Court of Queen's Bench of Alberta

Citation: R v Klaus, 2018 ABQB 97

Date: 20180214
Docket: 141048777Q1
Registry: Red Deer

Between:

Her Majesty the Queen

Crown

- and -

Jason Gordon Klaus and Joshua Gregory Frank

Accused

Reasons for Judgment on Sentencing
of the
Honourable Mr. Justice Eric F. Macklin

I. Introduction

[1] On January 10, 2018, I found Jason Gordon Klaus and Joshua Gregory Frank each guilty of three counts of first degree murder contrary to s 235 of the *Criminal Code*, RSC 1985, c C-46.

[2] The mandatory sentence for first degree murder is imprisonment for life.

[3] The Crown seeks an order pursuant to s 745.51 of the *Criminal Code* imposing consecutive parole ineligibility periods for each murder conviction. That is, it seeks an order that Mr. Klaus and Mr. Frank each be required to serve 75 years before being eligible for parole.

[4] Mr. Klaus and Mr. Frank ask that the life sentences for each murder be served concurrently. In that case, they would be eligible to apply for parole after 25 years of incarceration. Counsel submits that s 745.51 does not apply to multiple murders committed close in time as part of one criminal transaction. Further, if it does apply, the consecutive parole ineligibility periods should not be imposed in the circumstances of this case.

II. Background Facts

[5] Mr. Klaus and Mr. Frank were each found guilty of three counts of first degree murder in the deaths of Gordon Klaus, Sandra Klaus and Monica Klaus. The facts are set out in my Reasons for Judgment: ***R v Klaus***, 2018 ABQB 6, [2018] AJ No 17.

[6] In brief, I found that Mr. Klaus and Mr. Frank formulated a plan for Mr. Frank to kill the three members of the Klaus family for which he would be paid a sum of money by Mr. Klaus. Mr. Frank then intentionally shot to death the three victims following which he set the house on fire to conceal the crime.

[7] Mr. Klaus did not shoot the members of his family but he planned and deliberated their murders with Mr. Frank. Further, he counselled, procured, solicited, incited and encouraged Mr. Frank to kill the victims. He assisted in the commission of the murders by providing the weapon to Mr. Frank and information about the victims' whereabouts, including the location of the keys to the house. He transported Mr. Frank to the scene and facilitated Mr. Frank's departure from the scene. He knew and intended that his acts would aid or abet Mr. Frank. I found Mr. Klaus' involvement made him a co-principal in relation to the crime of first degree murder of the three victims and, in the alternative, a full-fledged party to the crimes.

III. Victim Impact Statements

[8] When determining the sentence to be imposed on an offender, the Court must consider any statement describing harm caused as the result of the commission of the offence and the impact of the offence on a victim: s 722(1).

[9] The Court heard seven Victim Impact Statements in this case. They were provided by uncles, aunts and cousins of Jason Klaus. Each described immeasurable personal loss and emotional scarring as a result of these murders. The depth of grief, and the horror each felt at the knowledge of how the victims died, was palpable. In addition, the peaceful and deserved retirement of two family members, Robert and Christine Klaus, has been severely affected. Robert Klaus is the older brother of Gordon Klaus and in his capacity as the Administrator of his brother's estate he spent a considerable amount of time on the farm property. He contracted a devastating virus as a consequence and spent a considerable amount of time in hospital receiving treatment. Both he and his wife, Christine Klaus, continue to suffer acute health problems that can be traced to the events of December 8, 2013.

[10] While it is hoped that the judicial process will provide some measure of peace for all those who have suffered, and continue to suffer, as a result of the senseless loss of Gordon, Sandra and Monica Klaus, it is acknowledged that life will never be the same for anyone touched by these events.

IV. Law

A. Consecutive Sentences

[11] Prior to the coming into force of s 745.51, courts had no discretion to impose consecutive parole ineligibility periods. However, they did have discretion in many cases to impose consecutive or concurrent sentences:

> 718.3(4) The court that sentences an accused shall consider directing

> ...(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
>
> (i) the offences do not arise out of the same event or series of events...

[12] Courts have generally held that concurrent sentences are appropriate where different offences constitute one continuous criminal act, or there is a sufficient nexus between them, whereas consecutive sentences are appropriate where the offences arise from "separate transactions", in the sense that they are essentially different in character and involved different subject matter: ***R v Keough***, 2012 ABCA 14 at paras 58-61, [2012] AJ No 10.

[13] In determining whether to impose concurrent or consecutive sentences, courts have considered factors such as the nature and quality of the criminal acts, whether there is a temporal or spatial nexus between the acts, the nature of the harm caused to the community or to victims, the manner in which the criminal acts were perpetrated, and the offender's role in the crimes: ***R v Potts***, 2011 BCCA 9 at para 89, [2011] BJC No 38.

[14] As stated, the mandatory sentence for first degree murder under s 235(1) of the *Criminal Code* is imprisonment for life. An offender convicted of more than one murder cannot be sentenced to consecutive life terms of imprisonment, as the second consecutive sentence could never take effect. Even assuming consecutive sentences were available in this context, the usual factors are arguably less relevant in a case of multiple planned and deliberate murders, as the planning and deliberation would necessarily apply with respect to each victim, regardless of the circumstances, including the location and timing of their deaths.

B. Parole Eligibility

[15] Unlike inmates serving fixed length sentences, those serving life sentences are not entitled to statutory release. They may apply for parole only after the stated period of parole ineligibility has expired. Parole is the system governing release of a prisoner to serve the remainder of his sentence in the community. The prisoner is released subject to conditions imposed by the Parole Board of Canada. The offender remains subject to the conditions of parole and the supervision of a parole officer. Parole may be revoked if the prisoner breaches conditions or commits a new offence.

