serving life sentences for murder are more likely to succeed in the community than those released for other offences,³² and recent statistics from

²⁴ See Correctional Service Canada, *Long-Term Offenders: Who Are They and Where Are They?* by John R Weekes, Forum on Corrections Research, vol 4, no 2 (Ottawa: Correctional Service Canada, June 1992) at 2 <https://www.csc-scc.gc.ca/research/forum/e042/042b_e.pdf>. Nearly ten percent (9.6%) of the federal prison population were serving a life sentence for second degree/non-capital murder, while 2.5% of the that population were serving life sentences for first-degree/capital murder.

²⁵ See Statistics Canada, *Female Inmates, Aboriginal Inmates, and Inmates Serving Life Sentences: A One Day Snapshot*, by Anne Finn et al, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, April 1999) at 1 <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x1999005-eng.pdf?st=7Zmo_mRJ>. Note that 18% of the total federal incarcerated population was serving a life sentence, including those serving life for first and second degree murder.

²⁶ See Canada, *Corrections and Conditional Release Statistical Overview 2009*, (Ottawa: Public Safety Canada Portfolio Corrections Statistics Committee, December 2009) at 66 <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ccrso-2009/2009-ccrs-eng.pdf>>. In 2009, 4.4% of the federal prison population were serving a life sentence for first degree murder, while 14.5% were serving a life sentence for second degree murder (*ibid* at 66).

²⁷ See Statistics Canada, *Canada's Crime Rate: Two Decades of Decline*, (Ottawa: Statistics Canada, 17 May 2018) <<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015001-eng.htm>>

²⁸ *Ibid*.

²⁹ See Statistics Canada, *Homicide in Canada, 2016*, by Jean-Denis David, Catalogue No 85-002-X (22 November 2017) at 3 <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54879-eng.pdf?st=WFuqCEHV>>.

³⁰ See Statistics Canada, *Homicide in Canada, 2018*, by Joel Roy & Sharon Marcellus, Catalogue No 85-002-X (27 November 2019) at 4 <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00016-eng.pdf?st=Px2lsGUs>>.

³¹ *CCRSO 2019, supra* note 1 at 66 (Table C14). In 2018-19, 307 individuals serving a life sentence for murder are on day parole and 1,600 are on full parole.

³² See Correctional Service Canada, *Community Outcomes for Offenders Serving a Life Sentence*, by Marsha Axford & Matthew Young, Catalogue No PS83-5/R264E-PDF (Ottawa: Correctional Service Canada, May 2012) <publications.gc.ca/pub?id=9.580685&sl=1>, as cited in Bill C-53, *An Act to amend the Criminal Code and the*

the Parole Board of Canada show that only 0.3% of people serving a life sentence for homicide were reincarcerated for a new offence after being granted day parole.³³ However, very little is known about how long people serving life sentences are spending in prison before being paroled into the community, if at all.

When capital punishment was abolished in 1976,³⁴ the average time in custody for capital murder and non-capital murder was 15.8 years and 14.6 years respectively.³⁵ The most recent public reference to the average time spent by life sentenced people in prison can be found in the 2010 Legislative Summary accompanying Bill C-54, the bill that abolished the “faint hope clause.”³⁶ It cited a 1999 government study pinning the average number of years before parole for first degree murder at 28.4 years, noting that “Canada exceeds the average time served [for first degree murder or its equivalent] in all countries surveyed, including the United States, with the exception of US offenders serving life sentences without parole.”³⁷ According to the 1999 study, the number was much lower in other comparable jurisdictions.³⁸ With respect to second degree murder, which is the largest group of people serving life sentences,³⁹ the average amount

Corrections and Conditional Release Act and to make related and consequential amendments to other Acts, 2nd Sess, 41st Parl, 2015, legislative summary (Life Means Life Act).

³³ *Performance Monitoring Report 2017-2018*, *supra* note 14 at 110.

³⁴ See Public Safety Canada, *50 Years of Human Rights Developments in Federal Corrections*, (Ottawa: Human Rights Division Correctional Service Canada, August 1998) <<https://www.csc-scc.gc.ca/text/pblct/rht-drt/index-eng.shtml>>. While capital punishment was formally abolished in July 1976, the last reported executions in Canada occurred in 1962, and all death sentences thereafter were commuted.

³⁵ See Correctional Service of Canada, *A Review and Estimate of Time Spent in Prison by Offenders Sentenced for Murder*, by Mark Nafekh & Jillian Flight, (Ottawa: Correctional Service of Canada Research Branch, November 2002) at 1 <<https://www.csc-scc.gc.ca/005/008/092/b27-eng.pdf>> [Nafekh & Flight 2002].

³⁶ See Bill C-54, *An Act to amend the Criminal Code and to make consequential amendments to the National Defence Act*, 2nd Sess, 40th Parl, 2010, executive summary (Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act).

³⁷ *Ibid.*

³⁸ *Ibid.* The number was 11 years in New Zealand, 14.4 years in England, and 14.8 years in Australia.

³⁹ *CCRSO 2019*, *supra* note 1 at 66.

of time spent in prison before parole is even more difficult to pin down because of the wide range of parole ineligibility periods to which these individuals are subject. A study by Correctional Service of Canada researchers found a relatively small increase in estimated time spent in prison before parole for this group between 1976 and 2002,⁴⁰ although the authors cautioned that their numbers were “underestimates of average incarceration times” due to challenges with the dataset.⁴¹

Data released by the Parole Board of Canada similarly does not give us a full picture of the extent to which correctional and parole decision-making are shaping life sentences. For example, the Parole Board reported that, in 2017-2018, people serving sentences for murder had a grant rate of 87% for day parole applications, which was the highest grant rate for any offence category.⁴² The full parole grant rate for those serving life sentences for murder was 51%.⁴³ However, these numbers do not tell us anything about how these grant rates compare to the applicants’ eligibility dates for parole (*i.e.*, whether life sentenced prisoners are going up for parole and being released when they are first eligible). We know that Indigenous people generally spend more of their sentence in prison before parole than other prisoners.⁴⁴ Other research suggests that the rate of withdrawing, postponing, or waiving rights to apply for parole are quite high, particularly for Indigenous people, and that parole decision-making is highly dependent on

⁴⁰ *Nafekh & Flight 2002, supra* note 35 at 12. See also Public Safety and Emergency Preparedness Canada, *Average Time Incarcerated for 1st Degree Murder Convictions: A 2005 Update*, by Guy Bourgon, (Ottawa: Corrections and Criminal Justice Directorate, 20 January 2005).

⁴¹ *Nafekh & Flight 2002, supra* note 35 at 13.

⁴² *Performance Monitoring Report 2017-2018, supra* note 14 at 25.

⁴³ *Ibid* at 28.

⁴⁴ *CCRSO 2019, supra* note 1 at 93.

whether the applicant has the support of Corrections for release.⁴⁵ Gaining an understanding of the relationship between eligibility for release and actual release of life sentenced prisoners—and particularly the experience for demographic groups, such as Indigenous people—is crucial to assessing the impact of our murder sentencing regime, and how it has changed over time.

3. Method

We received anonymized sentence and parole information from the Office of the Correctional Investigator on all people (living or dead) who were convicted of first or second degree murder in Canada after the murder sentencing regime came into force in 1976 through to January 2021.⁴⁶

To investigate parole ineligibility periods set by judges and the timing of parole release by the Parole Board of Canada (PBC), we identified all people (living or dead) with convictions (as of January 2021) for second degree murder only (N= 4,184). We then removed people who had been deported, young people (who had aged into CSC as they continued their youth sentence), young people sentenced as adults who have shorter periods of parole ineligibility, people whose convictions were quashed, people with offence dates of July 25, 1976 or earlier (the day before the murder sentencing regime came into effect), and those with sentences handed down before

⁴⁵ See Ivan Zinger, “Conditional Release and Human Rights in Canada: A Commentary” (2012) 54:1 *Can J Corr* 117 at 122–25.

