NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Butcher*, 2020 NSCA 50

Date: 20200625
Docket: CAC 480054
Registry: Halifax

Between:

Nicholas Jordan Butcher

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Anne S. Derrick The Honourable Justice Duncan R. Beveridge dissenting in part
Appeal Heard:	February 12, 2020, in Halifax, Nova Scotia
Subject:	**Second-degree murder. Admissibility of evidence. Antemortem statements. Whether probative value of statements was outweighed by prejudicial effect. Parole eligibility. Domestic homicide. Aggravating factors. Whether sentence is demonstrably unfit. Proportionality. Parity. Deference.**
Summary:	Mr. Butcher was in an intimate relationship with Kristin Johnston and had been living with her for two months. During a vacation away from Mr. Butcher, and upon her return, Ms. Johnston expressed to family and friends her desire to end the relationship. Within days of getting back to Halifax, Ms. Johnston went out to meet friends for the evening. Mr. Butcher was not invited. He used Ms. Johnston's computer to read Facebook and instant messages in which she had told friends she wanted to break up with him. Later in the evening he accessed the computer again and located Ms. Johnston at the apartment of a male friend. He drove to the apartment and entered it uninvited. He and Ms. Johnston spoke but she did not leave with him. He then waited outside the apartment for nearly two hours. He entered again and found Ms. Johnston and the male friend in

bed together. Although Ms. Johnston said she was where she wanted to be, she left with Mr. Butcher and they returned to the home where they had been living. A short time later, while Ms. Johnston was asleep, Mr. Butcher retrieved a knife from the kitchen and stabbed her to death. He then tried to kill himself.

Mr. Butcher appealed his conviction for second-degree murder on the basis that Ms. Johnston's antemortem statements testified to by two witnesses, a family member and a friend, and text messages by him, should not have been admitted into evidence. He also appealed his sentence, a 15-year period of parole ineligibility, arguing it was manifestly unfit.

Issues: Admissibility of evidence: Mr. Butcher argued the trial judge erred in law by admitting the antemortem statements. He also submitted his text messages to his landlord and various friends should not have been admitted. He argued the antemortem evidence was unreliable and could have been viewed by the jury as evidence of bad character (arguments rejected at trial). He submitted the trial judge erred in admitting the text messages by failing to conduct a probative value versus prejudicial effect analysis; not properly considering the bad character implications of the messages; dismissing the risk or moral and reasoning prejudice; and placing too much stock in the effectiveness of mid-trial and final instructions to the jury.

Sentence: Mr. Butcher submitted the trial judge relied on a factual finding that was unsupported by the evidence and gave insufficient attention to the principle of parity in cases of domestic homicide. Mr. Butcher also argued the trial judge fell into reversible error by relying on statutorily aggravating factors that did not apply. He said the appropriate period of parole ineligibility in his case is 12 years.

Result: The appeal against conviction was dismissed by a unanimous Court. The appeal against sentence was dismissed; Beveridge, J.A. dissenting.

Admissibility of antemortem statements: the trial judge made no error in admitting the contested antemortem statements of Ms. Johnston on the basis they fell within a recognized exception to

the hearsay rule. His assessment of the probative value of the statements versus their prejudicial effect is entitled to deference. The evidence was not unreliable and could not be construed as evidence of bad character. As the trial judge found, the statements could appropriately be used to establish motive to kill and to identify the killer.

Admissibility of Mr. Butcher's text messages: the trial judge's decision to admit the text messages was without error. He undertook a probative value/prejudicial effect analysis. The texts had significant probative value and no identifiable prejudicial effect. There was nothing in the texts to suggest bad character or discreditable conduct on the part of Mr. Butcher. The trial judge gave clear mid-trial and final instructions to the jury strongly cautioning them on the purpose for which the text message evidence could be used. The jury was told the evidence could not be used to infer that Mr. Butcher was guilty of any offence.

Sentence: in the view of the majority, the trial judge drew available inferences from the evidence and carefully considered the applicable sentencing principles, including parity. He found that Ms. Johnston's murder was closer to first-degree murder than manslaughter. And although he did incorrectly describe Mr. Butcher and Ms. Johnston as common-law partners, which they were not according to the definition in the *Criminal Code* at the time, this error was inconsequential. The common law has recognized for some time that the murder by a man of a woman with whom he has been in an intimate relationship calls for a more significant period of parole ineligibility. The lethal attack of Ms. Johnston, while she lay asleep in bed, constituted a breach of trust and the trial judge did not err in relying on this statutorily aggravating factor. There were significant aggravating factors here, including Mr. Butcher's conduct during the night prior to the murder, and the forethought involved in getting the knife while Ms. Johnston was sleeping and stabbing her to death in her bed. Whether it is through the application of statutory or common law principles, violence perpetrated in the context of intimate relationships requires emphatic denunciation. It was reasonable for the trial judge to view the effect of the aggravating circumstances as elevating the

degree of Mr. Butcher's moral culpability and justifying a 15-year period of parole ineligibility. There is a broad range of parole ineligibility for second-degree murder and the trial judge's determination of where Mr. Butcher's ineligibility should be placed in that range is entitled to deference.

In the view of the dissent, the trial judge expressly relied on two statutory aggravating factors which he found overwhelmed the previous good character of the appellant and led him to impose a 15-year period of parole ineligibility. The appellant was not a spouse or common-law partner of the victim, nor was he in a position of trust or authority vis-à-vis the victim. This error in law impacted sentence, which requires the Court to then determine the appropriate period of parole ineligibility.

Even if the fact they were intimate partners acts as an aggravating common-law factor, equivalent to that of a case of spousal murder, the factor cannot be counted twice as also a breach of trust, since the trust arose out of that intimate partner relationship. Further, the appropriate range of sentence for such an offence is not 10-15 year's parole ineligibility. The range is determined by the circumstances of the offence and of the offender guided by the relevant principles of sentence, in particular, that of proportionality and parity.

The recognized aggravating factors in cases of intimate partner murder such as: prior abuse; the existence of multiple victims; the presence of planning and premeditation; the presence of children; breach of a restraining order; or, post-offence conduct were absent. Significant mitigating factors were present. Considering the appellant's breach of trust in the commission of the offence, and the sentences imposed on similar offenders in similar circumstances, nothing justifies a period beyond 12 years' parole ineligibility.

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Her Majesty the Queen

Respondent

Judges:	Beveridge, Bourgeois and Derrick, JJ.A.
Appeal Heard:	February 12, 2020, in Halifax, Nova Scotia (Further written submissions: May 22, 2020)
Held:	Conviction appeal dismissed; sentence appeal dismissed per reasons of Derrick, J.A.; Bourgeois, J.A. concurring; Beveridge, J.A. dissenting in part
Counsel:	Jonathan T. Hughes, for the appellant Glenn Hubbard, for the respondent

Reasons for judgment:

Introduction

[1] On April 28, 2018 a jury convicted Nicholas Butcher of the second-degree murder of his intimate partner, Kristin Johnston whom he had stabbed to death on March 26, 2016.

[2] Mr. Butcher received an automatic life sentence. The trial judge, Justice Joshua Arnold, imposed a minimum period of parole ineligibility of 15 years. Mr. Butcher appeals both this decision and his conviction.

[3] Mr. Butcher's grounds of appeal against conviction concern the admissibility of evidence admitted at trial. He submits the trial judge was in error when he allowed the jury to hear statements made by Ms. Johnston to family and friends before her death. Antemortem hearsay evidence is often admitted in domestic homicide trials as an exception to the prohibition against hearsay to show the deceased's state of mind or present intention. This may be relevant to the issues of motive and identity of the killer.

[4] Mr. Butcher says in his case the antemortem statements, without more, had no probative value in relation to the issue of motive. (As the facts I will be reviewing shortly disclose, identity was ultimately not an issue as Mr. Butcher admitted to killing Ms. Johnston, claiming he did so in self-defence.)

[5] Mr. Butcher says the trial judge also erred by admitting what he claims was bad character evidence about him contained in text messages he had sent to friends. He says the prejudicial effect of evidence that he was experiencing financial and relationship stresses significantly outweighed its probative value. He submits the trial judge failed to properly consider the bad character implications of the messages, which could not be neutralized by mid-trial and final instructions to the jury.

[6] Mr. Butcher is looking for a new trial. He is also challenging his sentence. He says the 15-year period of parole ineligibility is demonstrably unfit and should be reduced to 12 years.

[7] For the reasons that follow, I would dismiss Mr. Butcher's appeal. I am not persuaded the trial judge erred in admitting the evidence being impugned nor in imposing a 15-year period of parole ineligibility in this case.

Overview of the Facts

[8] Mr. Butcher and Ms. Johnston became romantically involved in the summer of 2015. She was 32 years old and the owner of a yoga studio in Halifax. Mr. Butcher was 34 and had recently graduated from law school. He was having trouble finding articles and, like Ms. Johnston, was struggling financially. Ms. Johnston's yoga studio was faltering and Mr. Butcher had accumulated approximately $200,000 in debt pursuing his university education. He was working as a driving instructor to make ends meet.

[9] Mr. Butcher and Ms. Johnston were very stressed by their financial circumstances. They were having relationship issues. They each communicated with their respective friends about how they were feeling. Witnesses testified at Mr. Butcher's trial about these communications and a number of electronic messages were also admitted into evidence.

[10] In January 2016, Mr. Butcher began living with Ms. Johnston at her home although he had been spending nights there since the summer of 2015. By March 2016, Ms. Johnston was contemplating ending the relationship for good. They had already had a break-up the previous November. She was aware that Mr. Butcher was in love with her and wanted a future together. She did not. She was closing her yoga studio and considering selling her house and moving away. Continuing a relationship with Mr. Butcher was not part of her plans.

[11] Ms. Johnston had occasion to talk to family and friends about what was on her mind in February and March 2016. In late February, she went to Florida without Mr. Butcher to visit family and, while there, spent time with her sister, Kim, and her brother-in-law, Cameron Dennison. They discussed Ms. Johnston's negative feelings about her relationship with Mr. Butcher.

[12] From Florida, Ms. Johnston flew to Costa Rica to spend time with a close friend, Jennifer Hazard. She talked with Ms. Hazard about wanting to end the relationship with Mr. Butcher.

[13] Although Ms. Johnston exchanged affectionate text messages with Mr. Butcher while on holiday, within a day or so of her return to Halifax she was

arranging to socialize with friends on her own. She did not invite Mr. Butcher to join her. On the afternoon of March 25, 2016 she had a Facebook Messenger conversation with a former partner, Craig Conoley, in which they discussed how she might end her relationship with Mr. Butcher.

[14] On the evening of March 25, Ms. Johnston talked with friends at a local bar about leaving Mr. Butcher. By the end of the night, three of the friends, Matthew Whiston, Heather Townsend, and Anna Gilkerson, had left. Ms. Johnston was then joined around 11:15 p.m. by Lisa Abramowicz. She talked to Ms. Abramowicz about ending her relationship with Mr. Butcher.

[15] After leaving the bar, Ms. Johnston and Ms. Abramowicz went to Ms. Abramowicz's nearby apartment. Ms. Johnston, who had been texting Michael Belyea on Facebook Messenger, wanted to keep socializing. Mr. Belyea invited the two women over to his apartment which was close by. He and Ms. Johnston continued to exchange flirtatious texts.

[16] Mr. Belyea had been at the bar earlier and was an acquaintance of Ms. Johnston's. They had been intimate on one occasion in the past.

[17] Ms. Johnston and Ms. Abramowicz arrived at Mr. Belyea's apartment shortly after 1 a.m. on March 26.

[18] In the hour before their arrival at Mr. Belyea's, Ms. Johnston had texted Mr. Butcher to say she was staying with Ms. Abramowicz for the night, her phone battery was dying and she was going to sleep. His text in response didn't sound pleased: "Fan fucking tastic". Ms. Johnston signed off just as she and Ms. Abramowicz arrived at Mr. Belyea's apartment.

[19] Some time earlier, after Ms. Johnston had left her home for the bar to meet her friends, Mr. Butcher accessed her Facebook account using her computer. Her communications about ending the relationship were in plain view.

[20] While Ms. Johnston was at the bar, Mr. Butcher visited his friend, Adam Chisholm. Mr. Chisholm testified that Mr. Butcher was upset and anxious about his financial situation, his inability to find articles, and the state of his relationship with Ms. Johnston. Mr. Chisholm recounted Mr. Butcher's description of Ms. Johnston being distant since her return from Costa Rica and how she was out having drinks with friends that evening without him.

[21] It was Mr. Chisholm's advice to Mr. Butcher that if Ms. Johnston was not into the relationship he should end it. He said Mr. Butcher was unhappy about the prospect of the relationship being over.

[22] Mr. Butcher left Mr. Chisholm's house to return to the home he shared with Ms. Johnston. He again used her computer to access her Facebook account and learned from her Facebook Messenger exchanges with Mr. Belyea where she was.

[23] Ms. Johnston, Ms. Abramowicz and Mr. Belyea were in Mr. Belyea's living room talking and listening to music when Mr. Butcher arrived unexpectedly, at approximately 2 a.m. Mr. Butcher and Mr. Belyea were not acquainted. Nonetheless, Mr. Butcher entered the apartment uninvited. Ms. Johnston and Ms. Abramowicz did not know how Mr. Butcher had known where to find them. Mr. Butcher told Ms. Johnston he thought she was at Ms. Abramowicz's, which is what she had told him in her earlier text.

[24] Mr. Butcher and Ms. Johnston left the apartment together to talk outside. Only Ms. Johnston returned. She and Ms. Abramowicz and Mr. Belyea started talking about how strange it was that Mr. Butcher had found her. They speculated that he had accessed her Facebook Messenger texts.

[25] After Mr. Butcher had left, Ms. Johnston, Ms. Abramowicz and Mr. Belyea continued talking and listening to music for a bit. Then Ms. Johnston stood up and announced she was tired and intending to sleep at Mr. Belyea's. She headed into his bedroom. Mr. Belyea said goodnight to Ms. Abramowicz and followed her.

[26] It was past 4 a.m. on March 26. Ms. Abramowicz left the apartment. She did not notice Mr. Butcher sitting in his car. He had been there for almost two hours.

[27] After Ms. Abramowicz left, Mr. Butcher returned to Mr. Belyea's apartment unannounced. He went into the bedroom where Mr. Belyea and Ms. Johnston were in bed together, partially clothed. Mr. Belyea was on top of Ms. Johnston. Mr. Butcher pushed Mr. Belyea's shoulder and asked Ms. Johnston: "Why are you doing this?" She responded: "I want to be here".

[28] The situation was awkward. Mr. Belyea thought Ms. Johnston had ended her relationship with Mr. Butcher when he had been at the apartment earlier. He got out of bed, dressed, and left the apartment to give Mr. Butcher and Ms. Johnston some privacy. When he returned, they had gone. At 5:36 a.m. he received a text from Ms. Johnston that said: "Jesus fuking [sic] christ I'm sorry".

[29] At 7:36 a.m., 911 dispatch received a call from Mr. Butcher in which he said: “I killed my girlfriend and I tried to kill myself, I cut off my hand. I think I’m dying”. When police attended Ms. Johnston’s home, they found the injured Mr. Butcher and arrested him. Ms. Johnston was lying on her back in her bed with a pillow over her face and deep lacerations to her throat. She was dead.

[30] Mr. Butcher testified at trial. His evidence was consistent with the narrative provided by Lisa Abramowicz and Michael Belyea about the events at Mr. Belyea’s apartment in the early morning hours of March 26, 2016. He said he had driven Ms. Johnston home where they went to sleep together as was customary. He testified on cross-examination that he knew when he left Mr. Belyea’s with Ms. Johnston the relationship was over.

[31] Mr. Butcher described waking up sometime later in the pitch-dark bedroom straddled by an unknown assailant who was attacking him with a kitchen knife. He got the upper hand, seizing possession of the knife and stabbing his attacker. He then discovered he had killed Ms. Johnston. Overcome with shock and grief he tried to kill himself, ultimately cutting his hand off with a mitre saw he had retrieved from the basement. Bleeding and panicked, he reconsidered ending his life and called 911.

[32] Mr. Butcher’s claim of killing Ms. Johnston in self-defence was rejected by the jury.

The Issues

[33] The issues in this appeal are:

(1) Did the trial judge err in law by admitting the antemortem hearsay statements of Ms. Johnston?

(2) Did the trial judge err in law by admitting Mr. Butcher’s electronic messages for the improper purpose of establishing his bad character and were they incorrectly found by the trial judge to not be evidence of bad character?

(3) Is the 15-year period of parole ineligibility demonstrably unfit?

Standard of Review

[34] The standard of review for the first two issues – the admissibility of Ms. Johnston's antemortem statements and Mr. Butcher's electronic messages – is the same. As noted by Beveridge, J.A. in *R. v. Eisnor*, 2015 NSCA 64, the admissibility of evidence is a question of law and therefore,

> [162] …reviewable on the standard of review of correctness. A trial judge must be right in his or her identification and application of the rules on the admissibility of evidence (see *R. v. Underwood*, 2002 ABCA 310 at para. 61; *R. v. Smith*; *R. v. James*, 2007 NSCA 10 at para. 166, aff'd 2009 SCC 5). But considerable deference is afforded to trial judges with respect to issues such as determination of probative versus prejudicial effect (*R. v. Handy*, [2002 SCC 56]; *R. v. Pasqualino*, 2008 ONCA 554; *R. v. Poulette*, 2008 NSCA 95).

[35] The appropriate standard of review for the appeal against the 15-year period of parole ineligibility has been succinctly stated by the Supreme Court of Canada in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. [...]