[16] Parole does not represent termination of a sentence, but rather a modification of the conditions of the sentence. The deterrent and denunciatory purposes which justified the original sentence remain in force. The goal of specific deterrence is still advanced because the offender remains supervised as necessary to prevent possible crime, and risks re-incarceration if he commits another crime. The societal stigma of being a convicted offender serving a criminal sentence continues to serve the goal of denunciation: ***R v CAM***, [1996] 1 SCR 500 at para 62, [1996] SCJ No 28.

[17] Some inmates serving life sentences are never released as they are deemed a high risk to reoffend. On an application for parole, the Parole Board must assess the suitability of releasing the offender in question, and in so doing it is guided by the legislative objectives of the parole system: ***R v Shropshire***, [1995] 4 SCR 227 at para 34, 129 DLR (4th) 657.

[18] Over time, the focus of the legislation has shifted, now putting more emphasis than before on the protection of the public and less on rehabilitation. The Parole Board's decision-

making process is very different from the judicial determination of a fit sentence. It is largely based on the ongoing observation and assessment of the personality and behaviour of the offender during incarceration, focussing on dangerousness and the offender's ability to re-enter the community. This process may extend over several years. The resulting decisions are highly contextual and are based, in part, on what has actually happened during the incarceration of the offender: ***R v Zinck***, 2003 SCC 6 at para 19, [2003] 1 SCR 41.

[19] The Parole Board will not grant parole if an individual still poses a threat to society: *Corrections and Conditional Release Act*, SC 1992, c 20, ss 100-102 [*CCRA*]. The fact that an offender has committed multiple murders is relevant to an application for parole: *CCRA* s 101(a)-(e).

[20] As Campbell J noted in ***R v Vuozzo***, 2015 PESC 14 at para 10, [2015] PEIJ No 17, there is a common misconception on the part of many members of the public that murderers automatically get out of jail once they have served 25 years of their life sentence. In fact, parole for multiple murderers is rare. In other words, eligibility for parole and the granting of parole are two distinct matters, and the prospect of the Parole Board granting parole for a multiple murderer is slim.

[21] Certain provisions in the *Criminal Code* authorize a court to delay parole eligibility in appropriate cases. For example, where an offender is convicted of second degree murder, he is subject to a minimum of 10 years parole ineligibility. However, under s 745.4, a court may substitute any number of years between 10 and 25 after consideration of relevant factors. Parliament recognized that, within the category of second degree murder, there will be a broad range of seriousness reflecting varying degrees of moral culpability nearing that of first degree murder.

[22] A similar provision, s 743.6, permits the court to increase a period of parole ineligibility by any period of time up to the lesser of one-half of the sentence or 10 years when sentencing for a variety of listed offences.

[23] Delayed parole eligibility can be a significant component of a sentence given that it may almost entirely extinguish any hope of early freedom; thus, it brings a new element of truth, but also of harshness, to sentencing: ***Zinck*** at para 24.

[24] It has been held that on an application for delayed parole eligibility in a second degree murder case under s 745.4, the Crown need not demonstrate unusual circumstances, nor does the law require that the power to delay parole be used sparingly: ***Shropshire*** at para 31. There are many factors that might result in increased parole ineligibility in this context: see, for example, ***R v Ryan***, 2015 ABCA 286 at para 57, [2015] AJ No 977.

[25] Courts encountered problems in interpreting and applying s 743.6 in relation to listed offences. Ultimately, it was held that delaying parole under s 743.6 is a decision that is out of the ordinary, and it should not be done in a routine manner: ***Zinck*** at paras 24, 29-30.

C. Consecutive Parole Ineligibility Periods

[26] From 1976, when the death penalty was abolished in Canada, until 2011, an offender convicted of first degree murder was subject to a mandatory parole ineligibility period of 25 years: s 745(a).

[27] Section 745.51 came into being as a result of the enactment of the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5. Parliament's intention, in part, was to promote separation of dangerous offenders from society to ensure the safety of Canadian communities. As well, consecutive parole ineligibility periods would protect a victim's family members from having to attend parole hearings and re-hear all the horrific details of the crime. Parliament also intended to address a perceived concern on the part of the public that multiple murderers otherwise receive "discounted" sentences by virtue of the fact that it is impossible to stack, or make consecutive, more than one life sentence: Canada, Parliament, *House of Commons Debate*, 40th Parl, 3rd Sess, Vol 145, No 121 (1 February 2011) (Mr. Daniel Petit). This latter intention is reflected in the name of the Act amending the *Criminal Code*.

[28] Section 745.51 now provides that where an individual has been convicted of more than one count of first degree murder, the sentencing court may order that the periods without eligibility for parole be served consecutively:

> 745.5(1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made pursuant to section 745.21, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.
>
> (2) The judge shall give, either orally or in writing, reasons for the decision to make or not to make an order under subsection (1).
>
> (3) Subsections (1) and (2) apply to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act...

[29] Unlike ss 743.6 and 745.4, this provision does not grant the court discretion to increase a period of parole eligibility by any number of years to a maximum. Rather, it restricts the court's discretion to "stacking" two or more periods.

[30] Under s 745.4, in cases involving second degree murder such as ***Shropshire***, the court may increase parole ineligibility under s 745.4 by any number of years between 10 and 25, to reflect the nature of the crime.

[31] However, any stacking of second degree murder parole periods under s 745.51 would necessarily be in increments of at least 10 years.

[32] In cases involving more than one first degree murder, the court's discretion is restricted to consideration of whether it is appropriate to stack the 25 years parole ineligibility periods.

[33] The approach taken in ***Shropshire*** addressed an issue that arises in every case of second degree murder. The Court in ***Zinck*** set out a general principled approach applicable to the consideration of delayed parole eligibility. Given the potentially draconian effect of stacking parole ineligibility periods under s 745.51, the approach set out in ***Zinck*** with respect to a determination under s 743.6 is also appropriate under s 745.51.