⁴⁶ *CCRSO 2019*, *supra* note 1 at 66. The Corrections and Conditional Release Statistical Overview (CCRSO) showed, in 2018-19, a count of 4,841 people serving life sentences (in prison or in the community) for first or second degree murder. While we had a more comprehensive and updated dataset, we estimated, using our data, that in 2018-19 there were 4,899 people serving life sentences in penitentiaries or in the community for first and second degree murder. Given that we do not know when during the 2018-19 fiscal year the CCRSO count happened, and given that we had updated data (e.g. additional people admitting during 2018-19 after the CCRSO count happened), our estimate appears to be reasonable, and it suggests we are working from an equivalently documented dataset.

1977. This gave us a total sample of 3,843. The available demographic descriptions of this population are provided in Table 1.

To examine trends over time in the parole ineligibility periods set by judges and in parole release, we had to further restrict our sample to identify the less complicated cases: those with no prior (provincial or federal) custodial sentences,⁴⁷ and no parole revocations. Complicated cases with previous custodial stays or parole releases made understanding ineligibility periods and parole release timelines impossible.⁴⁸ Therefore, we identified those with no previous (federal or provincial) custodial sentences—that was 77% (N= 2,953) of these second degree conviction cases. To understand parole release, we then identified those who, if they had been released, had not returned to prison. That group was 80% (N= 2,370) of the total number of those who had no previous custodial sentences. An additional 47 entries were missing information, leaving us with a final group size of 2,323 (our “restricted sample”).

This restricted sample, then, while constituting the majority (2,323 out of 3,843 – or 60%) of adult second degree murder cases in Canada, should be understood as the less complicated cases, given there were no prior convictions that resulted in a (provincial or federal) custodial sentence, and no revocations while on full parole. There was also a significant⁴⁹ decline over time in the number of victims associated with our restricted sample of cases. In the earliest time period

⁴⁷ Meaning, individuals contained within the sample could have previous convictions, but none of them resulted in a (provincial or federal) custodial sentence.

⁴⁸ For example, if someone was released on parole, and breached a condition or committed an offence, and returned to prison, their parole eligibility date may change in our dataset to whatever the new eligibility date is, and the original eligibility date will be over-written. As another example, someone might have a previous (first) sentence, and be on parole when the murder happens (constituting a second sentence). In such a case it is possible that the “first release on full parole” could be linked to the first sentence, and the parole eligibility date for the murder would be impacted by that previous sentence. These issues make estimating the timing of the first full parole release impossible for those with custodial histories/parole releases.

⁴⁹ Chi-square= 10.52, df= 4, p<.05

(1977-1988), 10.1% of the cases had two or more victims, and in the more recent time period (2012-2020), only 6.4% of cases had two or more victims. This group is well-suited for an investigation into ineligibility periods set by judges because any increases in parole ineligibility over time cannot be attributed to these cases being more complicated or serious. If anything, one might expect the more complicated or serious cases to have longer periods of parole ineligibility and more time before parole.

Our restricted sample of cases is quite similar to the full population of (adult) second degree murder cases. The restricted sample has a slightly different age at the time of the offence distribution (slightly larger proportions of both younger and older people), slightly fewer people identified as white or Indigenous and slightly more people identified as Black or otherwise racialized. The differences were within 3%. Table 1 presents basic demographic information for all adult second degree murder cases (N= 3,843), and for our restricted sample of second degree murder cases (N= 2,323).

Table 1: Population characteristics second degree murder cases

Population characteristics	All adult second degree murder cases	Restricted sample – second degree murder cases with no previous custodial sentences and no parole revocations
Female	5.2% (201)	6.0% (139)
Male	94.7% (3,639)	93.9% (2,182)
Other gender	0.1% (3)	0.1% (2)
Total	100% (3,843)	100% (2,323)
18-20	14.7% (566)	16.6% (386)
21-24	18.1% (695)	18.5% (430)
25-29	16.8% (646)	15.0% (348)
30-39	22.6% (869)	19.5% (454)
40-49	11.8% (453)	12.4% (287)
50-83	6.7% (257)	8.4% (195)
Missing Information	9.3% (357)	9.6% (223)
Total:	100% (3,843)	100% (2,323)

White	64.0% (2,461)	61.6% (1,430)
Indigenous	21.7% (833)	19.3% (449)
Black	5.9% (228)	7.5% (175)
Other Racialized Identities	7.1% (271)	9.7% (226)
Missing Information	1.3% (50)	1.9% (43)
Total:	100% (3,843)	100% (2,323)

Age: Chi-square= 19.14, df= 6, p<.01

Race: Chi-square= 26.70, df= 4, p<.001

We were interested in understanding any changes over time and among groups in the *parole ineligibility period* (in years) as set by judges. The parole ineligibility period was provided for 78% (N= 1,821) of the restricted sample. For the remaining 22% (N= 502), we had to calculate the ineligibility period from the start of the prison stay (typically, this was the arrest date)⁵⁰ to the first full parole eligibility date.⁵¹ Those whose ineligibility period had to be calculated showed the same trends over time as the group with the information provided, so we have combined the two groups.

To explore trends over time, we created groups based on when the sentence was handed down. This resulted in six time intervals, with roughly equal numbers of individuals in each group:⁵² 1977-1988; 1989-1996; 1997-2004; 2005-2011; 2012-2016; and 2017-2020.⁵³

⁵⁰ *Criminal Code*, *supra* note 2, s 719(1), 746(a). Unlike other sentences, which begin on the day a person is sentenced (s 719(1) of the Code), a life sentence begins to run on the day a person is taken into custody for the offence (s 746 (a)).

⁵¹ Having to estimate the ineligibility period through dates is another reason why we restricted our sample to those with no previous custodial sentences and no revocations (if released on full parole). As described above, *supra* note 48, those dates could change if there were multiple releases, thus creating error. Restricting the group to more simple cases reduces (but obviously does not eliminate) concerns about using those dates to estimate the parole ineligibility period.

⁵² An obvious way to explore trends over time might have been to create six equal time intervals. However, given that cases are not evenly spread across years, this approach would create a different number of cases in each time interval, with a disproportionate number of cases occurring the later time periods. Very small numbers in some of the time intervals would make it difficult to discern trends over time.

⁵³ In exploring parole ineligibility periods, and time in prison before release, we tend to present distributions as a more complete description as compared to either a mean or median number of years. For our purposes, both the

Consecutive parole ineligibility periods for multiple murders were available for offences committed on or after December 2, 2011. Within our dataset there was no consistent coding of the imposition of consecutive parole ineligibility. However, 31 cases in our restricted sample of second degree murder convictions were eligible for consecutive ineligibility periods (committed on or after December 2, 2011, and had two or more victims), with the majority (26 cases) in the most recent time frame.

We also identified the *gender* and *race* of the individual, where it was available in the records. Exploring trends with respect to women, was made difficult by the low numbers of such groups identified in the sample, particularly in the earlier years. As Table 1 showed, we only had 139 women in our restricted sample, and none before 1981. Given such small numbers, we could only examine gender in the two more recent time periods (1981-2006 and 2007-2020), where there was a roughly equal number of women in each period.