[36] This Court recently discussed in *R. v. Potter*, 2020 NSCA 9, the standard of review in sentence appeals:

> [827] An appellate court is not to take "an interventionist approach" to a sentencing appeal:
>
> > ... An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable. [*R. v. Shropshire*, [1995] 4 S.C.R. 227, para. 46]
>
> [828] This Court recently explained in *R. v. Espinosa Ribadeneira*:
>
> > [34] Sentencing involves the exercise of discretion by the sentencing judge. An appellate court should only interfere if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to

> consider a relevant factor, or the over-emphasis of the appropriate factors. An error of law or an error in principle will only justify appellate intervention if the error had an impact on the sentence. An appellate court is not to interfere with a sentence simply because it would have weighed the relevant factors differently. See *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90; *R. v. Nasogaluak*, 2010 SCC 6 at para. 46; *R. v. Lacasse*, 2015 SCC 64 at para. 43-44 and para. 49. [2019 NSCA 7]
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> …
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> [830] As stated by the Supreme Court of Canada in *R. v. Lacasse*:
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> > [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence. [2015 SCC 64, para. 67]

[37] As Justice Beveridge noted in *R. v. Hawkins*, a parole ineligibility appeal, *Shropshire* has "made it clear that an appellate court does not have free rein to modify a sentencing decision simply because it feels a different order ought to have been made". [2011 NSCA 7, at para. 9]

Issue #1 - The Admissibility of Ms. Johnston's Antemortem Statements

[38] Statements made by Ms. Johnston to family and friends shortly before her death were hearsay statements and therefore presumptively inadmissible unless they came within a recognized hearsay exception or qualified for admission following a principled analysis that took into account their necessity and reliability.

[39] The statements came in two forms: as statements recalled by witnesses who testified to what Ms. Johnston had told them, and as electronic messages showing her state of mind. In the course of a *voir dire* to determine the admissibility of the antemortem statements, Mr. Butcher conceded the admissibility of some of the recalled statements and all of the electronic messages. In his factum, this partial concession shifted to a position that the trial judge erred in admitting any of the statements.

[40] However, before us at the appeal hearing, Mr. Butcher's lawyer, Mr. Hughes, who had been co-counsel at trial, clarified that the antemortem statements conceded to be admissible at trial are not the subject of this appeal. Mr. Butcher is not trying to revisit his position that certain statements made by Ms. Johnston were properly admitted into evidence.

[41] Mr. Butcher's concessions about the admissibility of statements Ms. Johnston had made about wanting to end the relationship with him covered the testimony provided by her friends Jennifer Hazard, Matthew Whiston, Heather Townsend, and with one exception, that of Lisa Abramowicz and Michael Belyea.

[42] These statements included Ms. Johnston:

- Asking Mr. Whiston about how to break up with someone, saying she was unhappy in the relationship with Mr. Butcher, indicating she still cared about Mr. Butcher but did not love him the way he loved her and talking about moving away.

- Talking to Heather Townsend about ending the relationship with Mr. Butcher and saying she did not want to see him that night (the night of March 25).

- Telling Ms. Abramowicz that she didn't want to see Mr. Butcher that night.

- Telling Mr. Belyea she didn't want to "settle" in her business or personal life anymore.

[43] Mr. Butcher agreed that all of the electronic communications between Ms. Johnston and her friends, and introduced at the *voir dire* by the Crown, showing Ms. Johnston's state of mind were admissible. He agreed that all of the communications between Ms. Johnston and Mr. Conoley on March 25, which were exclusively made via Facebook Messenger, were admissible.

[44] The evidence Mr. Butcher took issue with was that of Anna Gilkerson and Cameron Dennison.

Anna Gilkerson

[45] It was Mr. Butcher's position that Ms. Gilkerson was an unreliable witness who had difficulty differentiating between her own opinions, what was an encapsulation of Ms. Johnston's statements, and what Ms. Johnston actually said.

Cameron Dennison

[46] Mr. Butcher objected to much of what Ms. Johnston's brother-in-law, Mr. Dennison had to say about her state of mind on the basis that it was double hearsay, conjecture or conflated recollections. He did not contest the admissibility of certain statements recalled by Mr. Dennison including that Ms. Johnston wanted to end the relationship and that Mr. Butcher did not make her laugh the way Mr. Dennison made her sister laugh.

[47] The trial judge admitted antemortem statements from Ms. Johnston in addition to the ones Mr. Butcher had agreed were admissible. He noted the Crown's position that they were relevant to "proving the identity of Mr. Butcher as Ms. Johnston's killer and Mr. Butcher's motive for killing Ms. Johnston". (*R. v. Butcher*, 2018 NSSC 74, at para. 16 – *Voir Dire* #1) He rejected Mr. Butcher's argument that certain statements could be construed as evidence of bad character.

[48] In his *voir dire* decision, the trial judge explained Mr. Butcher's objection to the admission of certain statements, including his position that some of the evidence fell under a "rare case" exception justifying exclusion:

> [10] The Crown says the antemortem hearsay statements attributed to Ms. Johnston fall within a traditional hearsay exception and therefore there is no need to embark on a principled analysis. The Crown says the hearsay comments explaining Ms. Johnston's feelings about her relationship with Mr. Butcher and her desire to break up with him fall under either the state of mind exception or the present intention exception.
>
> …
>
> [13] Mr. Butcher does not challenge the "state of mind" or "present intention" exception. Since Ms. Johnston is deceased, necessity is not challenged by Mr. Butcher. However, he does say that some of the proposed hearsay evidence falls into the "rare case" category described in *Mapara*, on the ground that indicia of reliability are lacking.

[49] The trial judge explained the "rare case" exception discussed by the Supreme Court of Canada in *R. v. Mapara*, 2005 SCC 23:

> [15] The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the *Starr* decision, the following framework emerges for considering the admissibility of hearsay evidence:
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> > (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
> >
> > (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
> >
> > (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
> >
> > (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[50] The trial judge quoted *Mapara* on the issues of threshold and ultimate reliability:

> [16] Admissibility of evidence is determined on the basis of "threshold reliability" provided by circumstantial indicators of reliability. The issue of "ultimate reliability" is for the trier of fact, in this case the jury.

[51] The trial judge was well aware that he was dealing with threshold reliability not ultimate reliability. (para. 68)

[52] After a careful review of relevant law, the trial judge talked about the relevance of Ms. Johnston's antemortem statements:

> [26] Antemortem hearsay evidence in domestic homicides is often admitted as an exception to the hearsay rule to show the deceased's state of mind or present intentions. The declarant's state of mind must be relevant and the statement must be made naturally and not under circumstances of suspicion. Such evidence is often probative, going to the identification of the accused and to motive.
>
> [27] In this case, the Crown proposes to tender hearsay evidence to show that Ms. Johnston was unhappy in her relationship with Mr. Butcher and that she wanted to end the relationship. They also want to tender evidence that Ms. Johnston said she ended the relationship with Mr. Butcher just a couple of hours

> before she was killed. The Crown says this evidence indicates Mr. Butcher had a motive for killing Ms. Johnston.
>
> [28**]** The Crown says all the proposed hearsay statements occurred during natural conversation among family and friends, and that there were no circumstances of suspicion. They say none of the hearsay statements cast Mr. Butcher in a bad light. The Crown says that without the antemortem evidence, the trier of fact will be left without a clear picture of the dynamic between Ms. Johnston and Mr. Butcher…

The Evidence of Cameron Dennison and Anna Gilkerson

[53] The trial judge was not satisfied there were reliability issues that brought any of the proposed evidence within the *Mapara* "rare case" exception to make it inadmissible. He examined Mr. Butcher's objections to aspects of Cameron Dennison's evidence and the evidence of Anna Gilkerson. In the case of Mr. Dennison, Mr. Butcher argued it was impossible to sort out what he was told by Ms. Johnston and what his wife, Kim, had told him Ms. Johnston had said. However, the trial judge was satisfied Mr. Dennison was clear in recalling that Ms. Johnston had told him:

- She was struggling with Mr. Butcher's emotions and did not want to hurt his feelings by telling him the relationship was over.
- She wanted to break up with Mr. Butcher but was unsure of how best to do so.
- She and Mr. Butcher had broken up previously but around Valentine's Day he had begged her to reconcile with him[1].
- The rent for her yoga studio was very high and the business was failing.

[1] In his *voir dire* testimony, Mr. Dennison recalled a conversation with Ms. Johnston about a break-up with Mr. Butcher that was followed by Mr. Butcher pleading with Ms. Johnston to reconcile. Mr. Dennison testified Ms. Johnston had told him this had occurred around Valentine's Day in 2015. His recollection at trial of the timing was less clear. Mr. Butcher and Ms. Johnston did not become romantically involved until the summer of 2015. There is no evidence of Ms. Johnston and Mr. Butcher breaking up in February 2016. Mr. Dennison recalled hearing from Ms. Johnston there had been a break up and that Mr. Butcher had tearfully asked her to get back together. What his evidence did not clarify was when that break-up occurred.

[54] Having assessed the evidence, the trial judge found it satisfied the requirements of threshold admissibility and directed the Crown to ensure that its direct examination of Mr. Dennison did not "stray into areas that are inadmissible". (para. 38)

[55] The trial judge also found Mr. Dennison could testify to Ms. Johnston telling him that Mr. Butcher had been just "sitting around" and "doing nothing". He dismissed Mr. Butcher's suggestion that these statements could be construed as evidence of bad character. He characterized them as admissible hearsay going to Ms. Johnston's "state of mind or present intention" and "one reason why Ms. Johnston wanted to end the relationship with Mr. Butcher". (para. 42)

[56] Testimony about Mr. Butcher's inability to secure articles was also found by the trial judge not to be evidence of bad character. He said:

> [43] The reference to Mr. Butcher's inability to secure articles is not evidence of bad character. The probative value of this hearsay evidence lies in its relevance to explain another one of Ms. Johnston's reasons for wanting to end the relationship with him. This sentiment is corroborated by Ms. Hazard's report of what she was told by Ms. Johnston. There is little prejudicial effect in having the jury hear that although Mr. Butcher had graduated from law school, he had not yet secured articles. His employment situation would not lead to impermissible bad character reasoning on the part of the jury. A mid-trial and final jury instruction regarding this evidence would inoculate the jury against impermissible reasoning.

[57] The trial judge took account of Mr. Butcher's concerns about the reliability of Anna Gilkerson's evidence. However he rejected Mr. Butcher's position that none of what she recalled from talking to Ms. Johnston at the bar on March 26 was admissible. He accepted that Ms. Gilkerson was not intoxicated during the conversation with Ms. Johnston and could hear her clearly. He noted that Ms. Gilkerson testified she could specifically remember three distinct statements made by Ms. Johnston and found them to be admissible:

- Ms. Johnston was not happy in the relationship with Mr. Butcher.
- Ms. Johnston wanted to leave Mr. Butcher and did not want to go home.
- Ms. Johnston replied "I know" when Ms. Gilkerson told her she should break up with Mr. Butcher. (para. 52)

[58] The trial judge concluded that Ms. Gilkerson would be given "a caution…before she testifies, reminding her to testify about what she actually saw and heard, and not give summaries or opinions of her impression of Ms. Johnston's feelings". (para. 52) Ms. Gilkerson was cautioned in this manner.

The Evidence of Why Ms. Johnston Allowed Mr. Butcher to Move in With Her

[59] In his *voir dire* ruling, the trial judge determined that evidence about Ms. Johnston agreeing to Mr. Butcher living with her because he was in financial straits was admissible. He described the evidence:

> [74] Mr. Dennison says that Ms. Johnston told him Mr. Butcher was living with her because he could not pay his rent. Ms. Hazard said that Ms. [*sic*] told her that Mr. Butcher was a good friend and that she wanted to ask him to increase his rent for financial help. The witnesses, such as Ms. Hazard and Mr. Dennison, who speak to Ms. Johnston's explanation for having Mr. Butcher live with her, are consistent insofar as they each state that Ms. Johnston indicated that she had Mr. Butcher living with her for financial reasons. Mr. Chisholm confirms that Mr. Butcher was having financial issues. Several witnesses state that Ms. Johnston was having financial issues herself, in that her business, the yoga studio, was either closing or was closed.

[60] The trial judge accepted the Crown had satisfied the requirements for threshold reliability that justified the admission of evidence from witnesses about why Mr. Butcher was living with Ms. Johnston. He held that:

> [77] …on a balance of probabilities it is more likely than not that this evidence is sufficiently inherently trustworthy. The ultimate reliability of what Ms. Johnston said as to why Mr. Butcher was living with her will be left to the jury.

[61] Finally, the trial judge assessed the probative value of the hearsay statements versus the prejudice associated with admitting them. He found as follows:

> [79] The probative value of Ms. Johnston's statements of intention regarding her relationship with Mr. Butcher is significant. They tend to describe the nature of the relationship between herself and Mr. Butcher. They reveal her desire to end the relationship. They provide evidence of possible animus and a possible motive on the part of Mr. Butcher and go to the identity of Ms. Johnston's killer. The trier of fact should have this information in order to make an accurate decision.
>
> [80] Mr. Butcher points out no prejudicial effect.

[62] The trial judge was satisfied Ms. Johnston's antemortem statements were admissible "under a recognized exception to the hearsay rule". He noted the appropriate use of the evidence was to establish motive to kill and the identity of Mr. Butcher as Ms. Johnston's killer.

[63] It is important to note that, contrary to submissions made in Mr. Butcher's factum on appeal, the admissibility of the antemortem statements did not depend on supporting evidence to show Mr. Butcher was aware of Ms. Johnston's possible intentions or state of mind. (*R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), at para. 12, per Doherty, J.) That being said, there was abundant evidence in this case to support the inference that Mr. Butcher knew Ms. Johnston was unhappy and wanted to end the relationship; for example, her distancing behaviour on returning from her vacation, the Facebook messages Mr. Butcher accessed on her computer, her lie about spending the night at Ms. Abramowicz's, and her conduct at Michael Belyea's apartment where she explicitly signaled her rejection of Mr. Butcher.

Conclusion on Issue #1

[64] The trial judge's reasoning in relation to the admissibility of the antemortem statements was entirely sound. He identified and applied the correct law. He made supportable findings of fact. Deference should be shown to his assessment of the probative value of the statements versus their prejudicial effect. His analysis cannot be faulted. He made no error in permitting the Crown to place Ms. Johnston's antemortem statements before the jury. I would dismiss this ground of appeal.

Issue #2 - The Characterization and Admissibility of Mr. Butcher's Text Messages

[65] In *Voir Dire* #11 (*R. v. Butcher*, 2018 NSSC 105), the trial judge dealt with the admissibility of text messages between Mr. Butcher and his landlord and various friends. The Crown was seeking to have the texts admitted on the basis that they were relevant and probative of Mr. Butcher's motive and possible intent. (para. 2) Mr. Butcher was opposed to their admission saying the texts were stale, irrelevant, related to collateral issues, and carried a prejudicial effect that outweighed their probative value. (para. 3)

[66] The trial judge found the texts to be admissible. Noting that they had been written between August 2015 and March 2016, he concluded they were not stale. (para. 10) He identified their subject matter as relating to Mr. Butcher's financial

difficulties, job prospects, and his relationship with Ms. Johnston that included "breaking up and fighting".

[67] There were two texts in which Mr. Butcher had described himself, alternately, as having a "nervous breakdown" and "going crazy" in November 2015. The trial judge found that neither of these texts nor the ones referring to "breaking up" and "fighting" could be viewed as evidence of discreditable conduct by Mr. Butcher or bad character. (paras. 15 and 17) After reviewing case law discussing moral and reasoning prejudice, including *R. v. Taweel* from this Court (2015 NSCA 107), the trial judge concluded:

> [23] In this case, the text messages are not evidence of bad character or of discreditable conduct on the part of Mr. Butcher. There is no risk of moral prejudice or reasoning prejudice on the part of the jury. Any possible concern about reasoning prejudice (and there should be none) can be cured with a mid trial and a final jury instruction.
>
> [24] The probative value of this text message/electronic evidence far outweighs any prejudicial effect. Society has an interest in determining the truth of the charges. This text message/electronic evidence is relevant to provide the jury with the entire context of the events leading up to March 26, 2016. There is no impact to Mr. Butcher' s right to a fair trial by the admission of this evidence.

[68] Mr. Butcher submits the trial judge erred in admitting Mr. Butcher's text messages revealing stress over financial and relationship worries. He says the trial judge:

- Failed to conduct a probative value versus prejudicial effect analysis.
- Did not properly consider the bad character implications of the text messages.
- Dismissed the risk of moral (the potential stigma of bad character) and reasoning (the potential distraction of the jury from the offence with which the accused has been charged) prejudice.
- Placed too much stock in the effectiveness of mid-trial and final instructions to the jury.

[69] I would not give effect to Mr. Butcher's criticisms. As I have noted, the trial judge did undertake a probative value/prejudicial effect analysis, at paragraphs 18 through 22 of his decision. He was satisfied there was nothing in the texts that

suggested bad character or discreditable conduct on the part of Mr. Butcher. This finding is amply supported by the texts themselves. The texts show Mr. Butcher to have been very conscientious about his financial obligations, regularly reassuring his landlord that he would be providing his rent payments, and doing so, and working at four or five part-time jobs to pay the bills. He expressed love and concern for Ms. Johnston, helped her with issues relating to the yoga studio and encouraged her to take the trip to Costa Rica after visiting her family in Florida.

[70] There is equally nothing that discredits Mr. Butcher in the texts where he refers to feeling despondent about relationship conflict with Ms. Johnston and their breakup in November 2015, and the mention in one text of them having a fight in October. As the trial judge noted, there is no suggestion of the fight involving any physical violence. The texts show Mr. Butcher to have been stressed and frustrated about his grim financial situation and sad and anxious about the strains in his relationship with Ms. Johnston, none of which could be said to have cast him in a bad light.

[71] There was significant probative value in the texts, which indicated Mr. Butcher's state of mind, as revealed by his own words, and no identifiable prejudicial effect. Furthermore, the trial judge complied fully with the requirement for careful instructions to the jury, as emphasized by the Supreme Court of Canada in *R. v. S.G.G*, [1997] 2 S.C.R. 716:

> [65] …Even if the evidence is admissible under this exception, it is clear that it still cannot be used to determine guilt simply on the basis that the accused is the type of person to commit the crime…The trial judge has a duty to charge the jury in this regard, and to warn them against the improper use of the evidence.

[72] The trial judge gave both mid-trial and final instructions to the jury, strongly cautioning them on what would constitute the improper use of the evidence. Such instructions are the appropriate tool to assist juries and ensure fair trials even where bad character evidence is admitted as directly relevant to the Crown's theory of the case. As Watt, J.A. stated in *R. v. Moo*, 2009 ONCA 645, at para. 100:

> Where evidence of extrinsic misconduct is admitted, one antidote to ensure that prejudice does not substitute for proof are mid-trial and final cautions that educate jurors about the permitted and prohibited use of the evidence…

[73] Here the trial judge gave a very clear limiting instruction to the jury on the purpose for which the text message evidence could be used. He crafted his

instructions with input from Crown and Defence counsel. He cautioned that the evidence could not be used to infer that Mr. Butcher was guilty of any offence.