D. Principles of Sentencing

[34] When exercising discretion in the imposition of any sentence, a judge must have regard to the principles and objectives set out in ss 718 to 718.2:

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances...

[35] A court exercising the power to delay parole must apply the various sentencing factors, giving priority to general and specific deterrence as well as denunciation. The power should not be exercised routinely, nor invoked in relation to every jail term imposed for offences covered by s 745.51. The prosecution must establish that additional punishment is required, and delayed parole should be invoked only on the basis of demonstrated need: ***Zinck*** at paras 30-31.

V. Analysis

[36] There are three options in relation to parole ineligibility in this case:

1. All sentences to be served concurrently with parole ineligibility set at 25 years;
2. Two of the sentences to be served concurrently and one consecutively for a total period of parole ineligibility of 50 years;
3. All sentences to be served consecutively for a total period of parole ineligibility of 75 years.

[37] The Court must craft appropriate sentences for Mr. Klaus and Mr. Frank, taking into account those factors set out in s 745.51, while applying the principles and objectives of sentencing enunciated elsewhere in the *Criminal Code*.

[38] It is the overarching duty of the sentencing judge to determine a just and appropriate sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender. Notwithstanding how egregious the actions of the offender were and the effects have been, vengeance – being an act of harm as a reprisal motivated by emotion and anger - is not a consideration in the determination of a just and appropriate sentence. However, retribution is a sentencing principle properly considered by the Court in conjunction with the other principles and objectives of sentencing. Retribution requires an objective, reasoned and measured determination of a sentence which properly reflects the moral blameworthiness of a particular offender. Unlike vengeance, retribution incorporates the principle of restraint: ***CAM*** at paras 80-82.

A. Relevant Factors under s 745.51

[39] Section 745.51 requires the Court to consider: the character of the offender, the nature of the offence and the circumstances surrounding its commission.

[40] These factors are relevant on any sentencing. There is substantial overlap between the factors set out in s 745.51 and other sentencing principles. All of the factors set out in s 745.51 relate to the fundamental principle enunciated in s 718.1 to the effect that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Further, "denunciation" can be considered to fall within the statutory criterion of the "nature of the offence", and "future dangerousness" within the criterion of the "character of the offender": ***Shropshire*** at para 19.

[41] There is limited information about the character of these two offenders. However, there was evidence at trial to the effect that both offenders have led anti-social lives.

[42] At the time of the offences, Mr. Klaus was 38 years old. He is now 42 years old. Mr. Klaus purchased and sold cocaine, and he admitted to taking sexual favours from women in exchange for cocaine. He possessed and traded in restricted and prohibited firearms, and was stealing money from his parents.

[43] Mr. Frank was 28 years old at the time he shot and killed the Klaus family members. He is now 32 years old. Mr. Frank was unemployed, living off of the good graces of a bar/hotel manager who provided him with free lodging and supplied him with alcohol. It appears from the evidence that his limited money was going towards the use of drugs.

[44] I have already discussed the heinous nature of the offences and the circumstances surrounding their commission. Both offenders were integrally involved in the commission of the offences and each one had ample opportunity to reflect and desist.

[45] There is no doubt that the gravity of the offences committed by these offenders and the moral blameworthiness of each offender is at the high end of the spectrum of criminal conduct addressed in the *Criminal Code*.

B. Aggravating and Mitigating Circumstances – s 718.2(a)

[46] A sentencing court is required to take into account aggravating and mitigating factors under s 718.2(a). Again, those factors generally relate to the character of the offenders, the nature of the offence and the circumstances surrounding its commission.

[47] The only mitigating factor in relation to these offenders is that neither offender has a prior criminal record.

[48] As for aggravating factors, I note that the murders occurred inside the Klaus home. These were defenceless victims who were killed through the use of a firearm in an isolated rural setting. Their bodies were desecrated in order to cover up the crimes. Family pets were also killed. It was a contract killing. Both offenders hoped to profit financially. They planned the crimes together and each one had an opportunity to desist. The murders have resulted in great loss to the community.

[49] The Crown argues that Mr. Klaus breached a "position of trust" under s 718.2(a)(iii). Being trusted by someone does not necessarily mean an offender is in a "position of trust" toward that person in the sentencing context: ***R v BJO***, 2010 NLCA 19 at para 61, [2010] NJ No 94. Section 718.2(a)(iii) encompasses teachers, lawyers, parents, caregivers, and guardians: see ***R v Squires***, 2012 NLCA 20 at para 32, [2012] NJ No 101.

[50] Nevertheless, to the extent that Mr. Klaus' relationship with his family involved an element of trust, he clearly abused that trust. He had access to his parents' house, knew when everyone would be home, and provided Mr. Frank with the location of the key. These circumstances are relevant to all three factors listed in s 745.51.

[51] Aggravating factors will typically justify an increased sentence. For example, in sentencing for an offence without a mandatory sentence, aggravating factors will sometimes result in an increase by a number of years to an otherwise appropriate sentence. However, it bears noting again that the only options before the Court under s 745.51 on multiple convictions for first degree murder involve jumps in increments of 25 years.

[52] Ultimately, any sentence this Court imposes must be proportionate to the extremely serious nature of the offences and the very significant degree of responsibility each offender bears for these heinous crimes.

C. Parity under s 718.2(b)

[53] Denunciation and deterrence, along with other sentencing principles, must be carefully considered in sentencing for murder.