With respect to racialized and Indigenous people, the only group large enough to examine trends over time is Indigenous people. However, Indigeneity was not well-captured in this dataset until about 2005, making any exploration of trends over time difficult. Similar to the analyses with women, we created only two time frames—2005-2012 and 2013-2020—with roughly equal numbers of Indigenous people in each time period. We could not explore trends over time with other racialized identities because of their low numbers, and had to similarly restrict the sample because of inconsistent coding of racial identities in the pre-2005 data.

mean and median could obscure the changes we are interested in exploring over time. For example, a mean of 15 years could be produced if you had a sample of 100, 50 of whom received 10 years, and 50 who received 20 years. Alternatively, that mean could be produced if all 100 people received 15 years. While the mean in both cases would be 15 years, the distribution is completely different, and it is that distribution which helps us understand changes over time in the ineligibility periods set by judges. The median has similar problems.

We also explored whether there was any significant variation based on the *region* in which individuals were sentenced. For our restricted sample of 2,323, we identified six regions based on the location of the offence (Atlantic, Quebec, Ontario, Prairies, British Columbia, Territories) for 87% (N= 2,011). The missing information was mainly in the earliest time period, with 58% of the cases in 1977-1988 missing information on the location of the offence. Given that loss, we have removed that time frame from the regional analysis.

4. Trends over time in the parole ineligibility periods set by judges for second degree murder

Over time there is a significant increase in the length of parole ineligibility periods set by judges. In our restricted sample, where the individual was sentenced between 1977 and 1988, only 13.5% had an ineligibility period of over 15 years (see Table 2). That proportion grows over time such that, by the most recent time period (2017-2020), 26% received an ineligibility period of over 15 years. At the lower end of the spectrum, in the earliest time period, 51.3% received the minimum parole ineligibility period of 10 years, and by the most recent time period only 20.3% (see Table 2) received the minimum.

Figure 1 and Table 2 show significant increases over time in the ineligibility periods set by judges. That increase is not due to a specific change in legislation; indeed, the introduction of consecutive parole ineligibility in 2011 did not appear to change the overall pattern for second degree murder sentencing. The most recent time frame (2017-2020) had the largest number of cases eligible for consecutive parole ineligibility, yet the change seen during that time period is not particularly dramatic, nor different from previous time periods. In fact, there is a similar—or perhaps slightly larger—increase in the parole ineligibility periods from 1989-1996 to 1997-2004 (see Table 2). Other research shows that consecutive parole ineligibility is more likely to be

ordered in cases involving first degree murder, or a combination of first and second degree murders, rather than for multiple second degree murders alone.⁵⁴

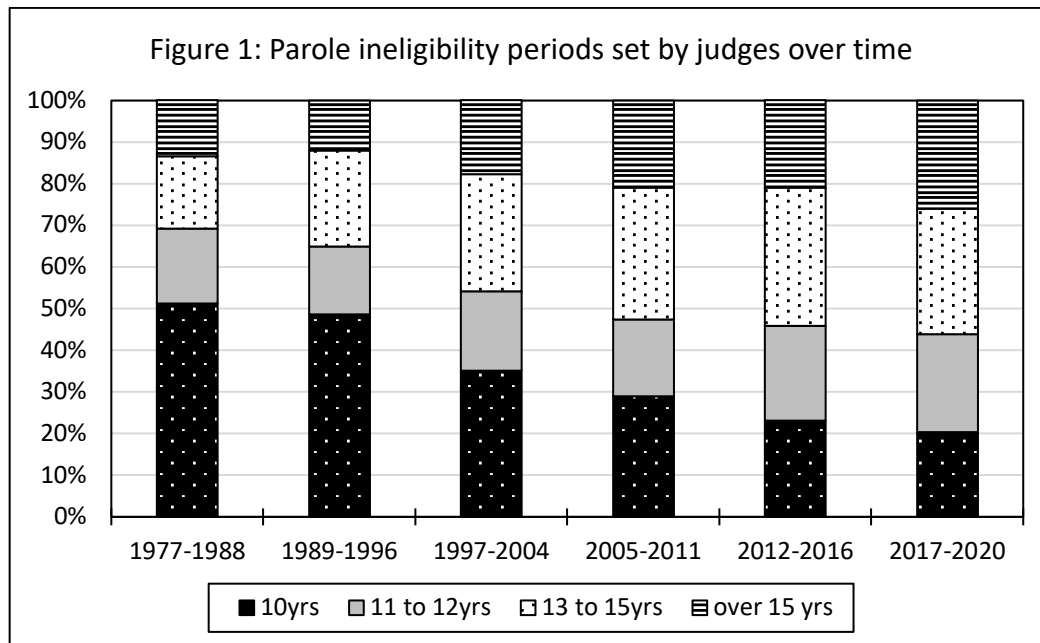


Table 2: Parole ineligibility periods set by judges over time

	Parole Ineligibility Period				Total
	10 years	11 to 12 years	13 to 15 years	Over 15 years	
1977-1988	51.3%	17.9%	17.4%	13.5%	100% (386)
1989-1996	48.6%	16.4%	23.0%	12.0%	100% (426)
1997-2004	35.1%	19.1%	28.1%	17.8%	100% (388)
2005-2011	28.9%	18.5%	31.7%	20.9%	100% (454)
2012-2016*	23.1%	22.8%	33.2%	21.0%	100% (334)
2017-2020*	20.3%	23.6%	30.1%	26.0%	100% (335)
Total	35.2% (817)	19.5% (452)	27.1% (630)	18.3% (424)	100% (2,323)

Chi-square = 151.825, df= 15, p<001

*Consecutive ineligibility periods for multiple murders were available for offences committed December 2, 2011 and later.

⁵⁴ *Grant, Choi & Parkes, supra* note 6 at 166–68. Examining reported cases and those referenced in the media, Grant, Choi & Parkes found 54 cases eligible for consecutive parole ineligibility. Twenty-three individuals (43%) received consecutive parole ineligibility and 31 (57%) did not. Of the 23 cases receiving consecutive parole ineligibility, only three involved charges of second degree murder only. The other 23 involved charges of first degree murder on its own or in combination with second degree murder.

Gender. As explained earlier, we could only examine two time periods with a roughly equal number of women in each period. In addition, because of the low numbers, the parole ineligibility periods have been pooled. Table 3 shows the ineligibility periods for both time frames for men and women separately. Men see a significant increase over time in their parole ineligibility periods. Women also see an increase in their parole ineligibility periods similar to that observed for men, but for women this change is non-significant in statistical terms, possibly due to the low numbers in some cells.

While the parole ineligibility periods set for men and women in 1981-2006 are relatively similar, in the most recent time frame, women see significantly⁵⁵ shorter ineligibility periods than men. In 2007-2020, 32.4% of women received an ineligibility period of 10 years compared to 22.8% of men and 40.8% of women received an ineligibility period of over 12 years compared to 55.6% of men (see Table 3). For both men and women, parole ineligibility periods increased across time, and men received longer parole ineligibility periods than women in both time periods.⁵⁶

Table 3: Gender and parole ineligibility periods set by judges (1981-2020)

		Parole Ineligibility Period			
		10 years	11 to 12 years	Over 12 years	Total
Women	1981 -2006	48.5%	19.7%	31.8%	100% (66)
	2007-2020	32.4%	26.8%	40.8%	100% (71)
	Total	40.1%	23.4%	36.5%	100% (137)
Men	1981-2006	43.3%	17.6%	39.1%	100% (1,179)
	2007-2020	22.8%	21.5%	55.6%	100% (924)
	Total	34.3%	19.3%	46.4%	100% (2,103)

Men: Chi-square= 98.22, df= 2, p<.001

⁵⁵ Chi-square= 6.02, df= 2, p<.05

⁵⁶ In an ANOVA, there was a significant main effect of gender ($F= 9.24$, $df= 1,2236$, $p<.01$), such that men saw longer ineligibility periods than women (an average of 13.1 years compared to 12.2 for women); and a significant main effect of time ($F= 7.09$, $df= 1,2236$, $p<.01$), with women increasing from an average ineligibility period of 11.9 years (1981-2006) up to 12.5 years (2007-2020), while men increased from an average of 12.6 to 13.6 years.