Conclusion on Issue #2

[74] The trial judge's decision to admit Mr. Butcher's text messages discloses no error. He identified the correct law and applied it appropriately. He conducted a careful analysis of the relevance and probative value of the texts. He correctly concluded the texts did not contain evidence of bad character nor risk creating moral or reasoning prejudice. He appropriately cautioned the jury about the proper use of the evidence. I would dismiss this ground of appeal.

Issue #3 – The Imposition of a 15-year Period of Parole Ineligibility

[75] As a result of being found guilty of second-degree murder, Mr. Butcher received an automatic sentence of life imprisonment pursuant to s. 235 of the *Criminal Code*, R.S.C. 1985, c. C-46. The remaining sentencing issue was how long he would have to wait before being eligible to apply for parole. Parole ineligibility for second degree murder ranges from a minimum period of 10 years to a maximum of 25. (s. 745.1(c), *Criminal Code*) The Crown sought 17 years. Mr. Butcher's lawyers recommended 10.

[76] The trial judge imposed a 15-year period of parole ineligibility. (*R. v. Butcher*, 2018 NSSC 194) Mr. Butcher says 15 years is demonstrably unfit and should be reduced to 12 years. He says the trial judge committed two errors in his analysis: (1) he relied on "a factual finding unsupported by the evidence" as an aggravating factor; and (2) he gave insufficient attention to the principle of parity.

[77] After the appeal hearing, counsel for the parties were asked to address three questions, which I reproduce below.

1) Did the trial judge rely on ss. 718.2(a)(ii) and (iii) as statutory aggravating factors?

2) If so, did he commit an error in law or principle and did that error impact the sentence he imposed?

3) What are the consequences if the answers to questions 1 and 2 are in the affirmative?

[78] Subsections 718.2(a)(ii) and (iii) of the *Criminal Code* will, if applicable, operate as aggravating circumstances on sentencing. At the time of Mr. Butcher's sentencing, the provisions specified a sentence should be increased on the basis of

evidence that in committing the offence, the offender "abused the offender's spouse or common-law partner" (s. 718.2(a)(ii)), and "in committing the offence, abused a position of trust…in relation to the victim" (s. 718.2(a)(iii)). (In September 2019, that is, after Mr. Butcher's sentencing, Parliament amended the *Code* to expand s. 718.2(a)(ii) by substituting "intimate partner" for "common-law partner". An intimate partner is defined as including a "current or former spouse, common-law partner and dating partner". The *Criminal Code* provision that applied at the time of Mr. Butcher's sentencing referred to abuse of "the offender's spouse or common-law partner".)

[79] In his response to the questions, Mr. Butcher argues the trial judge relied on statutorily aggravating factors and fell into reversible error. I will be returning to discuss this submission.

[80] Before I do so, I will address Mr. Butcher's complaints about two factual underpinnings in the trial judge's reasons. He says the trial judge: (1) relied on a fact not supported in the evidence, and (2) drew an inference he did not explain.

The Factual Finding – The Pillow on Ms. Johnston's Face

[81] The trial judge began his sentencing decision with a recital of the facts on which he was relying. He recognized he was both entitled and required to make his own findings of relevant facts, as long as they were consistent with the jury's verdict. He referred to s. 724 of the *Criminal Code* as authority:

> 724 (1) **Information accepted** - In determining sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any fact agreed on by the prosecutor and the offender.
>
> (2) **Jury** - Where the court is composed of a judge and jury, the court
>
> (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
>
> (b) may find any other relevant fact that was disclosed by the evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[82] With one exception, Mr. Butcher does not take issue with the trial judge's factual findings. The one exception is a reference made by the trial judge to Mr. Butcher putting a pillow over Ms. Johnston's face before he murdered her.

[83] The trial judge mentioned the pillow twice in his reasons:

> [44] Shortly after they arrived at 17 Oceanview Drive, Kristin Johnston changed her clothes and was lying in bed, at her most vulnerable. Mr. Butcher murdered Ms. Johnston. He put a pillow over her face and stabbed, slashed, and cut her in the neck ten times. The force used to cause the wounds was significant. Kristin Johnston died of sharp force injury. She had 10 sharp force injuries to her neck and throat and also had significant cuts on her hands that the forensic pathologist described as defensive wounds.

And later:

> [91] Ms. Johnston was in her own home, in her own bed and at her most vulnerable when Mr. Butcher put a pillow over her face and stabbed her repeatedly in the neck and throat until she died.

[84] Mr. Butcher challenges the trial judge's finding that he put a pillow over Ms. Johnston's face on the grounds that:

- There was no evidence to support it.
- It was treated as an aggravating factor by the trial judge without it being proven beyond a reasonable doubt as required in law. (s. 724(3)(e), *Criminal Code*)

[85] It is undisputed that Ms. Johnston was discovered with a pillow over her face. The first police officer to enter the bedroom saw Ms. Johnston lying on her back in her bed with her head covered by a pillow. He testified to lifting one side of the pillow to see if she was alive. He saw that she was dead with "a large amount of trauma to her throat". He then lowered the pillow back down to the position in which he found it.

[86] The trial judge made the reasonable inference that Mr. Butcher had placed the pillow on Ms. Johnston's face while she was still alive and being stabbed. This inference was available to him on the evidence.

[87] The forensic pathologist, Dr. Marnie Wood, testified that Ms. Johnston's fatal neck wounds and the crime scene evidence led her to conclude Ms. Johnston had been stabbed repeatedly in the front of her neck while lying on her back. She had defensive wounds to her hands and was lying in a large pool of blood.

[88] Ms. Johnston's neck wounds had been inflicted with deadly accuracy, severing the jugular veins on either side of her neck. A pillow on her face would have enabled Mr. Butcher to control her head, which otherwise Ms. Johnston could

have tried to move. This point was raised by the Crown in cross-examination of Mr. Butcher, although he did not recall placing the pillow on Ms. Johnston.

[89] The underside of the pillow, the side lying across Ms. Johnston's head, was heavily saturated with blood. This suggests that when it was put into position, the blood source, Ms. Johnston, was still alive, her heart pumping blood out of the wounds in her neck.

[90] Ms. Johnston's downstairs tenant heard nothing in the early morning hours of March 26 when she was being murdered. The pillow would have stifled any screams.

[91] The evidence I have noted supports the inference drawn by the trial judge that Mr. Butcher placed a pillow over Ms. Johnston's face while he set about stabbing her or, at least, at the point when she was bleeding to death.

[92] Significantly however, the trial judge's reasons do not indicate that he treated this finding as an aggravating factor. He mentioned it as part of his description of the murder but did not reference it as an aggravating factor.

[93] The aggravating factors noted by the trial judge were: the nature of the Butcher/Johnston relationship – that it was an intimate one; it was a relationship of trust; Ms. Johnston was murdered in her own home, lying in her bed; Mr. Butcher had stalked her by reading her Facebook messages, tracked her down, lain in wait for her, and brought her back with him to the house where he attacked her after she had gone to sleep.

[94] There was no mention by the trial judge of the pillow as an aggravating factor.

The Inference – "Some Indication of Forethought"

[95] Mr. Butcher takes issue with the trial judge having said in his reasons there was "some indication of forethought on the part of Mr. Butcher prior to murdering Ms. Johnston". He says the trial judge inferred forethought without elaborating on what justified that inference.

[96] There was no need for the trial judge to elaborate. It is obvious Mr. Butcher applied forethought to stabbing Ms. Johnston. He agreed under cross-examination there were no knives in the bedroom. Ms. Johnston was stabbed to death with an 8-10 inch steak knife. The police investigators located the other household knives in

the kitchen. To arm himself for his deadly assault, Mr. Butcher had to go to the kitchen and retrieve the knife he then repeatedly plunged into Ms. Johnston's neck.

[97] The stabbing of Ms. Johnston was not a spontaneous, impulsive act in the midst of a heated argument. It involved purposeful acts by Mr. Butcher. These acts were relevant to the trial judge as they located the second-degree murder of Ms. Johnston further along the continuum of moral culpability, closer to first-degree murder than to manslaughter.

[98] Mr. Butcher's lethal attack of Ms. Johnston was executed with deadly precision and effect. Both her jugular veins were punctured. A vertebrae was nicked. Death would have occurred in 5 minutes or less according to the forensic pathologist, Dr. Wood. Unconsciousness would happen slightly prior to death, which Dr. Wood estimated would have been a minute or two before although "It's difficult to say exactly how much". The injuries to Ms. Johnston's hands were, according to Dr. Wood, classically characterized as "defensive" injuries: "They are most commonly seen in people who are warding off blows or sharp force injuries".

[99] The record indicates Ms. Johnston was lying in her bed when Mr. Butcher attacked her. There can be no doubt she was or had been asleep. The first police officers on the scene after Mr. Butcher's 911 call found the bedroom dark with the curtains closed. Ms. Johnston had to have awakened just enough to try and fight off her killer. Her final moments were spent in terror and agony as Mr. Butcher repeatedly stabbed her and she bled to death.

The 15-Year Period of Parole Ineligibility

[100] The trial judge undertook his sentencing analysis in accordance with the requirements of s. 745.4 of the *Criminal Code* which mandated him to have regard for Mr. Butcher's character, the nature of the offence and the circumstances surrounding its commission, and the recommendations of the jury.

The Recommendations by the Jury

[101] Pursuant to s. 745.2 of the *Criminal Code*, the jury members were asked by the trial judge if they wished to make any recommendation on the number of years, between 10 and 25, that Mr. Butcher would have to serve before being eligible for release on parole. Their recommendations were as follows: 2 jurors – 10 years; 1 juror – 12 years; 1 juror – 15 years; 1 juror – 18 years; 3 jurors – 20 years; and 4 jurors – 25 years. The trial judge noted this in his reasons:

> [94] Therefore, of those jurors who chose to make a recommendation about a parole ineligibility date, eight suggested a date in the 18-25 year range, one at 15 years and three suggested 12 years or less. I am not bound by the jury's recommendation, but must consider it, which I have done.

[102] Although judges have questioned the jury's ability to make informed recommendations (see, for example, Watt, J. in *R. v. Barry*, [1991] O.J. No. 2666 (Ont. C.J.)), recommendations are to be taken into account, which the trial judge here indicated he had done.

Mr. Butcher's Character, the Nature of the Offence and the Circumstances Surrounding Its Commission

[103] The trial judge's reasons for imposing a parole ineligibility period of 15 years is encapsulated in the following paragraphs from his sentencing decision where he addresses Mr. Butcher's character, the nature of the offence and the circumstances surrounding its commission:

> [95] Nicholas Butcher is sentenced to imprisonment for life. That must never be forgotten.
>
> [96] Considering Mr. Butcher's previously mainly pro-social lifestyle, positive Pre-Sentence Report, as well as his lack of prior involvement with the criminal justice system, he falls into the first category as described in *Nash* [*R. v. Nash*, 2009 NBCA 7] and by other courts of appeal, that is the 10-15 year range for parole ineligibility.
>
> [97] On the continuum of second-degree murder facts relating to moral culpability, at the lower-end offences closer to manslaughter and at the higher end cases closer to first-degree murder, this case is at the higher end. There is some indication of forethought on the part of Mr. Butcher prior to murdering Ms. Johnston. The nature of his offence and the circumstances surrounding its commission, the actions of Mr. Butcher in stalking Ms. Johnston during the evening he murdered her, and murdering his common-law partner while she was at her most vulnerable, in her own home and in her own bed, warrant a significant increase beyond the 10 year minimum.
>
> [98] Mr. Butcher's personal circumstances do not outweigh the aggravating factors in this case. Put another way, the circumstances of his crime overwhelm his previous good character.
>
> [99] Considering cases that involve similar offenders and similar situations, and considering that domestic murder cases generally involve parole ineligibility in the range of 12 to 15 years, I set Nicholas Butcher's parole ineligibility at 15 years.

[104] On appeal, the parties agreed that, as noted in *R. v. Nash*, 2009 NBCA 7, (which the trial judge referenced at para. 64 of his decision) sentencing for second-degree murder falls within three time frames for parole eligibility: 10-15 years; 15-20 years; and 20-25 years. They diverge on where Mr. Butcher should be placed within the 10-15 year range. Mr. Butcher says the trial judge should not have found he belonged at the high end.

[105] Mr. Butcher points to this Court's decision in *R. v. Hawkins*, 2011 NSCA 7, as an example of a second degree murder that warranted a period of parole ineligibility at the high end of the 10-15 year range. I do not see how Mr. Hawkins represents a higher order of moral culpability than Mr. Butcher. Indeed, there are similarities even though *Hawkins* did not involve the murder of an intimate partner. The victim trusted Mr. Hawkins who murdered him in his home. I do not view the result in *Hawkins*, a 15-year period of parole ineligibility, as assisting Mr. Butcher's position in this appeal.

[106] Mr. Hawkins stabbed and then strangled his victim to death in the course of robbing him. His victim was a vulnerable, intellectually-disabled man murdered in his own home by someone he must have trusted enough to invite in. These were aggravating factors, as was the robbery, Mr. Hawkins' "callousness" in using the proceeds of the robbery to buy cocaine, and his post-offence conduct of lying and leaving the province. His skill as a tradesperson with a consistently strong work ethic and a good reputation as an employee were mitigating factors.

[107] Beveridge, J.A. reduced Mr. Hawkins' parole ineligibility from the 20 years imposed by the trial judge. He found the trial judge had erred in various respects, such as by failing to consider the appropriate sentencing principles mandated in the *Criminal Code*, including the principles of restraint and parity. He held a trial judge is required to consider the principle of parity enshrined in s. 718.2(b) of the *Criminal Code*, that a sentence being imposed be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. (para. 53)

[108] Unlike the trial judge who sentenced Mr. Hawkins, Mr. Butcher's trial judge considered the issue of parity along with the other sentencing principles he was required to take into account.

[109] Mr. Butcher submits the 15 years imposed by the trial judge is disproportionate to sentences for domestic murders not involving efforts by the perpetrator to conceal the crime or obstruct the police investigation. He references

cases that earned periods of parole ineligibility of 12 or 13 years as "demonstrating more aggravating circumstances" such as murders committed in the presence of others, including the victim's young children. His complaint is that the trial judge failed to justify "his departure from what was clearly set out in the case law". In other words, according to Mr. Butcher, the trial judge paid inadequate attention to the principle of parity. And, as I noted earlier, he says the trial judge erred by relying on statutorily aggravating factors that did not apply.

[110] Later I will review cases referred to by Mr. Butcher.

Analysis

[111] As I have said, Mr. Butcher's principal criticism of the trial judge's imposition of a 15-year period of parole ineligibility is that it is a manifestly unfit sentence for this particular second-degree murder. He says he should be at the lower end of the range of parole ineligibility for murder committed in the context of an intimate relationship.

[112] Mr. Butcher has abandoned his position at trial that his parole ineligibility should be set at the mandatory minimum 10 years. He now says 12 years is justified.

[113] In support of a 12-year period of parole ineligibility, Mr. Butcher relies on cases where parole eligibility was set at 12 to 13 years and argues that cases in the 14 to 15 year range involved "something beyond the mere killing of a domestic partner". He mentions in particular cases referred to by the trial judge that involved attempts to conceal the crime by disposing of the body or obstructing the police investigation.

[114] Before proceeding further, it is important to reiterate the standard of review this Court must use to assess the fitness of Mr. Butcher's sentence.

Standard of Review

[115] In its recent decision *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada re-emphasized the standard of review to be applied in sentencing appeals. Appellate courts must "generally defer to sentencing judges' decisions". Sentencing judges have "regular front-line experience" and are usually familiar with the "particular circumstances and needs of the community where the crime was committed". An appellate court is not to substitute its own decision for a

sentence without "good reason" to do so. (at para. 25) Appellate intervention is not justified unless a sentence is demonstrably unfit or the sentencing judge made an error in principle that had an impact on the sentence (*Friesen*, at para. 26, citing *R. v. Lacasse*, 2015 SCC 64, at paras. 41 and 49). An error in principle includes an error of law.

[116] Sentencing is a profoundly individualized exercise. As the Supreme Court of Canada stated in *R. v. C.A.M.*, [1996] 1 S.C.R. 500:

> [92] Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada…But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime…Sentencing is an inherently individualized process, and the search for a single appropriate sentence for similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes. [cites omitted]

[117] To successfully challenge the period of parole ineligibility imposed, Mr. Butcher must show that 15 years was a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" or that the trial judge made an error in principle that had an impact on the sentence. I am satisfied he has failed to do so.

No Justification for Appellate Interference

[118] For the reasons to follow, I find there is no basis to justify interfering with the trial judge's conclusion that, in Mr. Butcher's case, the period of parole ineligibility should fall at the higher end of the range for the murder of an intimate partner. As he noted, Ms. Johnston's murder was closer to first-degree murder than manslaughter. Furthermore, the common law has understood for some time that the murder by a man of the woman with whom he has been in an intimate relationship

calls for a more significant period of parole ineligibility. I will return to discuss the common law in more detail.