[54] Prior to embarking on a discussion of further sentencing principles, it is helpful to review cases in which s 745.51(1) has been addressed. In the following eight decisions, the Courts imposed consecutive periods of parole ineligibility:

- ***R v Baumgartner***, 2013 ABQB 761, [2013] AJ No 1497 (40 years - joint submission);
- ***R v Bourque***, 2014 NBQB 237, [2014] NBJ No 295 (75 years);
- ***R v Vuozzo***, 2015 PESC 14, [2015] PEIJ No 17 (35 years);
- ***R v WGC***, 2015 ABQB 252, [2015] AJ No 461 (35 years - joint submission);
- ***R v Husbands***, [2015] OJ No 2674 (SCJ), rev'd on other grounds 2017 ONCA 607 (30 years);
- ***R v Ostamas***, 2016 MBQB 136, [2016] MJ No 197 (75 years - joint submission);
- ***R v Garland***, 2017 ABQB 198, [2017] AJ No 853 (75 years);
- ***R v Saretzky***, 2017 ABQB 496, [2017] AJ No 831 (75 years - jury recommendation).

[55] In five decisions, the Courts imposed concurrent periods of parole ineligibility:

- ***R v Koopmans***, 2015 BCSC 2120, [2015] BCJ No 2484 (22 years);
- ***R v Bains***, 2015 BCSC 2145, [2015] BCJ No 2515 (18 years - joint submission);
- ***R v Rushton***, 2016 NSSC 313, [2016] NSJ No 463 (18 years);
- ***R v Sharpe***, 2017 MBQB 6, [2017] MJ No 22 (22 years);
- ***R v Ramsurrun***, 2017 QCCS 5791, [2017] JQ no 17816 (25 years).

[56] As I have already noted, the Court in this case only has discretion to impose parole ineligibility periods of 25, 50 or 75 years.

[57] The Crown relies in particular on three recent decisions dealing with triple first degree murders: ***Bourque***, ***Garland*** and ***Saretzky***. In these cases, each offender was sentenced to life in prison with no chance of parole for 75 years.

[58] In ***Bourque***, defence counsel had submitted that parole ineligibility should be set at 50 years. That case involved a 28 hour shooting spree, the random ambush and murder of three RCMP officers, and the attempted murder of two others. Attacks on police officers are denounced in the strongest ways possible given that they are viewed as attacks on the safety of the entire community and the rule of law: ***R v McArthur***, 184 OAC 108 at para 49, [2004] OJ No 721 (CA).

[59] In ***Garland***, the imposition of consecutive parole ineligibility periods was largely symbolic, given that the offender would not have been eligible for parole until he was 79 years old even after 25 years. The victims in that case included a child, and the offences involved abduction, torture and dismemberment.

[60] In ***Saretzky***, the jury had recommended 75 years. The three murders in that case were committed at three distinct and separate times, and the offences involved the cannibalization of an infant child.

[61] In ***Ostamas***, both counsel recommended consecutive parole ineligibility periods. The offender had an extensive prior criminal record. He hunted and bludgeoned three vulnerable, helpless, homeless individuals to death in cold blood. The Court sentenced in accordance with counsel's joint submission.

[62] There is no analysis in the decisions in ***Bourque***, ***Ostamas*** or ***Garland*** regarding the application of the totality principle under s 718.2(c) that a sentence should not be unduly long or harsh.

[63] In each of these four cases imposing consecutive periods of parole ineligibility for triple first degree murders, the second (***Garland***) or third consecutive parole ineligibility period was symbolic and was not required to ensure the imprisonment of each offender into his very senior years.

[64] In ***Ramsurrun***, the Court imposed concurrent parole ineligibility periods totalling 25 years for each of two first degree murders and 15 years for one second degree murder. The victims included the offender's spouse and her parents.

[65] While a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, it must always be borne in mind that the determination of a fit sentence is ultimately a highly individualized process: ***R v Ipeelee***, 2012 SCC 13 at para 38, [2012] 1 SCR 433, ***R v Pham***, 2013 SCC 15 at para 8, [2013] 1 SCR 739.

D. Denunciation under s 718(a)

[66] A sentence should communicate society's condemnation of the offender's conduct. Denunciation is a symbolic, collective statement that the offender's conduct should be punished for encroaching our society's basic code of values as enshrined within our substantive criminal law: ***CAM*** at para 81.

[67] Again, these two offenders have committed horrendous offences. I have cited the major aggravating factors.

[68] A crime of this magnitude and nature must be strongly denounced.

[69] However, s 745.51 does not mandate that a court impose consecutive parole ineligibility periods in every case involving multiple murders. All such cases are horrendous and by their very nature call out for robust denunciation. The fact that s 745.51 grants a discretion is an indication that Parliament remained of the view that concurrent periods of parole ineligibility can satisfy the need for denunciation when balanced with other principles in cases involving multiple murders, even multiple first degree murders.

[70] In other words, consecutive periods are not necessary to satisfy the objective of denunciation in all such cases. As previously noted, the strict control of the parole system itself serves the sentencing goal of denunciation.

[71] It follows that the circumstances in a particular case must justify a finding that it falls at or near the most serious end of the spectrum of what are already serious and heinous crimes. This approach is in keeping with that set out in ***Zinck***. Delaying parole to this degree is a decision that is out of the ordinary, and it should not be done in a routine manner.

[72] In considering whether denunciation in relation to these offenders requires consecutive parole ineligibility periods, the Court must have regard to any circumstances that are particularly

egregious when compared with other first degree murders. While by no means minimizing the gravity of the offences committed by these two offenders, I note that the use of a firearm in committing a murder, attempts to destroy evidence of the crime, and even paid "hitmen", while aggravating, are not particularly uncommon features in first degree murder cases. I do not find in this case the types of unique and exceptional circumstances which were considered by the Courts in ***Bourque***, ***Ostamas***, ***Garland*** and ***Saretzky*** as supporting consecutive 25 year ineligibility periods. That is, on the spectrum of the serious and heinous crimes that constitute first degree murder, the factors considered to be aggravating by the Courts in those cases are not present in this case.

[73] The objective of denunciation is met in relation to these offenders by the imposition of a sentence of life imprisonment with no chance of parole for 25 years.