Women: Chi-square= 3.70, df= 2, p= .157

Indigeneity and Race. Table 4 shows the parole ineligibility periods by Indigeneity for two time periods. Only non-Indigenous people see a significant increase in their parole ineligibility period over time. For example, 25.4% of non-Indigenous people received an ineligibility period of 10 years in first time period, but in the second, only 18.2% received 10 years (Table 4). Indigenous people also saw a reduction in the proportion receiving 10 years (from 38.1% to 30.1%), but this change was not significant.

Table 4: Indigeneity and parole ineligibility periods set by judges (2005-2020)

		Parole Ineligibility Period				
		10 years	11 to 12 years	13 to 15 years	Over 15 years	Total
Indigenous	2005-2012	38.1%	13.3%	28.3%	20.4%	100% (113)
	2013-2020	30.1%	20.5%	34.3%	15.1%	100% (166)
	Total	33.3%	17.6%	31.9%	17.2%	100% (279)
Non-Indigenous	2005-2012	25.4%	20.5%	33.1%	21.0%	100% (405)
	2013-2020	18.2%	24.4%	30.3%	27.1%	100% (439)
	Total	21.7%	22.5%	31.6%	24.2%	100% (844)

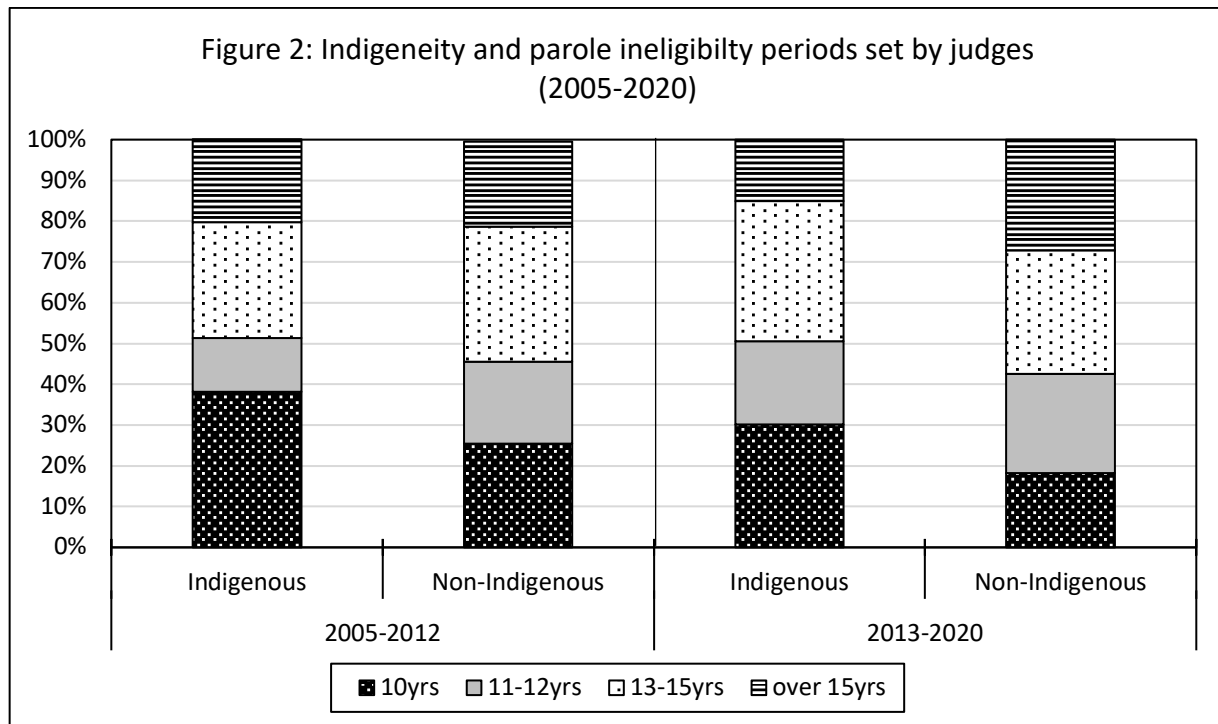
Indigenous: Chi-square= 5.12, df= 3, p= .163

Non-Indigenous: Chi-square= 10.24, df= 3, p<.05

In both time periods, however, there is a significant⁵⁷ difference in the ineligibility periods between Indigenous and non-Indigenous people: Indigenous people appear to receive significantly shorter ineligibility periods. For example, Figure 2 shows that in 2005-2012, 38% of Indigenous people received an ineligibility period of 10 years compared to 25% of non-Indigenous

⁵⁷ Indigenous vs. Non-Indigenous 2005-2012: Chi-square= 8.07, df= 3, p<.05. Indigenous vs. Non-Indigenous 2013-2020: Chi-square= 16.69, df= 3, p<.001.

people. In 2013-2020, 30% of Indigenous people received an ineligibility period of 10 years, compared to 18% of non-Indigenous people.

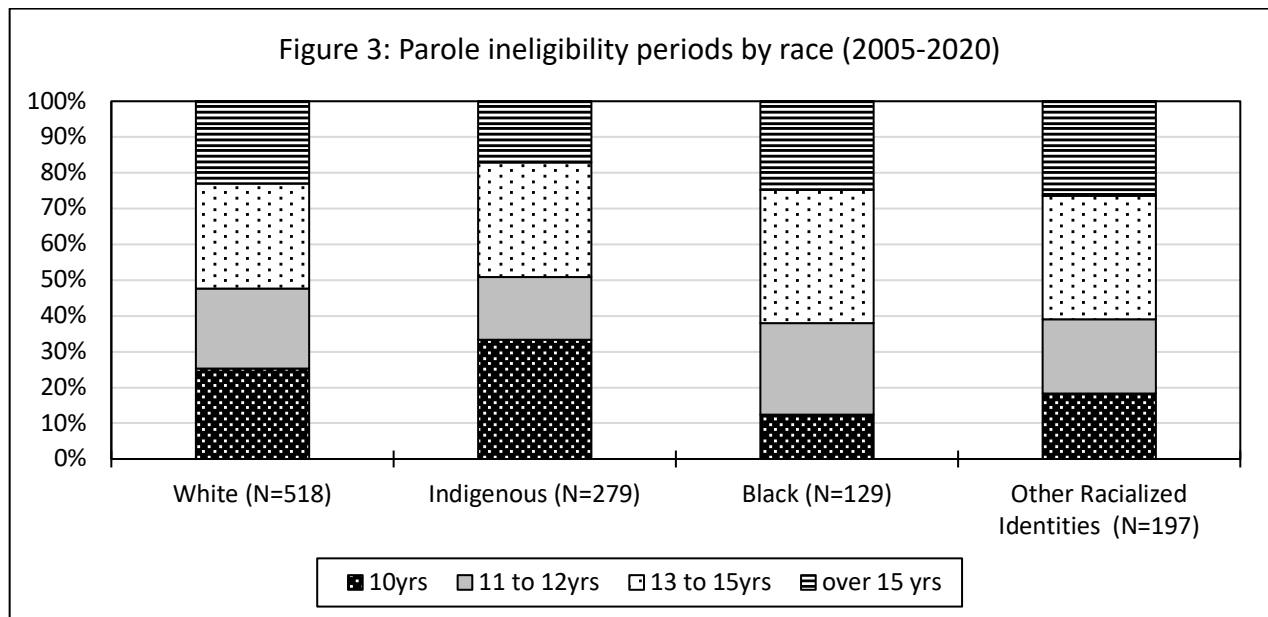


As discussed earlier, the number of racialized individuals in the restricted sample was not large enough across all periods to examine trends over time, and we had to restrict the time period to 2005 onwards. However, there was a significant⁵⁸ overall relationship between race and parole ineligibility periods (see Figure 3 below). In particular, Black persons and other racialized identities⁵⁹ saw significantly longer parole ineligibility periods than white or Indigenous

⁵⁸ Chi-square= 31.05, df= 9, p<.001. While Indigenous people, as a group, show the most marked differences in parole ineligibility periods compared to the other three groups, the significant differences persist if Indigenous people are removed from the analyses (chi-square= 13.52, df= 6, p<.05). Said another way, the significant differences across groups was not due solely to the Indigenous ineligibility periods.

