Court File No.: 39544

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC
HER MAJESTY THE QUEEN

Appellants
(Appellants)

– AND –

ALEXANDRE BISSONNETTE

Respondent
(Respondent)

– AND –

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PART I – OVERVIEW

1. This Court has recognized that some forms of punishment — such as death, torture, corporal punishment, castration, lobotomization, and indefinite sentences — are inherently incompatible with respect for human dignity and the value of human life. The denial of a person's humanity is repugnant to Canadian values and outside the legitimate domain of the criminal justice system. The Canadian Civil Liberties Association ("CCLA") submits that sentences which are irreducible — sentences without the possibility of review or release during an offender's lifetime — fall within the category of punishments that are inherently demeaning of human dignity and exceed the state's power to punish as constrained by the *Canadian Charter of Right and Freedoms*.

2. Limits on the state's power to punish are defined by domestic *Charter* jurisprudence, the values which underlie our constitutional democracy, and Canada's international human rights obligations. Existing *Charter* jurisprudence signals the emergence of reducibility as a constitutional limit on the state's power to punish. The CCLA submits that Canadian law in this area should be further guided by established principles of international human rights law regarding reducibility and the "right to hope." The judgement of the Grand Chamber of the European Court of Human Rights in *Vinter and others v. The United Kingdom* summarizes the European and international perspective on irreducible life sentences and holds that they are: (i) an inherently repugnant, degrading and inhumane form of punishment that demeans human dignity; and (ii) procedurally unfair, in that they do not allow for certainty, clarity, and due process in sentence administration. The analysis in *Vinter* provides a useful analytical framework for the consideration of irreducible life sentences under ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*.

PART II – QUESTIONS IN ISSUE

3. The CCLA takes no position on the facts in this appeal or the disposition of the appeal. CCLA offers the Court suggestions regarding the interpretation and application of ss. 12 and 7 of the *Charter* and limits its argument to the following four points:

   a. Canadian law should be guided by established principles of international human rights and civil rights law regarding reducibility and the "right to hope";

   b. The existing *Charter* jurisprudence in Canada signals the emergence of reducibility as a constitutional limit on the state's power to punish;

c. Irreducible sentences are inherently cruel and unusual contrary to s. 12 of the *Charter*; and

d. Irreducible sentences contravene s. 7 of the *Charter* in a manner that does not confirm with the principles of fundamental justice.

PART III – STATEMENT OF ARGUMENT

A. The Principle of Reducibility in International Human Rights Law

4. At international law, the term reducibility is used to distinguish life sentences which are subject to review, with the possibility of release (reducible sentences) and life sentences for which release is not available (irreducible sentences). Sources of international law, including international conventions to which Canada is a signatory, support the recognition of a "reducibility requirement" in the imposition and administration of life sentences.[1]

5. While requiring reducibility of life sentences does not equate to a guarantee of release,[2] either *de jure* or *de facto* irreducibility will be sufficient to render the sentence irreducible for the purposes of determining whether it is in keeping with international human rights standards.[3] At international law, irreducible sentences cannot be justified by either the availability of appeal or a remote or illusory possibility of clemency.

6. The following sources of international law form a robust foundation for the reducibility requirement:

a. The *Rome Statute of the International Criminal Court*, which stipulates that all sentences imposed shall be reviewed after two thirds of the sentence has been served and that, in the case of life sentences, all sentences will be reviewed after 25 years;[4]

b. The *International Covenant on Civil and Political Rights,* which mandates that reformation and social rehabilitation must be the essential aim of the penitentiary system;[5]

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[1] *Vinter and Others v. The United Kingdom*, [2013] ECHR 645 at para. 19 ["*Vinter*"].
[2] *R v. Bieber,* [2009] 1 WLR 223 at para. 39 ["*Bieber*"].
[3] *Kafkaris v. Cyprus*, [2008] ECHR 143 at paras. 89, 98 ["*Kafkaris*"]; see also *Vinter, supra* at paras. 24, 108.
[4] *The Rome Statute of the International Criminal Court,* 17 July 1998, 2187 UNTS 3, at Article 110(3).
[5] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, came into force 23 March 1976, at Article 10(1) and (3).