E. Deterrence under s 718(b)

[74] As a sentencing objective, deterrence has two facets. Individual deterrence is aimed at deterring the offender from committing such a crime, or any crime, in the future. General deterrence is aimed at the community at large, informing others of the negative consequences arising from such criminal behaviour.

[75] Lengthened periods of parole ineligibility may reasonably be expected to deter some persons from reoffending: ***Shropshire*** at para 21. In ***Shropshire***, parole was delayed by only two years beyond the minimum 10 years for second degree murder. The reasonable expectation that a lengthened period will deter a person from reoffending logically diminishes in proportion to the length of the mandatory period of parole ineligibility. This is because a delay in parole eligibility by 25 years already has a much more significant deterrent effect than a 10 year minimum delay.

[76] Mr. Klaus and Mr. Frank will receive sentences of imprisonment for life. Even if eligible to apply for parole at some point during their lives, neither one is guaranteed to obtain parole. It is difficult to imagine how an additional 25 or 50 years of parole ineligibility will do more to impress upon them the fact that they should not commit crimes in the future. The objective of individual deterrence, to the extent that it can be satisfied, will be fulfilled through imposition of a sentence of life imprisonment. Even if parole is granted at some point, the strict control of the parole system itself serves the sentencing goal of specific deterrence. I am not satisfied that a period of parole ineligibility longer than 25 years would provide greater individual deterrence for these offenders.

[77] Ironically, imposing 25 years of parole ineligibility may do more to effectively deter Mr. Klaus and Mr. Frank from committing crimes while incarcerated than would imposition of 50 or 75 years of parole ineligibility. Individuals who have no hope of ever achieving release arguably have much less deterrent to committing further crimes while incarcerated. The prospect of potential release may therefore serve to protect inmates, corrections officers and anyone else who may come into contact with the offender, from potential harm. Further, a prospect of freedom may encourage an inmate to attempt to improve his prospects for parole through treatment and programs provided in the corrections environment.

[78] In other words, life sentences imposed on these offenders with no parole eligibility for 25 years will require them to conduct themselves in an exemplary manner and to successfully complete all recommended and available treatments so as to convince the Parole Board, at the

appropriate time, that their imprisonment is no longer required to protect society: ***Ramsurrun*** at para 110.

[79] As for general deterrence, any fixed period of parole ineligibility reflects Parliament's view that a minimum period of physical confinement is necessary to advance the causes of deterrence and denunciation even if the offender was completely rehabilitated and posed absolutely no threat to society at the time of sentence: ***CAM*** at para 64.

[80] However, there is nothing before the Court to establish or even suggest that an increase in parole ineligibility beyond 25 years might play any real role in deterring members of the public from committing more than one murder, nor is it reasonable to draw such an inference. I would go so far as to suggest that it would be folly to think that a person pondering more than one first degree murder would be deterred from committing a second or third murder by the possibility of consecutive parole ineligibility periods.

[81] In my view, a life sentence achieves the objective of general deterrence in these cases. I am not satisfied that increased parole ineligibility assists in achieving the objectives of individual or general deterrence.

F. Separation from Society where Necessary under s 718(c)

[82] As I have already noted, s 745.51 was intended, in part, to help ensure that our communities are safe and that those multiple murderers who should never be released, will never be released. Section s 718(c) mandates that separation from society is based on necessity.

[83] Consequently, the ability to set parole ineligibility consecutively at 50 or 75 years is a form of punishment particularly appropriate for first degree murderers who are, and will be, dangerous to society. It is an appropriate measure for those not personally deterred by the prospect of at least 25 years of incarceration and who will be incapable of rehabilitation.

[84] In ***Shropshire***, the Supreme Court held that "future dangerousness" falls within the analysis of the "character of the offender".

[85] I have already noted that neither offender in this case has a prior criminal record. Although there is evidence before the Court that each one was involved in some forms of anti-social behaviour prior to the commission of the murders, none of that behaviour would be considered a reliable indicator that either one of these individuals could or would be involved in a violent crime, much less three first degree murders.

[86] The difficulty for a court in determining whether separation from society will be necessary for a period in excess of 25 years is that it is impossible to know what the impact of at least 25 years of incarceration will have on these individual offenders, based solely on the offences and the offenders' backgrounds to the time of sentencing. This necessarily requires a prediction of the future based on very little or no relevant and material foundational evidence.

[87] Simply put, there is no evidence in this case upon which this Court can conclude that Mr. Klaus and Mr. Frank will pose a danger to the community in 25 years so as to necessitate continued separation from society. It is difficult, if not impossible, to individualize the sentence and specifically the appropriate period of parole ineligibility, with no evidence as to how these particular offenders will respond to the sanctions that are imposed and the opportunities afforded for their rehabilitation.

[88] By contrast, prior to finding an offender to be a "dangerous offender" under s 753 of the *Criminal Code*, there must be evidence establishing that the offender is very dangerous and incapable of control in the community. On a court making such a finding, the offender receives a sentence of indeterminate detention but may still apply under s 761 for parole after 7 years and then every 2 years thereafter. In determining whether an offender should be granted parole, and if so on what conditions, the Parole Board reviews the condition, history and circumstances of the offender.

[89] Again, if Mr. Klaus or Mr. Frank were to be eligible to apply for parole after 25 years, there is no guarantee that either one would receive parole. Each one would be required, at that time, to satisfy the Parole Board that he could be released into the community on such conditions as are necessary to ensure the continued safety of the community.

[90] I conclude that the objective of separation from society where necessary is adequately addressed for each of these offenders by the penalty of life in prison without eligibility for parole for 25 years.

G. Rehabilitation under s 718(d)

[91] Rehabilitation is one of the main objectives of Canadian sentencing law, and is one of the fundamental moral values distinguishing Canadian society from the societies of many other nations in the world: ***R v Lacasse***, 2015 SCC 64 at para 4, [2015] 3 SCR 1089. In sentencing for murder, rehabilitation is secondary to other principles, such as deterrence and denunciation. Nevertheless, it remains a relevant consideration.