⁵⁹ The "Other Racialized Identities" group comprises Arab, Arab/West Asian, Southeast Asian, South Asian, Chinese, East Indian, Euro (eastern, northern southern western), Filipino, Hispanic, Japanese, Korean, Latin American, Multi-Ethnic, Oceania, and Other. The 1.9% of the sample (see Table 1 above) who were missing information were also included in this group.

people. For example, while 33% of Indigenous people and 25% of those identified as white received a parole ineligibility period of 10 years, only 12% of Black persons and 18% of other racialized people received these shorter ineligibility periods (see Figure 3). Our data does not provide an explanation for this finding. There was, for example, no significant difference across racialized groups in the number of victims associated with the second degree murder conviction. This finding is cause for concern given the well-documented racial biases that permeate the Canadian criminal justice system.⁶⁰



⁶⁰ While we are hampered by a lack of Canadian data (see Paul Millar & Akwasi Owusu-Bempah, “Whitewashing Criminal Justice in Canada: Preventing Research through Data Suppression” (2011) 26:3 *CJLS* 653), where data does exist, there is evidence of unexplained differences in the treatment of people who are Black versus members of other racial groups at every stage examined. See, for example, police stops and use of force (Scot Wortley & Lysandra Marshall, “Bias Free Policing: The Kingston Data Collection Project Final Results” (20 September 2005), online (pdf): *Queen’s University* <<http://hdl.handle.net/1974/8655>>; Scot Wortley, “Police Use of Force in Ontario: An Examination of Data from the Special Investigations Unit” (2006), online (pdf): *Ontario Ministry of the Attorney General* https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/AfricanCanadianClinicIperwashProject_SIUStudybyScotWortley.pdf; pretrial detention (Julian V Roberts & Anthony N Doob, “Race, Ethnicity, and Criminal Justice in Canada” (1997) 21 *Crime and Justice* 469; Gail Kellough & Scot Wortley, “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42:1 *Brit J Crim* 186); and over-incarceration (Akwasi Owusu-Bempah et al, “Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada” (2021) *Race and Justice* 1).

Regional Variation: As previously explained, given the missing information, we had to create a slightly different time frame (1989-2020) to examine regional differences. Moreover, given the small number of cases within some regions, we could not explore trends over time, and have therefore presented the entire time period.⁶¹ Table 5 shows the significant regional variation. The Atlantic region stood out as having longer parole ineligibility periods than any other region (36.1% received an ineligibility period of more than 15 years), and Quebec stood out as having the shortest (60.6% received a parole ineligibility period of 10 to 12 years). Expressed another way, the average parole ineligibility period was 14.3 years in the Atlantic region compared to 12.4 years in Quebec.

Table 5: Parole ineligibility period as set by the judge across regions (1989-2020)

	Parole Ineligibility Period			Total
	10 to 12 years	Over 12 years to 15 years	Over 15 years	
Atlantic	31.5%	32.4%	36.1%	100% (108)
Quebec	60.6%	29.7%	9.8%	100% (327)
Ontario	46.7%	33.9%	19.4%	100% (700)
Prairies	54.8%	23.3%	21.9%	100% (420)
BC	52.7%	25.6%	21.6%	100% (273)
Territories	31.6%	47.4%	21.1%	100% (19)
Total	50.8% (939)	29.6% (546)	19.6% (362)	100% (1,847)

Chi-square = 65.68, df= 10, p<.001 (one expected value <5). Chi-square (not including Territories) = 62.23, df= 8, p<.001

⁶¹ Only Ontario had a large enough number of cases to explore trends over time, and it mirrored the overall results shown in Table 2—significant increases over time from 9.8% receiving an ineligibility period of over 15 years in 1988-1996 to 22.6% receiving an ineligibility period of over 15 years in 2017-2020 (Chi-square= 41.11, df= 12, p<.001). Expressed another way, the average ineligibility period in Ontario in 1988-1996 was 12.3 years. In 2017-2020, it was 13.6 years.

5. Trends over time in actually being released on parole by the PBC

Of our restricted group of 2,323, 51% (N= 1,186) had a first full parole eligibility date of December 31, 2015 or earlier. We had parole release information until January 2021, thus allowing five full years to have possibly been released for those with a December 31, 2015 eligibility date. Seventy people who died before becoming eligible for full parole were removed, leaving a sample of 1,116. We created time frames based on people's first parole eligibility date, which gave us three time-groupings (those who had eligibility dates between 1986 to 2000; 2001 to 2008; 2009 to 2015). Over time we see a significant growing delay in being released when first eligible (Figure 4 and Table 6 below). There are, for example, substantial declines over time in the proportion of people who are released within one year of reaching their eligibility date (see Figure 4 and Table 6 below). Looking at those who had their first full parole eligibility date between 1986 and 2000, 41.7% were released within a year of their eligibility date. Of those who became eligible between 2001 and 2008, about a third were released within one year, and of the most recent group (eligible between 2009 to 2015), only 14.8% were released within one year of their parole eligibility date.