The Broad Range of Parole Ineligibility for Second-Degree Murder

[119] The trial judge sentenced Mr. Butcher in accordance with the requirements of the *Criminal Code* and the principles established by *R. v. Shropshire*, [1995] 4 S.C.R. 227. The *Shropshire* principles include:

- A case does not have to be "unusual" for the period of parole ineligibility to be extended past the statutory minimum of 10 years. (para. 27)
- The 10-year minimum period of parole ineligibility can be "ousted" where a trial judge determines, pursuant to the criteria in what is now s. 745, that the offender should wait to have his suitability for parole assessed after a longer period of incarceration. (para. 27)
- The "sliding scale" of parole ineligibility established by Parliament recognizes that for second degree murder there will be "a broad range of seriousness reflecting various degrees of moral culpability". (para. 29)
- A judge's power to extend the period of parole ineligibility "need not be sparingly used". (para. 31)

[120] *Shropshire* described the parole-ineligibility determination to be "a very fact-sensitive process" that must bear in mind "the discretionary power conferred on the trial judge". (para. 18)

The Evidence Considered by the Trial Judge

[121] It was the "nature of the offence and the circumstances surrounding its commission" that drove up Mr. Butcher's parole ineligibility. The trial judge laid out the evidence he considered:

> [89] Nicholas Butcher and Kristin Johnston were common-law partners living together when the murder occurred.
>
> [90] Mr. Butcher read Ms. Johnston's electronic communications without permission. He read that Ms. Johnston wanted to end her relationship with him. He entered Mr. Belyea's stairwell without permission on the first occasion when he believed Ms. Johnston was inside socializing with Mr. Belyea. He then

> watched Mr. Belyea's apartment from the street between approximately 3:00 AM to 4:51 AM to see what Ms. Johnston was doing. After he saw Ms. Abramowicz leaving Mr. Belyea's apartment without Ms. Johnston he again entered Mr. Belyea's residence without permission. He saw Mr. Belyea and Ms. Johnston being intimate in bed together. Instead of leaving, Mr. Butcher walked into the bedroom and pushed Mr. Belyea. After Ms. Johnston told Mr. Butcher that she wanted to be at Mr. Belyea's, Mr. Butcher told her he would not leave without her.
>
> [91] Ms. Johnston was in her own home, in her own bed and at her most vulnerable when Mr. Butcher put a pillow over her face and stabbed her repeatedly in the neck and throat until she died.

The Nature of the Butcher/Johnston Relationship

[122] The trial judge treated the nature of the relationship between Mr. Butcher and Ms. Johnston as a significant factor in his determination of Mr. Butcher's parole ineligibility. As I set out in para. 103 above, it was his view that Mr. Butcher's moral culpability was heightened by the fact of the murder occurring in the context of an intimate relationship.

[123] The trial judge's description of Mr. Butcher and Ms. Johnston as common-law partners was, strictly speaking, incorrect. The trial judge found they had been living together for two months when Ms. Johnston was murdered. At the time of Mr. Butcher's sentencing, the *Criminal Code* defined a common-law partnership as requiring a conjugal cohabitation of "at least one year". The Butcher/Johnston relationship did not qualify as common-law under this statutory definition. However, I am satisfied the trial judge's error had no effect at all on the calculus of Mr. Butcher's moral culpability and the fitness of his sentence. It was an error of no consequence.

[124] It does appear that by describing Mr. Butcher and Ms. Johnston as common-law partners, the trial judge was referring to the aggravating factor enumerated in s. 718.2(a)(ii). The Crown concedes he relied on ss. 718.2(a)(ii) and (iii), both of which he had recited earlier in his reasons as aggravating factors a court is mandated to consider. However, the trial judge did not sentence Mr. Butcher to a 15-year period of parole ineligibility because his relationship with Ms. Johnston came within the definition of a common-law relationship under the *Criminal Code*. (He never mentioned the definition in his reasons.) It was the nature of the relationship – that it was an intimate one – not its status according to a statutory definition that aggravated this murder in the trial judge's view.

[125] The nature of the Butcher/Johnston relationship and the breach of trust inherent in that relationship were relevant, indeed, essential considerations for the trial judge in his analysis of what constituted aggravating factors in this case. Whatever the trial judge chose to call the relationship, he was justified in finding it was a domestic homicide that required a significantly elevated period of parole ineligibility. His treatment of Mr. Butcher's moral culpability for the murder of Ms. Johnston, the woman he lived with in an intimate relationship, was entirely consistent with the common law.

[126] My colleague, Justice Beveridge, in his dissent, concludes I am saying that the amendments to the *Criminal Code* that made abuse of a "spouse or common-law partner" an aggravating factor on sentencing "meant nothing" and were "superfluous" because this was already recognized by the common law. To be clear, Parliament mandated what only some judges had recognized previously, that the murder of an intimate partner is an aggravating feature of the offence. My point is the trial judge in this case was not required to fit the Butcher/Johnston relationship into a *Criminal Code* definition in order to justify increasing Mr. Butcher's sentence.

Domestic Murder, the Common Law, and Parole Ineligibility

[127] The range for parole ineligibility in domestic murders is quite fluid. In the leading Ontario Court of Appeal case, *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), a majority of the court found that "similar cases from this province of brutal second degree murders of an unarmed wife or girlfriend suggest a range of 12 to 15 years" of parole ineligibility. (para. 48) A subsequent decision of the Ontario Court of Appeal viewed *McKnight* as "not cast in stone for all brutal spousal murders". (*R. v. Czibulka*, 2011 ONCA 82, at para. 67) The unanimous court in *Czibulka* held:

> [67]…Sentencing ranges "are guidelines rather than hard and fast rules": see *R. v. Nasogaluak* 2010 SCC 6 at para. 44. Sentencing remains an individualized process. The range stipulated in *McKnight* was driven by previous case law in this province and by several mitigating considerations in the case itself. These considerations included McKnight's remorse, his many contributions to the community, and his mental illness, considerations absent in the present case.

[128] In Nova Scotia, parole ineligibility for the second degree murder of an intimate partner has ranged as high as 17 years (*R. v. Doyle*, 108 N.S.R. (2d) 1

(N.S.S.C., App. Div); *R. v. Hales*, 2014 NSSC 408 (joint recommendation and 21 years); *R. v. Hutchinson*, 2014 NSSC 155).

[129] I do not find that *Hales* and *Hutchinson* are instructive in assessing the fitness of Mr. Butcher's sentence. As I will explain, it is the *Doyle* case that more closely parallels the domestic murder committed by Mr. Butcher. I disagree with the Crown's submission that the facts in Mr. Butcher's case are similar to those of *Hales* and *Hutchinson*. There are distinctive differences. Mr. Hales lured his wife to a secluded location where he stabbed her to death. At the very least, it was Mr. Hales' intention to confront his wife about child custody and financial issues that remained unresolved between them. The sentencing judge described the meeting as "planned" and the confrontation as "premeditated". (para. 22) Mr. Hales came armed with a knife and during the confrontation, repeatedly stabbed his wife who bled to death. Mr. Hutchison also stabbed his intimate partner to death. In the week before the murder, he had threatened to kill her. The relationship had been characterized by his "bouts of jealousy, name-calling, pleas for forgiveness, threats of suicide and promises of reform". (para. 3) Mr. Hutchison had a lengthy criminal record, including for violence. Cacchione, J. found that Mr. Hutchinson's "criminal antecedents clearly show an escalation of violence in the crimes he has committed culminating with this murder". (para. 29)

[130] Other than the much longer duration of the Doyle relationship, it is the facts and circumstances in *Doyle* that bear a closer resemblance than *Hales* and *Hutchinson* to the facts and circumstances in Mr. Butcher's case. There were financial problems. The Doyles had grown apart. Catherine Doyle had told her husband she had a friendship with a man at work although she did not know the extent of her feelings for him. Mr. Doyle was a jealous, possessive man who was stressed by the state of his relationship with his wife. After a long discussion one night, Catherine Doyle went to bed. Approximately three-and-a-half hours later, Mr. Doyle entered the bedroom and shot her three times with a high-powered rifle as she lay asleep. He then called the RCMP and advised them he had shot his wife.

[131] Although charged originally with first-degree murder, Mr. Doyle pleaded guilty to second degree murder. His only prior conviction was for impaired driving. He received the mandatory minimum period of parole ineligibility of 10 years. On appeal that was increased to 17 years. (The Crown on appeal suggested 15 years which the Court rejected.)

[132] One difference in the circumstances of the Doyle murder and Mr. Butcher's murder of Ms. Johnston is that Catherine Doyle's death was "instantaneous". Ms. Johnston bled to death over a matter of minutes after sustaining defensive wounds in her futile attempt to ward off her attacker. Another difference is that Mr. Doyle acknowledged having deliberated on the killing of his wife although he told police there had been no plan. That said, as I noted earlier, Mr. Butcher's murder of Ms. Johnston was not a spontaneous act.

[133] *Doyle* was decided before the *Criminal Code* amendments that made abuse of a spouse or common-law partner an aggravating feature of an offence. In the absence of any statutory provision, Chipman, J.A. still clearly recognized the special harm of intimate partner violence:

> [40] Although Parliament has not singled out wives for special protection, sentencing jurisprudence recognizes that courts attach significance to the relationship between the perpetrator of an offence and the victim, with special emphasis on crimes involving victims in positions of vulnerability and to whom the perpetrator is in a position of trust. With respect, it is wrong to say that one cannot consider as an aggravating factor the spousal nature of this murder simply because Parliament did not specifically say it should be done. The husband/wife relationship in this case is of great importance, and is a factor to be taken into account in moving towards the upper end of the range of parole ineligibility. Family and spousal violence are all too prevalent, and if courts have not sufficiently shown their stern disapproval of such conduct the time has now come to do so…

[134] Although Justice Chipman focused his comments around Catherine Doyle's marital status, the harm he was identifying was domestic homicide of women and the condemnation it required from the courts.

[135] As the Supreme Court of Canada said in *R. v. Stone*, [1999] 2 S.C.R. 290: "It is incumbent on the judiciary to bring the law in harmony with prevailing social values". (para. 239) *Doyle* can be seen as an example of what the Court has articulated in *Friesen* as the leadership role of appellate courts:

> [35] Sometimes, an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders (*R. v. Stone*, [1999] 2 S.C.R. 290, at para. 239). When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed

> in the past to impose a fit sentence (*Lacasse*, at para. 57). That said, as a general rule, appellate courts should take the lead in such circumstances and give sentencing judges the tools to depart from past precedents and craft fit sentences.

[136] Parliament's inclusion of domestic violence as an aggravating factor on sentencing codified what the common law already took into account. Whether it is through the application of statutory or common law principles, violence perpetrated in the context of intimate relationships requires emphatic denunciation. The murders of women in shorter intimate relationships, like Ms. Johnston, are no less aggravating because the relationships fell outside the statutory definition applicable at the time.

[137] There was nothing except duration to distinguish the intimate relationship between Mr. Butcher and Ms. Johnston with its financial and emotional components, the mutual expressions of affection and support, from a common-law partnership. The moral culpability for murder in the context of such a relationship is the same, whether the shared intimacy fell within the *Criminal Code* definition for "common-law partner" or not.

[138] In *Doyle*, Chipman, J.A. found the minimum period of parole ineligibility to be unacceptable. He held:

> [43] With respect, the respondent has demonstrated the ultimate abuse of his wife. I have examined the cases referred to us by both counsel. Comparisons with other cases is a difficult exercise. Attempts to seek similarities with or differences from other murders committed by other people can be very frustrating and counter productive. We are not dealing with an exercise of reviewing "comparables" such as is done in a property appraisal. In exercising the discretion under s. 744 of the *Code*, [now s. 745] other cases are no more than a rough guide for the sentencing judge in identifying the types of aggravating or mitigating circumstances that other courts have relied on as relevant in applying the guidelines. The circumstances of this case are such that when viewed in the context of the other cases referred to, it was egregious by any standard. I repeat that brutality and torture or a bad record in the perpetrator's past are elements that courts have considered in justifying a greater number of years of parole ineligibility. This is as it should be. The absence of these factors, however, do not preclude the same result. In this case there is premeditation, spousal violence, breach of trust and very little remorse. The unfavourable circumstances here are to my mind weighty ones.

[139] The Court in *Doyle* viewed Mr. Doyle as "fortunate indeed" to have avoided a trial on a charge of first-degree murder. In Mr. Butcher's case, first-degree

murder was never charged. That said, on the sliding scale of parole ineligibility for second-degree murder that represents degrees of moral culpability, the murder of Ms. Johnston was, as the trial judge found, closer to first-degree murder than it was to manslaughter. It warranted a sentence that reflected that fact.

Domestic Murder and Breach of Trust

[140] Counsel for the parties have also addressed the issue of whether the trial judge's reliance on the statutorily aggravating breach of trust factor was an error. I am satisfied it was not. I find the violence perpetrated by Mr. Butcher against Ms. Johnston was an undeniable breach of trust. Furthermore, nothing prohibited the trial judge from relying on both the nature of the relationship between Mr. Butcher and Ms. Johnston and s. 718.2(a)(iii) as aggravating factors.

[141] This Court's recognition of the murder of a domestic partner as a breach of trust is long-standing. In *R. v. Johnson*, 2004 NSCA 91, Oland, J.A., considering the issue of parole ineligibility for the second-degree murder of a girlfriend and her infant, found "In both instances, serious breaches of trust were involved". (para. 77)

[142] The element of trust in an intimate relationship is implicit. (*R. v. Bryan*, 2008 NSCA 119, at para. 59) As the Supreme Court of Canada observed in *Stone*, the killing of an intimate partner involves "the breach of a socially recognized and valued trust…" (para. 240)

[143] And notwithstanding the analysis in *R. v. Squires*, 2012 NLCA 20 and *R. v. Irving*, 2015 NBQB 70, referred to by Justice Beveridge, that s. 718.2(a)(iii) does not apply to the relationship between intimates, I find there was a violation of trust by Mr. Butcher that was aggravating in itself, specific to how this murder was committed. The nature of this violation has been recognized in other cases where the lethal attack was unleashed on a sleeping victim.

[144] The reasons in *Doyle* recognized the relationship of trust that existed between Mr. Doyle and his wife "enabled him to gain ready access to her for the purpose of committing the crime". (para. 41) The same relationship of trust that Mr. Doyle exploited to kill his wife enabled Mr. Butcher to murder Ms. Johnston as she, like Catherine Doyle, lay asleep in her bed. This breach of trust – the murder of a sleeping wife or girlfriend in her home – was also identified in *McKnight* where the Ontario Court of Appeal held:

> …he murdered Janet McKnight…when she was least suspecting, having just woken up; the killing was a breach of trust and showed elements of planning and deliberation. (para. 46)

[145] In *R. v. Pereira*, 2019 ONSC 6751, the murder of a sexual partner was explicitly viewed as a breach of trust and aggravating pursuant to s. 718.2(a)(iii) of the *Criminal Code*. The murder was committed in 2015; the relationship had been ongoing for over a year although the parties did not live together. The sentencing judge found the relationship had elements of trust, mutual affection, dependence and intimacy. He said the following about breach of trust:

> 6 Breach of trust in the context of intimate partner violence requires additional weight be given to the sentencing principles of denunciation and, to a lesser extent, general deterrence. There are two essential reasons which lead to this conclusion. First, it is a notorious fact that a disproportionate number of acts of violence are committed in a domestic context. There are powerful emotional and social bonds fostered in intimate relationships. When the love, affection and interdependence go awry, emotions may turn with tragic consequences. Historically, there are also cases in which violence and abuse is common with weak and cowardly partners, almost always men.
>
> 7 For both the affirmation of our core values and to ensure that there be no mistake about society's abhorrence of domestic violence, the prevalence and persistence of the problem requires firm and resolute sentences.
>
> 8 Second, it is part of our social compact [*sic*] that partners will support one another and nurture each other. There is a trust relationship between partners, a mutual reinforcement. Violence is a total repudiation of this trust. A breach of this trust requires sentences reflective of denunciatory objectives.

[146] I agree with these statements. The language used by the sentencing judge to describe the breach of trust by Mr. Pereira is readily applicable to Mr. Butcher. The killing was "a terrible betrayal" and "a deplorable violation of trust". (at para. 16)

[147] I also note a common thread that links the murders by Mr. Pereira and Mr. Butcher. Mr. Pereira's victim, like Ms. Johnston, was in the process of ending the relationship. This was identified as the "proximate motive for the crime". Exercising their autonomy cost both women their lives.

[148] I have no hesitation in finding the trial judge made no error in concluding that the aggravating factors in Mr. Butcher's case included breach of trust under s. 718.2(a)(iii).

Moral Culpability in the Context of Domestic Murder

[149] I will next discuss the cases Mr. Butcher has referred to in support of his argument that his sentence is unfit. As I noted earlier, Mr. Butcher has said it is cases where the perpetrator tried to conceal the crime or obstructed the police investigation that attract longer periods of parole ineligibility for second-degree murder. He cited *R. v. Folker* (2013), 344 Nfld & P.E.I.R. 247, *R. v. Panghali*, 2011 BCSC 421, *R. v. Calnen*, 2016 NSSC 35, *R. v. MacRae* (2011 unreported decision of the Nova Scotia Supreme Court), and *R. v. Sodhi* (2003), 66 O.R. (3d) 641, as involving "something beyond the mere killing of a domestic partner".

[150] *Folker*, *Panghali*, *Calnen*, *MacRae* and *Sodhi* all involved convictions for the second-degree murder of an intimate partner. In each case the victim's body was dumped and efforts made to divert the attention of the police. Parole ineligibility was set at 14 years in *Sodhi* and 15 years in each of the other cases. Mr. MacRae evaded justice for five years after murdering his wife in their home. He received a 15-year period of parole ineligibility following a joint recommendation by Crown and Defence.

[151] The aggravating circumstances of Mr. Butcher's offence were not acts occurring in the aftermath of the murder of Ms. Johnston. It was what Mr. Butcher did at the front-end, in the hours before the murder, that exacerbated the circumstances of the murder. Mr. Butcher's conduct leading up to the murder – stalking Ms. Johnston by reading her Facebook messages, tracking her down at Mr. Belyea's, entering the apartment uninvited to confront her, lying in wait outside the Belyea apartment to see whether Ms. Johnston was going to spend the night there, entering the apartment for a second time and confronting Ms. Johnston again, persuading her to leave with him and return home and then, with forethought, getting a knife and, after she had gone to sleep, stabbing her to death in her own bed – cannot be seen as any less egregious than the after-the-fact conduct in cases such as *Folker*, *Panghali*, *Calnen*, *MacRae* and *Sodhi*.

[152] Indeed, there is a compelling argument to be made that Mr. Butcher's conduct was more egregious. In the hours before killing Ms. Johnston, he was intent on finding her and exercising control over her. He consciously chose to do things that ultimately led to her death. At any point before he got the knife and started stabbing her, Mr. Butcher could have turned from the path he was on and Ms. Johnston would still be alive.

[153] Had the offenders in *Folker*, *Panghali*, *Calnen*, *MacRae* and *Sodhi* not dumped their victims' bodies and tried to frustrate the police investigations, those victims would still be dead. Had Mr. Butcher desisted from his pre-offence conduct, Ms. Johnston would have lived. It is entirely reasonable to view the effect of the aggravating circumstances in Mr. Butcher's case as elevating the degree of his moral culpability and justifying a 15-year period of parole ineligibility.