[92] I have found for these offenders that the principles of denunciation and deterrence are met by a sentence of life in prison with no chance of parole for 25 years. I must also consider the principle of rehabilitation along with other secondary principles and objectives enumerated in the *Criminal Code*.

[93] As I discussed in relation to the principle of individual deterrence, there is social utility in allowing offenders to remain hopeful that they eventually will be released. A prisoner facing a period of parole ineligibility until very near or past his life expectancy will be left bereft of hope. A life wanting of hope can only leave one questioning the value of attempts at rehabilitation. Hope of eventual release logically encourages an individual to strive for rehabilitation.

[94] The *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: Department of Justice, 1956) [the “Fauteux Report”] looked at the entire corrections system in Canada and recommended at 48-49:

> At no time should any prisoner have reason to feel that he is a forgotten man.... Prisoners should have some hope that imprisonment will end and thereby have some incentive for reformation and rehabilitation.

[95] I do not believe that other “exceptional remedies” such as the Royal Prerogative of Mercy, as discussed by the Court in ***R v Granados-Arana***, 2017 ONSC 6785, [2017] OJ No 5964, truly provide offenders with a reasonable hope of eventual release.

[96] In most criminal cases, once a sentence is imposed it falls to the Parole Board to further determine the date and conditions of parole eligibility. As noted, the *CCRA* now puts more emphasis than it previously did on the protection of the public and less on pure rehabilitation

objectives and concerns. The decision-making process of the Parole Board under the *CCRA* is largely based on the ongoing observation and assessment of the personality and behaviour of the offender during incarceration to determine dangerousness and the offender's ability to re-enter the community: ***Zinck*** at para 19.

[97] There was no evidence put forward that would support a finding that either Mr. Klaus or Mr. Frank is incapable of rehabilitation and therefore will be dangerous in 25 years.

[98] The Parole Board would be in a much better position at that time to determine whether the public requires continued protection from Mr. Klaus or Mr. Frank.

H. Reparations for Harm Done under s 718(e)

[99] As discussed earlier, the Court heard seven Victim Impact Statements highlighting the devastating effects and grievous harm caused by the actions of Mr. Klaus and Mr. Frank.

[100] It may be some small comfort for the community to know that public policy prevents these offenders from benefitting financially from the murders of the Klaus family members.

[101] Nevertheless, it must be recognized that there is no aspect of any sentence for first degree murder that can begin to provide adequate reparation to the victims or the community for the harm done.

I. Promoting Acceptance of Responsibility and Acknowledgement of the Harm Done to Victims and the Community under s 718(f)

[102] A life sentence is the most severe sentence in Canadian law and as such reflects the severity of the harm done to the victims and the community. To date, neither offender in this case has adequately acknowledged the harm done as a result of his involvement in these murders. Each one tried to absolve himself by blaming the other.

[103] The question for the Court is whether consecutive parole ineligibility periods would do more to promote their remorse or acceptance of responsibility than would a minimum of 25 years. Each one will necessarily be incarcerated during what they would otherwise have reasonably hoped to have been some of the best 25 years of their lives. There is no basis for me to conclude that these offenders would be more remorseful or accepting of responsibility as a result of delaying parole ineligibility for a period longer than 25 years.

J. Totality under s 718.2(c) and Restraint under s 718.2(d)

[104] In the usual course, a court considering whether to make sentences concurrent or consecutive will have regard to the totality principle. This requires the court to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender: Clayton C Ruby, Sentencing, 9th ed (Toronto: LexisNexis, 2017) at 54.

[105] Statutory totality requires consideration of whether a cumulative sentence will crush the offender's rehabilitative prospects. It requires a sentencing court to engage in an individualized consideration of restraint which exists over and above whether a cumulative sentence for the offences is broadly proportionate: ***R v Brodt***, 2016 ABCA 373 at para 6, [2016] AJ No 1237.

[106] The principle of restraint requires a court not to deprive an offender of liberty if less restrictive sanctions may be appropriate in the circumstances. The principle of restraint applies, for example, in determining whether less restrictive sanctions are available under the dangerous offender provisions. A sentencing judge is only to impose an indeterminate sentence when there

are no other less restrictive means to adequately protect the public from the threat of harm: ***R v Johnson***, 2003 SCC 46 at paras 28-29, [2003] 2 SCR 357.

[107] As stated earlier, retribution incorporates the principle of restraint. Sentencing judges are to exercise restraint by refraining from imposing a sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value: ***CAM*** at para 74. Where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty: ***R v Hall***, 2002 SCC 64 at para 47, [2002] 3 SCR 309.

[108] Hope for eventual release, although not set out as a principle in the *Criminal Code*, is a relevant factor in sentencing. It is "one of the conditions that inflects the nature of a sentence. It gives flavour, character and existential texture to the experience of punishment ...": Benjamin Berger, "Sentencing and the Salience of Pain and Hope" (2015) 70 Sup Ct L Rev 337 at 355. Setting parole ineligibility at 50 or 75 years constitutes a harsh intervention in an offender's life. Sentencing judges must "be alive to the way that a sentence is lived and, specifically, to the harshness involved in the extinguishment of hope": Berger at 356.

[109] Where a discretion in sentencing exists, the court should not lose sight of any of the relevant sentencing principles. The court must ensure that the sentence accords with the principles of proportionality, totality and restraint.

[110] A denunciatory sentence is necessarily symbolic: ***CAM*** at para 81. However, it must also be recognized that symbolism in and of itself is not a sentencing objective or principle in the *Criminal Code*. Sentences that exceed a person's foreseeable life serve no functional purpose; they are purely symbolic. When a sentence exceeds a reasonable estimate of an offender's remaining natural life span, "the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves": ***CAM*** at para 74.