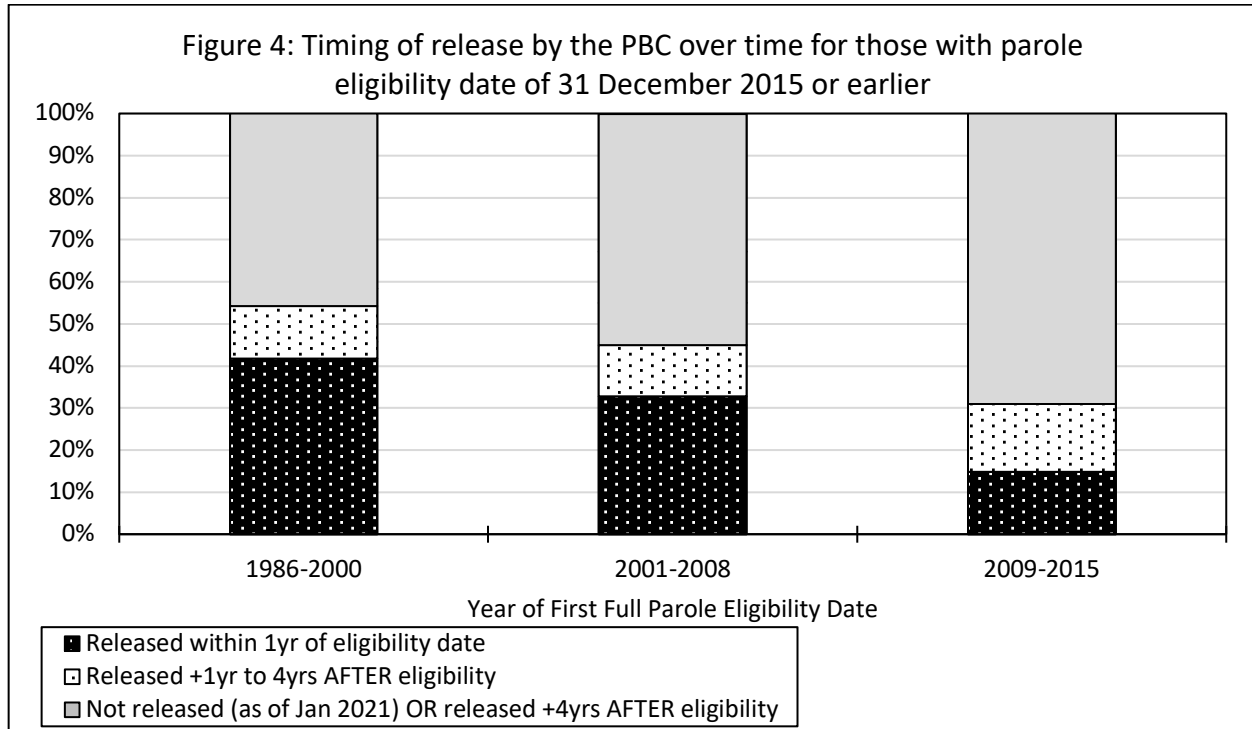


Table 6: Timing of release by the PBC over time for those with parole eligibility date of 31 December 2015 or earlier

		Time between being eligible for full parole and being released on full parole			Total
		Within 1 year of eligibility date	Over 1 year to 4 years AFTER eligibility	Not released (as of Jan 2021) OR released more than 4 years AFTER eligibility	
Year of first full parole eligibility date	1986-2000	41.7%	12.6%	45.7%	100% (405)
	2001-2008	32.8%	12.1%	55.0%	100% (338)
	2009-2015	14.8%	16.2%	69.0%	100% (364)
Total		29.9% (334)	13.6% (151)	56.5% (622)	100% (1,107)

Chi-square= 68.36, df= 4, p<.001.

NB: 9 people were removed because of clear typos in dates in the CSC records.

There are also increases in the proportion of people who were not released at all (as of January 2021), or were released more than four years after their eligibility date (see Figure 4 and

Table 6). We created this group (not released or released more than four years after eligibility), so that the number of people who fall into our groups (in Figure 4 and Table 6) stays the same over time. Some people, especially in the most recent time period, may end up eventually being released, but they would fall into the category of being released more than four years after their eligibility date. Of those whose eligibility date fell between 1986 and 2000, 45.7% have either not yet been released, or were released more than four years after their eligibility date. In the most recent time frame (2009 to 2015), 69% were either not released or released more than four years after their eligibility date.

The longer ineligibility periods set by judges, coupled with the relatively long delays in actually being released by the Parole Board has resulted in people spending significantly longer in prison over time. To estimate how long people sentenced to life are spending in prison before parole, we calculated the time from the start of their stay to their first full parole release, or, if not released, to December 31, 2020. Figure 5 and Table 7 shows that a little over a third (35.3%) of people spent 10-12 years in in prison before parole in the 1986-2000 time frame, while more recently (2009-2015) that number has declined to only 8% spending 10-12 years in prison. At the other end, 49.4% of people spent over 15 years in prison during the earliest time period (1986-2000), while more recently (2009-2015) 76.1% are spending that long in prison.

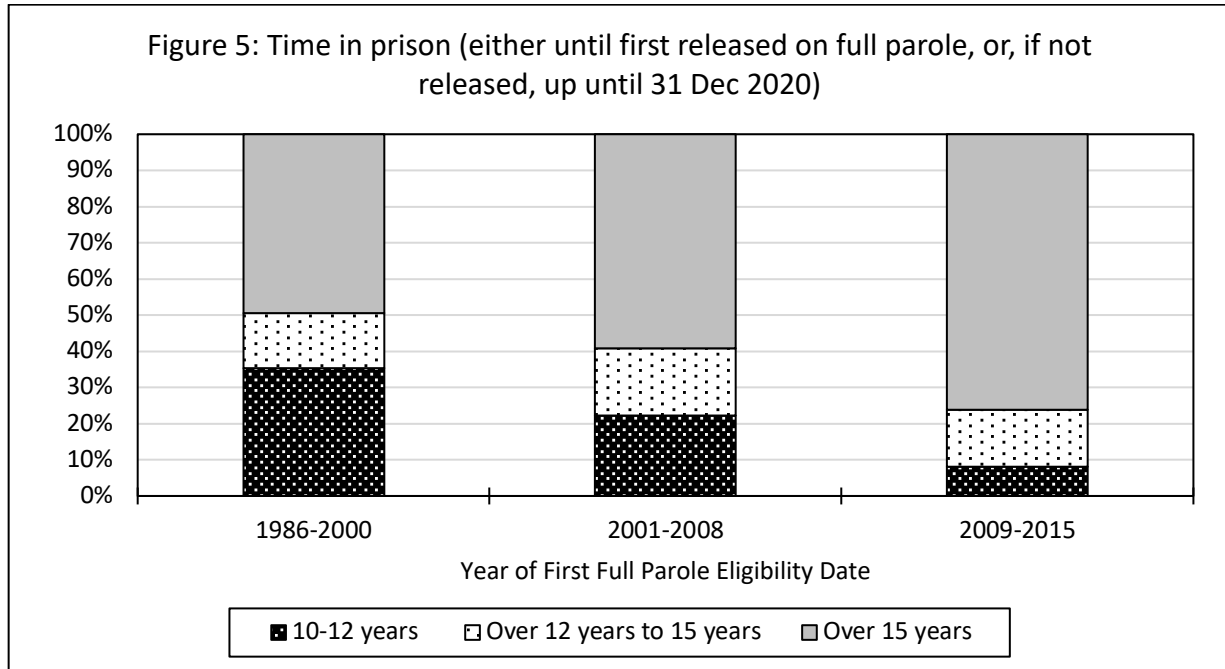


Table 7: Time spent in prison for those with a parole eligibility date of 31 December 2015 or earlier

		Time in prison (either until first released on full parole, or, if not released, up until 31 Dec 2020).			
		10-12 years	Over 12 years to 15 years	Over 15 years	Total
Year of first full parole eligibility date	1986-2000	35.3%	15.3%	49.4%	100% (405)
	2001-2008	22.2%	18.6%	59.2%	100% (338)
	2009-2015	8.0%	15.9%	76.1%	100% (364)
	Total	22.3% (247)	16.5% (183)	61.2% (677)	100% (1,107)

Chi-square= 88.27, df= 4, p<.001

We also see a significant⁶² delay in being released when first eligible when examining a more a restrictive range of cases at the lower end of seriousness—those with a parole ineligibility

⁶² Chi-square= 36.82, df= 4, p<001.

period of 10 to 12 years.⁶³ In the 1986 to 2000 time frame, 41% were released within one year of their first eligibility date, and this declines to 16.3% in the most recent (2009-2015) time period. At the higher end, we also see an increase over time in the number of people either not released or released after four years of being eligible, with 46.1% in the early time period, rising to 64.9% in the most recent time frame.

Although the judge set a parole ineligibility period of 10-12 years in each of these cases, the delay in parole release resulted in people sentenced to life for murder spending significantly longer in prison over time. Table 8 shows that, while 42.3% of people ended up serving 10-12 years in prison in the earliest time frame, that has declined down to 13.9% most recently. Thus, while a 10-12 year ineligibility period translated into a prison stay that lasted over 15 years for 44.3% of people in 1986-2000, more recently it has resulted in 64.9% staying over 15 years.