[154] In his dissenting reasons, Justice Beveridge makes a distinction between the murders of spouses and those of girlfriends. He says that Mr. Butcher was less morally blameworthy because this was not "a spousal murder". He notes this murder lacked the aggravating circumstances of planning, heightened brutality, the presence of children, a prior history of violence toward the victim, more than one victim, or post-offence conduct such as I mentioned earlier. While he agrees that Mr. Butcher's conduct immediately before the murder – the forethought to get the knife, the lethal attack against the sleeping, defenceless Ms. Johnston – justifies a period of parole ineligibility above 10 years, he rejects the conduct by Mr. Butcher in the hours before the murder as relevant considerations in the assessment of his moral blameworthiness. He says there is "no legitimate connection" between that conduct and Mr. Butcher's murder of Ms. Johnston.

[155] What I have characterized as stalking, Justice Beveridge points out was not criminal. Accessing Ms. Johnston's emails and instant messages "was not honourable". The attendances at Mr. Belyea's apartment were "ill-advised". He concludes that Mr. Butcher's moral culpability for Ms. Johnston's murder is not increased by those acts.

[156] As Justice Beveridge observes, there is no evidence that Mr. Butcher was planning Ms. Johnston's murder. The forethought referred to by the trial judge was the forethought of going to the kitchen to get the murder weapon. But what he did before he put his hand on the knife and carried it back to the bedroom were circumstances relevant to the murder that the trial judge was obliged to consider. These are circumstances of him seeking to assert control over Ms. Johnston – where she was, who she was with, what she was doing, and his determination that, as he testified, he was not leaving Mr. Belyea's without her, notwithstanding her statement to him that she was where she wanted to be.

[157] The circumstances of the murder for which Mr. Butcher was sentenced included textbook behaviours of possessiveness and control that can, and in this

case, did, lead to murder. Murdering Ms. Johnston was the ultimate expression of his control over her.

[158] I find it was no less aggravating that the intimate relationship between Mr. Butcher and Ms. Johnston was of short duration. There is a broad array of relationships that render women vulnerable to intimate partner violence. Mr. Butcher's moral culpability was not less because he and Ms. Johnston had lived together for only two months.

Proportionality and Parity

[159] The foundational principle of sentencing is proportionality; a sentence must be proportionate to the gravity of the offence and the degree or responsibility of the offender. A sentence will be demonstrably unfit "if it constitutes an unreasonable departure from this principle". (*Lacasse*, at para. 53) Parity is "an expression of proportionality" and gives meaning to it. (*Friesen*, at paras. 32 and 33) It is however "secondary to the fundamental principle of proportionality". (*Lacasse*, at para. 54) Sentencing precedents are relevant but proportionality is paramount.

[160] Before I discuss domestic murder cases in the 12-13 year parole ineligibility range, I will briefly address Justice Beveridge's use of "worse" cases in support of his view that Mr. Butcher's sentence is demonstrably unfit. He finds the moral blameworthiness of the offenders in the "worse" cases to be "significantly above" Mr. Butcher's, because of a range of aggravating factors not present here.

[161] Justice Beveridge acknowledges that comparing cases, particularly where the offence is murder, is always difficult. Fundamentally, the issue is whether the sentence was proportionate to the gravity of the offence and the degree of the offender's moral culpability. The aggravating features of the "worse" cases cited by my colleague are absent from Mr. Butcher's case. But this is not a substantially less "worse" case because of that. The trial judge found significant aggravating factors in the circumstances of the offence that justified a substantial increase in Mr. Butcher's parole ineligibility. His determination of where this case belongs in the 10-15 year parole ineligibility range is entitled to deference.

Cases of Domestic Murder Cited by Mr. Butcher

[162] Mr. Butcher relies on cases where parole ineligibility for the murder of a wife or girlfriend was set at 12-13 years. I do not accept they represent similar offenders and similar circumstances. A number of them make no mention of the

aggravating nature of homicide committed in the context of an intimate relationship. These cases were all considered by the trial judge. I will review them briefly.

[163] In *R. v. Munroe* ((1995), 79 O.A.C. 41), Mr. Munroe strangled his wife after becoming overwrought with anger during an argument. There was a history of violence and emotional abuse. The jury made no recommendation on parole eligibility. According to the Court of Appeal, the aggravating factors reviewed by the trial judge included Mr. Munroe preventing his wife from escaping and neutralizing her ability to defend herself by kneeling on her arms. The court upheld the 12-year period of parole ineligibility. (The case went on appeal to the Supreme Court of Canada against conviction only.)

[164] *R. v. McMaster* ((1998), 37 O.R. (3d) 543 (C.A.)) involved the killing by Mr. McMaster of his girlfriend with a single stab wound while she was asleep. The Court of Appeal upheld the trial judge's imposition of a 12-year period of parole ineligibility. The jury did not recommend any increase over the 10-year minimum for second-degree murder. The Court of Appeal noted the trial judge had taken this into account and, stating merely that the sentence was a fit one, declined to interfere. The court rejected Mr. McMaster's argument that the judge had failed to give adequate reasons for why he increased the period of parole ineligibility above the statutory minimum. No mention was made of the aggravating factors relevant to a domestic homicide.

[165] In *R. v. Muir* ((1995), 80 O.A.C. 7), Mr. Muir shot and killed his wife while she was asleep in bed. He testified at trial he was in a rage because she had been preparing to leave him, wanted a divorce and was intending to visit a man with whom she had previously had an affair. The Court of Appeal reduced a 12-year period of parole ineligibility to 10 years. Mr. Muir had no criminal record and no history of abusing his wife. He was remorseful. The jury had recommended no increase beyond the mandatory minimum of 10 years. The Court said: "Although this was a spousal homicide, there was no indication of prior abuse. We can find no basis to justify the increase in parole ineligibility". (para. 11)

[166] *R. v. McCormack* ((1995), 83 O.A.C. 73) was also decided before the *Criminal Code* amendments. Mr. McCormack, an alcoholic, was drinking heavily when he killed his wife of 25 years. He had a criminal record and a lengthy history of verbally and physically abusing his wife. Eight jurors declined to make a parole eligibility recommendation. Four recommended Mr. McCormack serve 25 years

before being eligible for parole. The Court of Appeal found "…it was an error in principle for the trial judge to hold that wife murder is in itself an exceptional circumstance justifying an increase in the period of parole ineligibility". (para. 8) "Spousal murder is horrible. But all murder is horrible". (para. 8) While recognizing that "no two cases can ever be the same", the Court used *Munroe* (which it said bore "some similarity") as "a helpful guide" to reduce Mr. McCormack's parole ineligibility to 12 years. (para. 9)

[167] I note here that social values and criminal justice policy have evolved since *McCormack, Munroe* and *Muir*. The *Criminal Code* now mandates that sentencing judges treat the murder of an intimate partner as an aggravating circumstance. *McCormack* is representative of cases from an era when femicide, the murder of a woman by a man in the context of an intimate relationship, was not consistently understood to require special condemnation.

[168] In *R. v. Barry* ([1991] O.J. No. 2666 (Ont. C.J.)), Mr. Barry inflicted 62 stab wounds on his girlfriend who wanted to end the relationship, and applied sustained pressure to her neck. Aged 19 at the time of the murder, he was found to have been emotionally dependent on her. He had no criminal record. Nine jurors recommended a 10-year period of parole ineligibility, the mandatory minimum. Three jurors recommended 15 years. A 12-year period of parole ineligibility was imposed. The sentencing judge emphasized his view that the "killing of some" should not "cost the killer more than the killing of others". This suggests *Barry* belongs in the same category as *McCormack, Munroe* and *Muir* and subject to my comments above. *Barry* was decided before the *Criminal Code* was amended to include domestic abuse and breach of trust as aggravating factors.

[169] In *R. v. Jimenez-Acosta* (2013 ONSC 5524), Mr. Jimenez-Acosta murdered his wife by inflicting numerous blunt and sharp force wounds to her head. It was another case of a deadly assault precipitated by a wife advising that she had a relationship with another man and wanted a divorce. Mr. Jimenez-Acosta tried to thwart the police investigation by contaminating the crime scene. He had no criminal record and there was no reported history of domestic abuse. The Crown sought a period of parole ineligibility of 15 years; the Defence argued for 10-12 years. Nine jurors recommended 15 years, one recommended 17 and two recommended 20.

[170] Goodman, J. imposed a 13-year period of parole ineligibility. He identified a number of aggravating factors – the statutorily mandated aggravating circumstance

of domestic homicide, the "vicious and brutal" circumstances of the assault that was "frenzied" and the attempt to contaminate the crime scene. Mr. Jimenez-Acosta's prior "very good character" and positive reports of him as a good husband and father were mitigating. Justice Goodman viewed the jurisprudence as supporting "the general range for the period of parole ineligibility in similar cases of domestic violence to be between 12 to 15 years". (para. 47)

[171] Justice Goodman was not convinced the offence involved any elements of planning or deliberation. While not condoning Mr. Jimenez-Acosta's actions, he found the murder was "likely perpetuated [*sic*] as a result of being told by his wife about Mr. Karpf and her intentions to leave the marriage". (para. 49)

[172] *R. v. Vaneindhoven*, 2013 NUCJ 30, involved the murder by Mr. Vaneindhoven of his common-law spouse. She died from a single stab wound to her heart. The stabbing followed a severe beating. The relationship had been characterized by Mr. Vaneindhoven's drinking and physical and emotional abuse. Mr. Vaneindhoven had been violent toward other women with whom he had relationships. He had a criminal record. The court noted he was Aboriginal but did not give this fact particular emphasis.

[173] Mr. Vaneindhoven's jury had recommended he serve 25 years before being able to apply for parole. The aggravating factors considered by the trial judge included the fact that the murder of a spouse is statutorily aggravating. The Crown sought a 15-year period of parole ineligibility; the Defence said it should be 12 years. The court imposed a period of 13 years which was one year longer than had been ordered following Mr. Vaneindhoven's first trial.

[174] In *R. v. Angelis* (2011 ONSC 462), Mr. Angelis asphyxiated his wife to death during a domestic altercation in front of their two young children. He failed to render or obtain any assistance for her when she fell unconscious. These circumstances were all treated as aggravating factors on sentencing. Mr. Angelis and his wife had been engaged in a bitter custody battle and he had recently learned that his wife intended to leave him to live with her lover. Smith, J. found no evidence of planning in the circumstances of the murder. The jury unanimously recommended the minimum period of parole ineligibility of 10 years. The Crown was seeking 14 years and the Defence argued for 10. The court considered the mitigating factors of Mr. Angelis' good character: he had been a good father, was employed and well-educated, and did not have a criminal record. A 12-year period of parole ineligibility was imposed.

[175] In *R. v. Lenius* (2007 SKCA 65), Mr. Lenius, who was separated from his wife, murdered her when she went to his house to pick up their two youngest children. A brief confrontation had ensued over the wife's new relationship and Mr. Lenius strangled her. The court overturned the trial judge's imposition of a 15-year period of parole ineligibility and substituted 12 years, saying the case warranted being placed in the lower end of the *McKnight* range of 12-15 years.

[176] None of the cases I have just reviewed persuaded the trial judge that Mr. Butcher's parole ineligibility should be set between 12 to 13 years. In sentencing Mr. Butcher, he carefully considered the applicable principles, including parity. He concluded Mr. Butcher's moral culpability took him to the higher end of the parole ineligibility range for the murder of an intimate partner. Given the nature of the offence and the circumstances surrounding its commission, there is ample justification for this determination.

[177] An appellate court owes significant deference to a trial judge's weighing of the relevant factors "in the delicate balancing process that sentencing requires". (*R. v. Chase*, 2019 NSCA 36, at para. 57) As I noted earlier, appellate interference is only justified if, in weighing the factors he took into account, the trial judge exercised his discretion unreasonably and imposed a demonstrably unfit sentence. (*Friesen*, at para. 26; *Lacasse*, at para. 49, citing *R. v. McKnight*, at para. 35) Neither basis for disturbing the trial judge's sentence has been made out in this case.

Conclusion

[178] One feature of Ms. Johnston's murder is shared in common with many of the domestic homicide cases. She died because she no longer wanted to be with Mr. Butcher. Ms. Johnston was rendered particularly vulnerable by seeking to end the relationship. She paid for that decision with her life.

[179] Mr. Butcher determined that Ms. Johnston's decision to end their relationship would not be without consequences. As this Court has recognized, women leaving intimate relationships are entitled to be "…free to get on with their lives without fear of violence, abuse or subjection at the hands of jealous ex-lovers". Sentences for violence directed by the partners of such women "must reflect the seriousness of the offence" and "the community's unequivocal denunciation of such conduct…" (*Bryan*, at para. 59)

[180] "The gravity, indeed, the tragedy of domestic violence can hardly be overstated". (*R. v. Lavallee*, [1990] 1 S.C.R. 852 at p. 872) It is women who are the primary victims of domestic violence, perpetrated by their male intimate partners. Sentencing law plays an essential role in ensuring that the gravity of intimate partner homicide, domestic violence's ultimate expression, is not under-emphasized. The particularly aggravating circumstances of Ms. Johnston's murder were appropriately recognized by the significant period of parole ineligibility imposed on Mr. Butcher. The trial judge's sentence is entitled to deference. I have found no basis in law or principle for interfering with it.

Disposition

[181] I would dismiss Mr. Butcher's appeals against conviction and against sentence.

Derrick, J.A.

Concurred in:

Bourgeois, J.A.

Reasons for judgment (partially dissenting):

[182] I have read my colleague's draft reasons for judgment. I agree entirely with her careful and thoughtful analysis and proposed disposition of the conviction appeal.

[183] With respect, I do not share her views on the sentence appeal. I will set out how the trial judge erred in principle and otherwise imposed a period of parole ineligibility outside the range for the circumstances of the offence and offender.

[184] I have no disagreement with my colleague's description of the appropriate standard of review. It is uncontroversial. My disagreement is based on my conclusion that the trial judge erred in principle and a period of 15 years' parole

ineligibility is outside the appropriate range for the circumstances of this offender and this offence.

[185] Nonetheless, to provide context for my reasons, I will briefly discuss the standard of review that governs an appeal from the determination of parole ineligibility.

STANDARD OF REVIEW

[186] *R. v. Shropshire* was the first Supreme Court of Canada case on the appropriate standard of review on a sentence appeal. Coincidentally, it dealt with the determination of parole ineligibility for second-degree murder.

[187] The respondent had pled guilty to second-degree murder. The trial judge rejected the joint submission of the statutorily prescribed minimum of 10 years' parole ineligibility. Instead, he set it at 12 years because: of the offender's criminal record; there was no explanation for the offender's actions; and, the murder had been committed during commission of another offence.

[188] The British Columbia Court of Appeal, in a majority judgment, concluded that an increase in parole ineligibility required unusual circumstances. The Supreme Court of Canada granted leave to appeal. It subsequently allowed the appeal and reinstated the trial judge's decision.

[189] Iacobucci J., writing for the unanimous Court, accepted that the existence of unusual circumstances was too high a standard before a court could increase parole ineligibility beyond 10 years. Instead, he held that as a general rule the period shall be 10 years, but could be increased according to the criteria enumerated in s. 745.4 of the *Criminal Code*:

> [27] In my opinion, a more appropriate standard, which would better reflect the intentions of Parliament, can be stated in this manner: as a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744 [now, 745.4], the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may well be that, in the median number of cases, a period of 10 years might still be awarded.

[190] With respect to the standard of review, Iacobucci J. adopted the deferential approach long espoused by the Nova Scotia Court of Appeal. He wrote as follows:

> [47] I would adopt the approach taken by the Nova Scotia Court of Appeal in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. In *Pepin*, at p. 251, it was held that:
>
> > ... in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.
>
> [48] Further, in *Muise* it was held at pp. 123-24 that:
>
> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate ...

[191] This deferential standard of review has since been consistently reaffirmed by the Supreme Court. Lamer C.J., for the full Court, in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, succinctly summed up the standard:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. […]

[192] However, mere presence of an error in principle or erroneous assessment of the appropriate factors is not sufficient to permit appellate intervention. The error or errors must have impacted on the nature or length of the sentence imposed (*R. v. Lacasse*, 2015 SCC 64, at para. 44).

[193] Various appellate courts, including ours, have concluded that if an impactful error is found, the appellate court is then at liberty to determine a fit sentence. It is not necessary for the court to be satisfied that the sentence is otherwise demonstrably unfit or outside the acceptable range (see: *R. v. Landry*, 2016 NSCA 53; *R. v. Bernard*, 2011 NSCA 53; *R. v. Brunet*, 2010 ONCA 781; *R. v. MacDonald*, 2009 MBCA 36; *R. v. Provost*, 2006 NLCA 30; *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.); and *R. v. Willis*, 2013 NSCA 78).

[194] The Supreme Court of Canada adopted this view in *R. v. Suter*, 2018 SCC 34 (at para. 24). Even more recently in *R. v. Friesen*, 2020 SCC 9 Wagner C.J. and Rowe J., for the unanimous full Court, explained:

> [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.
>
> [27] If a sentence is demonstrably unfit or **if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (*Lacasse*, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence**. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.
>
> [Emphasis added]

RELEVANT LEGAL PRINCIPLES

[195] I will next consider the relevant legal principles that inform a trial judge's determination of the parole ineligibility. I will then turn to the errors in principle by the trial judge that impacted his decision to impose the 15-year period of parole ineligibility.

[196] There are just four factors a trial judge must consider: the jury's recommendation; the character of the offender; the nature of the offence; and, the circumstances of the offence. These factors are found in s. 745.4, the sole specific direction found in the *Criminal Code*. It provides as follows:

> **745.4** Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, 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 to the recommendation, if

> any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

[197] Iacobucci J. in *Shropshire* added that parole ineligibility is part of the punishment and forms an important element of sentencing policy (para. 23). Historically, the common law in partnership with Parliament propounded that policy.

[198] However, in 1996, Parliament amended the *Criminal Code* to statutorily define the purpose and principles of sentence. The purpose of sentencing is set out in s. 718:

> **PURPOSE.**
>
> **718**. The fundamental purpose of sentencing is 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;
>
> (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 and to the community.