c. The *European Prison Rules,* which mandate that all life sentenced prisoners have a right to review in the form of conditional release;[6]

d. The *American Convention on Human Rights,* which mandates that punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoner*;*[7]

e. The *United Nations Standard Minimum Rules for the Treatment of Prisoners*, which directs prison authorities to use all available resources to ensure that inmates are able to reintegrate into society;[8]

f. The *United Nations Convention Against Torture* as interpreted by the *Committee on Prevention of Torture*, which condemns life without the possibility of parole as inhumane treatment;[9]

g. The Resolution and Recommendations of the Council of Europe, which has held for more than forty years that the law should make conditional release available to all life-sentenced prisoners;[10]

h. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* considers a prison sentence with no possibility of release precludes one of the essential justifications of imprisonment itself: the possibility of rehabilitation;[11] and

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[6] Council of Europe, Committee of Ministers, *Recommendation Rec (2003)22 of the Committee of Ministers to member states on conditional release (parole)*, adopted by the Committee of Ministers on 24 September 2003.

[7] *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, came into force on July 18, 1978, at Article 5(6).

[8] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UNGAOR, 70th Sess., U.N. Doc. A/Res/70/175 (December 17, 2015), at Rules 58-67, and 80.

[9] Council of Europe, Rapport au Conseil federal Suisse relatif a la visite effectuee en Suisse par le Comite europeen pour la prevention de la torture et des peines ou traitements inhumains ou degradants, *Comite europeen pour la prevention de la torture et des paines ou traitements inhumains* (CPT), (25 October 2012) CPT/Inf (2012) 26; Council of Europe, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* from 24 March to 3 April, 2014, CPT/Inf (2015) 12.

[10] Council of Europe, Committee of Ministers, *Recommendation Rec (2003)22 of the Committee of Ministers to member states on conditional release (parole)*, adopted on 24 September 2003; Council of Europe, Committee of Ministers Resolution 76(2) on the treatment of long-term prisoners, adopted on 17 February 1976.

[11] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*,* *25th General Report of the CPT*, January 1 – December 31, 2015, at p. 37.

i. The *European Convention on Humans Rights*, which prohibits irreducible life sentences under Article 3, which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[12]

7. Germany,[13] France,[14] Italy,[15] Mexico,[16] Namibia[17] and others[18] have recognized the reducibility requirement. The protection of human dignity stands as a cornerstone of many of these decisions. In holding that life imprisonment can only be justified if there are clear and proportionate release procedures, the German Federal Constitutional Court writes: "The essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom."[19] The Namibian High Court states: "Take away his hope and you take away his dignity and all desire he may have to continue living."[20]

8. The experience of the European Court of Human Rights is worthy of careful consideration. The *European Convention on Human Rights* which states at Article 3 "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment" provides a protection against inhumane punishment analogous to the protection afforded by s. 12 of the Canadian *Charter*.[21] Like the *Charter,* the *European Convention on Human Rights* is premised on the recognition and protection of human dignity.[22] In addition, the jurisprudence of the European Court of Human Rights adopts a theory of legitimate penological grounds for detention which are essentially identical to those recognized at Canadian law: punishment, deterrence, public protection, and rehabilitation.[23] The "whole life order" shares common features with sentences imposed by s.

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[12] *European Convention on Human Rights*, 4 November 1950, 213 U.N.T.S. 221, Article 3.
[13] *Life Imprisonment* case (*lebenslange Freiheitsstrafe*) of 21 June 1977, 45 BVerfGE 187, cited in Roger Hood and Caroline Hoyle, "Life without Hope, the New Challenge to Human Dignity", *The Death Penalty: A Worldwide Perspective*, 5th ed. (New York: Oxford University Press, 2015) at p. 486 [Hood & Hoyle].
[14] Hood & Hoyle, *supra* note 13 at p. 486, citing D. van Zyl Smit, 'Life Imprisonment: Recent Issues in National and International Law (2006) 29 *International Journal of Law and Psychiatry,* 405-21 at 409-10.
[15] Hood & Hoyle, *supra* note 13 at p. 486.
[16] Hood & Hoyle, *supra* note 13 at p. 486.
[17] *S. v. Nahemia Tjijo,* see also: *S v Tcoeib*, 1996 (1) SACR 390 (NmS).
[18] See *Vinter, supra* at paras. 68-72, 74.
[19] Hood & Hoyle, *supra* note 13 at p. 486.
[20] Hood & Hoyle, *supra* note 13 at p. 486.
[21] *Vinter, supra* at para. 82.
[22] *Vinter, supra* at para. 113.
[23] *Vinter, supra* at para. 111.