Table 8: Those with a 10-12 years ineligibility period set by the judge – Time spent in prison for those with a parole eligibility date of 31 December 2015 or earlier

		Time in prison (either until first released on full parole, or, if not released, up until 31 Dec 2020).			
		10-12 years	Over 12 years to 15 years	Over 15 years	Total
Year of first full parole eligibility date	1986-2000	42.3%	13.4%	44.3%	100% (336)
	2001-2008	33.2%	19.0%	47.8%	100% (226)
	2009-2015	13.9%	21.2%	64.9%	100% (208)
	Total	31.9% (246)	17.1% (132)	50.9% (392)	100% (770)

NB: lose 6 people because of typos in dates in the CSC records.

Chi-square= 48.86, df= 4, p<.001.

⁶³ Those with a 10-12 year ineligibility period and a first full parole release date of 15 December 2015 or earlier: N= 813; minus 37 people who died before their first full parole eligibility date.

Indigeneity and Race: While the low numbers precluded any exploration over time by Indigeneity, we found that overall Indigenous people were significantly less likely than non-Indigenous people to have been released near their eligibility date. In particular, Indigenous people were significantly⁶⁴ more likely to not be released or to be released more than four years after their eligibility date, with 72.4% falling into that category compared to 53.5% of non-Indigenous people. Table 9 shows the significantly longer periods of time Indigenous people are serving in prison compared to non-Indigenous people. While a quarter (24.2%) of non-Indigenous people served 10-12 years before release, only 11.7% of Indigenous people served 10-12 years. Three quarters (76.1%) of Indigenous people ended up serving over 15 years compared to 58.6% of non-Indigenous people. This finding is consistent with the available data about full parole release among the general penitentiary population, where the release of Indigenous people is significantly delayed beyond the average release date for all incarcerated people.⁶⁵

Table 9: Time in prison and Indigeneity for those who had a first full parole eligibility date of 31 December 2015 or earlier

	Time in prison (either until first released on full parole, or, if not released, up until 31 Dec 2020).			
	10-12 years	Over 12 years to 15 years	Over 15 years	Total
Indigenous	11.7%	12.3%	76.1%	100% (163)
Non-Indigenous	24.2%	17.3%	58.6%	100% (994)
Total	22.3% (247)	16.5% (183)	61.2% (677)	100% (1,107)

Chi-square= 18.78, df= 2, p<.001

⁶⁴ Chi-square= 23.14, df= 2, p<.001

⁶⁵ CCRSO 2019, *supra* note 1 at 99.

Thus, although we found that Indigenous people tended to have significantly lower ineligibility periods set by judges (see Figure 2 or Table 4 above), any impact of this trend was severely undermined by the delay in release by the Parole Board. The result is that Indigenous people serving life sentences ended up serving significantly longer time in prison than non-Indigenous people.

6. Understanding increases in parole ineligibility and actual releases on parole

Overall, we have demonstrated that, at least for our restricted sample of cases, judges have, over time, been imposing longer periods of parole ineligibility on those convicted of second degree murder, with less reliance on the minimum period of parole ineligibility. We have also shown that, over time, a larger number of people sentenced to life remain incarcerated at least four years beyond their parole ineligibility date. These two findings together strongly support the conclusion that the meaning of a life sentence for second-degree murder has become considerably harsher over time.

The finding with respect to judicial parole ineligibility supports the preliminary results of Grant, Choi and Parkes.⁶⁶ While the minimum period of 10 years used to be the norm, reliance on the minimum decreased considerably over time, as parole ineligibility over 15 years became more common. Our study provides some encouraging information, at least about judicially-imposed parole ineligibility for Indigenous persons. Although Indigenous persons are vastly overrepresented in our sample as compared to their proportion of the general population, in the two time periods for which we were able to obtain information, 2005-2012 and 2013-2020, Indigenous persons received significantly shorter periods of parole ineligibility than non-

⁶⁶ Grant, Choi & Parkes, *supra* note 6 at 174–76.

Indigenous persons, more reliance on the minimum period of parole ineligibility, and less reliance on the highest periods of parole ineligibility. It is noteworthy that both time periods come after the Supreme Court of Canada decision in *R v Gladue*,⁶⁷ interpreting s. 718.2(e) of the *Criminal Code* which was enacted to give judges a tool to respond to the over-incarceration of Indigenous people that is rooted in the ongoing impacts of colonialism and systemic racism.⁶⁸ However, some apparent improvement on the sentencing front is severely undermined by our finding that Indigenous persons are much more likely to be detained for four years or more beyond their parole ineligibility date. This finding is troubling given the extraordinarily high rates of Indigenous people, and particularly Indigenous women, being sentenced to life in recent years. From 2009-2019, 38.1% of all women sentenced to life were Indigenous.⁶⁹

We note also that, although the numbers are too small to study over time, Black persons received longer periods of parole ineligibility than white or Indigenous people in our sample. Despite substantial evidence of anti-Black racism in federal corrections,⁷⁰ and throughout the criminal justice system,⁷¹ Canadian courts have, until recently, generally limited the application

⁶⁷ [1999] 1 SCR 688, [1999] SCJ No 19.

⁶⁸ *Criminal Code*, *supra* note 2, s 718.2(e), requiring that “[a] a court that imposes a sentence shall also take into consideration the following principles: ... (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” See also *R v Jensen*, [2005] OJ No 1052, 195 CCC (3d), where the ONCA declared that *Gladue* principles also apply when deciding the parole ineligibility period for an aboriginal person, even in cases where the appellant is convicted of a serious offence, such as murder.

⁶⁹ *CCRSO 2019*, *supra* note 1 at 64.

⁷⁰ See Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries*, Catalogue No PS104-8/2013E-PDF, (Ottawa: The Correctional Investigator Canada, 2013) <<https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20131126-eng.pdf>>.

⁷¹ See Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Manitoba: Fernwood Publishing, 2017); Ontario Human Rights Commission, *A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service*, (Toronto: Government of Ontario, November 2018) <<http://www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black#Executive%20summary%20at%20p.%203>>; *R v Morris*, 2018 ONSC 5186, [2018] OJ No 4631 (Factum of the Interveners, The Black Legal Action Centre and the Canadian Association of Black Lawyers).

of s. 718.2(e) to the sentencing of Indigenous people. However, two recent appellate decisions from Nova Scotia,⁷² and Ontario,⁷³ may signal greater openness to addressing systemic racism, and particularly the impacts of anti-Black racism, in sentencing.⁷⁴ Our results suggest that further attention to this issue, including in relation to setting parole ineligibility periods, is warranted.

Our finding that people convicted of murder are serving longer before parole is alarming because it runs counter to what we know about the success of these individuals on parole. In 2017-2018, for example, the Parole Board of Canada reported that the vast majority of individuals sentenced to life for murder (96.2%) completed day parole successfully, with only a 0.3% revocation rate for a new offence.⁷⁵ The other 3.5% of non-successful day parole completions had their parole revoked for breach of conditions, not the commission of new offences.⁷⁶ The public safety rationale for detaining those convicted of murder longer is simply not there.

We also know that, when they go up for parole, life sentenced prisoners have a higher full parole grant rate than other prisoners, and that this rate has been rising in recent years. In 2017-2018, the last year for which the Parole Board of Canada has released data, 51% of lifers who applied for full parole received it, compared to a rate of 39% for those serving determinate sentences in the same year.⁷⁷ Therefore, given that life sentenced prisoners are more successful

⁷² See *R v Anderson*, 2021 NSCA 62, 174 WCB (2d) 577.

⁷³ See *R v Morris*, 2021 ONCA 680, 74 CR (7th) 390.