[199] The fundamental principle of sentence is defined as follows:

> **FUNDAMENTAL PRINCIPLE**.
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[200] Parliament also legislated other sentencing principles in s. 718.2. They have been amended from time to time. The version in force at the time of this offence was:

> **OTHER SENTENCING PRINCIPLES**
>
> **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, and, without limiting the generality of the foregoing,
>
> > (**i**) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
> >
> > (**ii**) **evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner**,
> >
> > (**ii.1**) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > (**iii**) **evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim**,
> >
> > (**iii.1**) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
> >
> > (**iv**) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
> >
> > (**v**) evidence that the offence was a terrorism offence
>
> shall be deemed to be aggravating circumstances;
>
> (***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; and
>
> (***e***) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
>
> [Emphasis added]

[201] I have emphasized two provisions because the trial judge relied on the presence of these two statutory aggravating factors to increase parole ineligibility to a period of 15 years.

[202] I accept that as a general proposition the ordinary principles of sentence can inform the discretionary power to set a period of parole ineligibility greater than 10 years for second degree murder to the extent that they fit within the s. 745.4

statutory factors (see: *R. v. Mafi*, 2000 BCCA 135; *R. v. Nash*, 2009 NBCA 7; *R. v. E.B.*, [2006] O.J. No. 2752, paras. 72-78, aff'd 2011 ONCA 194; *R. v. Hawkins*, 2011 NSCA 7 at para. 47).

[203] Section 743.6 is the only other section where courts can direct delayed parole eligibility. Under that provision, the court may require the offender to serve up to one-half of their sentence or 10 years, whichever is less before being eligible for full parole, taking into account the circumstances of the offence, the character and circumstances of the offender. Parliament directed that general and specific deterrence and denunciation are of paramount significance (s. 743.6(2)). Not so on the issue of parole ineligibility where the offence is second degree murder. As observed by Robertson J.A., for the Court in *R. v. Nash*:

> [27] At this juncture, it is important to draw attention to a distinction between the application of s. 743.6 and s. 745.4. As noted above, s. 743.6 provides that the sentencing objectives of denunciation and deterrence are paramount. Section 745.4 is conspicuously silent on this point. This omission did not escape the attention of the Supreme Court. At paragraph 30 of *R. v. Zinck*, [2003] 1 S.C.R. 41, [2003] S.C.J. No. 5 (QL), 2003 SCC 6, the Supreme Court stated: "It is worth noting that Parliament has not given priority to these specific factors in the application of s. 745.4". The factors being referred to in that sentence are general and specific deterrence, and denunciation. It is only logical to infer that those factors are no longer of "paramount" significance, in cases involving second degree murder, as s. 745.4 provides for a minimum period of parole ineligibility of 10 years.

[204] With this background, I turn to the trial judge's reasons.

TRIAL JUDGE'S REASONS

[205] The trial judge well understood the task before him. He was required to make findings of relevant facts so long as they were not inconsistent with the jury's verdict. He did so. The appellant complains that the judge's finding the appellant had used a pillow during the lethal attack was not only unreasonable, but improperly considered as an aggravating factor on sentence. I will comment later on this issue.

[206] The trial judge correctly referred to the s. 745.4 statutory criteria that required him to consider the character of the offender, the nature of the offence, the circumstances surrounding its commission and the jury's recommendation. In terms of the role of the general *Criminal Code* provisions with respect to sentence,

he identified two statutory aggravating factors that he was required to take into consideration: the offender abused his spouse or common-law partner; and, the offender abused a position of trust or authority in relation to the victim. He wrote as follows:

> [61] Section 718.2 states that a court that imposes a sentence "shall", so that section imposes a mandatory duty on a judge to also take into consideration the following principles:
>
> > 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, and, without limiting the generality of the foregoing,
> >
> > ...
> >
> > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
> >
> > ...
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > ...
>
> shall be deemed to be aggravating circumstances; ...

[207] Additionally, the trial judge acknowledged the need to consider dispositions for similar offenders for second degree murder committed in similar circumstances, a requirement found in s. 718.2(b) (para. 66)—otherwise known as the parity principle.

[208] The trial judge referred to a number of cases which involved the murder of a spouse or common-law partner to guide him on the appropriate sentence. He turned to comment on the evidence of the character of the offender, the nature of the offence, the circumstances surrounding its commission, and the jury's recommendation.

[209] The trial judge's reasons for imposition of 15 years' parole ineligibility is found in the following four paragraphs:

> [96] Considering Mr. Butcher's previously mainly pro-social lifestyle, positive Pre-Sentence Report, as well as his lack of prior involvement with the criminal

> justice system, he falls into the first category as described in *Nash* and by other courts of appeal, that is the 10-15 year range for parole ineligibility.
>
> [97] On the continuum of second-degree murder facts relating to moral culpability, at the lower-end offences closer to manslaughter and at the higher end cases closer to first-degree murder, this case is at the higher end. There is some indication of forethought on the part of Mr. Butcher prior to murdering Ms. Johnston. The nature of his offence and the circumstances surrounding its commission, the actions of Mr. Butcher in stalking Ms. Johnston during the evening he murdered her, and **murdering his common-law partner** while she was at her most vulnerable, in her own home and in her own bed, warrant a significant increase beyond the 10 year minimum.
>
> [98] **Mr. Butcher's personal circumstances do not outweigh the aggravating factors in this case**. Put another way, the circumstances of his crime overwhelm his previous good character.
>
> [99] Considering cases that involve similar offenders and similar situations, and considering that domestic murder cases generally involve parole ineligibility in the range of 12 to 15 years, I set Nicholas Butcher's parole ineligibility at 15 years.
>
> [Emphasis added]

ERRORS IN PRINCIPLE

[210] With respect, the trial judge erred in principle. The deceased was neither the spouse nor common-law partner. Yet, the trial judge identified this as a statutory aggravating factor.

[211] The offender and the deceased were not married. She was not his spouse, nor his common-law partner. The trial judge found as a fact that they had lived together for approximately two months (three weeks of which the victim was in Florida or Costa Rica on vacation). That finding was fully supported by the evidence.

[212] Section 2 of the *Criminal Code* defines that a common-law partner means a person who has cohabited with an individual in a conjugal relationship for a period of at least one year. It provides:

> "common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

[213] I am satisfied that the trial judge viewed the common-law spousal relationship as an aggravating factor and it impacted his determination of parole ineligibility. I say this because: the judge referred to it as a statutory aggravating factor that he was required to consider; almost all of the cases that he discussed to guide the issue of similar dispositions for similar offenders in similar circumstances involved spouses or common-law partners; the trial judge identified the murder of his common-law partner as a fact that elevated the appellant's moral culpability; and, the aggravating circumstances overwhelmed his previous good character.

[214] In addition, the trial judge also identified s. 718.2(a)(iii) as a statutory aggravating factor. For ease of reference, this provision stipulates that the sentence court must take into account as an aggravating factor, "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim".

[215] The problem is this: the appellant did not occupy a position of trust or authority in relation to the victim. The term "position of trust or authority" was first introduced into the *Criminal Code* in 1988 into the new offence of sexual exploitation in s. 153:

> 153. (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
>
> (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or
>
> (b)for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
>
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

[216] In *R. v. Audet*, [1996] 2 S.C.R. 171, the Supreme Court had to decide whether the Crown was required to establish that the offender actually abused his position of trust or authority vis-à-vis the victim or if it was sufficient the offender occupied such a position.

[217] La Forest J., for the majority, reasoned it was sufficient if the Crown proved that: the complainant is a young person within the meaning of s. 153(2); the accused engaged in one of the activities referred to in s. 153(1); and, at the time the acts in question were committed the accused was in a position of trust or authority towards the young person or the young person was in a relationship of dependency with the accused (para. 16).

[218] What constitutes a position of trust or authority was not exhaustively defined in *Audet*. La Forest J. referred to the fact that Parliament had not defined the terms, and the legislation was fairly new. He offered the following general comments:

> *(a) "Position of Authority" and "Position of Trust"*
>
> [33] The courts have had little to say on a theoretical level about the scope of these expressions, which are nowhere defined in the *Criminal Code*. Proulx J.A. wrote the following about the "position of authority" concept in *Léon, supra,* at p. 483:
>
> > [Translation] In its primary meaning, the notion of authority stems from the adult's role in relation to the young person, but it will be agreed that in the context of this statutory provision, to be in a "position of authority" does not necessarily entail just the exercise of a legal right over the young person, but also a lawful or unlawful power to command which the adult may acquire in the circumstances.
>
> For his part, Blair J. made the following comment in *P.S., supra*:
>
> > . . . [a position of authority] invokes notions of power and the ability to hold in one's hands the future or destiny of the person who is the object of the exercise of the authority. . . .
>
> Finally, Blair J., also in *P.S.*, wrote the following about the term "position of trust":
>
> > One needs to keep in mind that what is in question is not the specialized concept of the law of equity, called a "trust". <u>What is in question is a broader social or societal relationship between two people, an adult and a young person</u>. "Trust", according to the Concise Oxford Dictionary (8th ed.), is simply "a firm belief in the reliability or truth or strength of a person". <u>Where the nature of the relationship between an adult and a young person is such that it creates an opportunity for all of the persuasive and influencing factors which adults hold over children and young persons to come into play, and the child or young person is particularly vulnerable to the sway of these factors, the adult is in a position where those concepts of reliability and truth and strength are put to the test. Taken together, all</u>

> of these factors combine to create a “position of trust” towards the young person.
>
> [Original emphasis]

[219] La Forest J. then turned to the ordinary meaning of the words:

> [34] In the absence of statutory definitions, the process of interpretation must begin with a consideration of the ordinary meaning of the words used by Parliament. *Le Grand Robert de la langue française* (2nd ed. 1986) defines the French word "*autorité*" as a [Translation] "[r]ight to command, power (recognized or unrecognized) to enforce obedience", which is, at least in substance, quite similar to the definition proposed by Proulx J.A. It adds that another meaning of "*autorité*" is [Translation] "[s]uperiority of merit or seductiveness that compels unconstrained obedience, respect, trust". *The Oxford English Dictionary* (2nd ed. 1989) suggests similar definitions for the English word "authority": "[p]ower or right to enforce obedience" and "[p]ower to influence the conduct and actions of others". I am in complete agreement with Proulx J.A. that the meaning of the term must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power. As can be seen from these definitions, the ordinary meaning of the word "authority" or "*autorité*" does not permit so restrictive an interpretation. Furthermore, the comments of Proulx J.A. are entirely appropriate in view of the express intention of Parliament, which, in declining to include in s. 153(1) a list of the cases in which a person must refrain from sexual contact with a young person, intended to direct the analysis to the nature of the relationship between the young person and the accused rather than to their status in relation to each other. I will return to this.
>
> [35] The French word "*confiance*", according to *Le Grand Robert*, is a belief in or firm expectation of something, or faith in someone, and the confidence that results therefrom. In English, the word "trust" can have various meanings, especially in a legal context. However, considering that Parliament used the word "*confiance*" in the French version, I doubt that the word "trust" as used in s. 153(1) refers to the concept as defined in equity. I therefore agree with the reservations expressed by Blair J. "Trust" must instead be interpreted in accordance with its primary meaning: "[c]onfidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement". The word "confidence" is defined as follows: "[t]he mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith".
>
> [36] I would add that the definition of the words used by Parliament, like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective pursued by Parliament of protecting the interests of young persons who, due to the nature

> of their relationships with certain persons, are in a position of vulnerability and weakness in relation to those persons.
>
> [Original emphasis]

[220] La Forest J. concluded that in the vast majority of cases, teachers will be in a position of trust and authority toward their students. It would take exceptional factual circumstances for the element of trust or authority to be absent. The Supreme Court entered a conviction based on the uncontested facts.

[221] Despite many cases that refer to the element of trust that enriches most matrimonial relationships and is breached by domestic violence, a spouse is not in a position of trust vis-à-vis the other spouse within the meaning of s. 718.2 (a)(iii).

[222] At common law, breach of a position of trust by an offender has long been viewed as an aggravating factor on sentence. The well-established categories are: employers who sexually assault their employees; employees who steal or defraud their employers; financial managers; lawyers and judges or other court officials; doctors; parents and others in *loco parentis* to a victim (R. Paul Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982), pp. 112-124; similarly, Clayton C. Ruby, *Sentencing*, 7th ed (Markham: LexisNexis Canada, 2008) pp. 560-572).

[223] My colleague cites a number of cases where courts have recognized that a spousal homicide represents a breach of trust (see for example: *R. v. Stone*, *supra*; *R. v. Bryan*, *supra*; *R. v. Doyle*, *supra*).

[224] However, breach of trust does not mean the offender was in a position of trust towards the victim. This was acknowledged in *R. v. Oake*, 2010 NLCA 19 where Rowe J.A., as he then was, for the Court observed:

> (C) "It also does not reflect that the accused created a very significant position of trust for himself by intoxicating these victims while they were in his care and then abusing his position by sexually assaulting them."
>
> [60] The judge is simply wrong when he says Mr. Oake was in a position of trust vis-à-vis the four victims. He acknowledged as much at p. 22.
>
> > While the accused cannot be said to have been in a position of trust as it is usually defined by the Court, it is clear that these victims trusted the accused, he was trusted by the parents to travel with the victims to these festivals and that this trust was certainly abused.
>
> [61] While the judge acknowledged that Mr. Oake was not in a position of trust toward the four young men, as that is defined by law (e.g. he had no authority

> over them, they were not in a position of dependence toward him), he went on to say that the victims and their parents "trusted" Mr. Oake. **However, being "trusted" by someone in the everyday sense of the word does not place you in a "position of trust" toward them, as that term is used in criminal law**.
>
> [Emphasis added]

[225] Improper reliance on the then ss. 718.2(a)(ii) and (iii) was also engaged in *R. v. Squires*, 2012 NLCA 20. The trial judge cited these as applicable in sentencing the offender for sexual assault and assault causing bodily harm to his intimate partner. Welsh J.A., with the concurrence of her colleagues, found it was legal error:

> [31] The trial judge erred in concluding that the above paragraphs are applicable in this case. As the judge noted, it could not be said that Mr. Squires and the complainant were in a common-law relationship. **The rationale underlying section 718.2(a)(ii) is directed to the vulnerability and dependency, particularly from an emotional, financial and psychological perspective, presumed to arise from the domestic relationship between married or common-law spouses. The relevance of this factor is heightened where physical or psychological abuse results in a sense of powerlessness making escape or leaving the relationship difficult** (*R. v. Brown* (1992), 73 C.C.C. (3d) 242 (Alta. C.A.), at pages 249 to 250). There is no indication in the case before this Court that the complainant's relationship with Mr. Squires engaged the kind of vulnerability or dependency associated with a spousal relationship. (The relevance of a continuing intimate relationship is referenced below.)
>
> [32] **Nor could it be said that Mr. Squires was in a position of trust vis-à-vis the complainant. While it may be said that any personal or intimate relationship involves an element of trust broadly speaking, section 718.2(a)(iii) is directed to the abuse committed by a person in a "position of trust or authority" in relation to the victim, such as a parent, teacher, guardian, and so forth**. […]
>
> [Emphasis added]

[226] The majority (Welsh and Rowe JJ.A.), despite finding legal error, did not carry out their own assessment of what would be a fit and proper sentence but agreed that the sentence imposed was demonstrably unfit.

[227] The issue was directly addressed in the spousal homicide case of *R. v. Irving*, 2015 NBQB 70, where Grant J. reasoned s. 718.2(a)(iii) had no application:

> [44] The domestic nature of this offence is an aggravating factor as set out in section 718.2(a)(ii) of the *Criminal Code*. **The Crown also submits that s. 718.2(a)(iii) applies as Mr. Irving, in committing this offence "... abused a position of trust or authority." I do not accept that as an aggravating factor in this case. Rather, I accept the submission of the defence that in any spousal relationship the partners are equal and neither is in a position of authority over the other. I accept that Mr. Irving was in a position of trust as her spouse because being able to feel safe with your spouse is a kind of trust that is implicit in a spousal or common law relationship**. That, in my view, is one reason why s.718.2(a)(ii) is an aggravating factor, because that implicit trust has been violated. **However, Mr. Irving was not in a position, in relation to his wife, of the trust that a person in authority such as a parent or a teacher exercises over another person, so I find that s. 718.2(a)(iii) does not apply in this case.**
>
> [Emphasis added]

[228] I agree.

[229] In the Crown's supplementary submissions, it concedes that the trial judge relied on the statutory aggravating factors prescribed by ss. 718.2(a)(ii) and (iii), but suggests any error by the trial judge was merely technical in nature and did not impact on the sentence imposed.

[230] In various ways, my colleague appears to agree that the trial judge's error was merely technical and the common law has for some time understood that the murder of a female intimate partner calls for a more significant period of parole ineligibility (¶118; 123). I am unable to agree the error is technical or that the common law supports a period of parole ineligibility of 15 years. I will return to this issue later when I discuss parity.

[231] In my view, with all due respect to the trial judge and my colleague, the conclusion is inescapable that the trial judge erred in law or principle by reliance on aggravating statutory factors to increase the period of parole ineligibility.

[232] It therefore falls to this Court to determine the fit and proper period of parole ineligibility. Before doing so, I will comment on the appellant's specific complaints of error and my colleagues' proposed disposition of them.

The pillow on the victim's face

[233] The appellant complains that the trial judge found as a fact the appellant placed a pillow over the victim's face during the lethal attack. In particular, there

was no evidence to support such a finding, and if considered to be aggravating the trial judge had to be satisfied beyond a reasonable doubt (s. 724(3)(e) of the *Criminal Code*).

[234] Not only is it a reasonable inference that it was the appellant who placed the pillow over the victim's face, it is the only reasonable inference on the undisputed evidence. The police found the victim with a pillow over her head. The appellant was the only person who could have done so. But when?

[235] My colleague says the trial judge made the reasonable inference that the appellant placed the pillow on the victim's face while she was still alive and being stabbed. With respect, I am unable to agree.