[111] A sentence that extinguishes any hope of release for an offender is a crushing sentence. It risks violating the principle of totality as being unduly long and especially harsh. A sentence for first degree murder may inevitably have that effect for an older offender. As well, in extremely egregious cases, offenders may deserve to have all hope extinguished. In cases involving unique, exceptional and extremely egregious facts, such as the rape and murder of 11 children or the killing of 6 and potentially close to 50 vulnerable women, the maximum parole ineligibility period might be imposed without necessarily offending the totality principle. I need not consider that at this time. This is not one of those cases.

[112] As emphasized in ***Zinck*** at paras 30-31, delayed parole is a special, additional and harsher form of punishment. Stacking periods of parole ineligibility under s. 745.51, just as the Court stated with respect to delayed parole under s. 743.6, should be neither routine, nor automatic. It must remain the exception and be justified by the circumstances of a particular case.

[113] Again, it is impossible to foresee in this case whether less restrictive sanctions could ultimately be appropriate for one or both of these offenders. The Parole Board may well determine in 25 years that no less restrictive sanctions short of the continued imprisonment of Mr. Klaus and Mr. Frank could ensure the safety of the public. However, in that case it could be

said with greater certainty that the principle of restraint had been properly considered and applied.

[114] Here, the minimum sentence of 25 years of parole ineligibility is the least restrictive sentence that can be imposed. For both Mr. Klaus and Mr. Frank, given their ages at the time of the offences (38 and 28), parole ineligibility of 50 or 75 years would virtually guarantee that these offenders would spend the remainder of their productive lives in prison. The functional value of the traditional goals of sentencing would have been depleted. Given all of the sentencing factors and their application in these circumstances, such an outcome would be unduly long and harsh. It would violate the principles of totality and restraint.

VI. Conclusion

[115] Section 745.51 is not a mandatory provision, even in the case of multiple first degree murders. This Court has the discretion to impose consecutive periods of parole ineligibility where warranted having regard to all of the relevant factors. Having considered all of the relevant factors under s 745.51 and the principles and objectives of sentencing, I conclude that a period of parole ineligibility of 50 or 75 years is neither justifiable nor appropriate for either offender in this case.

VII. Applicability of s 745.51 to Contemporaneous Multiple Murders

[116] Mr. Frank has also argued that s 745.51 does not apply here given the plain wording of the section. He argues that this provision only applies to an offender who has already been convicted of murder on a prior occasion.

[117] I have undertaken the requisite analysis assuming that s 745.51 does apply in these circumstances. In light of my conclusions, it is unnecessary to consider this issue of interpretation raised by counsel.

VIII. Final Comments

[118] It will be apparent from the foregoing reasons that I do not view s 745.51 as a particularly effective means of addressing Parliament's concerns, especially with respect to those offenders who are convicted of first degree murders where the only options before the Court involve increments of 25 years. Indeed, the imposition of consecutive parole ineligibility periods under s 745.51 may necessarily conflict with some of the principles and objectives of sentencing set out in ss 718 to 718.2 which have long been part of our sentencing regime.

[119] I come to this conclusion having regard to fundamental principles of sentencing.

[120] As for denunciation, Parliament apparently intended through s 745.51 to address a perceived "discount" for offenders convicted of multiple murders. It bears noting, however, that prior to 2011, multiple murderers were in fact not treated in the same way as single victim murderers. The "faint hope" clause in the *Criminal Code* allowed single victim murderers to seek early release on parole after serving only 15 years of their sentence: s 745.6. That provision did not apply to multiple murderers and prevented them from receiving such consideration: s 745.6(2). This provision was amended and "faint hope" consideration is now only available for offenders who committed the relevant offence before December 2, 2011: s 745.6(1)(a.1).

[121] Furthermore, far from assuaging the public's concerns regarding "discounts", there is a danger that s 745.51 will actually undermine the public's confidence in sentencing in cases of multiple murders. The penalty for first degree murder has always been, and continues to be, the

most severe mandatory sentence available in Canadian criminal law. Where a court now declines on a principled basis to extend parole ineligibility for a multiple murderer under s 745.51, it might wrongly appear to victims' families and members of the public that the lives of one or more victims have been discounted in the process. In fact, that is not the case at all, as the number of victims is just one of numerous circumstances and factors which a court must consider in exercising its discretion.

[122] As outlined above, the goals of denunciation and individual deterrence are generally met by a sentence of life imprisonment combined with the strict controls of the parole system in the event that the offender is granted parole after 25 years. It is important to recognize that a sentence of life imprisonment necessarily involves control by the state for the rest of the offender's life.

[123] As for general deterrence, I am skeptical as to whether increased parole ineligibility for multiple murderers has any useful deterrent effect. I am prepared to assume that a member of the public probably understands that he may well spend his remaining lifetime in prison if he commits murder. However, it seems far-fetched to opine that a person, having formed the intention to murder more than one individual, would weigh in the balance the combinations and permutations under s 745.51, and would stop offending after the first murder as a consequence of possible variations in parole eligibility ensuing from a second or third murder.

[124] Regarding separation from society and rehabilitation, when a court imposes consecutive periods of parole ineligibility for multiple murders, it assumes the role which the Parole Board would have played many years into the future, and does this based on facts and factors existing only prior to and at the time of sentencing. While it has been opined that permitting trial judges to extend the period of parole ineligibility may not usurp or impinge upon the function of the Parole Board, delaying parole eligibility does remove the broad discretion Parliament has otherwise conferred on the Parole Board: ***Shropshire*** at para 34, ***R v Lam***, 2007 ABCA 83 at para 3, [2007] AJ No 252. The stacking of lengthy periods of parole ineligibility under s 745.51 impacts significantly on the traditional roles of the sentencing judge and of the Parole Board. It must be kept in mind that the Parole Board operates in a highly regulated environment and remains ultimately subject to the supervisory jurisdiction of the courts.