745.51 which will necessarily exceed the natural lifespan of the offender: the prisoner is not eligible for parole in their lifetime, though release is technically available through a form of clemency.[24]

9. Since 2001, the European Court of Human Rights has expressed concern that the imposition of whole life orders is incompatible with Article 3 of the Convention.[25] In the landmark judgement of *Vinter,* in a 16-1 majority, the Grand Chamber of the European Court of Human Rights addressed whether the whole life order, a *de facto* irreducible sentence, constituted torture or inhuman or degrading punishment under Article 3, taking into consideration international human rights standards. The Grand Chamber noted that there was clear support in European and international law and practice for the finding that reducibility is required under Article 3. Both a prospect of release and a possibility of review are essential.[26]

10. Irreducible life sentences have been criticized in *Vinter* and elsewhere as producing disproportionality in cases where the order extends beyond the point at which it no longer serves any valid penological purpose.[27] However, *Vinter* and the cases that follow are primarily focused on two concerns with irreducible life sentences:

(a) The inherent repugnance of irreducible life sentences, as a degrading and inhumane mode of punishment that demeans human dignity; and

(b) The procedural unfairness created by the lack of certainty, clarity and due process in the administration of irreducible life sentences.

11. *Vinter* holds that it is incompatible with human dignity to forcefully deprive an individual of his freedom without providing a prospect of release. Striving for rehabilitation, even in the context of life sentences, is constitutionally required in any community that holds "human dignity as its centrepiece."[28] The *Vinter*-court posits the right to hope of release as an essential component of human dignity. This is best expressed in the concurring judgement of Judge Power-Forde, which

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[24] *Vinter, supra* at para. 12; See *Hutchinson v. The United Kingdom*, [2017] ECHR 65 for a broader interpretation of the Secretary of State's clemency power.
[25] *Sawoniuk v. United Kingdom,* No. 63716/00; see also, *Kafkaris, supra* at para. 97 and. *Bieber, supra* at paras. 38-42.
[26] *Vinter, supra* at para. 110.
[27] See, e.g., *Bieber, supra* at para. 39-42; *Vinter, supra* at para. 102.
[28] *Vinter, supra* at para. 113.

recognizes that even those who commit abhorrent and egregious crimes "retain their fundamental humanity" and "carry within themselves the capacity to change."[29]

12. Irreducible life sentences deprive individuals of the ability to atone and impose an interminable punishment which ends only through the prisoner's own death.[30] From the point of view of the prisoner, the sentence never truly ends; the individual subject to the sentence is incapable of experiencing its termination. Moreover, as the *Vinter*-court observes, the longer the prisoner lives, the longer his sentence. In this way, irreducible life sentences demean human dignity by co-opting the essential human desire to live and transforming it into little more than a mechanism to prolong suffering. In a traditional fixed sentence or a reducible life sentence, the passage of time, anchored by a future hope, brings the individual closer to review and the prospect of release, allowing the individual to have a sense of goal-oriented progress. In an irreducible sentence, the state uses the incarcerated person's own lifespan against him. The most innate and basic human desire — the desire to survive — is rendered effectively a tool in the maintenance and prolonging of the incarcerated person's own suffering and despair.

13. The prospect of life without hope — where the only "release" a person can hope for is their own death — begs the question: what is worse, the death penalty or a sentence designed to make a person wish for death? More than one-hundred-and-fifty years ago, John Stuart Mill justified the death penalty by pointing out that executing a person may be less cruel than "immuring him in a living tomb."[31] Modern scholars and commentators have referred to irreducible life sentences as "death by incarceration",[32] "a fate worse than death", and as "a brutal, slow, execution done quietly, behind the gun towers and electric fences inside maximum security prisons."[33]

14. *Vinter* is also critical of irreducible life sentences for their failure to provide individuals with clarity and due process in the state-administration of significant penal sanction. As the court

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[29] *Vinter, supra,* concurring opinion of Judge Power-Forde.
[30] *Vinter, supra* at para. 112.
[31] John Stuart Mill, *Use of the Death Penalty*, a speech before the British Parliament on April 21, 1868 in opposition to a bill banning capital punishment.
[32] Robert Johnson and Sandra McGunigall-Smith, "Life Without Parole, America's Other Death Penalty" (2008) 88(2) *The Prison Journal* 328-46.
[33] Hood & Hoyle, *supra* note 13 at p. 485-486; See also Dirk Van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (London: Harvard University Press, 2019) at pp. 171-176.