[236] First of all, the Crown never suggested to the appellant at trial that he had used the pillow during the lethal attack, just that he had put it there at some point. The only exchange that suggested he handled the pillow is this:

> Q. Why did you put a pillow on her head?
>
> A. I didn't.
>
> Q. The pillow on her head, at the end of the night, was just there at the end of the night? You didn't put that pillow that was on her head when she died?
>
> A. I don't remember putting it on her head.
>
> Q. Well, nobody else put it on her head. Would you agree with me?
>
> A. Yes.
>
> Q. She didn't put it on herself.
>
> A. Not ... no.

[237] The Crown made no submission to the jury that the appellant had used the pillow on the victim's face to control her movements. In fact, counsel's reference to the pillow suggested it was placed there post-mortem:

> The events included attending Mr. Chisholm's house quite upset, then going all the way home to 17 Oceanview Drive prior to 1:40 a.m., because he wanted to read more messages to see what else she was up to. Going to Mike Belyea's house because he was tracking her down and intruding on her liberty. Going into Mike Belyea's house the second time, insisting Kristin return home to 17 Oceanview Drive, plunging that knife ten times in her neck, putting the pillow over her face, desperately attempting to commit suicide and calling 9-1-1 and telling 9-1-1 operator the truth of what just happened.

[238] Furthermore, the Crown made no mention of the use of the pillow in its written or oral submissions at the sentence hearing. The appellant therefore had no opportunity to make any submissions prior to what he alleges is the trial judge's reliance on an aggravating factor.

[239] My colleague analyzes the evidence that she says supports a reasonable inference the appellant first placed the pillow over the victim's face before stabbing her as follows:

> [87] The forensic pathologist, Dr. Marnie Wood, testified that Ms. Johnston's fatal neck wounds and the crime scene evidence led her to conclude Ms. Johnston had been stabbed repeatedly in the front of her neck while lying on her back. She had defensive wounds to her hands and was lying in a large pool of blood.
>
> [88] Ms. Johnston's neck wounds had been inflicted with deadly accuracy, severing the jugular veins on either side of her neck. A pillow on her face would have enabled Mr. Butcher to control her head, which otherwise Ms. Johnston could have tried to move. This point was raised by the Crown in cross-examination of Mr. Butcher, although he did not recall placing the pillow on Ms. Johnston.
>
> [89] The underside of the pillow, the side lying across Ms. Johnston's head, was heavily saturated with blood. **This suggests that when it was put into position, the blood source, Ms. Johnston, was still alive, her heart pumping blood out of the wounds in her neck**.
>
> [90] Ms. Johnston's downstairs tenant heard nothing in the early morning hours of March 26 when she was being murdered. **The pillow would have stifled any screams**.
>
> [91] **The evidence I have noted supports the reasonable inference drawn by the trial judge that Mr. Butcher placed a pillow over Ms. Johnston's face while he set about stabbing her or, at least, at the point when she was bleeding to death**.
>
> [Emphasis added]

[240] I am unable to agree. The Crown called no evidence to support such an inference. There was no evidence the downstairs tenant heard any scream or any untoward noise for that matter, including the noise of the miter saw, which the appellant undoubtedly used.

[241] The Crown's blood splatter expert was Sgt. Adrian Butler. He was qualified to give opinion evidence about shape, size, location of blood stains and give an interpretation of the physical events which gave rise to their origin. Sgt. Butler's forensic report makes no mention of being able to opine on the origins of the blood

stains on the pillow. The Crown specifically drew the pillow to Sgt. Butler's attention in direct-examination, but again Sgt. Butler offered no insight about how the pillow came to be saturated with blood.

[242] The forensic pathologist, Dr. Marnie Wood, gave no opinion about how severed jugular veins could come to deposit blood to the underside of the pillow *and* the victim's face. That the pillow was saturated in blood is just as easily explained by the fact it was beside the victim's neck during the attack, became saturated in blood, and the appellant placed the pillow over her face after the fatal attack.

[243] My colleague's description of the neck wounds as having been inflicted with deadly accuracy appears designed to suggest the use of the pillow to be able to control the victim's head movements. The gruesome photographs of the ten knife wounds and Dr. Marnie Wood's description of them belie either the suggestion of accuracy or control.

[244] In my view, in the absence of Crown submissions to a trial judge on a potential aggravating fact about the nature of the offence and its circumstances, if a trial judge intends to make such findings, they have an obligation to bring it to the attention of the parties and seek their submissions. That did not happen.

[245] However, I agree with my colleague that even though I view this finding of fact to be unsustainable as unreasonable, the trial judge did not appear to consider it to be an aggravating factor. The error was therefore harmless.

Parity and range of sentence

[246] The appellant complains that the trial judge did not properly apply the principle of parity which led to an unfit sentence. Quite apart from the errors in principle discussed earlier, I agree.

[247] We know from the *Criminal Code* that the cardinal or fundamental principle of sentence is proportionality (s. 718.1). This requires that any sentence imposed must be "proportionate to the gravity of the offence and degree of responsibility of the offender". The *Code* also directs courts to take into consideration other principles. One of those is parity. The relationship between these principles is explained in *Sentencing and Penal Policy in Canada*, 2nd ed (Toronto, ON: Emond Montgomery Publications, 2008) (Allan Manson et al quoting A. von Hirsch, "Proportionality in the Philosophy of Punishment"):

> Ordinal proportionality is the requirement that penalties be scaled according to the comparative seriousness of crimes. Two main sub-requirements are involved. First, parity. The proportionality principles permits differences in severity of punishments only to the extent these differences reflect variations in the degree of blameworthiness of the conduct. Accordingly, when offenders have been convicted of crimes of similar seriousness, they deserve punishment of similar severity unless special circumstances (i.e., of aggravation or mitigation) can be identified that render the offense, in the particular context, more or less deserving of blame than would normally be the case. […]
>
> p. 34

[248] Wagner J., as he then was, for the majority in *R. v. Lacasse*, echoed these views:

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. **Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.**
>
> [Emphasis added]

[249] This case is not a situation like *R. v. Hawkins* or *R. v. White*, 2020 NSCA 33, where the trial judges failed to carry out a parity analysis. Here, the trial judge referred to a number of cases to guide him on parity. However, with respect, he failed to appreciate that for the appellant, it was not a case of spousal homicide. Even if it was just as morally culpable due to their intimate relationship, the cases where 12 or more years of parole ineligibility were triggered by post-offence conduct that aggravated the moral blameworthiness of the offender or other aggravating factors not present in this case.

[250] To demonstrate, I will set out a number of cases where moral blameworthiness of the offender was plainly greater than that of the appellant, yet the period of parole ineligibility was set at 15 years or less. I will then set out other cases that settle that the appropriate range of parole ineligibility for the circumstances of the appellant and of the offence is 10 to 12 years.

[251] First, it is important to consider the important relevant mitigating and aggravating factors in the context of all of the circumstances of this case. This will help distinguish or make analogous those cases to the one at bar.

[252] At the time of sentence, the appellant was 36 years of age. He had lived a life unconnected to any kind of criminal or violent behaviour. The unchallenged evidence was that he started working in various retail jobs and as a lifeguard at a young age, and this employment history continued throughout obtaining degrees from McGill, University of New Brunswick and his graduation from Dalhousie Law School in 2015. Unable to immediately obtain articles, he worked at a variety of part-time and full-time jobs. The appellant experienced a depressive episode on the death of his father in 2009, almost ten years prior to sentence.

[253] There was not a hint of physical or verbal abuse during his relationship with the victim. The uncontested evidence was that she was supportive of him in his quest for articles, and he of her as she struggled to keep her yoga studio afloat. Much evidence was led at trial that the victim had told others she wanted to break up with the appellant during her Florida and Costa Rica vacation.

[254] That was not the message she presented to the appellant. The terms of endearment were consistent—photos, wishes that he could be there on the beach with her, and unreserved expressions of love and attachment. For example, on March 6, 2016, they had the following exchange:

> Nicholas Butcher: I've never loved a girl as much as I love you
>
> Kristin Johnston: That the nicest thing I've ever heard. I love you my sweet.

[255] The appellant encouraged the victim to go to Costa Rica for more vacation time. On March 12, 2016, the victim expressed a desire to make plans for a future together with the appellant:

> Nicholas Butcher: We sure do, babe. But only right now. We're gonna survive and we're gonna thrive!
>
> Kristin Johnston: Ok. I need that time to come. I'm excited to get home and make a plan with you.

[256] On March 16, 2016, the victim starts the message chain that day with:

> Kristin Johnston: I have internet for a bit so just wanted to say I love you and am so grateful for you. Xo.

> Nicholas Butcher: Hi, baby. What nice words! Thank you! I love you and I'm grateful for you too.

[257] These expressions continued unabated up to and during the victim's return to Halifax on March 22, 2016. Despite appearances of normality even after her return, she continued to tell others of her dissatisfaction. The trial judge found as a fact that the appellant accessed the victim's Facebook account which contained expressions of discontent. The most direct are found in a lengthy message thread between the victim and a former boyfriend (C.C.). The relevant contents are:

> KJ: That's really awesome. feels good ay? Did it for a few months a while back. I felt great.
>
> I'm totally fucked. Closed my business and ran away. Now I'm back in this hell with so many anchors. Freaking out.
>
> […]
>
> KJ: I just have all these things here that I don't want…a house, a partner. If it was just me, I could handle this. But I don't want any of the rest of it and I feel so smothered.
>
> And trapped
>
> CC: Well if you really don't want those things set yourself up to be honest
>
> Your going to have to brave a difficult time
>
> To come out the other side of it
>
> Decide what you want
>
> Sell, break up
>
> KJ: Fuck. I know. This is just really hard. Got myself in so deep.
>
> […]
>
> CC: […] Is your partner aware
>
> […]
>
> KJ: My partner has no clue at all. Is more in love than ever. My trip made me see things clearer. Made him want to make plans together.
>
> That scares me
>
> […]
>
> CC: And your scared of commitment
>
> KJ: No. I'm scared of settling.
>
> […]

CC: […] so whose your partner?

KJ: You met him. Nick

CC: riiiiiiight

the homosex

KJ: Jesus

CC: haha

jk

sorta

[…]

CC: So when are you going to tell him

KJ: I have no idea

I have no idea how to do this

[258] By way of aggravating factors, the appellant decided at some point in the early morning hours of March 26 to get a knife from the kitchen which he used to lethally attack the victim while she was asleep in her own bed. It was, like so many murders, brutal and senseless. There are no other relevant aggravating facts.

[259] They were not spouses nor common-law partners. He was not in a position of authority or trust towards the victim. She may have trusted him in many ways, including not to assault or abuse her. The appellant's attack against the victim was a breach of that trust. By virtue of s. 718.2(a) it can and should be taken into account as a relevant aggravating circumstance pursuant to accepted common law principles.

[260] The breach of trust occurred because of their intimate partner relationship. The fact they were intimate partners can only be counted once as an aggravating circumstance.

[261] The appellant did not engage in any aggravating post-offence conduct. His plea of not guilty and testimony that his actions were provoked or in self-defence were naturally viewed by the victim's family as aggravating. The trial judge commented on this (para. 52). But at law, the conduct of defence at trial cannot be viewed as aggravating (*R. v. Kozy* (1990), 74 O.R. (2d) 545 (C.A.); *R. v. Bradley*, 2008 ONCA 179; *R. v. Whalen*, 2015 NBCA 67).

Worse cases

[262] Chronologically, the following cases reveal far worse aggravating factors, yet the courts imposed parole ineligibility periods of 15 years or less:

> *R. v. Edgar*, [1988] Y.J. No. 11 (Y.T.C.A.). The appellant was originally charged with the first degree murder of his wife and her sister. They were in a dispute over a gold claim. The appellant put a loaded gun to the victim's head and threatened to kill her if he did not get a proper allocation of the mine and earnings. He found out their whereabouts and lay in wait. He stopped them and assaulted his wife, but she managed to drive off. He fired his rifle after them. The victims' vehicle crashed into a ditch. The appellant pursued and shot them both, one after the other. Despite the offender's previous excellent character, parole eligibility was set at 15 years, given the aggravating facts including the existence of two murder victims. The Yukon Court of Appeal upheld the sentence.
>
> *R. v. Randhawa*, [1990] A.J. No. 197 (C.A.). A jury convicted the offender of the first degree murder of his wife. The Court of Appeal substituted a conviction for second degree murder. The facts were gruesome. There was a history of abuse. On the night of the murder, he dragged his wife and his daughter to the basement. His daughter managed to escape to call 911. In the meantime, the offender bludgeoned his wife to death with an axe. The Court, despite the lack of a related criminal record, imposed parole ineligibility for 15 years in light of the senseless brutal slaying of his defenceless wife in her own home and in the presence of their daughter.
>
> *R. v. McMurrer*, [1991] P.E.I.J. No. 15 (C.A.). The offender had been convicted of threatening his wife. While on probation, and forbidden from contact, he continued to threaten her. He borrowed a gun on October 4. On October 26, the offender called her workplace and tricked the victim's co-worker into leaving. He then confronted the victim and using a bolt action rifle shot her three times in the head. Originally the charge was first degree murder. The offender pled guilty to the lesser offence of second degree murder. The trial judge imposed 10 years' parole ineligibility. The Court of Appeal increased the period to only 12 years despite the spousal relationship and significant evidence of planning and premeditation and flouting of the no contact order.

R. v. Morrow, [1995] O.J. No. 4052. The offender took his common-law spouse and their two-and-a-half-year old child to a secluded area. An argument led to a lethal knife attack during which, with his son close by, he cut his spouse's throat. The offender had a previous conviction for assault causing bodily harm. The trial judge imposed a period of parole ineligibility of 15 years.

R. v. McKnight, [1999] O.J. No. 1321 (C.A.). The offender was originally charged with the first degree murder of his wife of 20 years. The jury convicted him of second degree murder. Some hours before the murder, he had retrieved a 10-inch serrated knife from the kitchen and put it in under the foot of the bed. He used the knife to attack his wife. The attack happened in their bedroom and lasted 10 to 15 minutes. There were numerous injuries including over 50 defensive wounds to her hands and forearms. She had unsuccessfully pleaded for her life. The jury recommended 20 years' parole ineligibility. The offender had medical and law degrees with no prior record. He had previously tried to choke his wife. The trial judge imposed 17 years. Laskin J.A., for the Court, concluded that the appropriate range for the offender to be 12 to 15 years and imposed 14 years.

R. v. Sodhi (2003), 175 O.A.C. 107. The offender strangled his wife in their home. He covered up the crime, took her body and dumped it at the side of a rural road some distance away, and tried to make the crime look like she had been robbed and murdered by a stranger. The trial judge imposed a 14-year period of parole ineligibility. Moldaver, J.A., as he then was, summarily disposed of the sentence appeal that sought a reduction to 12 years with this comment: "The appellant's attempt to cover-up his crime and his persistent efforts to create suspicion that someone else had committed it were despicable and cowardly. This conduct amounted to a serious aggravating feature and, in and of itself, warranted a significant increase in the period of parole ineligibility. Combining that with the domestic nature of the crime and the brutality associated with it, I cannot say that the trial judge erred in imposing the sentence he did" (para. 131).

R. v. Teske (2005), 202 O.A.C. 239. The jury convicted the 41-year-old offender of the second degree murder of his wife in their home. They had two young children. Cause and mechanism of death could not be determined due to the extensive attempts by the offender to clean the home

> and destroy evidence. The offender incinerated the victim's body over several hours and cleaned the incineration site. Other post-offence conduct included his concerted effort to mislead the police. Extensive blood stains were found in three different areas of the home. The offender had one prior charge of domestic assault for which he received a conditional discharge. The trial judge imposed parole ineligibility for 16 years. Given the significant aggravating factors of the prior domestic assault and after-the-fact conduct, parole ineligibility was set at 13 years.
>
> *R. v. Pasqualino*, 2008 ONCA 554. The offender repeatedly verbally and physically abused his wife. He threatened to kill her if she ever tried to leave him. Two days before her murder, she told others she would be leaving. The offender shot her twice in the torso and four times in the head, emptying his handgun. The trial judge imposed a 13-year period of parole ineligibility. This was upheld on appeal.
>
> *R. v. Czibulka*, 2011 ONCA 82. The offender called 911 claiming his wife of 35 years was having difficulty breathing. He later claimed she was a prostitute that had suffered injuries from a client. The jury convicted the offender of having beaten his wife to death. The victim had 25 rib fractures, a broken breast bone and a lacerated diaphragm. The Court of Appeal upheld the trial judge's imposition of 15 years' parole ineligibility, citing the several aggravating factors of the terrible injuries, and the cruelty the offender exhibited in inflicting those injuries on his defenceless wife.

[263] It is always difficult to compare cases, particularly where the offence is murder. It is always brutal. It is always senseless. Moral culpability is always high. But in all of the cases above, the moral blameworthiness of the offenders was significantly above that of the appellant here, because of the spousal relationship, evidence of premeditation and planning, two homicides, extensive post-offence conduct, commission of other crimes, prior domestic violence, or the presence of children. Yet, despite the presence of these recognized aggravating features, the period of parole ineligibility was set at 15 years, and in many cases, considerably less.

[264] I will now turn to consider other cases that demonstrate that the appropriate period of parole ineligibility is at most one of 12 years. As with the previous section, I will simply set them out chronologically.

Similar cases

R. v. Edgecombe, [1991] O.J. No. 2044. The offender, charged with first degree murder, pled guilty to the second degree murder of his common-law spouse. She was beaten and strangled to death after another argument about ending the relationship. The offender had a record for a variety of offences, including for assaults causing bodily harm. Watt J. imposed the statutory minimum of ten year's parole ineligibility.

R. v. Barry, [1991] O.J. No. 2666; aff'd [1993] O.J. No. 3955. The jury found the young offender guilty of the second degree murder of his girlfriend who terminated their relationship. She was stabbed 62 times, including many defensive wounds and strangled. The offender ingested drugs to feign unconsciousness and inflicted wounds to himself to give credence to an attack by the deceased. Watt J. imposed 12 years' parole ineligibility.

R. v. Pabani (1994), 17 O.R. (3d) 659 (C.A.). The jury convicted the offender of the second degree murder of his wife. She had been beaten unconscious and then drowned in their home's bathtub. The offender was 41 years of age with no criminal record. The offender had previously beaten his wife. The jury rejected his alibi defence. The trial judge imposed a period of parole ineligibility of 12 years to reflect deterrence and society's repudiation of his callous and cowardly crime. The Court of Appeal found the record did not support an order beyond the minimum 10-year period of parole ineligibility.