[125] As I have noted, the Parole Board determines the date and conditions of parole eligibility and is required to consider the protection of the public. In the case of these two offenders, the Parole Board will have the benefit of information on the personality and behaviour of each offender during 25 years of incarceration, and thus will be in a far better position to determine dangerousness and the offender's ability to re-enter the community in 25 years. In exercising discretion under s 745.51, a sentencing court is necessarily deprived of the opportunity to consider those facts and opinions that might later be available at the time of parole eligibility in order to make an informed determination as to whether continued incarceration at that time is necessary for the continued protection of the public. It is difficult to understand the logic in advancing – in a case such as this one, by 25 years - the consideration of an offender's future trajectory, thereby requiring a sentencing court to engage in the realm of speculation.

[126] The fact that sentencing remains a highly individualized process requires the Court to consider the potential effect of the sanction imposed, and the success of rehabilitative efforts, on the individual offenders before it. In some cases, a court may have expert evidence of dangerousness which supports imposition of an extended parole ineligibility period into the

foreseeable future: ***R v Cheddesingh***, 2004 SCC 16 at para 2, [2004] 1 SCR 433. On the sentencing of a first degree murderer, a court rarely has before it sufficient evidence to enable it to determine whether an offender will be dangerous in 25 years. It would likely be very difficult for the Crown to adduce such evidence in all but the most extreme cases. The Parole Board of Canada has traditionally been the body best equipped to make that determination based in large measure on the offender's history during incarceration.

[127] There is nothing before the Court to suggest that the Parole Board regime did not adequately address the goal of separation from society in the case of multiple murderers. Parliament could have achieved all of its stated objectives through amendments to the *CCRA*, for example through less frequent potential parole applications by those who are convicted of having committed the most serious of crimes. This would also achieve the aim of relieving an undue burden on victims' families by regular attendances at parole hearings. Further, it is not clear why Parliament felt it necessary to restrict the options before the court to stacking murder parole ineligibility periods, as opposed to allowing for discretionary increases of a lesser magnitude.

[128] Finally, statutory totality requires consideration of whether a cumulative sentence will crush the offender's rehabilitative prospects, and the principle of restraint requires a court not to deprive an offender of liberty if less restrictive sanctions may be appropriate in the circumstances. Successful rehabilitation may support the imposition of less restrictive sanctions that would still ensure individual deterrence and the continued protection of the public.

[129] I have commented on the role that hope plays in relation to these sentencing principles and objectives. Hope for eventual release also respects the dignity of the prisoner: Derek Spencer, "Hope for Murderers? International Guidance on Interpreting the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*" (2017) 22 Can Crim L Rev 207 at 227, 232.

[130] Although there are differing international approaches to the issue of lifelong incarceration, many of the international perspectives support the view that hope of release is a critical component.

[131] In 1977, the German Federal Constitution Court held that the "essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of regaining his freedom": cited in Dirk van Zyl Smit, "Life imprisonment: Recent issues in national and international law" (2006) 29 Int'l JL & Psychiatry 405 at 409. The German Court accepted that the principle of human dignity is compromised if the offender must abandon all hope of ever being released, even if that hope is never realized due to continued dangerousness: van Zyl Smit (2006) at 409.

[132] More recently, in ***Vinter and Others v United Kingdom***, [2013] ECHR 645 the Grand Chamber of the European Court of Human Rights provided a summary of the use of life sentences in 47 countries. The Court noted that in nine of those countries, no life imprisonment exists and that 32 countries provide a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by law: ***Vinter*** at para 68. The Court concluded that there is clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved: ***Vinter*** at para 114. Power-Forde J. commented:

> The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.

[133] The Court made it clear that offenders who continued to pose a risk to society could be detained in prison until the end of their lives. In the absence of a real prospect of release, however, the denial of any hope of release would be inhumane and degrading. All offenders, no matter what they have done, should have the opportunity to rehabilitate themselves while maintaining the prospect of reintegrating into free society: Dirk van Zyl Smit et al, "Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?" 2014 HRL Rev 59 at 62, 65. The Court also explained that "it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether ... a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release": ***Vinter*** at para 122.

[134] Other courts have reached similar conclusions. Clearly, many international jurisdictions have recognized the importance of, and have protected, the right of an offender to retain some hope for possible release in the event of rehabilitation. Rehabilitation is more likely when there is a hope of possible release. For most offenders, parole ineligibility periods of 50 years extinguish that hope, and periods of 75 years certainly do so even for the youngest offender, thereby severely undermining prospects of rehabilitation. Although a secondary consideration in murder cases, rehabilitation remains one of the main objectives of Canadian sentencing law. It has been held to be one of the fundamental moral values distinguishing Canadian society from the societies of many other nations: ***Lacasse***. One might argue that this distinction is eroded by the imposition of consecutive ineligibility periods under s 745.51.

IX. Decision

[135] I impose the following sentences:

1. Jason Klaus, with respect each count of first degree murder contrary to s 235 of the *Criminal Code*, imprisonment for life with parole ineligibility set at 25 years, to be served concurrently.

2. Joshua Frank, with respect each count of first degree murder contrary to s 235 of the *Criminal Code*, imprisonment for life with parole ineligibility at 25 years, to be served concurrently.

[136] Finally, I make the following orders:

1. A lifetime weapons prohibition pursuant to s 109 of the *Criminal Code*;
2. Mandatory DNA order pursuant to s 487.051(1);
3. No communication with those persons identified by the Crown pursuant to s 743.21(1).

Heard on the 22nd day of January, 2018.
Dated at the City of Red Deer, Alberta this 14th day of February, 2018.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Douglas Taylor
Ann MacDonald
Dallas Sopko
for the Crown

Allan Fay
for the Accused, Jason Klaus

Tonii Roulston
Andrea Urquhart
for the Accused, Joshua Frank