observed, while penological grounds which justify the sentence may be in place at the time the sentence is ordered, these factors are not necessarily static and may shift over long time periods. Irreducible life sentences do not have an appropriate mechanism — or safety valve — in place to assess whether or not sufficient penological justification continues to exist for a custodial sentence, despite the passage of a substantial time period. [34]

B. The Principle of Reducibility in Canadian Law

15. While this Court has not had opportunity to directly consider the principle of reducibility, it has expressed concerns regarding reducibility, or related concepts of irreversibility, in the jurisprudence around cruel and unusual punishment.

16. This Court has recognized that a certain class of sanctions rest beyond the constitutional limits of the state's power to punish. This Court has held that some sentences, including the death penalty,[35] torture,[36] corporal punishment, castration, and lobotomization,[37] by their very nature, will *always* outrage our "standards of decency."[38] These sentences share the common features of finality and irreversibility. In considering Canadian society's abhorrence of the death penalty[39] and torture,[40] this Court has explicitly pointed to finality and irreversibility as underlying the prohibition against cruel and unusual punishment.[41] Final and irreversible sentences are abhorrent because they do not allow for error-correction following sentence administration.[42] In recognizing that irreversible sentences are problematic, our courts recognize that the future is uncertain. Irreversible sentences, like the death penalty, deny the individual, and society, the ability to correct mistakes and respond to change.[43]

17. The rationale which underlies our abhorrence of irreversible sentences applies equally to the problem at the heart of irreducible sentences. When we administer an irreducible sentence, we

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[34] *Vinter, supra* at para. 111.
[35] *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779 at paras. 3, 83, 130, 154*; United States v. Burns,* 2001 SCC 7.
[36] *Suresh v. Canada (Minister or Citizenship and Immigration)*, 2002 SCC 1.
[37] *R. v. Smith,* [1987] 1 S.C.R. 1045 at para. 57.
[38] *Smith*, *supra,* at para. 57.
[39] *Kindler, supra; Burns, supra*.
[40] *Suresh, supra* at para. 51.
[41] *Burns, supra* at para. 78.
[42] *Burns, supra* at para. 1, 96 and 103.
[43] *Burns, supra* at para. 103.

make a final and absolute decision that the individual is irredeemable and we eliminate all access to redress should time reveal that we were wrong; we lock the person up and throw away the key.

18. This Court has recognized that indeterminate detention without access to parole engages the principles which underlie s. 12 of the *Charter.* In *Lyons,*[44] this Court considered the constitutionality of discretionary indeterminate sentences in the context of the dangerous offender regime found in Part XXI of the *Criminal Code.* In upholding the former s. 688*,* Laforest J. observed that, while indeterminate detention is not unconstitutional *per se,* the court must consider the way in which indeterminate sentences are implemented in order to determine whether they are compatible with the *Charter.*[45] After acknowledging that indeterminate sentences are "profoundly devastating" to the individual, Laforest J. acknowledged the prospect of review and release as "the sole protection of the dangerous offender's liberty interest" and of "utmost importance" in determining whether indeterminate sentences are cruel and unusual.[46] The *Lyons*-majority concluded that indeterminate sentences under the dangerous offender regime would offend s. 12 *but for* the ongoing review of detention mandated by the parole process.[47]

19. While Laforest J.'s analysis in *Lyons* is couched in the gross disproportionality framework, his majority judgement recognizes several key components of the principle of reducibility: the significance of a termination mechanism (review and possible release); the significance of the individual's experience of hope in relation to the termination of sentence; and the need for checks-and-balances on the imposition of indeterminate sentences (an exit valve) should the individual greatly improve themself while incarcerated. *Lyons* provides a foundation for the recognition of the reducibility requirement in our domestic jurisprudence under s. 12 of the *Charter*.