R. v. McCormack (1995), 83 O.A.C. 73; Crown application for leave dismissed, [1995] S.C.C.A. No. 374. The jury convicted the offender of the second degree murder of his wife of 25 years. The trial judge imposed a 14-year period of parole ineligibility. The offender was a 48-year-old alcoholic with a criminal record, mostly dated and unrelated, except for a conviction for domestic assault against his wife, and just a year prior to the murder, of chasing his wife with a knife. There was lengthy history of verbal and physical abuse. The majority reduced the period of parole ineligibility to 12 years.

R. v. Paterson, 2001 BCCA 11. The offender was charged with the first degree murder of his former lover. The jury convicted him of second degree

murder. His moral blameworthiness was at the highest. The evidence of planning was patent. The offender bought a bat and acquired rope. He then broke into the victim's parents' home to lie in wait for the victim. On entry, the victim's skull was fractured with the bat. The offender used the rope to choke the victim and then used the victim's necktie. It took some time to accomplish his goal. The trial judge imposed a period of 14 years' parole ineligibility. The majority of the Court of Appeal dismissed the appeal.

R. v. Juanetty, [2001] O. J. No. 5827. The jury convicted the 39-year-old first-time offender of the murder of his former girlfriend. The trial judge observed that the offender was intent on taking her life. He damaged her patio door in her home trying to gain entry. He then broke her front window with a stone. The victim was on the phone with the police and begged him to stop. He took out a steak knife and slit her throat twice. The trial judge imposed a period of 13 years' parole ineligibility.

R. v. Lenius, 2007 SKCA 65. The jury convicted the offender of the strangulation death of his wife. He lured her to his home by refusing to return their two youngest children. When she arrived at his home, the children were sequestered in a room with the door tied shut. He confronted his wife over her new relationship. The offender strangled the victim for between 30 seconds and four minutes. There had been two recent incidents of spousal abuse and a no-contact order in place. The offender showed little remorse. The trial judge attempted to apply the parity principle and imposed 15 years' parole ineligibility. The majority reduced the period to 12 years.

R. v. Angelis, 2011 ONSC 462. The jury convicted the 41-year-old, well-educated and employed offender of the second degree murder of his wife of 16 years. He strangled his wife in the presence of his two young children. The jury rejected his claim of self-defence. Not only did the offender fail to offer or call for any assistance, he instructed his daughter not go to the neighbours when the victim had asked her to do so. After canvassing numerous cases, the trial judge imposed 12 years' parole ineligibility.

R. v. Mullin, 2012 ONSC 784. The jury rejected the 43-year-old offender's claim that his 20-year common-law spouse had stabbed herself in the chest and convicted him of second degree murder. He had no prior criminal record, but had been found guilty and discharged for uttering threats against the victim. The trial judge canvassed numerous cases and concluded that a

period of 12 years' parole ineligibility was appropriate for the brutal domestic murder of an unsuspecting and defenceless woman.

R. v. Irving, 2015 NBQB 70. The jury convicted the 54-year-old offender of the second degree murder of his wife of 17 years. They had three children, one of whom was home when the offender strangled the victim to death, first with his hands and then later with an extension cord. He moved the family car so that his children would think their mother had gone out. Grant J. reviewed numerous cases. This review was quoted by the trial judge in this case (para. 70). The Court accepted the aggravating factors that the offender had murdered his spouse (s.718.2(a)(ii) and the offender's post-offence conduct. Despite some mitigating factors, parole ineligibility of 12 years was warranted.

R. v. Florence, 2015 BCCA 414. A judge convicted the 45-year-old offender of the second degree murder of her husband of 15 years. The trial judge imposed a 12-year period of parole ineligibility in light of the aggravating features that: the victim while severely intoxicated had been stabbed ten times and cut four times; the murder happened in the victim's home; the attack was brutal and vicious; and, the offender had abused the victim regularly. The offender had a mixed Aboriginal background which was found not to have played an active role in her adult life. The Court dismissed the appeal from sentence.

ANALYSIS

[265] The cases summarized above establish that the typical period or time frame of parole ineligibility for a homicide where a spouse is the victim is 10 to 15 years. My colleague writes that the parties diverge on where within this 10-15 range the appellant should be placed (¶ 100). She later concludes that we must defer to the trial judge's determination of 15 years' parole ineligibility (¶161).

[266] The parties did not agree that the appropriate range of parole ineligibility was 10-15 years. As pointed out by my colleague, they agreed with the observation by Robertson J.A. in *R. v. Nash* (at para. 54) that judges work with three time frames: 10-15; 15-20 and, 20-25 years, and the appellant's case should be in the first time frame of 10-15 years.

[267] Determining the appropriate range in that time frame is a function of the proper application of the relevant legal principles along with such things as the character of the offender, the brutality of the murder, prior acts of violence, the presence of children, aggravating post-offence conduct, or evidence of planning and premeditation.

[268] It was not until 1996 that Parliament decreed the murder of a spouse or common-law partner must be considered as a statutory aggravating factor.

[269] In her article, "Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners" (2010), 47 *Alta L Rev* 779, Professor Isabel Grant examined sentences imposed on male offenders before and after the 1995 decision in *R. v. Shropshire*. That decision coincides with the 1995 *Code* amendments, which came into force in 1996. She writes of the factors that influence parole ineligibility both before and after that time period:

> Similar reasons are given for raising the parole ineligibility period in the pre- and post-*Shropshire* period. These include: more than victim, brutality, a history of violence towards the victim or towards another spouse, evidence of planning and deliberation, breach of a restraining order, high risk of re-offending, attempts to cover up the killing and to deny involvement, and the presence of children in the house at the time of the killing. The absence of a history of violence is a significant mitigating factor and may in some cases lead to a parole ineligibility not being raised above ten years.
>
> p. 797 [footnotes omitted]

[270] None of these recognized aggravating factors were present in this case. The significant mitigating factors were. Not only was the appellant of previous good character, but there was no history of violence or abusive behaviour towards the victim.

[271] The trial judge said the mitigating factors were overcome or outweighed by the aggravating factors. The judge improperly applied the statutory aggravating factors set out in s. 718.2(a)(ii) and (iii). There was no spousal relationship. This was not a case of spousal homicide. The appellant was not in a position of trust towards the victim.

[272] There is absolutely no evidence of planning or premeditation. The Crown never suggested at trial that there was. During the sentence hearing, the Crown acknowledged there was no evidence of a prior intent to harm the victim.

[273] That is not to say there were no aggravating factors. The attack was a breach of trust. There is evidence of what the trial judge said was forethought, in the sense the murder was not a spontaneous act. Because at some point, while the victim was asleep in her own bed, the appellant decided to go to the kitchen and get the knife he used to lethally attack the victim.

[274] However, this was not a case of spousal homicide with the attendant mandatory statutory aggravating factor. The trial judge treated it as such, so does my colleague, essentially saying Parliament's 1996 amendments meant nothing—even if the statutory aggravating factors do not apply, the common law would reach the same conclusion. With respect, I am unable to agree that Parliament's initiatives in 1996 were superfluous. Indeed as Professor Grant observes, those amendments, where applicable, and the influence of *Shropshire* moved the willingness of courts to raise parole ineligibility period beyond 10 years:

> Almost all of the cases occurring after 1996 refer to s. 718.2(a)(ii), which makes it an aggravating factor that the victim was the offender's spouse. Some refer to s. 718.2(a)(iii), which makes the abuse of a position of trust or authority aggravating. On reading the cases, one is left with the impression that both *Shropshire* and the amendments (and the changing social values they reflect) are at play. Judges and courts of appeal are definitely more willing to raise the period of parole ineligibility over ten years after *Shropshire*. But the attitude towards spousal homicide in particular, as reflected in the cases has also changed. The clear legislative statement that the spousal nature of the crime is an aggravating factor gives the courts a specific reason for raising the parole ineligibility period in the spousal context.
>
> The data suggest that sentences for spousal second degree murder peaked in the period immediately following *Shropshire* and levelled off in the 2001-2008 time period, albeit, at a level still higher than that prior to *Shropshire*.
>
> p. 798

[275] My colleague references *R. v. Doyle* where this Court increased the parole ineligibility from 10 years to 17. That was a case of spousal homicide, albeit, prior to the 1996 amendments making that relationship a statutory aggravating factor. But in that case, there were other aggravating factors present. For example, there was clear evidence of planning and premeditation. The offender had originally been charged with first degree murder. As Chipman J.A, for the Court observed:

> [37] The statements made to the police satisfy me that this murder was considered by the respondent, if not planned by him, and was close indeed to first degree murder, if not amounting to such. It was a deliberate calculated crime,

> coldly executed. He appointed himself to be his wife's prosecutor, judge, jury and executioner.

[276] There was also a history of abusive behaviour by the offender, but only one prior conviction for a drinking and driving offence. However, as to his character, Chipman J.A. reasoned the offender was a danger to society:

> [33] With respect to the character of the offender, there are many aspects of it which are disturbing. His relative lack of remorse, the absence of provocation or any plausible motive, the deliberateness of his action and the thought he put into it, as well as his thoughts of killing other people, are all elements which characterize him as a danger to society. In fixing the period of ineligibility for parole, the protection of society and the dangerous nature of this offender are aspects which warrant moving away from the minimum period of ineligibility for parole.

[277] My colleague makes the suggestion that the circumstances of the appellant's offence were more serious than that of Doyle's because the victim bled to death and suffered defensive wounds, whereas in *Doyle*, the victim's death was "instantaneous" (¶132).

[278] With respect, the moral culpability of Mr. Doyle was far greater than that of the appellant. Doyle killed his wife of 15 years while she slept in her bed, after having deliberated on it for three or four hours. There were acts of prior abuse. Mr. Doyle got his rifle and shot her three times in the heart at 2:30 a.m. The circumstances were summed up by Chipman J.A. as follows:

> [35] The Crown emphasizes the lengthy deliberation by the respondent that lead to the murder. Reference is made to the time frame during which the respondent considered the murder before actually committing it. His wife had gone to bed about 10:30 p.m. but was not murdered until some three and one-half hours later. In his interview with the police, the respondent said he made the final decision to shoot his wife about 2:00 a.m. but had been thinking about it for three or four hours. Having made up his mind to do so, he then shot her three times in the area of the heart with a lever action rifle which required him to manually eject the shell after each shot.

[279] It is important to recall that Parliament created two categories of murder: first degree and second degree. For each, the sentence is automatic: life imprisonment. Each offender will forever be subject to that sentence, subject only to their death or a grant of clemency by the Crown.

[280] For first degree murder, the offender has no chance to be released on parole before serving 25 years. Parliament defined first degree murder as all murders that are planned and deliberate or where the victim is a police officer or a prison employee or where death is caused by the offender while committing or attempting to commit enumerated offences such as hijacking an aircraft, sexual assault, kidnapping, terrorism or for the benefit of a criminal organization (see: s. 231 of the *Criminal Code*).

[281] All other murder is second degree. There is a minimum period of 10 years' parole ineligibility. That period can be increased all the way to 25 by the trial judge having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission and the jury's recommendation.

[282] Whatever role a jury's recommendation can have (see *R. v. Barry*, *supra*), no one has suggested that the jury's recommendation here played a significant role. Neither is there anything in the character of the appellant that could warrant an increase in parole ineligibility.

[283] Hence, the only justification for an increase must rest on the nature of the offence and its circumstances that increase the appellant's moral blameworthiness for the murder he committed.

[284] Moral blameworthiness increases if there is evidence of planning and premeditation or other blameworthy conduct such as post-offence conduct, heightened brutality, the presence of children, prior history of violence toward the victim, the existence of more than one victim, or if it was a spousal murder.

[285] None of these are present in this case. The most that can be said is that the appellant had some forethought as he had to go to the kitchen to obtain the knife, and his lethal attack against his sleeping defenceless girlfriend was cowardly. While they were not spouses or common-law partners, they lived together in an intimate relationship. When he lethally attacked her, he violated the trust inherent in such a relationship. These circumstances could justify some increase above 10 years.

[286] No two cases will ever be identical in all respects. Appellate courts cannot demand the exact same sentence even for cases that bear a close resemblance. Appellate courts do require a principled approach. Where there is a difference in sentence, the courts can and should demand the difference be the result of the proper application of sentencing principles. I see no principled basis to increase

the period of parole ineligibility beyond 12 years in light of the periods imposed on the cases set out above where the offences involved the murder of a spouse.

[287] Many of these cases summarized above were directly or indirectly before the trial judge. He did not explain how the range of 12-13 years found in so many cases of *spousal* murder could be distinguished on a principled basis in order to arrive at a period of 15 years. I see none.

[288] My colleague acknowledges that in the cases cited by the appellant, *Folker*, *Panghali*, *Calnen*, *MacRae* and *Sodhi*, all involved the presence of the recognized aggravating circumstances of extensive post-offence conduct (¶150). She postulates that the appellant's conduct before the murder was particularly aggravating, indeed more egregious than the after-the-fact conduct of other offenders (¶152). It was the appellant's failure to desist from his pre-offence conduct that elevated his moral culpability and justified a 15-year period of parole ineligibility (¶153).

[289] With respect, the basic premise underlying these assertions is flawed. To be sure, pre-offence conduct can aggravate the moral culpability of the offender if it reflects planning and premeditation as in *Doyle*, *Paterson*, or *McMurrer*.

[290] The appellant committed no criminal offences in finding out where his girlfriend was and persuading her to leave with him. She did not have to leave. Do we now blame her? Obviously not. The homicide was entirely the result of the appellant's morally blameworthy conduct of obtaining a knife and attacking the victim while she slept in her bed.

[291] The appellant's access of the victim's electronic communication was not honourable conduct. His consequent attendances at Mr. Beylea's apartment were ill-advised. It is easy to say that he should not have done any of these things. But there is no legitimate connection between those acts that elevate his moral culpability for the murder he later committed.

[292] The only path to attach moral blameworthiness to the appellant's conduct before their return to 17 Oceanview Drive would be to say that he planned on attacking the victim once he found her and persuaded her to leave with him. There is not a shred of evidence to suggest he had any such plan, let alone proof beyond a reasonable doubt. Mr. Beylea testified that the appellant displayed no physical or even verbal aggression toward the victim or anyone. There was no evidence of any power imbalance.

[293] As for the cases cited by the appellant where parole ineligibility for spousal murder was set at 12-13 years, my colleague does not accept they involved more aggravating factors, nor even represent similar offenders and similar circumstances (¶162). She reviews nine of them.

[294] I see no legitimate basis to distinguish those cases. My colleague seeks to differentiate some of these cases, (*McCormack*, *Munroe*, *Muir and Barry*) on the basis that they were all decided before Parliament amended the *Criminal Code* to make spousal abuse and abuse of a position of trust aggravating factors in sentencing (ss. 163-171). As detailed earlier, neither ss. 718.2 (a)(ii) nor (iii) are applicable. The victim was not his spouse or common-law partner, nor was he in a position of trust or authority toward her.

[295] Whether common law principles or the statutory aggravating factors are at play, there is no justification for an increase beyond 12 years, as in *Munroe* (12); *MacMaster* (12); *McCormack* (12); *Barry* (12); *Jimenez-Acosta* (13); *Vaneindhoven* (13); *Angelis* (12); and, *Lenius* (12).

[296] There is nothing to distinguish these cases, nor the myriad others. Some have significant aggravating factors not present here: all were cases of spousal homicide; previous acts of violence (*Vaneindhoven*); post-offence conduct (*Jimenz-Acosta*); the presence of young children (*Angelis*); and, prior spousal abuse (*Lenius*).

[297] My colleague reasons that none of the cases above persuaded the trial judge the appellant's parole ineligibility should be set at between 12 to 13 years (¶176); with all due respect, in these circumstances, they should have. An appropriate range is determined by the application of the relevant legal principles. Parity is one of those principles. It is also an essential component of the proportionality calculus. Appellate courts have a duty to ensure the relevant legal principles are respected.

SUMMARY AND CONCLUSION

[298] A fit sentence is not driven by normative judgments about the worth of a particular human life. All unlawful killing is serious. When it is murder, the sentence is life imprisonment.

[299] If the murder was planned and premeditated, a contract killing, or committed during the commission of enumerated offences or against law enforcement

personnel, it is first degree murder. By operation of law, there can be no parole eligibility for 25 years.

[300] All other murder is second degree murder and Parliament has mandated a minimum period of 10 years' parole ineligibility. That is the general rule, but courts have the power to increase that period up to 25 years, in light of the jury's recommendation, the character of the offender, and the circumstances of the offence.

[301] Exceptional or unusual circumstances need not be established to increase the general rule of 10 years' parole ineligibility. If the victim was a spouse, it can legitimately be increased because of marked brutality; prior abuse; the existence of multiple victims; the presence of planning and premeditation; the character of the offender; the presence of children; breach of a restraining order; or, post-offence conduct.

[302] In this case, there were significant mitigating factors. The appellant had no prior record or history of violent behaviour toward the victim or anyone. He had worked since his teens at numerous part and full-time jobs to put himself through college and law school.

[303] The trial judge erred in principle when he relied on the existence of s. 718.2(a)(ii) and (iii) as statutory aggravating factors to increase the period of parole ineligibility to 15 years. The victim was not a spouse or common-law partner, nor was the offender in a position of trust or authority toward the victim. Breach of trust inherent in a domestic relationship is not the same thing as being in a position of authority or trust vis-à-vis a victim.

[304] These errors in principle entitle this Court to determine what is a fit period of parole ineligibility without deference to the trial judge's determination.

[305] Quite apart from those errors in principle, the trial judge's period of parole ineligibility is outside the appropriate range and hence is unreasonable.

[306] Many of the common aggravating factors are absent. There are significant mitigating factors. Nonetheless, I would increase the parole ineligibility period to 12 years. I do so because of the increased moral blameworthiness by the appellant's forethought when he went to the kitchen to obtain the murder weapon that he used to lethally attack his intimate partner while she slept in her own bed.

[307] I would dismiss the conviction appeal for the reasons of Derrick J.A., but allow the sentence appeal and substitute a period of parole ineligibility of 12 years. The sentence, of course, remains one of life imprisonment.

Beveridge, J.A.