⁷⁴ See generally Maria C Dugas, "Committing to Justice: the Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders," (2020) 43:1 Dal LJ 103; Danardo Sanjay Jones, *Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing* (LLM Thesis, Osgoode Hall Law School, 2019) [unpublished], online: <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1039&context=llm>>.

⁷⁵ *Performance Monitoring Report 2017-2018*, *supra* note 14 at 110 (Table 123).

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 92. The full parole grant rate for lifers has been on the rise, from 33% in 2013-2014, 38% in 2014-2015, 39% in 2015-2016, and 43% in 2016-2017.

than other applicants in their claims for full parole in recent years, our study results raise the question of whether people are not going before the board when they are eligible.⁷⁸

The reality that parole is vastly underutilized, generally,⁷⁹ has prompted Doob, Webster and Manson to argue that Canada has a system of “zombie parole”, a nearly-dead process that does not meet its objectives of promoting public safety through timely and supported reintegration into the community.⁸⁰ They suggest public misperceptions that people are routinely released early on parole and risk-aversion in parole decision-making may be contributing to this phenomenon.⁸¹ Other research shows the powerful influence that correctional staff have on parole decisions, to the point that it is nearly impossible to be released by the Parole Board if one does not have the explicit support of correctional staff.⁸² These factors may have particular impact on life sentenced prisoners, given that they do not have access to statutory release at 2/3 of a sentence, which is the predominant form of release for other incarcerated people.⁸³ As our

⁷⁸ We note that during the period under study, the Conservative government cancelled an award-winning program called LifeLine in 2012. See Sarah Heath, “Life(r)’s Work: An Historical Analysis and Evaluation of a Program for Life Sentenced People in Canada” (November 2017) at 18, online (pdf): *St Leonard’s Society of Canada* <https://stleonards.ca/wp-content/uploads/2021/06/Lifers-Work_PeerLife-Collaborative-2017.pdf>. Under the program, people serving life sentences who were in the community on parole were hired as LifeLine peer workers to provide life sentenced prisoners with in-reach support, release planning and reintegration, while also fulfilling a public education mandate (*ibid* at 9–16). While it is unclear whether the cancellation of this program had an impact on the longer time spent by lifers in prison before parole, it suggests that preparing life sentenced prisoners for timely release at their eligibility date may not have been a high priority during this period.

⁷⁹ *CCRSO 2019, supra* note 1 at 88. Data on penitentiary releases generally shows that nearly 60% of those serving determinate sentences are not released on parole at all; instead they come out of prison on statutory release, a presumptive release at 2/3 of the sentence (Table D1).

⁸⁰ See Anthony N Doob, Cheryl Marie Webster & Allan Manson, “Zombie Parole: The Withering of Conditional Release in Canada” (2014) 61:3 *Crim LQ* 301.

⁸¹ *Ibid* at 306–08.

⁸² *Zinger, supra* note 45 at 122–23. In Ivan Zinger’s 2012 study, the Parole Board agreed with the Correction Services Canada [CSC] recommendation in 89.5% of full parole decisions and 83% of day parole decisions. When CSC did not recommend parole, the Board only granted it in 4.7% of full parole decisions and 7.6% of day parole decisions.

⁸³ *CCRSO 2019, supra* note 1 at 88. The percentage of statutory releases was 59.1% of all federal releases in 2018–2019, down from 70.9% in 2009–2010 (Table D1).

study shows, increasing numbers of life sentenced prisoners are incarcerated for many years past their eligibility dates, and without the relief provided by the statutory release mechanism.

The trends in our study are even more concerning for Indigenous people serving life sentences. Inadequate access to culturally appropriate programming, healing lodges, Elders, and other programs to prepare Indigenous people for release on parole is well-documented,⁸⁴ and the Supreme Court of Canada has acknowledged that discrimination against Indigenous people is “often rampant in penal institutions.”⁸⁵ We know that Indigenous people are more likely than non-Indigenous people to delay or waive their parole hearings,⁸⁶ and that when they are before the Board, they are less likely to be granted parole.⁸⁷ Parole ineligibility is only one marker of the harshness of a murder sentence. Our results show that life sentences for Indigenous people may mean something different—and longer—than they do for non-Indigenous people.

7. Conclusion

We found significant increases in parole ineligibility imposed by judges, and significant increases in the amount of time people are being incarcerated beyond their parole eligibility dates. All of this reflects an increasing punitiveness towards those convicted of murder. It is

⁸⁴ See e.g., Auditor General of Canada, *Report 3—Preparing Indigenous Offenders for Release—Correctional Service Canada*, (Ottawa: Office of the Auditor General of Canada, July 2016) <https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_03_e_41832.html> [Auditor General].

⁸⁵ *Gladue*, *supra* note 67 at para 68.

⁸⁶ See Correctional Service Canada, *Waivers, Postponements, and Withdrawals among Indigenous Offenders*, by Shanna Farrell MacDonald, RIB 17-04 (Ottawa: Correctional Service Canada, July 2017) <<https://www.csc-scc.gc.ca/005/008/092/rib-17-04-eng.pdf>>, which found that “60% of the reviews during the study period [2014-2015] were delayed or cancelled. Waivers were most common (31%), followed by postponements (23%) and withdrawals (6%). This trend was evidence for both moderate and high-risk offenders, regardless of genders. Low risk offenders, however, were most likely to postpone their review.”; *Auditor General*, *supra* note 84.

⁸⁷ *CCRSO 2019*, *supra* note 1 at 93. According to the most recent statistics available from the Parole Board of Canada, Indigenous people had a full parole grant rate of 27.9% from 2018-2019, whereas the overall full parole grant rate for non-Indigenous people was 40.8% for the same period. “Over the last 10 years, lower federal day and full parole rates were reported for Indigenous offenders (67.8%; 20.3%) than for non-Indigenous offenders (73.4%; 32.2%)” (*ibid* at 93).

striking that our study focused on what we assume are the simplest cases—cases where the accused was not otherwise detained for another offence, and where they did not have multiple parole revocations. If these less complicated cases have seen significant increases in time in prison before parole, one would expect that more complex cases, with serious criminal histories and multiple parole revocations, might see even bigger increases. The central question for future research is: why are these changes happening? There is no suggestion that people paroled for second degree murder are reoffending at increased rates; hence it is difficult to identify a public safety rationale for either of these findings.

In sum, we have observed all three systems that influence the meaning of life sentences—legislative, judicial, and administrative—demonstrating increased punitiveness. Legislatively, we have seen the abolition of the faint hope clause, which will result in people being detained longer and the imposition of consecutive parole ineligibility for multiple murders. Judicially, we are seeing longer periods of parole ineligibility imposed by judges without much explanation for this trend, and with the exception of Indigenous persons for whom there is express statutory and jurisprudential direction to avoid or limit incarceration. Administratively, in terms of release on parole, we are seeing more people detained well past their parole ineligibility dates. This confluence of increasing punitiveness is evident across a range of systems with no evidence-based justification for the increased punitiveness. As the policy choice to pursue life sentences with long parole ineligibility periods has come under scrutiny for its harmful and costly impacts in the United States,⁸⁸ and as the Supreme Court of Canada considers the constitutionality of

⁸⁸ Mark Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences*, The Sentencing Project, 4 December 2018, <<https://www.sentencingproject.org/publications/meaning-life-case-abolishing-life-sentences/>>.

consecutive parole ineligibility periods for multiple murder,⁸⁹ our study suggests it is time for Canadian policy makers to reckon with the increased punitiveness of our murder sentencing and parole systems.

⁸⁹ *Bissonnette c R*, 2020 QCCA 1585, leave to appeal to SCC granted, 2021 CanLII 44585.