20. More recently in *Boudreault*, this Court recognized that indefinite sentences violate s. 12.[48] In *Boudreault*, the Court found that the victim surcharge mandated by s. 737 of the *Criminal Code* violated s. 12 because it created a *de facto* indefinite criminal sanction for offenders who were unable to pay.[49] These offenders faced repeated appearances before a court to explain their

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[44] *R. v. Lyons*, [1987] 2 S.C.R. 309 ["*Lyons*"].
[45] *Lyons, supra* at para. 42.
[46] *Lyons, supra* at paras. 47-48.
[47] *Lyons, supra* at paras. 49.
[48] *R v Boudreault*, 2018 SCC 58 ["*Boudreault*"].
[49] *Boudreault*, *supra* at para. 76.

inability to pay the surcharge — a ritual which would continue indefinitely, operating like "public shaming".[50] As stated by the majority of this Court, "[c]riminal sanctions are meant to end".[51]

21. This Court should develop the foundation provided by *Lyons* and *Boudrealt* in accordance with international law on human rights and the ethical treatment of prisoners. This is in keeping with the presumption of conformity, a firmly established principle in *Charter* interpretation, which holds that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".[52] International sources that Canada has not ratified are still relevant and persuasive in *Charter* interpretation.[53] The preponderance of compelling international authority from likeminded jurisdictions supports formal recognition of the reducibility requirement.

22. The *Vinter* case, while not binding, offers an analysis of the of reducibility requirement which is easily transposed into the Canadian constitutional environment. *Vinter* holds that irreducible life sentences are inherently problematic in that they demean human dignity to an intolerable degree. Human dignity is a basic organizing principle which underlies the Canadian *Charter*[54] and is especially apposite to the rights guaranteed by s. 12 of the *Charter*.[55] *Vinter*'s poignant analysis of the profound effect that loss of hope has on the human dignity of the incarcerated person provides ample justification for including irreducible life sentences among the class of sanctions that rest, *per se,* beyond the constitutional limits of the state's power to punish.

23. *Vinter* is also concerned with the lack of clarity and due process in the administration of irreducible life sentences. The *Vinter*-court was deeply concerned by the idea that irreducible life sentences possess no mechanism for review in the event of relevant material change. The lack of any safety valve in the administration of a judicial detention order which may endure for fifty years or more is a grave matter which requires sober reflection. Moreover, the court was of the view that individuals could not be asked to wait until the conditions of release materialized before applying

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[50] *Boudreault*, *supra* at para. 77.
[51] *Boudreault*, *supra* at para. 79; citing *R. v. Demers*, 2004 SCC 46 at paras. 53, 55.
[52] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, para. 59, per Dickson C.J. (emphasis added); affirmed in *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32, para. 31.
[53] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32, para. 35.
[54] *R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 136; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 166.
[55] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras. 2, 17.

for review of their continued incarceration under Article 3 of the Convention, noting that it would be capricious to expect the individual to work towards release never knowing if review would be available and because the individual is entitled to know, at the outset of sentence, whether review will be available.[56] In short, the *Vinter*-court sets out basic tenants of procedural fairness in the administration and review of life sentences.

24. *Vinter's* reliance on the individual's entitlement to procedural fairness is relevant to this Court's analysis under s. 7 of the *Charter*. There can be no doubt that the imposition of irreducible life sentences engage the tripartite protection of life, liberty and security of the person guaranteed by s. 7 of the *Charter.* As Laforest J. observed in *Lyons,* in the context of indeterminate sentences "subsequent to the actual imposition of the sentence itself", access to parole is "the sole protection of the dangerous offender's liberty interests".[57] Under s. 7, any state actions which deprive the individual of life, liberty, and security of the person must conform with the principles of fundamental justice. Procedural fairness is one such principle.[58] The content of the right to procedural fairness is highly context-specific. It is submitted that this Court should be guided by *Vinter* in finding that, in the context of life sentences, the principles of fundamental justice require that there be a safety valve, in the form of review, which is known to the person at the outset of their sentence and which provides a real possibility of review and prospect of release within the incarcerated person's natural lifetime.

25. The CCLA submits that s. 745.51, which allows a judge to impose a life sentence without the possibility of review or release in the offender's lifetime, is an afront to human dignity, is not fair or compatible with justice, and therefore constitutes a significant limit on the rights protected by ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms.*

PART IV – COSTS

26. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

27. The CCLA takes no position with respect to the disposition of the appeal.

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[56] *Vinter,* supra at para. 119.
[57] *Lyons,* supra at para 48.
[58] *Lyons,* supra at para 85.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Stephanie DiGiuseppe & Harshi Mann,
Counsel for the Intervener,
Canadian Civil Liberties Association

Dated at Toronto, Ontario
this 25th day of November, 2021.

PART VII – TABLE OF AUTHORITIES

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